Sprain Brook Manor Nursing Home, LLC *and* New York's Health and Human Services Union 1199/SEIU. Cases 2–CA–37258 and 2–CA–37448

December 26, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On September 29, 2006, Administrative Law Judge Michael A. Rosas issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified, to amend the remedy, and to adopt the recommended Order as modified.[2]

The unfair labor practices alleged in this case arose from the Respondent's responses to the Union's organizing campaign in August and September 2005,[3] and the events following the representation election on September 22, in which the Union became the exclusive collective-bargaining representative of the bargaining unit employees. We adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act by photographing and placing employees under surveillance while they engaged in protected concerted activity; that the Respondent violated Section 8(a)(3) by discharging Catherine Alonso and Alvin Nicholson, disciplining Clarissa Nogueira, and reducing the overtime hours of Nogueira, Karen Bartko, and Marjorie Ridgeway;[4] and that the Respondent violated Section 8(a)(5) by increasing employees' wages and reducing overtime of employees without providing the Union with notice and an opportunity to bargain.

We also adopt the judge's finding that the Respondent violated Section 8(a)(1) by threatening employees with more onerous working conditions, threatening to cut overtime, interrogating employees, soliciting grievances, making statements indicating that support for the Union would be futile, and threatening employees with discharge for participating in protected activities.[5]

For the reasons stated below, however, we reverse the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) by engaging in surveillance of employees' union activities.[6] We also reverse the judge's dismissal of the complaint allegations that the Respondent violated Section 8(a)(1) by calling the police and by hiring a second, armed security guard in response to employees' union activities.

Surveillance of Employees' Union Activities

The Union began organizing at the Respondent's facility in the summer of 2005. On August 12, the Union filed a petition for a representation election. On August 13, Union Organizer Cherice Vanderhall began meeting with employees in the nursing home parking lot area twice a week during shift changes—before 7 a.m., 3 p.m., and sometimes 11 p.m. During the meetings, the employees and Vanderhall generally stood on the grassy area next to the nursing home's parking lot or in empty parking spaces.

As noted above, Union Organizer Vanderhall's first meeting at the facility with employees occurred on Saturday, August 13. On this day, the nursing home admin-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissal of the allegation that the Respondent violated the Act by denying employee Alvin Nicholson's request to be represented by a fellow employee during an interview.

[2] The General Counsel noted in cross-exceptions that the judge failed to conform his conclusions of law, remedy, recommended Order, and notice to the violations found. The judge found that the Respondent did not provide the Union with notice and an opportunity to bargain prior to reducing the overtime hours for some bargaining unit employees, but the judge failed to include that violation in his conclusions of law or to include the requisite remedial provisions in his recommended Order and notice. Similarly, although the judge found that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide the Union with notice and an opportunity to bargain prior to implementing a wage increase for bargaining unit employees, the judge failed to order a remedy for this violation. We grant the General Counsel's cross-exceptions in these respects and appropriately modify the conclusions of law, remedy, Order, and notice. We also modify the conclusions of law, remedy, Order, and notice to conform to the additional violations found, as discussed infra.

[3] All dates are in 2005, unless otherwise indicated.

[4] In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) in the manner described above and in his decision, we find it unnecessary to rely on the Respondent's "oppositional literature during the campaign" as evidence of antiunion animus. Rather, we rely on the numerous 8(a)(1) violations as evidence of animus.

[5] With the exception of the last of these allegations, the Respondent's exceptions to these findings are based on the Respondent's disagreement with the judge's credibility determinations. As stated in fn. 1, supra, we find no basis for reversing the credibility findings. As to the last allegation, the Respondent has excepted to the judge's conclusion that the Respondent threatened employees with discharge for participating in protected activities, but it offers no basis in its exceptions for overturning that finding and does not argue the point in its brief. Therefore, we adopt this finding in the absence of argument. See e.g., *Conley Trucking*, 349 NLRB 308, 308 fn. 2 (2007).

[6] Member Schaumber does not pass on this allegation. See discussion infra.

istrator, Eleanor Miscioscia, went to the facility because she thought there might be organizing activity. Miscioscia did not usually work on Saturdays, as it was her regular day off. She arrived at the nursing home at 6 a.m. and remained for nearly 2 hours. While there, Miscioscia stood at the exit door to the dining room at the side of the building, which was the door closest to where the employees were standing, in order to observe them throughout the meeting.

As the judge stated, an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. *Fred'k Wallace & Son, Inc.,* 331 NLRB 914, 915 (2000). Therefore, because the focal point of union activity was visible to all who entered, exited, and parked on the Respondent's property, the judge found that management's observation of employees' conduct would not reasonably tend to coerce employees. We disagree.

Although an employer may observe open union activity on or near its property, "an employer may not do something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities." *Loudon Steel, Inc*., 340 NLRB 307, 313 (2003). The record shows that Miscioscia's actions on August 13 were out of the ordinary. Indeed, her very presence at the facility was unusual because she did not ordinarily work on Saturdays. Employees testified that they had never seen her at the facility on a Saturday. On this day, employees saw her standing in the doorway and watching their union activities. By her own testimony, Miscioscia was at the facility solely for the purpose of observing union activity. Under these circumstances, Miscioscia's conduct was "out of the ordinary" and constituted unlawful surveillance. See *Partylite Worldwide, Inc*., 344 NLRB 1342 (2005); *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982).[7]

Calling the Police

The Respondent repeatedly called the police in response to union organizers and employees meeting in the Respondent's parking lot or an adjacent grassy area during shift changes. Specifically, the Respondent requested police assistance on September 10, 13, and 15 to deal with what its administrator characterized as "labor disputes." On September 10, the police officer remained on the scene for about 30 minutes and did not record a description of the incident. On September 13, the police incident report by the responding officer indicates that he arrived in order to monitor picketing activity and that, finding no picketing activity, he left after about 20 minutes. On September 15, the responding officer stated in his report that three union representatives were standing on the curb "not blocking entrance or obstructing traffic in any way."

The judge found that, although there was insufficient evidence in the record to indicate that the employees or organizers blocked traffic, it was impossible to determine the extent to which traffic flow may have been impeded or opponents of the Union harassed or intimidated. Apparently on this basis, the judge concluded that it was "impossible to say that the Respondent did not have a legitimate reason for requesting a police presence. . . ." We reverse.

"It is well established that an employer may seek to have police take action against pickets where the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests." *Nations Rent, Inc*., 342 NLRB 179, 181 (2004) (citing *Great American*, 322 NLRB 17, 21 (1996)). Moreover, as the judge observed, an employer can take reasonable steps to prevent nonemployees from trespassing onto private property. See generally *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992) (employer may lawfully bar nonemployee union organizers from private property unless the employees are inaccessible through usual channels). Here, the Respondent failed to establish that it was motivated by reasonable concerns when it called the police on September 10, 13, and 15. Indeed, it did not introduce any specific evidence relating to those incidents or its reasons for requesting a police presence on those days. The police dispatch records show that the Respondent's stated reason for requesting police was "labor disputes." There is no evidence in the record of threats or violence. The police reports from those days do not indicate that the organizers or employees were blocking traffic or creating safety problems, and the judge found that there was no evidence of blocking. To the extent that the Respondent claims that it was protecting its private property interests, there is no evidence that the nonemployee organizers were encroaching on the Respondent's property on those particular days. In the absence of any showing by the Respondent that it was motivated by reasonable concerns when it called the po-

[7] We find it unnecessary to pass on the other alleged instances of unlawful surveillance, as any such finding would be cumulative and would not materially affect the remedy.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by "photographing and placing employees under surveillance while they engaged in protected concerted activity." In light of that violation, Member Schaumber finds that any further determination of surveillance would be cumulative and would not materially affect the remedy. Member Schaumber, who dissented in *Partylite Worldwide, Inc.,* supra, therefore does not consider whether finding further instances of surveillance would be consistent with the majority opinion in that case.

lice on the above days, and in the absence of any evidence indicating the need for a police presence, we find that the Respondent's actions violated Section 8(a)(1).[8]

Hiring an Armed Security Guard

In addition to calling the police in response to the employees' union activity, the Respondent also hired two security guards. On September 8, the Respondent hired the first guard. In a memorandum documenting the Union's parking lot meeting on September 8, Joanne Jinete, the Respondent's administrator, asserted that as "a result of this situation Sprain Brook Manor had to appoint a security guard because of the fear in the atmosphere." The guard was unarmed and worked from 5:45 to 7:45 a.m. and from 10:30 p.m. to 12 midnight—time periods encompassing the morning and evening shift changes.

On October 10, the Respondent hired a second security guard. The second guard worked about 4 hours per day "as directed," including virtually every weekday until January 7. Like the first guard, the second guard was generally deployed during periods that encompassed shift-change meetings. Unlike the first guard, the second guard was armed.

The complaint alleges that the Respondent violated the Act by hiring the armed security guard on October 10. The judge dismissed the allegation, finding that there was no evidence that the guard engaged in surveillance. We reverse and find the violation.

The Respondent provided no explanation for its decision to hire the second guard. Furthermore, nothing in the record establishes that circumstances changed between the hiring of the first and second guards. The evidence reveals no violence, threats of violence, or any other activity that would explain additional security personnel. Indeed, all that appears to have occurred during the period between the hiring of the first and second guard was an increase in employees' union activity.

The armed guard was deployed during shift changes while employees were engaged in protected activities. In light of all the preceding ways in which the Respondent acted unlawfully in response to the employees' union activity, including the repeated calls to the police, and in the absence of any legitimate explanation for the Respondent's decision to add additional (and armed) security, we find that the Respondent's hiring of the second security guard reasonably tended to intimidate or coerce employees engaged in protected activities. Accordingly, the deployment of the second guard violated Section 8(a)(1). See *Shrewsbury Nursing Home, Inc*., 227 NLRB 47 (1976).[9]

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusions of Law 3 and 4.

"3. By threatening employees with reprisals if they engaged in union activity, interrogating employees about their union sympathies, soliciting employee grievances, photographing employees while they engaged in protected concerted activity, placing employees under surveillance while they engaged in protected concerted activity, telling employees that it would be futile to support the Union, calling the police in response to employees' protected activities, and hiring a security guard in response to employees' protected activities, the Respondent violated Section 8(a)(1) of the Act.

4. By increasing employees' wages and reducing employees' overtime hours without providing the Union, which had prevailed in the representation election, notice or opportunity to bargain, the Respondent violated Section 8(a)(5) and (1) of the Act."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent discriminatorily discharged Catherine Alonso and Alvin Nicholson, we shall order it to offer Alonso and Nicholson full reinstatement to their former jobs, without prejudice to their seniority or other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and benefits they may have sustained by reason of the Respondent's unlawful conduct. Backpay shall be computed in accor-

[8] In disagreeing with the judge's dismissal of this allegation, we note that the case relied upon by the judge, *Tecumseh Foodland*, 294 NLRB 486 (1989), is distinguishable. There, the Board found that the respondent's exclusion of pickets and handbillers was lawful based in part on a showing that five pickets and handbillers congregating in the small area near the entrance to the respondent's store tended to impede patrons' access to the store and impermissibly impaired the respondent's private property rights. Id. at 487, 488. Here, by contrast, the preponderance of the evidence indicates that the union representatives were not impeding access or impairing the Respondent's private property rights. Additionally, we note that the Board in *Tecumseh Foodland* analyzed the access issue under *Jean Country,* 291 NLRB 11 (1988). The *Jean Country* test was abandoned by the Board after it was rejected by the Supreme Court in *Lechmere, Inc. v. NLRB*, supra.

[9] Our dissenting colleague asserts that "the mere presence of a security guard does not amount to unlawful surveillance." We agree. In our view, the posting of the armed guard without any explanation, during a period of increased union activity and during the times of the day that that activity was taking place, was coercive whether or not any actual surveillance occurred. Cf. *Epic Security Corp.*, 325 NLRB 772, 777 (1998) (employer violated Sec. 8(a)(1) by posting guards; the Board rejected the employer's proffered justifications and noted the lack of a causal connection between the posting and the incidents that purportedly gave rise to security concerns).

dance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest calculated as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, having found that the Respondent unlawfully reduced the overtime hours of Clarissa Nogueira, Karen Bartko, and Marjorie Ridgeway, we shall order it to make whole these employees for any losses incurred by them as a result of the Respondent's unlawful actions in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest calculated as prescribed in *New Horizons for the Retarded*, supra. Having found that the Respondent unilaterally increased bargaining unit employees' wages without providing the Union notice and opportunity to bargain, we shall order it to rescind the wage increase, but only upon request by the Union. Finally, we shall order the Respondent to remove from its files any reference to the discipline of Nogueira and the discharges of Alonso and Nicholson.

ORDER

The National Labor Relations Board orders that the Respondent, Sprain Brook Manor Nursing Home, LLC, Scarsdale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, counseling, disciplining, or otherwise discriminating against any employee for supporting New York's Health and Human Services Union 1199/SEIU or any other labor organization.

(b) Threatening employees with reprisals if they engage in union activity, coercively interrogating employees about their union support or union activities, soliciting employee grievances, photographing employees while they engage in protected concerted activity, placing employees under surveillance while they engage in union or other protected concerted activity, telling employees that it would be futile to support the Union, calling the police in response to employees' protected activities, and hiring a security guard in response to employees' protected activities.

(c) Unilaterally changing the wages, hours, or other terms and conditions of employment for members of the bargaining unit without first bargaining with the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Catherine Alonso and Alvin Nicholson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Catherine Alonso and Alvin Nicholson whole for any loss of earnings and other benefits suffered resulting from the discharges in the manner set forth in the amended remedy section of this decision.

(c) Make Clarissa Nogueira, Karen Bartko, and Marjorie Ridgeway whole for any loss of earnings and other benefits suffered as a result of their loss of overtime hours in the manner set forth in the amended remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Catherine Alonso and Alvin Nicholson and unlawful discipline of Clarissa Nogueira, and within 3 days thereafter notify each of them in writing that this has been done and that the discharges and discipline will not be used against them in any way.

(e) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of its unit employees.

(f) On request by the Union, rescind the wage increase to bargaining unit employees that was unilaterally implemented on or about October 22, 2005.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Scarsdale, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Re-

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 9, 2005.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

MEMBER SCHAUMBER, dissenting in part.

I agree with my colleagues as to many of the violations in this case. I cannot join them, however, in finding that the Respondent violated Section 8(a)(1) by hiring a second security guard to protect its residents, employees, and property.

In September 2005,[1] the Respondent hired a security guard. As explanation for this action, the Respondent's administrator, Joanne Jinete, noted in a September 8 memorandum to file that the Respondent had to appoint a security guard because of the "fear in the atmosphere." The General Counsel did not allege and my colleagues do not find that the Respondent violated Section 8(a)(1) by hiring this security guard. On October 10, the Respondent hired an additional guard who generally worked about 4 hours per day from either 6 to 10 a.m. or 2 to 6 p.m.

The complaint alleged that the hiring of the second guard violated Section 8(a)(1). The judge dismissed that complaint allegation because there was no evidence that the guard engaged in surveillance. My colleagues, in reversing the judge, find that the Respondent hired the second guard in response to the employees' union activities and therefore violated the Act. I respectfully disagree.

The Board has held that the mere presence of a security guard does not amount to unlawful surveillance. *Villa Maria Nursing & Rehabilitation Center, Inc.,* 335 NLRB 1345, 1350 (2001). Rather, there must be proof that the security guard engaged in surveillance or other intimidating conduct before a violation of the Act will be found. Id.; see also *Shrewsbury Nursing Home,* 227 NLRB 47 (1976).[2] Here, there is no evidence that the Respondent's security guard conducted surveillance of employees while they engaged in concerted protected activity, or that the guard otherwise engaged in any behavior that would tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Instead, the record shows only that the guard was armed[3] and that he worked about 4 hours a day, in the morning or afternoon, during shift changes. The majority's finding of a violation of the Act on these facts is unprecedented.

Nor is there any record basis for my colleagues' conclusion that the guard was hired in response to protected activity at the Respondent's facility. The Respondent's September 8 memorandum says nothing about the reasons for hiring a second guard in October. Moreover, that guard was hired 2 months after the start of the Union's organizing campaign, and 3 weeks after the union election. Thus, the timing of the decision to hire the security guard was relatively remote to the inception of the protected activity and does not show that the Respondent was motivated to hire the guard based on the employees' protected activities.[4] Similarly, the guard's conduct after he was hired does not demonstrate an improper motivation. The fact that he was deployed at times when union meetings took place says little about the Respondent's motivation for hiring him absent evidence that he interfered with those meetings. As shown, there is no such evidence. Thus, I would dismiss the complaint allegation.

[1] All dates are in 2005, unless otherwise indicated.

[2] In *Shrewsbury Nursing Home*, a guard was placed at the entrance to the involved facility at the outset of organizing and reported the arrival of any organizer to the respondent's management. The owner would then join the guard and watch the activities of the organizer. There is no evidence that the security guard at issue herein engaged in conduct of this character.

Similarly, in *Epic Security Corp.,* 325 NLRB 772, 776–777 (1998), a case relied upon by the majority, supervisory security guards posted by the respondent in front of its facility engaged in actual surveillance of union activity, including following union supporters as they spoke with coworkers and handed out authorization cards. There was no allegation in *Epic*, as there is here, that the hiring of the guards itself was unlawful. Moreover, the surveillance finding in *Epic* was premised on the conduct of the supervisory guards in spying on employees interacting with union representatives. No evidence of this character exists in this case.

[3] There is no evidence that the Respondent specifically requested the presence of an armed guard. Nor does Board precedent preclude employers from deploying armed security. The Board simply is not empowered to second guess the appropriateness of security measures adopted by property owners.

[4] Any increase in union activity between September 8, when the first guard was hired, and the election held September 22, says little about the motive or impact of the hiring of the second guard on October 10. I find no support in the record for any finding that union activity increased significantly after September 22.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LABOR LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, counsel, discipline, or otherwise discriminate against any of you for supporting New York's Health and Human Services Union 1199/SEIU or any other union.

WE WILL NOT threaten you with reprisals if you engage in union activity, coercively interrogate you about your union support or union activities, solicit your grievances, photograph you while you engage in union or other protected concerted activity, place you under surveillance while you engage in union or other protected concerted activity, tell you that it would be futile to support the union, call the police in response to your protected activities, or hire a security guard in response to your protected activities.

WE WILL NOT change your wages, hours, or other terms and conditions of employment without first bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Catherine Alonso and Alvin Nicholson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Catherine Alonso and Alvin Nicholson whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL make Clarissa Nogueira, Karen Bartko, and Marjorie Ridgeway whole for any loss of earnings and other benefits suffered as a result of their loss of overtime hours, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Catherine Alonso and Alvin Nicholson, and unlawful discipline of Clarissa Nogueira, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and discipline will not be used against them in any way.

WE WILL notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees.

WE WILL, on request by the Union, rescind the wage increase to bargaining unit employees that was unilaterally implemented on or about October 22, 2005.

SPRAIN BROOK MANOR NURSING HOME, LLC

Lauren Esposito, Esq., for the General Counsel.
Jeffrey A. Meyer and *Richard M. Howard, Esqs. (Kaufman, Schneider & Bianco, LLP),* of Jericho, New York, for the Respondent.
William S. Massey, Esq. (Gladstein, Reif & Meginniss, LLP), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in New York, New York, on May 3–5, 8, and 15, 2006. The charge in Case 2–CA–37258 was filed October 12, 2005, and amended on November 23, 2005; December 30, 2005; and January 26, 2006. A complaint issued January 31, 2006. On January 23, 2006, the Union filed a charge in Case 2–CA–37448 and an order consolidating cases, consolidated complaint and notice of hearing (consolidated complaint) issued March 29, 2006.[1] The consolidated complaint alleges that the Sprain Brook Manor Nursing Home, LLC (Respondent or nursing home) committed the following violations of Section 8(a)(1), (3), and (5): discharged Catherine Alonso in retaliation for her activities in support of New York's Health and Human Services Union 1199/SEIU (the Union); reduced the overtime hours of Clarissa Nogueira, Karen Bartko, and Marjorie Ridgeway unilaterally and in retaliation for their union activities; engaged in surveillance of union activity; photographed employees engaged in union activities; summoned police to the nursing home and hired an armed security guard in order to discourage union activity; solicited grievances; promised benefits; unilaterally implemented a wage increase in order to discourage support for the Union; interrogated employees; threatened to impose more onerous working conditions of employees; threatened to reduce overtime shifts if employees voted for the Union; threatened to discharge employees for engaging in union activities; unlawfully denied Alvin Nicholson his *Wein-*

[1] All dates are in 2005, unless otherwise indicated.

garten rights; disciplined Nogueira, and discharged Nicholson in retaliation for their union activities.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates and maintains a nursing home in Scarsdale, New York, where it annually, in the course and conduct of its business operations, derives gross revenues in excess of $100,000, and purchases and receives goods and services valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

The nursing home is jointly owned by Robert Klein and members of the Book family. The key members of management are: Joanne Jinete, the nursing home's administrator; Eleanor Miscioscia, the director of nursing; Elizabeth Gerosa, the assistant director of nursing; Joann Farenga, the director of admissions; John Vitello, the director of dietary and maintenance; and his assistant supervisor, Robert Formisano.

The nursing home is a 4-floor facility with 121 beds. The first floor consists of offices, a kitchen, and a recreational therapy area. The second through fourth floors house the nursing home's residents. The facility is staffed 24 hours a day by approximately 85–100 employees. Hourly employees include nurses, certified nursing aides (CNA), dietary workers, geriatric techs/activity aides, housekeeping employees, laundry employees/assistants, dietary aides, and cooks. They are assigned to one of three shifts—the day shift (7 a.m. to 3 p.m. or 6 a.m. to 2 p.m.); the second shift (3 to 11 p.m.); and the third shift (11 p.m. to 7 a.m.).

B. The Union's Organizing Campaign

By July, the Respondent's management personnel became aware of an organizing campaign by the Union. During that month, prounion flyers were placed at several locations throughout the nursing home. In addition, some employees, including Nogueira and Ridgeway, wore purple to work on Wednesdays as an expression of support for the Union. On August 9, the Respondent commenced its publicity campaign opposing the Union. In its initial letter to employees, accompanied by an article in the *Journal News*, a local newspaper, the Respondent criticized the Union for questionable expenditures and the cost of union dues, and asked, [w]ill everything balance out in the end for everyone?" The Respondent then noted that "[a]ll the scheduled overtime in all departments may have to be eliminated. To all the staff that depends on that overtime money—will the raise you get cover the loss of overtime wages and also pay for your dues?" The Respondent subsequently followed up with additional leaflets opposing the organizational campaign.[3]

In early August, Bartko, a CNA, and Nogueira, a full-time housekeeping employee and part-time CNA on weekends, met at a nearby diner with union organizer, Cherice Vanderhall. Nogueira and Bartko agreed to assist the Union organize the nursing home's hourly staff. In that regard, Vanderhall provided them with authorization cards, which Nogueira and Bartko proceeded to distribute to approximately 20–25 coworkers. Nogueira then arranged for other employees to attend weekly organizational meetings at the diner. Attendees included Bartko, Ridgeway, Catherine Alonso, and Alvin Nicholson.

On August 12, the Union petitioned for a representation election in Case 2–RC–23014 and served it on the Respondent.[4] On August 13, Vanderhall began meeting with employees in the nursing home parking lot area twice a week during shift changes—before 7 a.m., 3 p.m., and sometimes 11 p.m. Nogueira, Alonso, Bartko, Nicholson, and Ridgeway attended these meetings. During the meetings, the employees and Vanderhall generally stood on the grass area in the middle of the nursing home's parking lot or in empty parking spaces.[5] On August 31, the *Journal News* published an article containing statements by Nogueira and Nicholson supporting the Union, and by Jinete opposing the Union. Nogueira complained about low wages, high-cost health insurance, and working long hours. Nicholson complained that he did not mind working long work hours, but could not make ends meet on his low salary. About a week before the representation election, the Union mailed a leaflet containing pictures of individual nursing home employees accompanied by their statements expressing support for the Union. Statements on the leaflet by Nogueira, Alonso, Nicholson, and Ridgeway indicated their support for the Union based on their desire for higher wages, improved fringe benefits, and more respect. Jinete and Miscioscia received and read those materials around the time that election took place.[6]

C. The Respondent's Preelection Actions

1. Robert Klein

In addition to distributing materials opposing the organizational campaign, management began meeting with employees. In August, Klein met individually with numerous employees about the organizing campaign. Around 11:30 a.m. one morning, he called dietary aide Vernon Warren into his office. Unbeknownst to Klein, Warren had seen the flyer in the nursing

[2] The consolidated complaint was amended at trial to include additional 8(a)(1) and 8(a)(3) allegations pertaining to Nicholson's discharge. In addition, the General Counsel withdrew pars. 6(i)–(k) and 9 (a)–(c) of the consolidated complaint. Tr. 9, 324–325; GC Exh. 2.

[3] GC Exh. 7.

[4] GC Exhs. 3–4.

[5] Employees generally met on the grass area, but it is clear that there were times when they ventured onto the parking lot area. Tr. 50, 129–131, 138–139, 171–172, 192–193, 230, 268–269, 317–320.

[6] It is not disputed that Jinete and Miscioscia saw the promotional material at that time. Tr. 18–22, 72–73, 131, 139, 323–324; GC Exhs. 8–9.

home earlier that day. Klein asked Warren whether he knew "anything about this garbage floating around the compound." Warren denied having previously seen the flyer, which stated that "1199 is coming." Klein then asked, "Vernon, we are friends, right?" Warren said "yes." Nicholson was also summoned to a meeting with Klein around that time. Klein told him that he "had seen some stuff laying around here." He added that "if you want to join the union, you can go ahead," but "a lot of stuff would change." Klein also told Nicholson that he should vote "no" at the election. Nicholson assured Klein he would not join the Union and returned to work.[7] Alonso and Nogueira were each summoned to Klein's office for individual meetings a few days before the representation election on September 22. During his meeting with Alonso, Klein asked her to state her grievances. Alonso accommodated him and explained that current employees were angry that new employees were earning starting salaries of $10 per hour. Alonso, an 18-year employee at the nursing home, was earning approximately $12. In his meeting with Nogueira, Klein suggested she speak with Mrs. Book, who "would take it back to him and he would see what he could do for me to make things better." As Nogueira left, Klein told her "not to be mad at him." Nogueira assured him she was not mad.[8]

2. The Book family

Members of the Book family—Mrs. Book and her son, Mordechai—also met with the nursing home's employees prior to the representation election. The meeting was held in the residents' dining room from 1 to 3 p.m. It was attended by the CNAs and dietary, housekeeping, and maintenance employees. Mordechai Book explained he was aware of problems in the nursing home. Mrs. Book added that the Book family was still involved in running the nursing home and suggested employees contact Mordechai Book if they wanted to discuss anything. Mordechai Book concurred and announced his cellular telephone number. Ridgeway then complained that the nursing home recently eliminated its longstanding practice of providing breakfast to employees. The Respondent resumed its practice of providing breakfast to employees the very next day.[9]

3. Joanne Jinete

At 2:30 p.m. on September 8, Vanderhall and another union organizer, "Robin," arrived for a union shift meeting. They were joined initially by two or three employees. At about 2:50 p.m., before the 3 p.m. shift change, and without speaking to the organizers or employees assembled in the parking lot, Jinete called the Greenburgh Police Department and spoke with Captain DiCarlo. She complained that union organizers and at least 15 staff members were standing on the driveway, blocking traffic, and harassing employees to sign union authorization cards. Captain DiCarlo informed Jinete that two officers would respond to the complaint. At the time, there were no more than five people in the group. Members of the group were calling out to incoming and outgoing traffic attempting to enlist other employees in support of the Union. After the 3 p.m. shift, the group was joined by about 10 more employees. The group continued calling out to passersby. While waiting for the officers to respond, Jinete also called the Yonkers Police Department to request assistance.

At 3:51 p.m., Jinete called the Greenburgh Police Department, alleged there was riot activity in the nursing home's parking lot and requested police assistance. At the time, there were about a dozen staff and organizers in the parking lot. As a result, a squad car and a police riot truck were dispatched to the nursing home. The assigned officer, Police Officer Vlasaty, arrived at approximately 4:03 p.m. At that time, there were only five persons standing in the parking lot—Nogueira, Alonso, Sandra Reed, and the two union organizers. He spoke to Vanderhall and Nogueira, confirmed that there was no riot activity, and left.[10]

In a memorandum documenting the events of September 8, Jinete also noted that "union organizers parked in Sprain Brook Manors parking lot. Their vehicle is an unauthorized vehicle on the premises." She also noted that, as "a result of this situation Sprain Brook Manor had to appoint a security guard because of the fear in the atmosphere." The security guard, John Bogetti, began working on September 12 and worked generally every weekday until the election from 5:45 to 7:45 a.m. and 10:30 p.m. to 12 a.m.[11]

Jinete also requested police assistance on September 10, 13, and 15.[12] At 3:29 p.m. on September 10, she contacted the Greenburgh Police Department regarding "labor disputes." The police incident dispatch detail report indicates that Police Officer Deastis arrived in less than 1 minute. The officer remained at the nursing home until 4:02 p.m. and did not find the circumstances significant enough to record a description of the incident. At 2:38 p.m. on September 13, Jinete again contacted the Greenburgh Police Department over "labor disputes." The incident report completed by the responding officer indicates that he/she arrived very shortly thereafter in order to monitor picketing activity. However, there was no picketing activity and the officer left at 3 p.m. At 2:26 p.m. on September 15, Jinete again called the Greenburgh Police Department regarding "labor disputes." The responding officer arrived a few minutes later,

[7] This finding is based on the credible and unrebutted testimony of Warren and Nicholson, as Klein did not testify. Tr. 228, 231–233, 235–256, 266, 270–272.

[8] This finding of fact is based on the credible and unrebutted testimony of Nogueira and Alonso. Tr. 134–135, 196.

[9] This finding is based on the unrefuted testimony of Nogueira and Nicholson, as neither Mrs. Book nor Mordechai Book testified. Tr. 135–137, 274–276.

[10] Although there were some discrepancies, the police reports and collective testimony of Jinete, Nogueira, Bartko, and Vanderhall essentially established that the organizers and employees were standing in parking lot spaces and calling out to incoming and outgoing traffic. However, I do not credit Jinete's conclusory and unsupported allegations that union proponents were harassing other employees, blocking traffic, engaged in any other form of misconduct, and were ordered to leave by police. She was not a credible witness. Throughout much of her cross-examination, Jinete's answers were inconsistent and she could not recall much of the earlier testimony that she gave before Judge Green. Tr. 45–51, 146–147, 194–195, 321–322, 441–442; GC Exhs. 18, 22, p. 5.

[11] Tr. 56–57, 284; GC Exhs. 18, 23.

[12] GC Exhs. 22, 6–10.

remained until 4:02 p.m., and provided the following incident report:

> Undersigned officer while at above premises between the above date and time observed 3 union reps standing on curb not blocking entrance or obstructing traffic in any way. Above [Vanderhall] union organizer states her and her reps. will be on location on Saturday 9/17/05 and Wed 9/21/05 at the usual time and sporadically during the day on Thurs 9/22/05. [Vanderhall] states Thurs 9/22/05 should be final day. [Vanderhall] states no union reps on scene on Tuesday. All union reps left without incident.

4. Eleanor Miscioscia

Miscioscia, the nursing director, observed employees engaged in organizing activity on numerous occasions during the preelection period. At Klein's direction, she went in to work on Saturday, August 13, her regular day off. It was the day after the petition was filed and Miscioscia went in to work because she thought there might be organizing activity. She arrived at the nursing home at 6 a.m. and remained for nearly 2 hours. She stood at the exit door to the dining room at the side of the building, the door "closest to where [the employees] were standing," in order to observe them throughout the meeting.[13]

Miscioscia also observed employees during union shift change meetings every Wednesday at the facility, because "that was the most often time that there was ever any activity." From an office window located at the front of the nursing home, Miscioscia would look at employees and union organizers congregated "at the end of the parking lot by the driveway."[14] She was joined on occasion by Jinete, Vitello, Farenga, and Edward Book.[15]

Miscioscia was also involved in calling for police intervention. At 7:09 a.m. on August 13, she called the Greenburgh Police Department and complained about the Union's activities in the parking lot. The police responded to the complaint and spoke with Vanderhall. Vanderhall explained that employees were engaged in a union organizing meeting. The policeman told Vanderhall that they had the right to do so, but directed her to confine the meeting to the grass area by the parking lot entrance. He also directed her to keep the participants out of the street so they did not get hurt in traffic. The police were called again that day at 2:17 p.m. and informed that there would be a "possible strike occurring sometime today." The report stated that "the above activity is not a strike—the business is not a union shop. Local 1199 is attempting to organize the 30 employees and sets up outside business for 15 minutes at shift changes only. There is no significant labor activity projected for the future." The report also indicated that union organizers will "usually arrive Tue, Thur, Sat at change of shift. Vote is Sept 22, 2005."[16]

5. John Vitello

On August 15, Vitello, the dietary and maintenance director, called Nicholson into his office and told him that, if the Union prevailed in the representation election, "some things would change," the Respondent would adhere to the collective-bargaining agreement and "it won't be as lenient as how we are right now with our staff." Specifically, he also noted that the Respondent would no longer permit employees to "go to the store for ten minutes," arrive late or depart late, and receive free meals. In fact, around this time, the dietary department stopped the customary practice of providing breakfast to employees.[17] Vitello also spoke with others about the upcoming election. On or about September 20, Vitello told Warren that he would lose overtime if the Union prevailed in the election.[18]

D. The Representation Election

A representation election in Case 2–RC–23014 was held on September 22. The voting resulted in a majority of the bargaining unit employees (62–23) designating and selecting the Union as their collective-bargaining representative. Nogueira served as the Union's observer, while Antonetta Gjelaj served as the Respondent's observer.[19] As a result of the election, the following employees of the Respondent now constitute a unit appropriate for the purposes of collective bargaining pursuant to Section 9(b) of the Act:

> All full-time and regular part-time and per diem nonprofessional employees including licensed practical nurses, certified nurses' aides, geriatric techs/activity aides, housekeeping employees, laundry employees/assistants, dietary aides, and cooks employed by the Employer at its facility located at 77 Jackson Avenue, Scarsdale, NY, but excluding all other employees, including office clerical employees, managers, and guard, professional employees and supervisors as defined by the Act.

On September 29, Sprain Brook Manor filed objections to the representation election. On February 7–9, 2006, Administrative Law Judge Raymond P. Green heard testimony and on March 1, 2006, overruled the objections and remanded the case to the Regional Director for certification of representative.[20] The Respondent filed exceptions to Judge Green's Decision and Order with the Board. On June 29, 2006, the Board af-

[13] This finding is based on the fairly consistent testimony of Miscioscia, Nogueira, Alonso, Nicholson, and Vanderhall. Tr. 131–132, 193–194, 279, 318–319, 409–416.

[14] Miscioscia asserted that she would "look out the office window just to see who was out there" but it was clear from her overall testimony that she was more than a disinterested bystander. Tr. 413–416.

[15] This finding is based on Nicholson's credible and unrefuted testimony. Tr. 277–278.

[16] This finding is based on the police reports and the credible testimony of Nogueira and Vanderhall. Tr. 132–133, 319–320; GC Exh. 22, pp. 1–4.

[17] The testimony of Nicholson and Vitello was fairly consistent as to what Vitello told employees would happen if the Union came in. Tr. 122–123, 137, 273, 276.

[18] I based this finding on Warren's credible testimony. Vitello denied addressing overtime but, based on the Respondent's statement about overtime in its oppositional literature, I find it likely that Vitello mentioned it along with the other items that would be affected by a collective-bargaining agreement. Tr. 110, 228, 233.

[19] GC Exh. 5.

[20] GC Exh. 6.

firmed Judge Green's Decision and Order and certified the Union as the exclusive collective-bargaining representative.

E. The Respondent's Post-Election Actions

1. Overtime reductions

Klein also serves as the nursing home's controller; Edward Book serves as assistant controller. The Respondent's 2004–2005 fiscal year ended in May. In June, Edward Book reviewed the fiscal year's records and determined there had been an increase in payroll costs for the CNA, housekeeping, and laundry departments for the past fiscal year.[21] However, neither Edward Book nor Klein planned to take any action with respect to such costs. In September, after the Respondent issued its oppositional union literature, Klein asked Edward Book for the individual payroll information.[22]

After the week ending September 22, and without notifying the Union or giving it an opportunity to bargain, Klein ordered overtime reduced or eliminated for every employee in the nursing, housekeeping, and laundry departments.[23] Examples of such reductions were reflected in the payroll records of Bartko, Ridgeway, Nogueira, Elijandro Campbell, and Brian Magner. Overtime in other departments, however, was not reduced. An example is reflected in the payroll records of dietary aide Vernon Warren. Overtime in the CNA and housekeeping departments was eventually restored after the election, but not in the laundry department. Nogueira was the only employee in the laundry department.[24]

Bartko consistently received 7.5 hours of overtime per week in 2005, until the week ending September 22. She received overtime for the first two pay periods in November, but did not receive overtime after that in 2005. During the week of September 19, and prior to the representation election on September 22, Bartko asked Miscioscia why she was not scheduled for a sixth day of work. Miscioscia said, "if the union gets in, no more overtime."[25]

Ridgeway consistently received 7.5 hours of overtime per week until the week ending September 22. After that, it was discontinued until it was restored during the week ending December 29. Around that time, Bartko learned that Ridgeway's overtime had been restored and asked Gerosa, the assistant nursing director, to restore her overtime. Gerosa explained that Ridgeway's overtime had been restored at Klein's direction. Bartko protested that it was unfair, but her overtime was not restored until March 2006.

Nogueira consistently received 7.5 to 15 hours of overtime per week in 2005, until the week ending September 22. Her overtime pay was usually attributable to her weekend CNA work. She received 7.5 hours of overtime during the week ending October 6, but none at any time after that. After learning that Bartko's overtime was restored in March 2006, Nogueira asked Gerosa to restore her weekend CNA work. Gerosa asked Nogueira whether she was a certified CNA. Nogueira said that she was, and Gerosa told her she would "find out" whether Nogueira was eligible to perform CNA work. The next day, however, Gerosa approached Nogueira in the laundry room and told her that she would not be assigned overtime work as a CNA because "they told me no because you work in laundry, not in nursing."[26] This was the first time since Nogueira began performing weekend CNA work in 1999 that was she told that she was ineligible for such work because her regular assignment was in the laundry room.[27]

2. The wage increase

On October 22, without consulting the Union, the Respondent awarded a $1 per hour wage increase to all hourly employees, including all bargaining unit employees.[28]

3. Police intervention

At approximately 2:15 p.m., on September 30, the Greenburgh Police Department was called to the nursing home regarding a "labor dispute."[29] At that time, a group of employees was meeting with Greg Speller, the Union's vice president. Approximately 10 to 15 minutes after the meeting began, five police cars arrived. Two police officers approached Nicholson, directed him to step away from the group, and arrested him. At the time, several management personnel were standing in front of the nursing home, including Miscioscia, her daughter, Christine Miscioscia, Antonetta Gjelaj, and Karen Meyers. Nogueira or another employee asked why Nicholson was being arrested. A policeman explained they received a complaint accusing an employee of harassment or attempted rape. After Nicholson was arrested and placed in the police car, a police officer approached Miscioscia's group. The police officer returned shortly thereafter, said Nicholson was the wrong person, and

[21] It is not disputed that this was the Respondent's custom and practice. R. Exh. 5.

[22] Edward Book's contention that he spoke to Klein about this in June, but waited until September to act on the information, was not credible. First, Klein did not testify. Secondly, Book testified that Klein went "away for a week or two," then Book became involved in unspecified personal issues and it was not until September that he was able to address this problem. Tr. 347–348. At that time, he provided Klein with each employee's payroll information. Tr. 361. The circumstances strongly support an inference that Book did so at Klein's request due to the union campaign and not because the Respondent was genuinely concerned about payroll costs.

[23] The Respondent stipulated that it did not provide 1199 with notice and the opportunity to bargain prior to eliminating Nogueira, Bartko, and Ridgeway's overtime hours. Tr. 334–336.

[24] The General Counsel did not provide any evidence to contravene the Respondent's contention that the payroll records of the six employees were representative of the overtime cuts to their respective departments. Tr. 127–138, 170–173; 339–348, 356–358; R. Exhs. 6–11; GC Exhs. 41–43.

[25] This finding is based on Bartko's credible testimony, as Miscioscia's general, terse denial—that she never threatened any employees that their overtime would be eliminated—did not sufficiently address their encounter. Tr. 173–174, 410.

[26] The parties stipulated at the hearing that Nogueira is licensed as a CNA and qualified to perform CNA work. Tr. 11–12.

[27] This finding is based on the credible and unrefuted testimony of Bartko and Nogueira. Tr. 139–141, 174–177; GC Exh. 34. Gerosa was not called to testify.

[28] The Respondent stipulated that it never gave the Union notice or the opportunity to bargain before implementing this wage increase. Tr. 11.

[29] GC Exh. 22, p. 12.

released him. The police then arrested Jose Veloso, a nursing home employee discharged the previous day.[30]

4. Threats to dietary department employees

On October 1, Klein, Jinete, and Vitello met with dietary department employees in Klein's office. Klein told the dietary staff that police were investigating "the case," presumably referring to Veloso's arrest. Klein went on to say that "this is a free country" and he could not stop employees from doing what they wanted to do. He then noted, "[b]ut remember, I'm the big man in here. I'm the man who signs the paychecks" and can terminate anyone who "demonstrate[s] or protests." Klein also added that he had been "in business for 32 years and nobody is going to come in and break it up." Klein then told the employees that if they joined the union, demonstrated, or protested, their jobs could be terminated. Klein also told the assembled employees that things were going to change, so that break periods and leaving the facility were "going to stop."[31] On or about November 14, Klein, Jinete, and Vitello met once again in his office with dietary staff. Klein again stated they were free to participate in an informational picket planned for November 16. However, he advised them, once again, not to participate. Klein added he was "the big man" who "signs paychecks," and warned the employees they would be terminated if they participated in the picketing.

Finally, on December 23, the day of the Respondent's holiday lunch, Warren was once again called to Klein's office. No one else was present. Klein told Warren he heard he was not happy and, referring to Klein, had said "no good." Warren explained he made the statement in the heat of the union campaign. Klein responded, "So, okay, we're going to set the date, we can get complete dietary staff and we have a meeting and let's see what can be done." Warren agreed. About 15 minutes later, Warren was called back into Klein's office. Jinete, Vitello, Formisano, and two other dietary supervisors were also present. Klein explained that the wage increase he gave employees in October was all he could afford. Warren said, "Mr. Klein, I think you are trying me today." Warren added that Klein knew he was involved with the Union and, thus, "if you're going to try me today, just get it over with." The meeting ended with Klein's comment that he had been in business for 32 years, and nobody was going to come in and tell him how to run the nursing home.[32]

5. Deployment of an armed security guard

On October 10, 2005, despite already having one guard, the Respondent hired a second security guard to patrol the nursing home. The security guard was armed and generally worked 4 hours per day "as directed," except October 13, when he worked 10 hours. The security guard was deployed virtually every weekday until January 7. The time periods varied, but Jinete and Klein generally deployed the guard during periods that encompassed shift change meetings.[33]

6. Catherine Alonso

Catherine Alonso, a 17-year employee of the nursing home, worked the 7 a.m. to 3 p.m. shift Monday through Friday and every other weekend. She was assigned to the housekeeping department and was responsible for replacing supplies on each floor. Her supervisors were Formisano and Vitello. Her most recent performance appraisal, dated October 8, 2004, was written by Vitello and approved by Jinete. In the appraisal, Alonso received a rating of excellent in all categories, except one—attendance. The items that were rated excellent included discipline, quality of work, cooperation, and her "overall" performance. The "general comments" were: "Kathy does a great job for [the nursing home]. She really cares about the residents. Kathy fills in when we need her in different assignments and does a good job."[34]

As noted above, Alonso was also a visible union supporter. Alonso and Katrina Gjelaj, another housekeeping employee and opponent of the Union, did not get along. Katrina Gjelaj, whose daughter, Antonneta, was a management employee and the Respondent's election observer, had an extensive disciplinary history. Over the past several years, Katrina Gjelaj had several documented conflicts with other employees and supervisors.[35]

Katrina Gjelaj's history of conflict included Alonso, but there was never a documented incident between them prior to August. On or about August 22, Alonso was pushing her supply cart down the second floor hallway. Katrina Gjelaj was in her path, but Alonso was not about to change course. As a result, Katrina Gjelaj had to step out of the way. The event was witnessed by Gaetana Capozzo, the Respondent's social services director, but she obviously did not consider it serious enough to document.[36]

[30] This finding is based on the unrefuted, credible, and substantially consistent testimony of Nogueira, Warren, and Nicholson. Tr. 142–145, 233–237, 279–282.

[31] The credible testimony indicates that this meeting occurred the day after Nicholson was arrested, which was September 30.

[32] My findings regarding Klein's meetings with Warren and other dietary staff are based primarily on Warren's unrefuted and credible testimony. Tr. 237–250. Alvin Nicholson was less credible on this point, as he did not recall others present at the meetings. Nevertheless, he substantially corroborated Warren's version of the events. Tr. 286–289.

[33] Tr. 59–60, Tr. 241–242, 285; GC Exh. 24.

[34] GC Exh. 40, p. 11.

[35] Jinete was quite aware of this. Tr. 41–45; GC Exh. 19–21.

[36] Reconstructing the conflict between Alonso and Katrina Gjelaj was difficult, as both were less than credible on this issue. Gjelaj's testimony was alternately belligerent and tentative in nature, and she looked frequently at Jinete, seated at counsel's table, as she answered. Furthermore, her version of the incident conflicted with that given by Capozzo. Gjelaj conceded she was vacuuming and not looking up when Alonso approached, while Capozza said Gjelaj was walking toward Alonso and, on her own account, moved to the side. In addition, Gjelaj testified that Capozza yelled out to Alonso, while Capozzo testified that she said nothing. Tr. 365–366, 371, 395–397. In addition, the circumstances of their statements of the incident were highly questionable. GC Exhs. 14, 28. Capozzo's statement was suspiciously written on September 26, the day Alonso was discharged. Given my strong suspicion that a paper trail was being concocted, Gjelaj's undated statement was, in all likelihood, not written on August 30, as purportedly dated, but rather, on September 26, as well. The statement was written by Antonetta Gjelaj, a member of management and was never shown to Alonso by Jinete. Tr. 34–38. In any event, Alonso evinced a temper during her testimony when discussing Katrina Gjelaj that indicated the likelihood

A few days later, on August 26, Alonso and Ridgeway were "discussing 1199 issues with each other loudly" at the nursing station. Veronica Bago, a nurse, overheard the conversation. Bago passed that information along and it reached Klein. Klein then called Bago and directed her to document the incident and give it to her nursing supervisor, Aurora Richter. Bago complied and gave Richter a note detailing the incident. Richter, in turn, passed along the note to Jinete. The note stated that Klein himself "called Veronica to write this note what she heard from Cathy & 4th Floor staff." The subject that Alonso had been "discussing" was her advice to another employee, Charlene Cobb, to "watch out for" Katrina Gjelaj, because she was "sneaky" and "not for the union."[37]

The same day, Alonso was called to a meeting with Jinete and Formisano. At the meeting, Jinete stated that she heard that Alonso had been talking about another employee in a manner that "wasn't nice." Alonso apologized and said that it wouldn't happen again. Alonso signed an attendance sheet for this meeting, as directed by Jinete.[38] During this meeting, there was no mention of the "supply cart" incident, since Jinete was not aware of it at the time.[39]

On September 26, Gjelaj was mopping a second floor shower room when Alonso entered the area with her supply cart. In order to pass Gjelaj, Alonso pushed a mop handle in Gjelaj's cart. The handle nudged Gjelaj on the left shoulder. Gjelaj immediately reported the incident. Jo-Ann Farenga, the director of admissions, saw Gjelaj crying and brought her into her office. Gjelaj told Farenga, "I cannot take this no more" and stated that she was ready to quit her job because of Alonso. Gjelaj then reported the incident to Jinete.[40]

Jinete spoke with Katrina Gjelaj and decided she had enough to discharge Alonso. Later that day, Alonso was called to a meeting with Jinete and Formisano. Jinete informed Alonso of Katrina Gjelaj's accusations and, without asking Alonso for her version or investigating the matter further, told her that she was being discharged. Alonso asked why she was being discharged. Jinete explained that "this is the second time I had to reprimand you about Katrina [Gjelaj]." Jinete told Alonso that she struck Gjelaj on the shoulder with her hand. Alonso denied that charge and added that Gjelaj harassed her in the past, but she never reported such incidents to Jinete.[41] At that point, Jinete handed Alonso a letter and her final paychecks.[42]

7. Nogueira's discipline

Nogueira has been employed by the nursing home since 1981. Once or twice per week, Nogueira would leave the nursing home during lunch or breaks to take care of personal matters. She knew that she was required to inform either of her supervisors—Vitello or Formisano—in such an instance. However, this requirement was not rigidly applied, as Nogueira would, on some occasions, simply tell a coworker if neither supervisor was around. She would then punch out and leave. Upon returning, she would punch back in.

On October 27, Nogueira needed to leave the nursing home during lunch at approximately 1:40 p.m. to handle a personal matter. Before leaving, she looked for Formisano and Vitello, but could not find either one. As a result, Nogueira informed Edna, a coworker, that she was leaving and clocked out. Nogueira returned to the facility about 20 minutes later and attempted to punch in, but her card was not in its slot by the timeclock. As Nogueira proceeded to the business office to inquire about the timecard, she encountered Vitello. She asked him if he knew anything about her timecard and he acknowledged taking it. Nogueira asked Vitello to return her timecard. He did not return it, but replied that he thought she had left for the day. Nogueira explained that she told Edna. Vitello then responded that she should tell him next time. She then explained that she did look for him and Formisano, could not find either one, and asked why he took her card to the dietary department. Vitello told her that he would take everyone's card.[43]

The following morning, Nogueira was called into a meeting with Vitello and Formisano. After having her sign an attendance sheet, Vitello told Nogueira that she left the facility the day after telling a coworker, but without informing a supervisor, and then returned and questioned him about her timecard. Nogueira explained that her inquiry was due to the fact that she did not understand why he took her timecard to the kitchen.

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that something did occur—although not nearly rising to the threat level alleged by the Respondent.

[37] This finding is based on a reasonable construction of the events preceding Bago's note. Tr. 22–23; GC Exh. 10.

[38] This finding is based on Alonso's credible and unrebutted testimony. Tr. 197–199. In contrast to the "shopping cart" incident, the Respondent held a meeting with Alonso and generated an attendance sheet. GC Exh. 35.

[39] As previously explained in fn. 35.

[40] I based this finding on the testimony of Katrina Gjelaj, as corroborated by Jo-Ann Forrenga. Tr. 372–373, 403–405; GC Exhs. 4, 12. As explained at fn. 35, I found both Gjelaj and Alonso to be less than credible as to their conflicts. As to this incident, however, Gjelaj's testimony that she was crying after the incident was corroborated by Forrenga, whom I found credible. Alonso testified that she simply pushed her cart through the shower room and past Gjelaj without incident, without further elaboration. Tr. 199–200. I realize that this finding may or may not be inconsistent with the New York State Department of Labor finding that Alonso did not engage in misconduct and awarded her unemployment insurance benefits. GC Exh. 36. However, in resolving credibility disputes, it is not proper to base a finding on a judge's determination in another proceeding. *Southern Florida Hotel & Motel Assn.,* 245 NLRB 561, 561 fn. 7 (1979).

[41] I credited Alonso's testimony that she had attempted in the past to complain about Gjelaj to Vitello, but Vitello told her that he was not interested. Tr. 153–154, 205–206.

[42] I base this finding on the fairly consistent testimony of Jinete and Alonso regarding the meeting. However, it is notable that there was no testimony that the supply cart incident was brought up in this conversation. It surfaced, however, in Jinete's written statement. Tr. 30–33, 42, 200–202; GC Exhs. 13, 17.

[43] I based the finding regarding the events of October 27 primarily on Nogueira's mostly credible testimony. I did not, however, credit her testimony that she was not required to notify a supervisor, as her search for one before she left indicates otherwise. Tr. 147–150. Vitello's recollection of his conversation with Nogueira that day, on the other hand, was quite selective and lacked credibility. Although I did credit his testimony regarding the requirement that employees notify a supervisor before leaving the facility, I found it significant that he could not recall a conversation with Nogueira when she returned or seeing her look for her timecard. Tr. 110–111, 121–125.

Vitello responded that he customarily took timecards and checked them. Contrary to his statement the day before in which he indicated a belief that Nogueira had left for the day, Vitello added that he was holding Nogueira's card because he wanted to speak with her when she returned about washing curtains. Vitello then wrote "warning" on the top of an employee counseling form and handed it to Nogueira. The form stated the "problem" as follows: "On Thursday Oct 28, 2005 Clarissa was scheduled to work at 7–3. She punched out at 148 pm & returned at 216 pm. She did not tell her supervisor or Director that she was leaving the building. She told her co-worker Edna." The "resolution of problem or action taken" provided that "Clarissa will let Director or supervisor know when she is leaving the building." Vitello asked Nogueira if he "wrote down the truth." Nogueira acknowledged that it was the truth, but noted that she did not have a witness present and refused to sign the counseling form. Vitello asked "whose rule is that" and Nogueira responded that it was her right to have a witness.[44]

8. Nicholson's discharge

At approximately 7 a.m. on November 15, Sergio Petito, a nursing home employee, observed Nicholson in the employee locker room with flyers in his shirt. He proceeded to follow Nicholson and saw him place flyers near the visitors' sign-in sheet at the front of the building. When Nicholson left the area, Petito scooped up the flyers, continued following Nicholson, and saw him place flyers in the lobby area. Petito also saw Nicholson "put a flyer in the men's locker room by the mirror." At some point during that timeframe, Nicholson told Petito about the informational picket that would be held the next day. He added that he was "scared to get fired by Mr. Klein."[45] Petito immediately reported Nicholson's activities to Vitello. Vitello prepared a statement that Petito signed and provided it to Jinete. Jinete and Vitello then decided to counsel Nicholson.[46]

Later that morning, Vitello took Nicholson to Jinete's office for a meeting. Jinete told Nicholson, a dietary aide at the nursing home since 2000, to sit down. She proceeded to tell him that she had nothing against him, but was informed that someone saw him posting union flyers in the facility earlier that day. Jinete and Vitello intended to issue Nicholson a counseling form. The form contained Vitello's description of the "problem" as follows: "On Tuesday morning, Alvin was putting union flyers in the locker room area. Their [sic] is no union in this nursing home & this conduct will not be tolerated."[47]

Previously, however, a memorandum relating to such activity had been provided to employees along with their paychecks. The memorandum was entitled, "Defacing private property," and had as its source a provision in the Respondent's "Work Rules and Regulations" prohibiting "[d]estruction of property." The memorandum stated:

> We are well aware of the ongoing union activity and campaign. We must ask though when placing posters or flyers that they are not placed on any paint or wallpaper that will be damaged when removing them. The little flag signs were colorful but unfortunately many of them destroyed wallpaper and paint when being removed. This act represents defacing private property and is not allowed. Thank you for your cooperation.[48]

When Nicholson heard Jinete mention the word, "union," he asked to be excused. Jinete excused Nicholson and he went to the kitchen. Nicholson then asked Vernon Warren to accompany him in the meeting. Warren agreed and they proceeded back to Jinete's office. However, they were met by Vitello, who informed them that Warren could not accompany Nicholson and the latter would have to return alone to the meeting. Nicholson replied that "if Mr. Warren cannot come with me, then I would not go in there." Vitello responded that Nicholson would be sent home if he did not return to the meeting. Nicholson, still defiant, told Vitello that if he wanted to send him home, then that was he needed to do. Vitello then instructed Nicholson to "go home." As Nicholson was changing his clothes in the locker room, Vitello approached him again and asked him to reconsider, insisting that Nicholson was putting him in a difficult position. Nicholson did not reconsider and Vitello again told him to go home and not return until he heard from someone.

Nicholson left and went home without signing the attendance sheet or counseling form that had been prepared. In place of his signature on the attendance sheet, however, Jinete inserted the following statement: "[e]mployee walked out of Administrator's office while Administrator was speaking and in front of Director of Food Service." Jinete also added two statements to the counseling form. Her first statement was inserted after Vitello's description of the "problem": "Union flyers were distributed on Company time and staff were informed in writing through memo." Jinete then added the following statement at the bottom of the counseling form, in place of Nicholson's signature: "Employee did not hear Administrator's concern and walked out without letting the Director/Administrator know what was going on." Jinete also drafted a memorandum purportedly describing the meeting:

> At approximately 10:15 a.m. I Joanne Jinete, Admin, John Vitello, Dir. Of Environmental asked to meet with Alvin Nicholson, dietary aide to discuss his inappropriateness of distributing union flyers throughout the building. As I began the meeting I stated to Mr. Nicholson that we understood his position and that he needed to understand our position as management. He first refused to sit down I asked to please sit down. I then stated that it was informed to me that he distrib-

[44] The testimony of Nogueira and Vitello was fairly consistent regarding their meeting on October 28. Tr. 111–120, 150–153; R. Exhs. 1–3.

[45] There was no indication as to how the flyer was "put . . . by the mirror." GC Exh. 32.

[46] Vitello's testimony lacked credibility. He hesitated for a few seconds when asked if he met with Jinete prior to meeting with Nicholson that day and answered, "I don't know." During follow-up questions, however, he testified that he gave Jinete the flyer and both decided to meet with Nicholson. Tr. 106–107.

[47] Under the circumstances, I find that Jinete's statement regarding the distribution of union flyers on company time was not added until after Nicholson was sent home. GC Exh. 26, p. 3.

[48] R. Exh. 12; GC Exh. 26, pp. 4–5.

> uted union flyers throughout the building. Mr. Nicholson did not make eye contact he stood up and walked out of my office. Mr. Nicholson was insubordinate to myself, the Administrator and Director of Dietary. Mr. John Vitello went to go see where he went and he found him speaking to Clarissa Nogueira, laundry attendant.[49]

That day, after Nicholson was sent home, there had been no determination to discharge Nicholson.[50] Nicholson returned at about 3:30 p.m. on November 16, to participate in a union informational picket in the parking lot. The picket was filmed by Channel 12, the local cable news channel, and Nicholson was interviewed by the reporter. The interview aired later that day. Also on that day, Jinete drafted a letter discharging Nicholson. The letter, which was mailed to Nicholson, stated:

> Please be aware that your services will no longer be needed. You were terminated on November 15, 2005. The reasons for your termination were explained to you by your director.[51]

On November 17, without hearing from Vitello, Nicholson reported for work at his regularly scheduled time at 7 a.m. He changed into work clothes and was walking toward the timeclock when he encountered Vitello. Vitello admonished Nicholson for returning to work without hearing from him. Vitello then took him to his office and repeated his statement. Nicholson responded that he returned to work because he thought he might have missed Vitello's telephone call.[52] Vitello then informed Nicholson that the Respondent decided to discharge him. Nicholson asked why and Vitello responded that it was due to insubordination. Nicholson asked for the basis of the insubordination. Vitello responded that he had walked out of a meeting while Jinete was issuing him a warning. Vitello then asked Nicholson to clear out his locker, and Nicholson complied. Vitello then documented this encounter.[53]

9. Surveillance of employee picketing activity

On October 31, Speller wrote to Jinete informing her that "all employees in the petitioned for unit(s) at your institution will conduct informational picketing, at your institution, on their own time on Wednesday, November 16, 2005, from 2:00 p.m. to 5:00 p.m." Jinete received the letter.[54] She did not respond to the letter or take any other action until 1:45 p.m. on November 16, when she contacted the Greenburgh Police Department. The police report summary stated:

> At the above time and location undersigned and [squad car] 86 responded to Sprain Manor Nursing Home where there were approximately 12 picketers assembled. The picketers were orderly and were not blocking the driveway to the above facility. Greg [Speller] stated that he anticipated 40–50 picketers at maximum and that they would not [encroach] on the property of the above facility. 86 is to remain at location until relieved by the outgoing 63. The work action is to end at 1700 hours.[55]

In fact, a group of approximately 20–30 employees and union organizers congregated on the grassy area adjacent to the parking lot. The picket lasted between 2 to 3 hours. Members of the group wore union T-shirts and caps, carried signs, chanted slogans, and generally walked in a circle around a large tree in the grassy area between the road and the Sprain Brook Manor parking lot. However, a very brief portion of the picket was filmed and broadcast by Channel 12 and broadcast later that day. That film shows, at one point, most of the picketers standing on the grassy area, but about six picketers standing just off the grassy area on the driveway. Nogueira and Nicholson were interviewed and made statements in support of the Union. During the picket, members of management stood in front of the nursing home observing the activity. They included Klein, Jinete, Farenga, Vitello, Eleanor and Christine Miscioscia, Edward Book, Formisano, and Jeff Frylock, the Respondent's director of recreation, Ridgeway, and several security guards stood near the building observing the participants. Miscioscia took photographs of the employees as they picketed. A police officer sat in his car in the parking lot throughout the event.[56] Later that day, Jinete was also interviewed by Channel 12 and read a prepared statement explaining that certain action was justified because of objectionable conduct. Ellen Miscioscia saw the news report of the picket that day and notified Jinete who viewed a tape of the broadcast a couple of days later.[57]

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[49] I found Nicholson's testimony on this issue—that he asked to be excused, was excused and attempted to return to the meeting—more credible than that of Jinete and Vitello for several reasons. Tr. 290–294. First, his version of the encounter with Vitello was corroborated by Vernon Warren, whom I found to be credible as to most issues testified to at trial. Warren's demeanor was spontaneous and calm, yet without reflection. Tr. 246–247. Secondly, Jinete testified that she was going to counsel Nicholson because he violated the terms of the memorandum that had been placed in employees' paychecks. Tr. 64–65, 428; R. Exh. 12. However, the predrafted counseling form was based solely on the fact that Nicholson distributed union flyers in the nursing home. It did not allege that he taped flyers to a painted or wallpapered wall, much less destroyed property. GC Exh. 26, p. 3. Thirdly, Vitello never rebutted Nicholson's testimony that the latter attempted to return to the meeting accompanied by Warren, but was prevented from doing so by Vitello. Vitello was asked only one question as to whether Nicholson mentioned anything about union representation and, after a significant pause, had no recollection. Tr. 110. Accordingly, I did not credit Vitello's memorandum to the file, written 2 days later after Nicholson attempted to return to work, that Nicholson left Jinete's office on November 15 as he was being issued a warning. GC Exh. 33.

[50] Vitello's testimony, his written statement, and Jinete's written description of the meeting all indicate clearly that there was no determination to discharge Nicholson that day. Jinete never modified Vitello's description of the "action taken" to indicate anything other than that "future occurrences will lead to suspension/or termination." Tr. 104–106; GC Exh. 26, pp. 2–3.

[51] Here, again, Jinete was not credible as to when she truly made the determination to discharge Nicholson. The discharge letter was simply inconsistent with the document generated she and Vitello generated from the short-lived meeting on November 15, Tr. 64–65, 293; GC Exh. 27.

[52] That statement was not credible, as Nicholson was clearly trying to force the issue by returning to work prematurely.

[53] Tr. 108, 295–297; GC Exh. 33.

[54] GC Exh. 25; Tr. 60.

[55] Tr. 45, 63, 441; GC Exh. 22, pp. 13–15.

[56] Tr. 157–158, 247–248, 293–295, 439; GC Exh. 22, p. 15.

[57] Nogueira, Warren, and Jinete were all less than credible on the issue of where the picketers stood during the event. Nogueira and Warren

III. LEGAL ANALYSIS

A. The 8(a)(1) Charges

The General Counsel alleges that the Respondent violated Section 8(a)(1) by: interrogating employees; soliciting grievances; promising benefits; threatening to discharge employees, reduce overtime, impose more onerous working conditions; stating that it would be futile to support the Union; conducting surveillance, summoning police, and hiring security guards. The Respondent denies the allegations and maintains that it acted at all times within the permissible bounds in opposing organizational activities and protecting life and property at the nursing home.

Under Section 8(a)(1), it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." It is well established that, in determining whether an employer has violated Section 8(a)(1), the test is objective, not subjective. *Multi-Ad Services,* 331 NLRB 1226, 1228 fn. 9 (2000). Animus toward the Union is not a required element of 8(a)(1) violations. Rather, the test is whether the employer's conduct may reasonably be seen as tending to interfere with Section 7 rights. *Naomi Knitting Plant,* 328 NLRB 1279, 1280 (1999); *Williamhouse of California*, 317 NLRB 699, 713 (1995); *American Freightways Co.*, 124 NLRB 146, 147 (1959).

1. Threats

During the organizational campaign, Klein, Vitello, and Miscioscia threatened to reduce overtime and impose more onerous working conditions if the Union prevailed in the election. Prior to the election, Klein and Vitello each warned Nicholson that working conditions, including free meals, breaks outside the nursing home, late arrivals, and early departures would change if the Union prevailed. After the election, the Respondent's threats continued. In early October and mid-November, Klein met with dietary staff and warned that any employees engaged in picketing or other union activity would be discharged. Threatening employees with reprisals if they engage in union or other concerted protected activities has repeatedly been found to have a coercive effect on employee Section 7 activity. *United Scrap Metal, Inc.*, 344 NLRB 467, 472 (2005). This includes threats that explicitly or implicitly threatening employees with the loss of fringe benefits or jobs, or other negative consequences. *DynCorp,* 343 NLRB 1197, 1199 (2004); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 711 (2005); *Sheraton Hotel Waterbury*, 312 NLRB 304, 305 (1993). Under the circumstances, the Respondent's threats to discharge employees and/or reduce overtime opportunities and impose more onerous work conditions violated Section 8(a)(1).

2. Interrogation of employees

In August, Klein, the highest ranking member of management, met individually in his office with employees about the union campaign. In his meetings with Warren and Nicholson, he inquired as to employees' knowledge of the organizing campaign and their views of the campaign. Klein asked if they knew anything about this "stuff" or "garbage" floating around the compound. He did not assure either of them that there would not be consequences to their actions. Under the circumstances, the questioning clearly sought to evoke the union sympathies of each of them in a manner that reasonably tends to restrain, coerce, or interfere with Section 7 rights. *Angotti Healthcare Systems, Inc.,* 346 NLRB 1311, 1316 (2006); *Jefferson Smurfit Corp.*, 325 NLRB 280, 285 (1998); *Rossmore House*, 269 NLRB 1176, 1177 (1984); *NLRB v. Shelby Memorial Hospital Assn.*, 1 F.3d 550, 559 (7th Cir. 1993). Indeed, Klein's reference to the union material as "garbage" conveyed his contempt for it, as well as a sense of unspecified reprisals. *Hialeah Hospital*, 343 391, 392 (2004). Accordingly, Klein's questioning constituted unlawful interrogation in violation of Section 8(a)(1).

3. Solicitation of grievances

In September, Klein met privately in his office with employees, including Alonso and Nogueira. He asked Alonso to share her grievances and urged Nogueira to communicate her grievances with Mrs. Book, who would then communicate them to Mr. Klein. He promised to do whatever was necessary to make things better for them. The statements were made during the heat of the organizational campaign and were clearly intended to discourage Alonso and Nogueira from supporting the Union. The Board has held that an inquiry regarding an employee's complaints are prohibited, coercive conduct if it carries an implied promise to remedy those concerns if employees discontinue union activity. *The Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1090–1093 (2004); *Orbit Lightspeed Courier Systems,* 323 NLRB 380 (1997); *Reno Hilton*, 319 NLRB 1154, 1156 (1995); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971). Under the circumstances, Klein's solicitation of grievances from Alonso and Nogueira violated Section 8(a)(1).

4. Surveillance of employees

On numerous occasions before and after the representation election, numerous members of the Respondent's management personnel, including Klein, Jinete, Miscioscia, Vitello, Formisano, Farenga, and Edward Book visibly observed employees in the facility's parking lot as they engaged in assorted campaign activity, including marching, chanting, cheering, calling out to passing cars, and picketing. They watched from office windows or from the front of the facility. In addition, during an informational picket on November 16, Miscioscia also photographed employees.

An employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. *Fred'k Wallace & Son, Inc.,* 331 NLRB 914 (2000). In this instance, management personnel frequently observed employee union activity in the parking lot. The focal point of un-

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denied that anyone from the group ever stood on the driveway, a fact contradicted by the videotape, which was provided by the General Counsel. Tr. 157, 256–258; GC Exh. 29. Another employee, Bartko, could not recall if anyone "ever" walked into the driveway. Although the record indicates that, when pressed on this issue, Bartko said, "no," at the time she was moving her head from side to side, indicating that she was trying to recall such an instance. As such, that follow-up answer was consistent with a failure to recall anyone standing on the driveway. Tr. 184. Jinete, meanwhile, could not recall whether there were ever times when the group stood on the grass area. Tr. 62–63.

ion activity was visible to all who entered, exited, and parked on the Respondent's property. Attempting to sell their case to other employees and the public, the union supporters were intentionally loud. As such, it is not reasonable to believe that management's mere observation of employees' public union activity would reasonably tend to coerce employees and such conduct did not violate Section 8(a)(1). Photographing employees engaged in lawful picketing, however, tends to intimidate by instilling fear of future reprisals. Miscioscia did not offer a legitimate justification for doing so on November 16 and, under the circumstances, her conduct amounted to unlawful surveillance and photographing of employees in violation of Section 8(a)(1). *Athens Disposal Co.,* 315 NLRB 87, 98 (1994).

5. Summoning the police and hiring an armed guard

An employer can take reasonable steps to prevent nonemployees from trespassing onto private property. *North Hills Office Services,* 345 NLRB 1262, 1266 (2005). Either Jinete or Miscioscia called the Greenburgh Police Department on several occasions before and after the representation election. They also hired an armed security guard during the organizational campaign. The evidence established that union proponents, on some occasions, were standing in the paved portion of the parking lot and not on the grassy area. Although I did not find sufficient evidence to indicate that they blocked traffic, Judge Green, in his decision, did note that the preelection conduct of both sides was quite contentious. Based on the record, however, it is impossible to determine the extent to which traffic flow may have been impeded or opponents of the Union harassed or intimidated. Under the circumstances, it is impossible to say that the Respondent did not have a legitimate reason for requesting a police presence during picketing or hiring an armed security guard. See *Great Scot, Inc.,* 309 NLRB 548, 549 (1992); *Tecumseh Foodland,* 294 NLRB 486 (1989). Furthermore, there was no evidence that the armed security guard conducted surveillance of employees while they engaged in concerted protected activity. The mere presence of a security guard alone does not amount to unlawful surveillance. *Villa Maria Nursing & Rehabilitation Center,* 335 NLRB 1345, 1350 (2001). Accordingly, I shall dismiss these two allegations.

6. Statements suggesting futility in supporting the Union

In early October and on December 23, Klein told dietary staff that no one was going to tell him how to run the nursing home. His statements were made following a representation election that resulted in a successful vote for the Union, picketing, and frequent police action. Under the circumstances, Klein's statements to staff indicated that it would be futile for such employees to support the Union and violated Section 8(a)(1). *Goya Foods,* 347 NLRB 1118, 1135 (2006).

B. The 8(a)(5) Charges

The Respondent reduced overtime during the week ending September 22, and continued such reductions after the election. The Respondent reviewed its 2004–2005 fiscal records in June, noticed that overtime costs had increased, but did not consider it significant at the time. As a result, neither Edward Book nor Klein did anything about it, until September. The timing of the action, especially after threatening to cut overtime if employees supported the Union, strongly suggests that it was not based on a legitimate business purpose. *Classic Sofa, Inc.,* 346 NLRB 219, 223 (2006). In addition, in late October or early November, the Respondent awarded an across-the-board $1 hourly wage increase for all bargaining unit employees. There is no indication that the increase was based on a regular practice. Before taking such action, however, the Respondent did not provide the Union with notice or give it an opportunity to bargain. The Respondent changed this term and condition of employment after the election, but before union certification, "at its peril." *Mike O'Connor Chevrolet,* 209 NLRB 701 (1979). It lost this gamble when Judge Green's Decision and Order certifying the union was affirmed by the Board on March 1, 2006. Under the circumstances, the wage increase violated Section 8(a)(5). *Flying Foods Group, Inc.,* 345 NLRB 101, 104 (2005).

C. The 8(a)(3) Charges

The consolidated complaint alleges that Nicholson and Alonso were discharged, Nogueira was disciplined and overtime pay opportunities were reduced as a result of the discrimination by the Respondent and tended to discourage membership in the Union in violation of Section 8(a)(3) and (1).

An employer violates Section 8(a)(3) by taking adverse action against an employee because the employee engages in, or is suspected of engaging in, union activities. *Mays Electric Co.,* 343 NLRB 121, 134 (2004). Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 602 F.2d 899 (1st Cir. 1981, cert. denied 455 U.S. 989 (1982), the General Counsel has the initial burden of establishing that union activity was a motivating factor in the Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3) of the Act. The elements required to support such prima facie violations of Section 8(a)(3) are union activity, employer knowledge of the activity, adverse action against the employee, and a connection between the employer's union activity and the adverse action. Once the General Counsel has established a prima facie case, the burden shifts to the Respondent to show it would have, and not merely could have, terminated an employee even in the absence of protected activity. *Chadbury Beverages, Inc. v. NLRB,* 160 F.3d 24, 31 (D.C. Cir. 1998).

There is no dispute that the Respondent had prior knowledge of the union activities of Nogueria, Alonso, Nicholson, Bartko, and Ridgeway. Nogueira was a union observer at the election. Nogueira and Bartko wore colors in support of the Union on Wednesdays. Nogueira and Nicholson were interviewed by television and newspaper reporters. All appeared in literature promoting the Union and participated in shift change meetings that were observed by management. It is also undisputed that the Respondent was hostile toward unionization, as documented in its oppositional literature during the campaign and in statements by Klein, Jinete, Vitello, and Miscioscia to employees. The Respondent denies, however, that any disciplinary actions or reductions in overtime were attributable to union activity.

Improper employer motivation is frequently established by circumstantial evidence and may be inferred from several factors, including: the Respondent's known hostility toward unionization coupled with knowledge of an employee's union

activities; pretextual, and shifting reasons given for the employee's discharge; the timing between an employee's union activities and the discharge; and the failure to adequately investigate alleged misconduct. *Temp Masters, Inc.,* 344 NLRB 1188, 1195–1196 (2005); *Promedica Health Systems,* 343 NLRB 1351, 1367 (2004). All of these factors are present.

Alonso, a 17-year employee with excellent performance ratings and no history of prior warnings, was discharged on September 26, just 4 days after the representation election. The bases of the discharge were the incidents of August 22 and September 26. Although these minor altercations did occur, Jinete did not conduct a meaningful or objective investigation of either one. Instead, she relied solely on Gjelaj's version of the September 26 incident. In preparing the basis for the discharge, Gjelaj also told Jinete about the August 22 incident. Although it was not significant enough to report to Jinete at the time it occurred, Jinete proceeded to "paper" the file with a statement about that incident as well. In doing so, Jinete relied exclusively on the version of Gjelaj, an employee with a checkered employment history. The statement was never shown to Alonso and there was clearly no meeting about that incident on August 30. On August 30, Jinete called Alonso into a meeting, but only to counsel her for gossiping about Gjelaj. A sign-in sheet was generated only for that meeting. Under the circumstances, I found that Jinete's statement, dated August 30, Katrina Gjelaj's undated statement, and Capozza's undated statement, were all generated on September 26, just prior to Jinete's meeting with Alonso. Furthermore, they were generated for the purpose of bolstering the case for Alonso's discharge.

Nicholson, a dietary aide since 2000, was discharged on November 16. The basis for the discharge was that he walked out of a counseling meeting with Jinete and Vitello on November 15. After hearing Jinete mention that he posted union flyers earlier in the day, Nicholson asked to be excused so he could get a paper and pencil. I found that he was excused. He then decided to ask Warren to accompany him to the meeting because he reasonably believed that the interview could lead to disciplinary action. See *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975). He told this to Vitello, who rejected the request that he be accompanied by Warren in the meeting. Vitello sent Nicholson home and returned to Jinete's office. I have no doubt that Vitello reported his discussion with Nicholson to Jinete, who then proceeded to write a false statement that Nicholson walked out of the meeting without explanation and did not return.

As a matter of law, Nicholson's request for representation by a coworker was not a reasonable request, since Nicholson was not yet represented by the Union. *IBM Corp.,*341 NLRB 1288 (2004). Nevertheless, Jinete did not decide to discharge Nicholson that day. Instead, she decided, as she wrote on the counseling form, that *future occurrences* would result in suspension or termination. Such a *future occurrence* turned out to be the informational picket on November 16, in which Nicholson participated and was interviewed by Channel 12. As a result, Jinete decided to discharge him that day.

On October 28, Vitello issued Nogueira a written warning for leaving the nursing home without telling a supervisor. The Respondent indeed had such a policy, but it was not enforced prior to October 28. It was usually sufficient for Nogueira and other employees to tell another employee they were leaving the facility if a supervisor was not around.

Lastly, the Respondent reduced the overtime hours of Nogueira, Bartko, and Ridgeway during the week of the election and that continued for a time after the election. During the election week, Bartko asked Miscioscia why she was not scheduled for a sixth day of work and Miscioscia told her there would be no more overtime if the Union prevailed. After the election, there was still no overtime in the nursing, housekeeping, and laundry departments. By December, Ridgeway's overtime was restored at Klein's direction. That month, Bartko inquired about having her overtime restored, but it was not restored until March. Nogueira inquired as to the restoration of her overtime in March, but Gerosa informed her the next day that she could not be assigned to overtime work as a CNA because she was assigned full-time to the laundry room. This explanation was false, since Nogueira, a licensed CNA, had performed weekend part-time work as a CNA since 1999, and that point had never been raised.

Based on the foregoing, the discharges of Alonso and Nicholson, Nogueira's counseling, and the reduction in overtime opportunities were pretextual for the Respondent's retaliation for their activity in support of the Union. Having determined that the General Counsel met its burden under *Wright-Line,* the burden shifted to the Respondent to show that it would have, even in the absence of union activity, taken such action.

In the absence of their union activity, there is no evidence that either Alonso or Nicholson would have been discharged. Nicholson may not have been legally justified in refusing to return to the meeting without Warren, but Jinete documented that he was not going to be suspended or fired that day. That would occur only in the event of future occurrences. With respect to Alonso, the evidence strongly indicates that, based on the Respondent's custom and practice, termination for fighting—and this was far from it—was a drastic remedy rarely applied in even the worst cases. In early September, CNAs Gloria Smith and Paula Thomas engaged in an extremely violent and physical brawl in the dining room. Nogueira suffered a minor injury to her hands attempting to break up the fight, and the police was summoned. Neither employee was discharged as a result of the incident.[58] It is hard to imagine how Alonso's altercation with Bartko even comes close to the Smith-Thomas altercation.

Given the threats of Klein, Vitello, and Miscioscia to eliminate overtime if the Union prevailed in the election, and Klein's unexplained reason for waiting until just before the election to request employees' overtime pay information, it is unlikely that the Respondent would have reduced overtime pay in the ordinary course of its business in September.

[58] I based this finding on Nogueira's credible and unrefuted testimony. Tr. 154–157. I did not, however, give any weight to a 1989 incident involving CNA Carmen Smith's treatment of a patient, as that was too remote in time to be relevant. GC Exh. 44.

Under the circumstances, the disciplinary action taken against Alonso, Nicholson, and Nogueira, as well as the reductions in overtime to Nogueira, Bartko, and Ridgeway, were implemented in retaliation for their activity in support of the Union, and were, therefore, unlawful and violated Section 8(a)(3) and (1).

CONCLUSIONS OF LAW

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with reprisals if they engaged in union activity, interrogating employees about their union sympathies, soliciting employee grievances, photographing and placing employees under surveillance while they engaged in protected concerted activity, and telling employees that it would be futile to support the Union, the Respondent violated Section 8(a)(1) of the Act.

4. By increasing employees' wages without providing the Union, whom had prevailed in the representation election, notice or opportunity to bargain, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By discharging Catherine Alonso and Alvin Nicholson, counseling Clarissa Nogueira, and reducing the overtime hours of Nogueira, Karen Bartko, and Marjorie Ridgeway, all because they engaged in protected concerted activity, the Respondent violated Section 8(a)(3) and (1) of the Act.

6. By engaging in the conduct described above, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

7. The Respondent has not otherwise violated the Act as alleged.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged Catherine Alonso and Alvin Nicholson, it must offer them reinstatement. In addition, the Respondent shall make Alonso, Nicholson, Clarissa Nogueira, Karen Bartko and Marjorie Ridgeway whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, or for the period they were unlawfully denied overtime work opportunities, whichever is applicable, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, the Respondent having discriminatorily counseled Clarissa Nogueira, it must remove from its files any reference to such discipline.

[Recommended Order omitted from publication.]