Wayneview Care Center and Victoria Health Care Center *and* SEIU 1199, New Jersey Health Care Union. Cases 22–CA–26987, 22–CA–26988, 22–CA–27119, and 22–CA–27365

August 26, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On July 26, 2007, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondents jointly filed exceptions and a supporting brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[3]

We agree with the judge that the Respondents failed to prove that the parties reached impasse. The decisions cited by the Respondents, in which the Board found impasse, are distinguishable. In *Richmond Electrical Services*, 348 NLRB 1001 (2006), the union conceded that a most-favored-nations clause in its collective-bargaining agreement with a multiemployer group precluded the union from agreeing to wages lower than those in the multiemployer agreement, and the union never proposed lower wages. Id. at 1002. In addition, the impasse over wages in *Richmond Electrical* "led to a complete breakdown in negotiations." Id. at 1003. In the present case, the Union initially adhered to a health insurance proposal that required participation in the Union's health care fund—as did the Union's agreement with a group of other employers, which agreement contained a most-favored-nations clause. At the August 18 bargaining session, however, the Union retreated from that position and offered to continue participating in the Respondents' health insurance plan. Thus, the most-favored-nations clause was not a bar to further movement by the Union. In *Matanuska Electric Assn.*, 337 NLRB 680 (2002), the Board found that the union engaged in stall tactics, such as taking the position that "all words are ambiguous" and that the employer was obliged to explain its intent and motivation. Furthermore, the employer in *Matanuska* specifically stated that it was willing to continue bargaining if the union submitted a proposal showing movement, but the union did not do so. Id. at 683–684. Those facts bear no resemblance to the present case.[4]

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Respondents have 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.

The Respondents also contend that the judge demonstrated bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondents' contentions are without merit.

Other than the Respondents' general exception to the crediting of the General Counsel's witnesses, there are no exceptions to the judge's findings: that Respondent Wayneview violated Sec. 8(a)(1) by telling employees to remove union buttons and by threatening to discharge employees for striking, wearing union buttons, or talking to the Union; that Respondent Wayneview violated Sec. 8(a)(3) and (1) by suspending employee Marjorie Barnett; that Respondent Victoria violated Sec. 8(a)(1) by threatening to discharge employees for striking and by threatening to permanently replace locked-out employees; that Respondent Victoria violated Sec. 8(a)(5) and (1) by conditioning a contract and employees' return to work on the Union's agreeing to withdraw pending unfair labor practice charges; that Respondent Victoria violated Sec. 8(a)(3), (5), and (1) by unilaterally withdrawing benefits from returning strikers because they engaged in a strike; and that both Respondents violated Sec. 8(a)(5) and (1) by denying the Union access to the facilities. We therefore affirm those violations.

We reject, as lacking in merit, the Respondents' arguments that the judge erred by failing to impose sanctions on the General Counsel pursuant to *Bannon Mills*, 146 NLRB 611 (1964), and by revoking the Respondents' subpoena to the extent it sought internal union communications regarding bargaining strategy.

[3] We agree with the judge that Respondent Wayneview failed to show a legitimate and substantial business justification for locking out its employees, and that the lockout therefore violated Sec. 8(a)(3) and (1). We find it unnecessary to rely on the judge's alternative finding that the lockout was motivated by antiunion animus. We also find it unnecessary to rely on the judge's finding that the lockout was unlawful under *Dayton Newspapers*, 339 NLRB 650 (2003), enfd. in relevant part 402 F.3d 651 (6th Cir. 2005), because Respondent Wayneview failed to inform the Union of the conditions for ending the lockout. Those additional grounds for finding the lockout unlawful would not materially affect the remedy.

In adopting the judge's finding that Respondent Wayneview violated Sec. 8(a)(1) by assisting employees with a decertification petition, we rely on Respondent Wayneview's conduct with respect to employee Margaly Pierre. We find it unnecessary to rely on the conduct of Wayneview's staffing coordinator, Christopher Irizarry. An additional violation based on Irizarry's conduct would be essentially cumulative and would not materially affect the remedy.

We shall modify the judge's conclusions of law and recommended Order and substitute a new notice to conform to the violations found and to the Board's standard remedial language.

[4] Although we agree with the judge that the parties in the present case did not reach impasse, we find it unnecessary to rely on the judge's statement in sec. III,A of her decision that an impasse cannot exist where one party does not view the negotiations as having reached impasse.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusions of Law 3, 4, and 5.

"3. By promising employees a return to work and increased benefits if they signed a petition to decertify the Union, Respondent Wayneview assisted employees in the solicitation of signatures on a petition to decertify the Union in violation of Section 8(a)(1) of the Act.

"4. By threatening employees that they would be fired if they wore union buttons, spoke to the Union, or engaged in a strike, and by instructing employees to remove union buttons, Respondent Wayneview violated Section 8(a)(1) of the Act.

"5. By locking out its employees in the absence of a legitimate and substantial business justification and to coerce the Union into accepting unilaterally implemented terms and conditions of employment, Respondent Wayneview violated Section 8(a)(3), (5), and (1) of the Act."

2. Substitute the following for the judge's Conclusion of Law 11.

"11. By withdrawing benefits and uniform allowances from employees because they participated in a strike and supported the Union, Respondent Victoria violated Section 8(a)(3), (5), and (1)."

AMENDED REMEDY

We have adopted the judge's findings that the Respondents unilaterally implemented new terms and conditions of employment prior to a lawful impasse and that Respondent Victoria unilaterally and discriminatorily withdrew benefits and uniform allowances from returning locked-out employees. Therefore, in addition to the relief described in the remedy section of the judge's decision, we shall require the Respondents to make employees whole for any loss of earnings and other benefits resulting from the unlawful implementation of new terms and conditions of employment, in the manner prescribed in *Ogle Protection Services*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also require Respondent Victoria to make employees whole for any loss of earnings and other benefits resulting from the unlawful withdrawal of benefits and uniform allowances, and to reimburse employee Geraldine Morgan (whom the Respondent unlawfully treated as an on-call, "no-frills" employee without benefits after the lockout) for any expenses resulting from the withdrawal of her health benefits, as set forth in *Ogle*, supra, and *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons*, supra.

ORDER

A. The National Labor Relations Board orders that the Respondent, Wayneview Care Center, Wayne, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending its employees because they support SEIU 1199, New Jersey Health Care Union (the Union), or any other labor organization and engage in union activities.

(b) Assisting employees in the solicitation of signatures to decertify the Union by promising employees a job and increased benefits if they sign a petition to decertify the Union.

(c) Threatening employees that they will be fired if they wear union buttons, speak to the Union, or engage in a strike, and instructing employees to remove union buttons.

(d) Locking out its employees in the absence of a legitimate and substantial business justification and to coerce the Union into accepting unilaterally implemented terms and conditions of employment.

(e) Prematurely declaring impasse, refusing to meet with the Union, and threatening to implement and unilaterally implementing new terms and conditions of employment prior to reaching a lawful impasse in collective-bargaining negotiations.

(f) Unilaterally changing a mandatory subject of bargaining by denying union representatives access to the facility.

(g) Failing to provide the Union with requested information that is relevant and necessary to the Union's role as the exclusive collective-bargaining representative of the Respondent's employees in the unit described below.

(h) 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) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time CNAs, housekeeping, laundry, and dietary employees employed by the Employer at its Wayne facility, but excluding all other employees including managers, statutory supervisors and guards within the meaning of the Act.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension of Marjorie Barnett and the unlawful lockout of

employees, and within 3 days thereafter, notify those employees in writing that this has been done and that the suspension and lockout will not be used against them in any way.

(c) Make whole the unit employees for loss of earnings and benefits suffered as a result of the Respondent's unlawful conduct in the manner set forth in the remedy and amended remedy sections of the decision.

(d) On the Union's request, cancel and rescind all terms and conditions of employment unilaterally implemented on or after September 6, 2005, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union.

(e) Provide the Union with the information set forth in the remedy section of the decision.

(f) 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.

(g) Within 14 days after service by the Region, post at its facility in Wayne, New Jersey, copies of the attached notice marked "Appendix A."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, 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 Respondent 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 early August 2005.

(h) 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.

[5] 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."

B. The National Labor Relations Board orders that the Respondent, Victoria Health Care Center, Matawan, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they engage in a lawful strike.

(b) Withdrawing benefits and uniform allowances from employees unilaterally and because they participated in a strike and supported SEIU 1199, New Jersey Health Care Union (the Union), or any other labor organization.

(c) Prematurely declaring impasse, refusing to meet with the Union, and threatening to and unilaterally implementing new terms and conditions of employment prior to reaching a lawful impasse in collective-bargaining negotiations.

(d) Unilaterally changing a mandatory subject of bargaining by denying union representatives access to the facility.

(e) Failing to provide the Union with requested information that is relevant and necessary to the Union's role as the exclusive collective-bargaining representative of the Respondent's employees in the unit described below.

(f) Conditioning agreement and return to work of employees on the Union's agreement to withdraw its pending unfair labor practice charges.

(g) Refusing to reinstate striking employees upon their unconditional offer to return to work, locking out employees in the absence of a legitimate and substantial business justification and to coerce the Union into accepting unilaterally implemented terms and conditions of employment, and threatening permanently to replace unlawfully locked-out employees.

(h) 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) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time CNAs, housekeeping, laundry, and dietary employees employed by the Employer at its Matawan facility, but excluding all other employees including managers, statutory supervisors and guards within the meaning of the Act.

(b) Within 14 days from the date of the Board's Order, offer Geraldine Morgan and any unit employees who

remain locked out 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, dismissing, if necessary, any persons engaged as replacements.

(c) Make whole the unit employees for loss of earnings and benefits suffered as a result of the Respondent's unlawful conduct in the manner set forth in the remedy and amended remedy sections of the decision.

(d) Within 14 days from the date of the Board'' Order, remove from its files any reference to the unlawful lockout and failure to reinstate and, within 3 days thereafter, notify the affected employees that this has been done and that the lockout and failure to reinstate will not be used against them in any way.

(e) On the Union's request, cancel and rescind all terms and conditions of employment unilaterally implemented on or after September 6, 2005, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union.

(f) Provide the Union with the information set forth in the remedy section of the decision.

(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 Matawan, New Jersey, copies of the attached notice marked "Appendix B."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, 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 Respondent 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 June 27, 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.

APPENDIX A

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 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 suspend employees because they support SEIU 1199, New Jersey Health Care Union (the Union) or any other labor organization and engage in union activities.

WE WILL NOT assist employees in the solicitation of signatures to decertify the Union by promising employees a job and increased benefits if they sign a petition to decertify the Union.

WE WILL NOT threaten employees that they will be fired if they wear union buttons, speak to the Union, or engage in a strike, and WE WILL NOT instruct employees to remove union buttons.

WE WILL NOT lock out employees in the absence of a legitimate and substantial business justification and to coerce the Union into accepting unilaterally implemented terms and conditions of employment.

WE WILL NOT prematurely declare impasse, refuse to meet with the Union, and threaten to and unilaterally implement new terms and conditions of employment prior to reaching a lawful impasse in collective-bargaining negotiations.

WE WILL NOT unilaterally change a mandatory subject of bargaining by denying union representatives access to the facility.

[6] See fn. 5, supra.

WE WILL NOT fail to provide the Union with requested information that is relevant and necessary to the Union's role as the exclusive collective-bargaining representative of our employees in the unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time CNAs, housekeeping, laundry, and dietary employees employed by us at our Wayne facility, but excluding all other employees including managers, statutory supervisors and guards within the meaning of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension of Marjorie Barnett and the unlawful lockout of employees, and WE WILL, within 3 days thereafter, notify those employees in writing that this has been done and that the suspension and lockout will not be used against them in any way.

WE WILL make unit employees whole, with interest, for loss of earnings and benefits suffered as a result of our unlawful conduct**.**

WE WILL, on the Union's request, cancel and rescind all terms and conditions of employment unilaterally implemented on or after September 6, 2005.

WE WILL provide the Union with the information it requested**.**

WAYNEVIEW CARE CENTER

APPENDIX B

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 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 threaten employees with discharge if they engage in a lawful strike.

WE WILL NOT withdraw benefits and uniform allowances from employees unilaterally and because they participated in a strike and supported SEIU 1199, New Jersey Health Care Union (the Union) or any other labor organization.

WE WILL NOT prematurely declare impasse, refuse to meet with the Union, and threaten to and unilaterally implement new terms and conditions of employment prior to reaching a lawful impasse in collective-bargaining negotiations.

WE WILL NOT unilaterally change a mandatory subject of bargaining by denying union representatives access to the facility.

WE WILL NOT fail to provide the Union with requested information that is relevant and necessary to the Union's role as the exclusive collective-bargaining representative of our employees in the unit described below.

WE WILL NOT condition agreement and employees' return to work on the Union's agreement to withdraw its pending unfair labor practice charges.

WE WILL NOT refuse to reinstate striking employees upon their unconditional offer to return to work, lock out employees in the absence of a legitimate and substantial business justification and to coerce the Union into accepting unilaterally implemented terms and conditions of employment, and threaten permanently to replace unlawfully locked-out employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time CNAs, housekeeping, laundry, and dietary employees employed by us at our Matawan facility, but excluding all other employees including managers, statutory supervisors and guards within the meaning of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Geraldine Morgan and any unit employees who remain locked out 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, dis-

missing, if necessary, any persons engaged as replacements.

WE WILL make the unit employees whole, with interest, for loss of earnings and benefits suffered as a result of our unlawful conduct.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful lockout and failure to reinstate, and WE WILL, within 3 days thereafter, notify the affected employees that this has been done and that the lockout and failure to reinstate will not be used against them in any way.

WE WILL, on the Union's request, cancel and rescind all terms and conditions of employment unilaterally implemented on or after September 6, 2005.

WE WILL provide the Union with the information it requested.

VICTORIA HEALTH CARE CENTER

Jeffrey P. Gardner, Esq., for the General Counsel.
David F. Jasinski, Esq. and *Alex Tovitz, Esq. (Jasinski and Williams),* of Newark, New Jersey, for the Respondents.
Ellen Dichner, Esq. (Gladstein, Reif & Meginniss), of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was heard in Newark, New Jersey, on eleven days from September 26 to December 6, 2006. The Complaint alleges that Respondent Wayneview Care Center, hereafter Wayneview, in violation of Section 8(a)(1), (3) and (5) of the Act, forced employees to remove Union insignia, threatened employees with termination if they participated in a strike or other protected activity, threatened employees with termination if they met with Union representatives, denied access to Union representatives, conditioned agreement on a permissive subject of bargaining, refused to meet with the Union for negotiations, locked out its employees, solicited employees to withdraw support for the Union and promised benefits if they did, assisted employees in a decertification effort, refused to provide information to the Union, threatened to implement and did implement new conditions without reaching a valid impasse and suspended employee Marjory Barnett.[1] The Complaint alleges that Respondent Victoria Health Care Center, hereafter Victoria, in violation of Section 8(a)(1), (3) and (5) of the Act, threatened employees with termination if they participated in a strike or other protected activity, promised employees benefits if they did not strike, refused to reinstate striking employees, locked out employees, threatened to implement and did implement new terms and conditions without reaching a valid impasse, threatened to replace locked-out employees permanently, denied access to Union representatives, conditioned agreement on a permissive subject of bargaining, refused to meet with the Union for negotiations, refused to provide information to the Union, and unilaterally changed conditions of employment for reinstated employees.

Respondents Wayneview and Victoria deny that they have engaged in any violations of the Act.

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 Respondents, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

Victoria Health Care Center is engaged in the operation of a nursing home in Matawan, New Jersey. Wayneview Care Center is engaged in the operation of a nursing home in Wayne, New Jersey. Respondents Victoria and Wayneview each annually derive gross revenue in excess of $100,000 and purchase goods valued in excess of $5,000 directly from points outside the State of New Jersey. Respondents Victoria and Wayneview are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and health care employers within the meaning of Section 2(14) of the Act. SEIU 1199, New Jersey Health Care Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The following individuals are supervisors at Victoria:

Vincent Tufariello	Chief Operating Officer
Michael DelSordo	Administrator
Evelyn Savarese	Director of Nursing
Rita Burke	Assistant Director of Nursing
Melissa Guglielmo	Assistant Administrator/Administrator
Ricardo Munoz	Director of Environmental Services
Anthony Merez	Dietary Supervisor

[1] During the instant hearing the General Counsel withdrew allegations relating to the discharges of Carmen Marcellius and Marie Mazarim.

[2] The record is hereby corrected so that on page 34, line 21, Mr. Jasinski is asking the question and at line 22, Mr. Gardner has made an objection; on page 44, line 15, the date should be the 28th; on page 57, line 2, the correct exhibit is "GC-11"; on page 108, line 18, the correct date is August 18; on page 117, line 2, the correct date is August 5; on page 162, line 7, the first two words should read "the impetus"; on page 294, line 17, the last word is *Berbiglia*; on page 306, line 20, and thereafter, the correct name is Morris Tuchman; at page 512 the correct name of the witness is Marcia Cover; on page 581, line 1, the phrase should read "they are ephemeral pieces"; on page 676, line 24, the record should show that Mr. Jasinski was questioning the witness; on page 709, line 18 and thereafter the word "parody" should be replaced by the word "parity"; on page 722, line 6, the first three words should read "was less than"; on page 731, line 17, the second word is "fleshes"; on page 764, line 21 and thereafter, the correct abbreviation is "DON"; on page 1062, line 13, Mr. Gardner conducted the cross-examination; on page 1084, line 16, Mr. Jasinski voiced the objection; on page 1094, line 25, Mr. Gardner rested on behalf of General Counsel; on page 1116, line 10 and thereafter, the correct term is Most Favored Nations Clause.

The Union has been recognized as the collective-bargaining representative of employees of Victoria in the following appropriate unit:

> All full-time and regular part-time CNAs, housekeeping, laundry, and dietary employees employed by the Employer at its Matawan facility, but excluding all other employees including managers, statutory supervisors and guards within the meaning of the Act.

The most recent collective-bargaining agreement between the Union and Victoria had an expiration date of March 31, 2005. During the course of negotiations the parties extended the contract term to May 31, 2005.

The following individuals are supervisors at Wayneview:

Vincent Tufariello	Chief Operating Officer
Margaret Nolan	Administrator
Nancy Ziccone	Director of Nursing
Leeah Develez	Assistant Director of Nursing
John Larina	Director of Housekeeping
Tom Gioeni	Food Service Director

The Union has been recognized as the collective-bargaining representative of employees of Wayneview in the following appropriate unit:

> All full-time and regular part-time CNAs, housekeeping, laundry, and dietary employees employed by the Employer at its Wayne facility, but excluding all other employees including managers, statutory supervisors and guards within the meaning of the Act.

The most recent collective-bargaining agreement between the Union and Wayneview had an expiration date of March 31, 2005. During the course of the negotiations the parties extended the contract term to May 31, 2005.

The course of the collective-bargaining negotiations is relevant to the resolution of most of the issues in the case. A brief outline of a few events will be helpful when considering the detailed evidence discussed below. Collective bargaining negotiations were held separately for Wayneview and Victoria for some period of time from February until April 2005 when the parties agreed that both contracts should be negotiated at the same table. The employee bargaining committees composed of unit members for, respectively, Wayneview and Victoria attended the negotiations along with the representatives of management and the Union. At all times Vincent Tufariello was the chief spokesperson for management with respect to both contracts. Justin Foley began as the chief spokesperson for the contract covering Wayneview. Odette Machado began as the chief Union spokesperson at Victoria but eventually Justin Foley became the chief spokesperson for the Union when the negotiations were combined. In July Foley left the Union and Larry Alcoff became the chief Union negotiator. Union president Milly Silva determined the overall strategy for the negotiations but she was not consistently involved in most of the sessions. In April the State of New Jersey informed both Wayneview and Victoria that they must have in place a contingency plan to prevent disruption of services to patients in case of a strike or other "reportable event." Administrator Margaret Nolan began to prepare such a plan for Wayneview which included advertising for replacement employees in case of a strike. On August 12, 2005 the Union sent 10-day strike notices to both Wayneview and Victoria. The negotiations culminated in a marathon session with two mediators present on August 18 and 19, 2005. On August 22 employees at Wayneview voted to engage in informational picketing for one day and the employer was notified accordingly. On August 22 employees at Victoria voted to engage in a five day strike. Wayneview employees who attempted to work their usual shifts on August 23 were not permitted to work. Victoria employees who attempted to return to work on August 28 after the employer was notified that the strike was over were not permitted to work. There is a dispute as to the mechanism for and timing of the eventual return to work of most of the employees at the two facilities. At some point the Union learned that Respondents had promulgated what was termed a last best offer and eventually the terms of this offer were implemented at the two facilities. The Union denies that impasse was reached in the negotiations and has continued to demand negotiations and to seek information.

B. The Early Negotiations at Wayneview

Justin Foley was Assistant to the President of SEIU 1199 from April 2004 until July 15, 2005. His duties included negotiating contracts and helping with campaigns. Foley was the chief Union negotiator for the Wayneview contract from the first meeting in February 2005 until he left the Local's employ in July. Foley testified that there were two or three bargaining sessions at Wayneview before the negotiations were combined with the Victoria contract talks. Wayneview Administrator Margaret Nolan and Chief Operating Officer Vincent Tufariello were present on behalf of Wayneview. Foley stated that after two or three meetings he telephoned Tufariello and said the Union was interested in bargaining the contracts for Wayneview and Victoria together. Tufariello agreed and a time was set for the next session.

Nolan recalled that the first bargaining session took place on February 23, 2005 and consisted of a discussion of the healthcare industry and of the impact of the Medicare cuts. At the second meeting on March 11 the employer responded to the Union's information request and Tufariello went over details of the information provided. On March 18, according to Nolan, the Union made a proposal at the bargaining table.

Tufariello, the chief negotiator for both Victoria and Wayneview, could not recall how many sessions took place in which Wayneview was discussed separately but he thought it was less than five.[3] Tufariello testified that at some point Foley remarked that if Tufariello were involved in both negotiations it would be an efficient use of Tufariello's time to combine the negotiations for Wayneview and Victoria. Tufariello agreed and combined negotiations began in April 2005

[3] Tufariello testified that he is employed by Atrium Administrative Services, Inc., a management company overseeing the operations of several skilled nursing and assisted living facilities in New Jersey.

C. The Early Negotiations at Victoria

Odette Machado was called by Respondent to testify about the negotiations at Victoria. Machado had worked for an affiliated union in New York. In 2004 she was named director of administrative organizing of the Union in New Jersey. Her duties included supervising five organizers, training organizers and delegates, dealing with problems concerning Union funds and assisting Union president Milly Silva. Machado testified that she helped with negotiations and handled some negotiations. Machado ceased her employment with the Union in June 30, 2006 after an admittedly "ugly" internal Union election where she unsuccessfully challenged Silva for the presidency.

Machado has formed a new union called Local 707 HEART. Machado testified that her relationship with the new union is structured so as not to interfere with her entitlement to unemployment insurance. Machado denied that she has called herself president of 707 HEART and she denied that she had assumed the responsibilities of president of 707 HEART. Machado related that employees in some facilities represented by Local 1199, including Wayneview, have filed petitions to be represented by 707.[4] In other facilities which currently have a collective bargaining agreement with Local 1199, Machado stated, 707 HEART is seeking to represent the employees. Machado has spoken to Local 1199 unit members but she denied that she wrote to them or that anyone else connected with 707 had written to them. However, Machado identified a letter to employees at a facility where an effort was underway to decertify Local 1199 and "to join us."[5] The letter, signed by "Odette Machado, President Local 707 HEART", describes 707 as a union with experienced leaders including "President Odette Machado" who have defended employees from injustice caused by Silva. Machado testified that she felt passionately about the election and she wanted to convince employees to vote for 707 over 1199.

Machado met Larry Alcoff in 2003. Alcoff, an employee of the Service Employees International Union, handled special projects, he coordinated strategy to increase state funding to health care facilities and he worked with Silva on negotiating strategy. Before April of 2005 Alcoff and a representative from the International Union conducted training in negotiations. Silva and Alcoff set the agenda for negotiations in New Jersey. They wanted Union negotiators to work from a set of proposals that had to do with rates of pay, health benefits, pension funds, parity increases and the issue of "no-frills" employees.[6] Alcoff instructed negotiators not to deviate from the guidelines which called for a wage increase of 4% per year for three years, a benefit fund contribution of 22.33% of payroll and a formula for converting no-frills employees to benefited employees.[7] Alcoff described a group of facilities that employed Attorney Morris Tuchman as a bargaining agent and had signed a master agreement known as the Tuchman contract. Alcoff said that it would cause problems for the Union to sign an agreement with lesser conditions than the Tuchman contract because that agreement contained a most favored nations clause. Machado believed that the Tuchman contract was signed in May of 2005.

Machado described herself as the lead negotiator for Victoria. She testified that the unit employees at Victoria were most interested in wage increases, paid leave issues, the uniform allowance and health benefit increases. Machado said she led the negotiations for four or five sessions in March and then Foley took over as the lead negotiator for both Victoria and Wayneview. According to Machado, the four or five sessions of the Victoria bargaining conducted before the negotiations were combined with Wayneview resulted in some tentative agreements with the employer. Machado testified that the Victoria negotiations began after March 31, 2005 but she identified a letter dated March 3 which indicated that negotiations had in fact begun in late February and were to continue on several dates in March.

Tufariello identified a Union document given to him at the first Victoria bargaining session entitled "2005 contract proposals (1st session 3/2/05).[8] It contains no specific wage demand.[9] Tufariello wrote his notes on the Union proposal and later sent a letter to Machado asking for calculations to support her statement that Victoria's health insurance costs would double if it participated in the Union fund.

Tufariello could not recall when the parties met after March 2 but he stated that he met several times with Machado before the negotiations were combined in April. Tufariello estimated that there were between 12 and 20 bargaining sessions between the parties.

On direct testimony elicited by Counsel for Respondent Machado testified that one day Foley told her the "good news" was that negotiations for Victoria and Wayneview were being combined and the "bad news" was that they would not be able to get the health benefits they wanted. Tufariello was not giving these health benefits at Wayneview and they would not be able to get them at Victoria. On this occasion Foley informed Machado that he wanted to lead the negotiations from that point so that he could do the strategy for the health benefits. Foley asked Machado for her paperwork showing where they were in the Victoria negotiations. Foley said he would merge the paperwork to reflect one set of proposals for the combined negotiations. Machado recalled that she attended a few sessions after the negotiations merged.

On cross-examination by Counsel for the General Counsel Machado changed her testimony in a significant way. Machado stated that Foley did not tell her he was taking over as the lead spokesperson for both the Victoria and Wayneview negotia-

[4] The Wayneview petition was filed on September 27, 2006 by Marjorie Barnett, who testified in the instant proceeding as will be seen below.

[5] Machado stated that the letter was sent to employees at Emerson or Harborside or both.

[6] The no-frilled employees, also called non benefited employees, had opted to forego benefits otherwise provided by the employer in return for a higher hourly wage.

[7] The benefit fund in which the Union's members would participate is known as The Greater New York Benefit Fund, or GNYBF.

[8] This is Respondent's Exhibit #10. Due to the multiplicity of documents received in this proceeding I shall identify many by Exhibit number for ease of reference.

[9] The document says the wage demand is attached but no such attachment was introduced and no testimony was offered to explain the discrepancy. I conclude that there was no wage demand attached to the document.

tions. Machado said Foley did not ask for her paperwork and he did not say he needed her notes. Instead Machado and Foley met in Foley's office and they jointly compiled their proposals.

I do not find that Machado is a reliable witness. First, Machado often contradicted herself. Second, throughout her testimony Machado stated that she could not recall various subjects relating to the bargaining because she had no documents to consult. However, Respondent called Machado as its witness and Respondent was in possession of many documents concerning the negotiations, including documents subpoenaed from the Union. Thus, Machado had access to written proposals and correspondence and her memory could have been refreshed before she testified or while she was being questioned. Machado is thus unreliable on dates, issues in the bargaining and other subjects about which she was questioned, and the fault is not attributable to the General Counsel or the Union. Third, Machado was not truthful about her role as president of Local 707 HEART and she tried to avoid testifying candidly about her attempts to supplant the Union herein with her new union. As a result, I shall not credit Machado's testimony where it is contradicted by more reliable evidence.

Much testimony was introduced by Respondent about Machado and whether she was or was not on an equal footing with Foley. This included the testimony of Machado and other witnesses. I am unable to see that any resolution of this point is relevant to my decision of the issues in this case. Machado was not involved in the negotiations when they reached a crucial stage in August 2005. Respondent seems to advance a theory that the Union reneged on certain agreements reached with Machado in the early days of the Victoria bargaining but, as will be seen below, Respondent's own witnesses offered clear testimony that contradicts this theory.

Machado recalled that there were tentative agreements at Victoria on the uniform allowance and some type of leave arrangement, but Machado could not recall the specific provisions of the leave agreement. Machado said that wages were still open. The employer had said it could give the percentage the Union was asking for but "then with the benefit fund situation it would be an economical factor and we couldn't finalize that". Machado stated that the parties had not reached agreement on economic issues when she was still active in the negotiations. However Machado also stated that there had been agreement at Victoria on the subject of holidays, personal days, vacations and sick leave. It is not clear why Machado did not consider this paid time off to be an economic issue.

Respondent called Josephine Ortiz to testify about the negotiations. Ortiz, a senior aide at Victoria, is a Union delegate and attended most bargaining sessions as a member of the employee committee. Ortiz testified that Machado and the committee had come to an agreement on "everything" in the bargaining with Tufariello by April 11. Ortiz maintained that the parties had agreed to a healthcare provision and wages of 4% a year for three years. Ortiz described the healthcare agreement as the affordable healthcare that the employees were asking for although she did not know what plan this was. Ortiz said the agreement was to reduce the cost for a family from $185 to $85, to reduce the cost for a child and parent from $85 to $65 and to reduce the cost for single coverage to $20. I do not credit Ortiz that the parties had reached agreement on healthcare and wages at Victoria by April. Neither Tufariello nor Machado contended that they had reached agreement on wages and health insurance, nor had any General Counsel witnesses testified to this effect. Ortiz' assertions are contrary to the documentary evidence herein. I find that Ortiz' testimony about the course of negotiations while Machado was the chief representative for the Union at Victoria is not reliable. Ortiz also testified about many other subjects. Because I find that she is not reliable I shall not credit her testimony where it is contradicted by more trustworthy evidence.

D. Off the Record Meetings

Machado described an off-the-record meeting at which Tufariello told the Union that Victoria did not get the same funding from the State as a nursing home and the employees could not have as much as nursing home employees.[10] Tufariello said, "This is all we have and all we can offer." He said, "I can tell you the total amount that we can offer for the contract and then see what you can do with that. I will sit with you and see if we can work out the benefit fund or the wages, whatever you would want to get in the contract but I can't do any more." Machado attended this meeting with Alcoff, Foley, Tufariello and two other management representatives. The participants were trying to work out figures using different approaches for the parity increase and rates for the benefit fund and wages. Silva and Alcoff said they could not deviate from their demands for health insurance, wages and parity due to the most favored nations clause. Machado could not recall when this session was held but she stated it was after the negotiations for the two facilities had been combined. Machado said that she eventually stopped attending the negotiations because she no longer "enjoyed" the process and she stopped talking to members of the bargaining committee.

Tufariello described two off the record meetings between the parties. The purpose of the first such meeting held in May, attended by himself with Nolan and DelSordo and by Silva, Foley, Alcoff and Machado, was for everyone to understand the economic issues in the demands for health insurance, wages, parity and no-frills employees. At this meeting Tufariello said the demands involved significant amounts and he would have to consider them. Foley said the most favored nations clause in the Tuchman agreements required the Union to "get us to that point at some time during the contract period." Foley tried to determine the cost of the Union's economic proposal in light of what his records showed was the current cost to the employer. Tufariello identified the document prepared by Foley to show the current and future costs of the various benefits and the Union proposals. The current cost to the employer per employee year of single health care coverage is shown as $3,653. Tufariello was unable to recall the significance of any of the other figures on the document.

Tufariello held a second off-the-record meeting with Foley and Alcoff in early June. Foley recapped the changes mandated by the most favored nations clause. Tufariello could not recall whether Foley said the additional cost would be one million

[10] This assertion is not otherwise explained.

more per building or one million more for both facilities. The parties discussed the increase in state reimbursement in every year. Alcoff said Tufariello should find the money or he would put him out of business.

Tufariello said that even after the off-the-record meetings he did not have a clear understanding of the Union's economic proposals. However, Tufariello testified that after he learned at the second off-the-record meeting that remaining in the employer's health insurance plan was less expensive than participating in the Union's fund he never had occasion to change his mind about this conviction. He always continued to believe that the Union fund was more expensive.

Tufariello was confused about the timing of the off-the-record meetings. He stated that they took place after the Union presented its demands in March and before the Union made any additional economic proposals, apparently forgetting the Union's economic proposal of May 10 which is described below. He said the purpose of the meetings was not to discuss any specific demands but only to discuss general issues.

Foley recalled two off-the-record meetings between Union and management. Machado attended the first meeting. Foley had calculated what he thought the Union's proposals would cost and he and Tufariello discussed the assumptions that underlay his calculations. Tufariello took notes on a print-out at the first meeting. The Union was attempting to secure the employer's agreement to participate in the Union health plan. Tufariello did not say this was off the table but he did say it would be difficult. Tufariello pointed out that if no-frills employees became benefited by moving into the plan it would be very costly. At the off-the-record meetings the parties tried to determine where they were flexible. Foley tried to explore different ideas and Tufariello said he would consider them but, according to Foley, when they returned to the bargaining table it turned out that Tufariello had not considered the ideas presented by the Union.

Alcoff testified that he participated in the negotiations with Wayneview and Victoria beginning in June 2005. The first meeting he attended was off-the-record with Foley and Tufariello. The purpose was to look at the numbers and see if there was a way to package a deal. The participants discussed the components of the economic proposals and discussed "what if" scenarios. There was an undefined pot of money. Alcoff said it was clear that the Union would have to be flexible to get a deal. In the talk about wages, health insurance, pension and no-frills employees the Union knew that "all things could not be done at once under any scenario."

E. Combined Negotiations: Foley and Tufariello

Foley testified that after Tufariello agreed that the Victoria and Wayneview negotiations should be conducted at the same table Silva told him that he should be the lead negotiator for both contracts.[11] Foley recalled that there were "internal tensions" in the Union. Foley spoke to Machado about the role he would play in the talks, making it clear that he would introduce the sessions, he would run the agenda, he would present proposals and he would lead the caucus for the Union team. Foley stated that he reviewed some proposals and notes given to him by Machado and he reconciled the status of negotiations at the two facilities as he sat at the table with the employer representatives. Silva confirmed Foley's description of the situation.

Foley created a document before the first combined session on April 11, 2005 which reviewed the differences in the two contracts and highlighted where there was already similar language in the two documents.[12] Foley made handwritten notes on the document during the session. Foley testified that if there had been tentative agreement earlier on some language for Wayneview the parties would use the same language at Victoria so that there would be "almost a master contract" at the two facilities. This was indicated on the document with arrows and other symbols. The Union withdrew its meals proposal at Victoria; there was no corresponding meals proposal at Wayneview. Foley marked PTO, (paid time off), in the margin next to the three categories of "holidays, personal days and vacations". The status of these subjects was marked TA at Victoria and there was a different proposal at Wayneview. Foley said that it was recognized that the current contracts at the two locations had big differences in PTO. The parties viewed this area as being open for discussion and they knew the language from Wayneview could not be copied into the Victoria contract. Before the April 11 session, according to Foley, he had spoken to the employer representatives about the disparity and the employer understood that PTO would be revisited. Foley testified, "The employer agreed that . . . we could reopen these things without accusing us of bad faith bargaining or regressive bargaining."[13] Tufariello confirmed this testimony. He said that Foley wanted to revisit the tentative PTO agreement at Victoria. Machado was at this meeting and she did not object. Tufariello stated that he reluctantly agreed to reopen the PTO issue at Victoria.

Foley testified that the Union's first full economic proposal was presented by the Union on May 10 in a document entitled "Economic Proposal 5–10–05."[14] Some of the language came from a common proposal that the Union had made in negotiations with other employers. Prior to preparing this proposal Foley consulted with Alcoff, Silva and the employee committees and possibly Machado. The Union proposed that by the end of the three year contract all facilities would have 8 paid

[11] Foley recalled that he attended four or five combined negotiations for Wayneview and Victoria.

[12] This document is Respondent's Exhibit #19.

[13] Foley's notes on the document were not complete. After the bargaining session Foley typed up his understanding of the discussions and sent this to Tufariello. The latter would comment on the Foley's notes and in this way a working document was created.

[14] A copy of this document was introduced as Respondent's Exhibit #24. It bears notations in Tufariello's handwriting.

holidays, 11 paid sick days and 3 paid personal days. Wages would increase by 4% on May 1 of each of three years. Parity increases would require that by the end of the contact, housekeeping and dietary workers would have a minimum rate of $10/hr and CNAs would have a minimum rate of $11/hr. The health insurance rate for participation in the Union fund had been raised to 22.33% by the fund trustees. The training and education fund would increase to 1/2% and the alliance fund to ½% while the legal fund stayed at the same rate. There was a formula for pension payments setting the rate at 2% and making changes in later years of the contract, including a rate of 1.7% in cases where the employer was not currently paying for a pension. A lengthy proposal dealing with per diem and no-frills employees contained a formula to reduce the use of this class of employees until their time would constitute 15% of hours worked at a facility. Present no-frills employees could be grandfathered if they wished. A handwritten addition to the proposal required a decrease from a 40 hour week to a 37-1/2 hour week at Victoria with a 6% increase in wages.

Foley was an observer, but not a participant, in the Tuchman negotiations. Foley identified the full table of contents and the ratification information sheet distributed to unit employees at one facility covered by the Tuchman agreement.[15] Foley explained that the Tuchman agreement served the purpose of showing how some common problems had been solved at other facilities. Foley had not been instructed that the Victoria and Wayneview contracts had to mimic the language or terms of the Tuchman agreement. In fact, Foley stated, his proposals differed in various respects from the Tuchman contract. The Union's wage demands were different, the PTO demand was less than what was provided by the Tuchman contract and the Tuchman contracts do not have a legal services fund. The health insurance rate is the same because these are set by the trustees of the fund and not by the Union. Foley testified that the Union's goals were established in December 2004 and that he had to check with Silva before accepting an offer from the employer that was less than the standard goal.

Foley contradicted Machado's recollection about the import of the Tuchman agreement and its most favored nations clause. Foley testified that he never told Tufariello that he could not agree to a proposal because it deviated from the Tuchman contract. He never said his hands were tied. Foley denied discussing the most favored nations clause at the bargaining table and he never heard Alcoff mention this while he was present.

However, Tufariello testified that Foley repeatedly maintained that he was bound to the most favored nations clause in the Tuchman agreements and that he could not deviate on the issues of health insurance, the no-frills employees and wages. Tufariello said that Foley made these statements when the negotiations began at Wayneview.

Alcoff has negotiated about 15 contracts with New Jersey employers and he was the Union's spokesperson for the Tuchman coordinated bargaining involving 20 nursing homes. Alcoff testified that the most favored nations clause has existed for years and it is always inserted into the contract with the first New Jersey employer to sign with the Union in any negotiating cycle. The most favored nations clause provides that the net economic impact of agreements with other employers cannot be less than the net economic impact of the contract containing the most favored nations clause. The employer has the burden of proof with respect to showing the net economic impact of the various contracts and bears the burden of proof to show a violation of the clause.

Before the bargaining session of June 8, 2005 Foley prepared a page showing the status of various issues and whether they had a major or minor economic impact. The open items of major economic impact were hours (at Victoria), wages, PTO, and the health insurance fund at both facilities. Items of smaller economic impact included Union activity, probationary period, and the non health related funds.

Alcoff testified that he and Foley had discussed the progress of negotiations; Foley's major concern was economic, especially the large number of non-benefited "no-frills" employees and the cost of health insurance. Foley told Alcoff that Tufariello was "a numbers guy" and that the Union should therefore be creative with numbers. If the Union could show Tufariello that the cost was not extreme then Tufariello would be amenable to a solution to the no-frills issue. Accordingly, the Union conducted a sidebar discussion with Tufariello before a scheduled June 30 bargaining session. Alcoff, Foley and Tufariello discussed spread sheets that showed the costs of various items. Alcoff proposed back loading some costs to the end of the contract to make it less expensive.

Alcoff testified that he sat in on part of a June 30 bargaining session. Foley was the chief negotiator for the Union and Silva was present. Tufariello, DelSordo and Nolan were there on behalf of the employer. The Union discussed the hours at Victoria where employees worked an 8 hour day and a 40 hour week in contrast to the 7-1/2 hour day and 37-1/2 hour week at Wayneview. The Union proposed a transition to a shorter workweek for the Victoria employees with a wage multiplier provision so that their weekly earnings did not change. Tufariello replied that he would agree to shorten the week but not to raise the hourly rate and the Union said it would live with the status quo. At this meeting the Union raised the issue of a newspaper advertisement for replacement workers. The Union said it had no intention of calling any job actions at that point and asked why the employer was seeking replacement workers. The Union remarked that the wages promised in the ad were higher than those being earned by unit employees and it asked how current employees could get those wages.

Before Foley left the Union's employ on July 15 he prepared an exit memo showing the status of negotiations at Wayneview and Victoria. Although the memo refers to "attached financials" these are not in evidence.[16] Foley's memorandum highlighted the major difficulty posed by the Union's health insurance demand. It said, "The entry into the health insurance is

[15] These are General Counsel's Exhibits 68 and 69 and they are more accurate than partial documents introduced earlier by Respondent.

[16] Foley said these were an Excel file that he and Tufariello worked on together to be sure they shared the same cost assumptions. Foley testified that Respondent's Exhibit #20 did not contain his handwriting and that he had never seen R #20 before the hearing. In fact, R #20 is Alcoff's document.

difficult because of the transition from no frills to frills. . . . [T]hey save roughly $4000 for every employee that doesn't take benefits, averaged between the two places. Consider that Wayneview is 75% no frills. . . . Vinny is convinced that what we're looking for is too expensive. . . . Once it comes time to spend money, they don't want to do it. After lots of idea exploring and such, they came back with their incremental move."

F. Combined Negotiations: Alcoff and Tufariello

Alcoff testified that his first bargaining session as the Union's chief negotiator took place on August 5, 2005. Tufariello, Nolan and DelSordo were present, as was the employee committee. Silva looked in for part of the meeting.

At the August 5, 2005 negotiating session the Union presented a document entitled "Comprehensive Economic Counter Proposal".[17] Alcoff said this was a modified economic package. The discussion attempted to clarify the open and settled issues. The Union wage demand now provided five increases ranging down from 3% to 2% over the life of the contract, with a provision for raising the wages of the lowest paid employees, the so-called parity provision. This wage proposal was less costly than prior Union demands. The Union abandoned its demand to convert the 40 hour work week at Victoria to a 37-1/2 hour week with a make whole raise. There was extensive language relating to participation in the Union's benefit fund and the effective date was later than in prior demands. The pension proposal was reduced. Language was included providing details relating to the demand on no-frills employees as outlined in the May 10 proposal. The demand for a legal fund was withdrawn subject to agreement on the Union's benefit fund. Alcoff testified that the bargaining committee at Victoria did not want to maintain the present PTO system and the Union proposed improved paid time off benefits at that location. Alcoff stated that the August 5 proposal was based on his off the record discussion with Tufariello and Foley. Alcoff used cost information provided by the employer to calculate the cost of health insurance, wage increases and the proposed changes in the status of non-benefited employees. Alcoff had used Tufariello's assumptions about how many employees would elect to remain non-benefited in calculating costs of health insurance. Alcoff had also consulted with the employee committees before preparing the Union's August 5 demands. The committee thought the wage demands were too low. Some committee members were not concerned with health insurance because they were non-benefited or had other insurance through a spouse. The Union's position was that the committee had to consider all the workers in the unit, not just themselves, in setting health insurance goals.

Alcoff recalled that as of August 5 the unsettled items were health insurance, no-frills employees, wages, PTO, the pension and participation in various benefit funds.

Alcoff testified that on August 5 Tufariello handed him a wage proposal, a PTO proposal for Victoria and a training proposal.[18] Tufariello marked the items he considered tentatively agreed to. The wage proposal, based on prior discussions between Foley and Tufariello, showed that there was tentative agreement on work in a higher classification, merit increases, direct deposit and transfer to a higher grade and conceptual agreement on the wages of no-frills employees. The employer's wage proposal provided a 4% increase in the first year and 1.5% increases in the second and third years. Wages of no-frills employees would be $1.50 higher than those of benefited employees.

Tufariello inaccurately testified that from March to August the Union had demanded a 21% contribution rate to the benefit fund but that now the rate was raised to 22.33%. In addition, Tufariello at first testified that the Union's no-frills proposal had not changed but then he stated that he told Alcoff the new proposal was regressive. Alcoff replied that Tufariello did not know what he was talking about.

Another bargaining session took place on August 9 with the usual representatives and the employee committees. The Union presented two written proposals; one dealt with the Victoria PTO system and was responsive to the employer's August 5th proposal on PTO and the second was a new successorship article occasioned by rumors of a sale.[19] Alcoff explained that the PTO proposal was a reduction in the August 5 Union demand for vacation, holiday, sick days and personal days. Further, the effective date of certain accruals was pushed further into the term of the contract. Tufariello stated that the language in the current contract dealt with succcessorship and was sufficient and Alcoff promised to consider that provision.

Alcoff testified about a sidebar discussion of economic issues held on August 9. Tufariello informed Alcoff that the two issues of most concern to him as a stumbling block to achieving a collective-bargaining agreement were the no-frills employees and the health insurance. Tufariello said it was important that employees have the right to choose whether to be benefited or no-frills and he was opposed to the Union proposal that would phase down the number of no-frills employees. Tufariello said employees preferred the $1.50 extra hourly wage and they would not change their status. Alcoff and Tufariello determined the cost of some scenarios relating to this discussion: if employees did not elect to become benefited then health insurance costs would not increase drastically. Alcoff quoted Tufariello as saying, "controlling the benefit structure and the relationship to the health insurance plan was more of an obstacle than the economics when it came to the health insurance proposal." By this time the PTO issue was narrowed down to a question of how many days the employees would be entitled to. The employer proposed adding 50 cents to the starting wage rates at Victoria and possibly some addition to all wages at the beginning of the contract period. Tufariello did not contradict Alcoff's testimony about this meeting. Significantly, Tufariello did not dispute Alcoff's testimony about his prediction that many employees preferred to remain non-benefited and Tu-

[17] This document was introduced into evidence as General Counsel's Exhibit #12 and, with Tufariello's handwritten notes, as Respondent's Exhibit #12.

[18] The Victoria PTO proposal is General Counsel's Exhibit #13. The wage proposal is General Counsel's Exhibit #16.

[19] The PTO proposal is General Counsel's Exhibit #14 and the successorship article is #15.

fariello did not deny that he told Alcoff that that it was of prime importance to the employer to maintain its own health and benefit plan and that the cost factor was less of an issue.

Alcoff recalled that the first time Tufariello suggested mediation was either August 9 or 11. Alcoff disagreed with the suggestion. He thought the parties were narrowing the issues and there was momentum to the negotiations. Both parties had moved on wages and the off-the-record conversations had been productive. However, by the end of the August 11 session Alcoff was not opposed to mediation.

At the August 11 meeting Alcoff received employer counterproposals and these were discussed in detail with the employee committees present.

Alcoff described his presentation to the employer at the August 11 meeting. He had a large flip chart on an easel and he showed the possibilities for bargaining in two columns marked A and B. Column A was to continue with the bargaining as presently constituted and to try to narrow the differences on each issue. Column B called for determining the total "number" the employer was willing to spend over the three years and to see how the money could be distributed in different ways. Tufariello did not like the column B approach; he wished to continue negotiating issue by issue.

Tufariello recalled this meeting as one where Alcoff said if he knew how much money the employer wanted to spend he would figure out how to divide it up. Alcoff still insisted on participation in the Union health plan and he cited the most favored nations clause.

At a sidebar meeting on August 11 Alcoff suggested to Tufariello that it might help if he brought counsel to the table in order to "get another set of eyes" on the issues. Tufariello denied this conversation took place. Later, Alcoff learned that Respondent would have counsel present next time. At some point the parties discussed asking mediators to join the discussions. Tufariello testified that he told Alcoff that mediators should be brought in because the parties were at impasse. Alcoff responded that the parties were not at impasse. The record is unclear how the presence of mediators was obtained for the meeting after August 11.

On August 18, 2005 Tufariello was accompanied to the negotiations by Nolan, DelSordo and Dennis Alessi, Esq. Alcoff and Silva were present for the Union along with some staff representatives and the two employee committees. Also in attendance were New Jersey State mediator Wellington Davis and Federal mediator James Kenny. Alcoff met first with the employee committees and explained the import of the 10-day strike notices and the role of the mediators.

When the meeting began Alcoff gave the employer the Union proposals for Wayneview.[20] The underlined language represented Union proposals given at the session. Alcoff also presented the Union proposals for Victoria.[21] Alcoff explained that the PTO language in the Victoria document as typed was inaccurate and he corrected the language as he went through both proposals with Alessi. Alcoff explained to Alessi that there was a problem with the employer's wage proposal: although Tufariello had initially said that increases would apply to starting rates this position had changed on August 11.

After the initial presentation the parties went to separate rooms. Alcoff recalled that he and Alessi and the mediators had several conversations to clarify certain issues. Late in the evening the mediators asked the Union to draft a proposal for submission to the employer.

Alcoff and Silva worked on a handwritten proposal which was explained to the employee committees and then handed to the mediators and to Alessi.[22] The Union's proposal on wages was new; it no longer had specific dates and percentages for wage increases but only required to get to certain rates as of March 1, 2008, at the end of the contract term. The Union explained to the mediators that it was willing to be flexible with respect to wages. The Union continued to request the establishment of new minimum wage rates, but these would be effective in March 2008. The Union also changed its health insurance proposal. For the first time it abandoned its demand that the employer participate in the Union's fund and it agreed that employees could be covered by the existing Aetna plan or a similar plan. The Union agreed that dependent coverage could be phased in. The Union agreed to an opt-out feature if the employee had other coverage. Alcoff explained that this was a significant move to accommodate Tufariello's wish that the employer control benefits and not be a participant in the Union plan. Up to this time the Union had been demanding fully paid benefits for employees from the first day of the contract term but now the Union agreed to delay fully paid coverage. In the first year the employer would pay for single coverage and coverage for family members would be phased in later. The Union plan thus provided for payments by the employees. This would not necessarily be an expensive proposal if Tufariello were right that many employees preferred to remain non-benefited in exchange for a higher wage rate. The Union changed its demands on PTO, delaying the implementation of an extra sick day at Wayneview and reducing the number of sick days for new employees with less than two years on the job in order to pay for the additional day of sick leave in the contract. The Union abandoned its no-frills proposals and agreed to accept the employer position of free choice for employees without any mandated diminution in the number of no-frills employees. The Union agreed to the employer's proposal on the training fund for the first 30 months of the contract, and asked for the Union proposal to be implemented for the last six months. This was a new position. Alcoff summed up by stating that although in early August the Union was still trying to obtain benefits similar to those it had obtained with some other employers, by August 11 and 18 it was not longer trying to achieve those goals.

Alcoff testified that after midnight he and Silva met with the mediators and Alessi who gave him a proposal written by Tufariello.[23] The mediators explained the Respondent's proposal which Alcoff stated had positive developments and promise. The wage proposal now increased the minimum rates. The medical proposal had two significant changes. There was a

[20] This is General Counsel Exhibit #17.
[21] This is General Counsel Exhibit #18.
[22] This is General Counsel Exhibit #5.
[23] This is General Counsel Exhibit #6.

partial frills proposal which permitted employees to receive an extra 75 cents on their hourly rate with PTO or some health insurance and there was an increase in the Victoria wage rate for non-benefited employees of $1.50/hr. The employer proposed a reduction in the employee costs for health insurance and suggested phasing in a better provision later in the contract period. The new PTO proposal increased the allotment for Victoria, and Alcoff thought this was "in the ballpark." The employer responded to the Union's desire to afford no-frills employees an opt-out window. The Respondent now agreed that there would be a 2% pension contribution at both facilities by March 2008, a move that Alcoff characterized as "significant."

After Alcoff discussed this new employer offer with Alessi and the mediators, Alessi informed them that the "owners" were in Florida, that Tufariello was in touch or would be in touch with the owners, and that he was not sure how much further they could go. Alessi said his side wanted to leave because they were tired. It was now about 3 am on August 19. Alessi said his firm had an outing that weekend and that he would not be available by phone to Alcoff. He would not give Alcoff a phone number, but he said Alcoff should communicate through mediator Davis. Alessi said he would speak to Tufariello over the weekend, and certainly on Sunday, and try to get him to think about the Union proposals. Alcoff gave Alessi and Davis his contact numbers. Alcoff said he thought there was an opportunity to get a contract and that he would come back from his home if the parties could engage in collective bargaining. Alcoff and Silva thought that Tufariello had made some movements and that there had been progress. They hoped to continue the negotiations over the weekend. They did not withdraw the strike notice and they hoped that a contract could be reached.

After receiving the employer's proposal on the morning of the 19th Alcoff discussed it with the employee bargaining committees. He outlined its provisions on a flip chart. Alcoff testified that he does not believe it is a good policy for mediated proposals and off-the-record discussions to be copied and available wholesale. The proposal was not something that could be submitted for a ratification vote. The parties were still negotiating and there was still room to move.

Tufariello could not recall as much about the meeting of August 18–19. His direct testimony did not mention that Alessi was present. Tufariello said that the mediators asked for his best and final offer. Tufariello said that he responded with a proposal that encompassed the key economic components that he characterized as still unresolved; wages, health insurance, and issues related to no-frills employees. He called this a final proposal although he did not write language indicating final proposal on the document. Tufariello said he thought the Union proposal of August 18–19 was more expensive than the August 5 comprehensive proposal. He could not recall how he came to this conclusion. But he recalled that the Union proposed to change the starting wage for a grade 1 employee from $7.50 to $9.38, a more than 12% increase over three years.[24] Tufariello thought the Union's August 18-19 proposal on health insurance was more expensive because theoretically every employee could take family coverage.

Nolan testified that she and Tufariello discussed the negotiations that night. They both had a sense that "we were really getting somewhere." Tufariello made changes to the employer's position with respect to the PTO and the health insurance contributions. The Union came back with a proposal agreeing to the existing form of health insurance but asking that it be paid for by the employer. Nolan thought that health insurance cost about $1000 per month and she and Tufariello were disappointed. Nolan did not explain where she got this figure and she did not testify about the actual document given to her during the negotiations. Nolan said she would have been available to continue the negotiations over the weekend. Nolan apparently believed that Respondent gave the Union its final offer on the night of the marathon bargaining, August 18–19; she stated the last best offer was given to the bargaining unit, "it was that marathon night, if not before." I do not credit Nolan's description of the events of August 18–19.

On cross-examination Tufariello acknowledged that Alessi was the Respondent's legal representative for the August 18–19 bargaining. Tufariello stated that Alessi may have had some discussions with the mediators at which he was not present.

Alcoff could not recall that there was any discussion at the bargaining table on August 18–19 concerning temporary replacement employees. He did not see a work schedule with a list of temporary replacements.[25]

Over the weekend following the August 18–19 negotiations and on Monday morning August 22, Alcoff telephoned Davis to see whether he had heard from Alessi. Davis said he had not had any contact with Alessi. Later in the afternoon of August 22, while driving his car, Alcoff spoke to Davis who informed him that Alessi had faxed a proposal. Davis said he would fax the proposal to Alcoff and when Alcoff reached his office on the evening of August 22 the fax was there. The two page document with a fax receipt sheet attached shows that two pages were received by the union at 4:19pm from one of the mediators.[26] Based on the notations at the top of the two page proposal it appears that the two pages were faxed to Alessi by Tufariello and that Alessi then faxed the proposal to a mediator for transmission to the Union.

Alcoff compared the August 22 employer proposal to the employer's proposal handed to the Union through the mediators on the night of August 18–19 and found that it was regressive. The new health insurance offer was less generous because it required employee contributions much greater than had been proposed in the August 18–19 offer. The earlier offer required contributions of $150 declining to $125 for family coverage whereas the August 22 offer required a contribution of $185. The earlier offer required a contribution of $50 to provide coverage for a husband and wife or parent and child whereas the new offer was $85. In the August 22 document the 2% pension contribution offer was taken off the table and the 75 cent partial frills offer was withdrawn. Alcoff testified that the August 22

[24] I note that the $9.38 figure was in the August 5 proposal.

[25] He could not recall whether he had seen such work schedules at the facilities prior to this.

[26] This is General Counsel Exhibit #19.

offer was "an in your face sort of move that seemed bizarre and not helpful." Alcoff emphasized that nowhere on the document was there any statement that the August 22 offer was a final offer. Indeed, the concept of a final offer had never been mentioned in the mediator-assisted bargaining.

Tufariello testified that he could not recall whether he sent the August 22 offer to the mediators or whether Alessi had done so, but after looking at some documents he stated that Alessi faxed the offer to mediator Davis.[27] Tufariello said the offer of August 22 was indeed the employer's final offer. The documents Tufariello consulted at the hearing were contained in a packet sent to the Union's attorney, Ellen Dichner, Esq., by Alessi on September 12, 2005. The events leading to that correspondence will be discussed below.

It will be evident from the description of the negotiations given above that Tufariello did not recall many details and had a very vague recollection of the specific offers, their costs and the timing of the discussions. Even with documents in front of him, Tufariello could not explain the figures and notations made during negotiations. As to some matters Tufariello testified contrary to the contemporaneous documentary evidence. I do not credit Tufariello's testimony about the course of the negotiations. I find that Foley and Alcoff had a more precise recollection of the negotiations and that they had a detailed knowledge of the movement made by the parties. I shall credit their testimony. I note that Tufariello did not deny Alcoff's testimony about the employer's stated goals and priorities.

G. The Employee Votes and Concerted Activities at the Facilities

In April 2005 Nolan had received a letter from the New Jersey Department of Health and Senior Services addressed to administrators of various facilities. The letter stated that the Department had been notified of "possible strikes" against nursing homes and it reminded the administrators that a strike was a "reportable" event and that nursing homes must have in place a contingency plan in place to deliver services. The forms accompanying this letter provided illustrations of reportable events including murder, fire, abuse, missing residents and "impending job action, strike action or staff walk out." For each reportable event a set of forms was to be filled out. Nolan testified that when she received the April communication from the State she put together a contingency plan for Wayneview which she later memorialized in a submission to the State.[28] Nolan arranged for advertisements seeking temporary replacements to run in the local newspapers. These ads ran from April to August and Nolan got a "huge response." Nolan and Tufariello decided to offer more than the going rate of pay because those responding to the ads were being offered only temporary work and they "might never work at all." Nolan informed those who responded that they might never work at all and that they could be replaced by the original employees "at any time." Nolan gathered information about the replacement employees "so that we would be able to . . . do what we needed to do to bring them in, if there were actually a job action."

Silva testified that on August 12, 2005 the Union sent 10 day notices to Wayneview and Victoria pursuant to Section 8 (g) of the Act. Each letter, identical in the substantive language, stated that it was sent respecting the relevant unit employees, and that:

> You are hereby notified that the aforesaid Union shall begin to engage in a strike, picketing, or other concerted refusal to work activities beginning at 7:00 AM on Tuesday August 23, 2005. . . .

The notices were sent after discussions with the employees about the course of the bargaining and the need to send a strong message to the employer that the Union and the employees wanted progress in the negotiations. Alcoff summarized the state of the bargaining to the committee members at each location. He suggested that they determine the strongest action that members were willing to take. He wanted to send a message that a job action was not inevitable but that a deal was possible. The Union circulated petitions for signature at each of the facilities asking whether the employees were willing to strike in order to obtain a settlement of the collective-bargaining contract. The 10 day notices were sent when the Union had obtained signatures from at least a majority of unit members at the respective locations. However, strikes would not be called without a further secret ballot vote by the unit employees. Alcoff testified that it was clear from the meetings that the Wayneview unit members would not ultimately vote to strike.

Shop steward Marjorie Barnett testified that after the ten-day notice was sent she and other Wayneview Union stewards went to Nolan's office to tell her that they did not want to go out on strike. They said the people were scared because of what they were hearing about a possible strike and they said the employer should give them a good contract. They said all had been on the job a long time but had no medical benefits. Barnett denied saying that the Union was forcing employees to strike; she said the people did not want to go out on strike. Barnett was a forthright and cooperative witness. I shall credit her testimony in this proceeding.

As soon as Nolan was informed of a possible job action she sent in the reportable event form to the State. She contacted the people who had responded to the ads for temporary work and she and other managers compiled work schedules. A work schedule for a minimum of two weeks was completed to commence August 22.

Silva testified that on Monday August 22 the Union conducted meetings at both Victoria and Wayneview to determine whether there would be job actions.

Alcoff spent the early part of August 22 at Victoria meeting with unit employees. He discussed the progress of negotiations as of the morning of August 19; he said there was movement and there were opportunities but that employee action was needed "to push the employer further along." Alcoff and the employees discussed Union efforts to obtain affordable health insurance, wage increases, a pension plan and improved PTO. The Union did not request a vote on the employer's offer given to the mediators because the bargaining was still continuing and

[27] These documents are contained in General Counsel Exhibit #48.

[28] The contingency plan for Wayneview is Respondent's Exhibit #22.

there was no final offer. Alcoff helped supervise a secret ballot strike vote among the employees. He told them that if they overwhelmingly voted to strike the Union would conduct a five day strike. Union organizer Neal Gorfinkle was present when the vote was taken. He confirmed that a majority of employees voted in favor of a five-day strike.

A similar meeting was conducted at Wayneview. The Wayneview employees decided to conduct one day of informational picketing during their respective non-working hours.

On August 22 Silva sent a letter to Tufariello by certified mail and fax stating:[29]

> This is a follow-up to the Union's Section 8 (g) ten-day notice dated August 12, 2005. Please be advised that the Union activity in my letter will be limited to informational picketing at the Wayneview facility, to begin at 7:00am on Tuesday, August 23, 2005, and will terminate at 4:00pm that day. The picketing by employees will take place on their non-working time and all employees will report to work at their usual reporting time and work their regular schedules.

That evening, at 9 PM, Alessi faxed a letter to Silva which stated:[30]

> I am in receipt of your letter which was faxed to me at 4:55 PM today. As you know, upon receipt of your strike notice, the State of New Jersey required Wayne View to develop a contingency plan to insure sufficient staffing for the uninterrupted care of its residents. Pursuant to that requirement, Wayne View hired temporary replacements. The names of these replacements were recently placed on the two week work schedule which was posted in the facility, as per its standard scheduling practices. No names of unionized employees were placed on this schedule. These replacement workers were directed to report to work, pursuant to this schedule, beginning tomorrow morning, based on the union's Section 8 (g) ten-day strike notice. . . . Accordingly, there is no work for your members at Wayne View. Please advise your members not to report to work tomorrow morning and until further notice by Wayne View.

Silva was present at Wayneview at about 5 am on August 23. A police officer and patrol car were situated at the bottom of the driveway. The officer had a list of those who were permitted to enter and he refused admittance to those whose names were not on the list. The employees conducted informational picketing that day only, concluding with the end of the day shift. On August 24 Silva was present with the employees but there was no picketing and no marching, bullhorns or other manifestations. Some employees who had not been scheduled to work the day before but who expected to work on the 24th attempted to enter the facility but they were turned away.

Margaly Pierre worked as a CNA at Wayneview for seven years ending in October 2006. She was on a scheduled vacation from August 15 to 22, 2005. Her regular schedule called for her to return to work on Thursday August 25. She reported at 2:50pm but was told by the police officer that her name was not on a list to work. When Pierre insisted that she was scheduled to work and explained that she had just returned from vacation the officer permitted her to enter the building. Pierre had some discussion with Director of Nursing Nancy Ziccone and Assistant Director of Nursing Leah Develez, both of whom welcomed her back to work, then Ziccone left the area for a minute.[31] Ziccone then returned to tell Pierre that the lawyer said he did not want anybody who was a member of the Union to work in the building. Ziccone instructed Pierre to leave saying, "Go. I don't want you in the building." Pierre went home. Neither Ziccone nor Develez were called by Respondent to testify herein. Pierre was a convincing witness; in addition, her testimony is uncontradicted on the record and I shall credit it.

Nolan's testimony about the employer's refusal to permit the Wayneview employees to work as of the morning of August 23 was confusing and full of inconsistencies. I note that Nolan described herself as the top manager at Wayneview. Nolan testified that the majority, if not all, the bargaining unit employees at Wayneview did not want any job action. When asked who made the decision not to permit the employees to work Nolan replied that the decision was made by the employees explaining that, "they had a job action that was in full force." She said the employees knew there was a job action so they did not come to work. She stated that employees saw the listing of temporary help prior to "not being there." Then Nolan testified that a few people came to work on August 23. However, Nolan also said she spoke to one employee, whose name she could not recall and who was in tears, but that no one else requested to come to work that day. Then Nolan said she could not recall if anyone came to Wayneview saying they were going to work. Finally Nolan testified that she or Ziccone gave the police a list of temporary workers and informed the officers that other employees could not come in to work at Wayneview. It is evident from this summary of Nolan's testimony that her answers were obfuscatory and glaringly inconsistent. I find that Nolan showed an unwillingness to recall and testify fully to the facts about which she was being questioned and I do not credit her testimony.[32]

Nolan also testified that Wayneview employees were not permitted to work on August 23 because the facility had temporary staff lined up and a minimum commitment of two weeks had been made to them. A verbal offer had been made to the temporary workers.

Josephine Ortiz, a witness called by Respondent, testified on direct examination by Counsel for Respondent that after the strike vote at Victoria she had a conversation with director of Nursing Evelyn Savarese. Savarese was posting a list of temporary employees and their start times and dates near the time

[29] The letter, General Counsel Exhibit #7, was sent to various people, including Alessi.

[30] The letter is General Counsel Exhibit #8.

[31] This discussion is dealt with below.

[32] Respondent's Brief quotes from the transcript where the ALJ states that Nolan was "convincing" and had a "thorough knowledge" of the matter about which she had testified. This comment related only to Nolan's testimony about the actions she took in the spring of 2005 in response to the State of New Jersey's requirements that nursing homes prepare for reportable incidents. The ALJ's comments do not relate to Nolan's testimony on many other subjects all of which has been carefully read and evaluated.

clock. Savarese told Ortiz that Victoria would hire temporary employees but, "If we decided not to go out on strike those employees would not be coming, we would still be there." Ortiz expanded on her testimony on cross-examination stating that before the strike both Savarese and Administrator Melissa Guglielmo told her that if the employees decided not to go on strike they would be able to work, the employer could tell the temps "never mind."

Alcoff was present at Victoria in the early morning of August 23 when the night shift ended. As the employees exited the facility, they set up a picket line.

Alcoff testified that after three days he informed the employer that the strike would end after the fifth day. Alcoff's letter dated August 26 was addressed to DelSordo.[33] It stated:

> This is to inform you that all Victoria House employees currently on strike unconditionally offer to return to work on Sunday, August 28, 2005 beginning with the shift starting at 6:00 a.m. We shall provide you a list of all returning workers upon request.

After this letter was delivered to the employer Alcoff received a telephone call from Alessi who said that the Union could not make an unconditional offer to return to work because the company had made its last best offer. Alcoff replied that Respondent had not made a last best offer, but Alessi disagreed saying that it was contained in the fax. Alcoff said the fax was just a proposal. Alessi stated that the fax was sent to mediator Davis with a cover sheet but Alcoff denied seeing a cover sheet. Alcoff said no one ever told the Union the fax was a last best offer. Alcoff maintained that the old contract was still in effect and the employees could return subject to those conditions. He said the Union planned to return to the bargaining table because there "is a deal to be had." Alessi responded you "will force Tufariello to permanently replace. That's what he's talking about. You need to know that." Alcoff said if the employees were not permitted back to work it would be a lock-out; it was illegal to replace locked out employees permanently.

At 9:31 pm on the 26th the Union received a six page fax from Alessi.[34] Alessi's letter disputed that the Victoria employees were making an unconditional offer to return to work. Alessi noted that the Union was not accepting the August 22 offer faxed by the mediator, which Alessi characterized as the employer's last best offer, and that the Union wanted to continue negotiating. As a result Victoria was declining the employee's offer to return to work. The letter continued:

> From its perspective SEIU is still on strike and, consequently, Victoria health will continue to operate with temporary replacement workers and any SEIU members who, of their own volition, choose to cross it picket line. Also, please be advised that starting on September 6, 2005, Victoria Health will implement its "last best offer" and will begin hiring permanent replacements for the striking SEIU members.

The second page of Alessi's transmission indicated a "cc" to Tufariello. The third page was a fax cover sheet from Alessi's firm showing that three pages were being faxed to mediator Davis. No date was filled in on the form. The cover sheet contained a handwritten note to Davis from Alessi stating that attached was "management's last best offer. Please relay same to union and call with its response." The fourth and fifth pages were the same two-page document that the Union had received from the mediator on August 22. The sixth page of the transmission was the same fax cover sheet from Alessi to Davis described above, but with the information at the top that the transmission was not completed to the mediator's number.

I note that there was no documentary evidence introduced and no testimony by anyone from Alessi's office or the mediator's office that the cover sheet was successfully faxed to the mediator and/or successfully faxed to the Union before August 26. Thus the cover sheet with the statement that the offer was a last best offer has not been shown to have been sent to and received by either the mediator or the Union before Alessi sent it to Alcoff on August 26.[35]

Silva testified that the first time the Union was informed that the August 22 employer two page proposal was the last best offer was late in the evening of the 26th.

Silva was at Victoria after 5 am on August 28 with Alcoff and a number of employees who were attempting to return to work. A police officer and patrol car blocked the driveway. DelSordo stood with the officer and the two consulted a list, telling employees that if they were not on the schedule they could not return to work. Union representatives told DelSordo that the unit members were there to work. Alcoff said that the employees were there to work pursuant to Alessi's letter, quoted above, that permitted unit members to come to work "of their own volition." DelSordo replied that if they were not on the schedule they could not work. Alcoff asked how the employees could get on the schedule, but DelSordo did not respond to this questions. Silva asked DelSordo whether the members were locked out or permanently replaced. DelSordo left the area and walked over to a place on the grounds where Tufariello was standing and observing. Silva saw DelSordo speak to Tufariello. After a few minutes DelSordo returned and said the people were not allowed to work. Silva asked her question again and said, "Go ask Vinny." DelSordo went back to speak to Tufariello and he returned waving his arms in the air, saying, "It's a lock-out, it's a lock-out."[36] The employees changed their picket signs from strike to lock-out and returned to picketing. I note that organizer Neal Gorfinkle, who was present on this occasion, testified to the same effect as Silva and Alcoff.

Geraldine Morgan, a CNA employed at Victoria, testified that she attempted to return to work after the five-day strike. The returning employees were met at the gate by a police officer and DelSordo. After the officer asked Morgan her name he at first directed her to enter the facilities but then told Morgan to leave or she would be arrested. When the employees asked DelSordo what was going on he said he did not know and they

[33] The letter is General Counsel Exhibit #9.

[34] The reply is General Counsel Exhibit #10.

[35] Neither Alessi nor mediator Davis testified herein, and no one from their offices testified as to the various mail transmissions.

[36] DelSordo did not testify herein.

demanded that he ask Tufariello. Eventually DelSordo told the employees that they were all locked out.

Senior Aide Josephine Ortiz, who testified as Respondent's witness, stated that she was present on August 28 when all the Victoria employees tried to go back to work. The employees were not let in. Ortiz testified that the employees were told to call their supervisors; however, Ortiz did not say who issued this instruction or how or when she received it. On August 29 Ortiz spoke to Director of Nursing Savarese and she also spoke to DelSordo. Ortiz asked DelSordo why the employees were not back in the building and why the employer had not accepted the Union's proposal. DelSordo told Ortiz that the employer had accepted the Union's proposal and he handed Ortiz a copy of Alessi's August 26 letter to Alcoff, with the August 22 "last best offer" attached. These documents are described above, and I note that the letter states that the employer would operate with its temporary workers and unit members who cross the picket line. The letter says nothing about a manner of placing Victoria employees back on the schedule so that they could return to work. I also note that, contrary to Ortiz' testimony, Victoria never accepted the Union's proposal. I conclude that Ortiz' recollection is inexact and confused. I shall not credit Ortiz about the events of August 28 and 29. I also do not credit her that all the employees were told to call their supervisors to get back on the work schedule. Ortiz testified that she and Savarese called all the unit members and told them that if they wanted to work they should contact their supervisors and they would be put back on the schedule. Ortiz did not name anyone she had contacted in this manner. I do not credit Ortiz that she called all the unit members. I have found that she is not a reliable witness and, not only did her testimony on this subject lack any specificity but no other witnesses testified to being called by Ortiz. Savarese did not testify herein so there is no credible evidence that Savarese telephoned anyone on August 29 or before September 6 to inform them how to return to work. Some employees were called back, as is shown by other testimony, but the record does not permit a finding that "all the unit employees" were notified by Victoria of the way to get back on the schedule for September 6. Ortiz herself was back at work by September 4. She stated that some employees were back at Victoria on September 3, but she did not identify them.

On August 31, 2005 Nolan wrote to Silva stating that on September 6 at 6 am Wayneview would implement the "last best offer" that Tufariello had faxed to Alessi on August 22.[37] Nolan testified that she sent a copy of the letter to the Wayneview employees with the last best offer attached because six to ten employees had told her that did not now know what the final offer was. Then Nolan changed her testimony to say that employees did not approach her about the final offer but that she heard "rumors" that employees never got the final offer. At this point Nolan and Tufariello decided to give the document to employees.

On September 1 Alcoff wrote to Alessi informing him that when the Victoria employees reported to work on August 28 they were told that they were locked out. On September 3 Alcoff wrote to Alessi informing him that the employees at both Wayneview and Victoria were prepared to return to work on Tuesday, September 6 at 6am to the same jobs that they left under the terms of the expired contract. This letter asserted that the Victoria and Wayneview employees had offered to return to work before the Union was notified of the employer's last best offer and at a time when the terms of the expired contract were in effect. Alcoff maintained that the parties were not at impasse and that the Union was prepared to offer a counterproposal. The Union repeated its request for bargaining dates.[38]

H. Request for Information and Bargaining

On August 30 Alcoff wrote to Alessi requesting information about the employer's last offer and asking for dates for negotiations during the week of September 6 and subsequent weeks.[39] Alcoff testified that the Union had never seen the Aetna health insurance contract and had never seen the provisions applicable to non-unit employees referred to in the last offer. The Union wanted to see the promissory notes and loan documents referred to in the training proposal. The Union wanted information about the work force because there had been changes since bargaining began. Alcoff testified that the information was not provided. Alessi responded that some information had been given to the Union when negotiations began and that other information was not available. The Union made a further request for information on September 12 for details concerning employees performing bargaining unit work from September 6 forward, a copy of the current schedule for each department and unit and a copy of all materials describing terms and conditions of employment for unit employees beginning September 6.[40] Alessi replied on October 3 giving some information about employees performing unit work, stating that the work schedules were posted and could be copied by the shop stewards and saying that the working conditions were those of the expired contract as modified by the last offer.[41] Alcoff wrote to Alessi on October 12 stating that the information provided on October 3 was incomplete and inaccurate and that the Union still wanted all the information it had requested.[42] The request for information and for bargaining was renewed in a letter from Alcoff to Alessi on January 19, 2006. On February 8, 2006 Alessi replied stating that the parties had reached impasse after the all night mediation session and that Wayneview and Victoria had "properly proceeded to implement their last best offer." Alessi asserted that the employer had provided all the information requested.[43]

Nolan testified that in response to information requests from Foley in February 2005 Respondent had provided the Union with a copy of the summary plan for health benefits and fringe benefits. Although Nolan did not so testify, I assume that the plan was the same for Victoria. There was no testimony about requests for information concerning Victoria.

[37] This is General Counsel Exhibit #11.

[38] These are General Counsel Exhibits #21 and #36.
[39] This is General Counsel Exhibit #20.
[40] This is General Counsel Exhibit #23.
[41] This is General Counsel Exhibit #24.
[42] This is General Counsel Exhibit #32.
[43] This is General Counsel Exhibit #34.

I. Further Meeting Between the Parties

Alcoff testified that he and Silva attended a bargaining session on September 19 with mediator Kinney and Alessi. The employee committee was present but Alessi refused to meet with them. Alessi met with Silva and Alcoff. Alessi had the two pages which he characterized as the employer's last best offer. Alessi told the Union that if they accepted the offer and if the Union withdrew the pending charges at the NLRB then 41 Victoria employees would be let in to work. Otherwise, Alessi said, the employees would lose their jobs and be permanently replaced.[44] Alcoff asked some questions about the last best offer. Alessi replied, "You understand English, you're a smart guy" and then Alessi left the room. There were no further negotiations between the parties.

J. Attempts to Return to Work on September 6

Wayneview

Silva was present at Wayneview at 6 am on September 6 with a number of Wayneview employees who were attempting to return to work. Two managers came out and asked her why she was there. After Silva explained that the employees wanted to return to work the managers went back into the facility. Then a police car with two officers arrived and the officers went into the building. The police then came outside and asked Silva for her identification and asked her what she was doing there. Silva explained that she was there to accompany the employees and to represent them in case of problems. Eventually the officers informed Silva that they had asked Nolan and Nolan had told them she did not want the Union on the premises and that Silva would have to leave. Silva left.

Marjorie Barnett a CNA at Wayneview for 16 years went back to work on September 6. While waiting outside the building she was informed by Silva that she should have received a letter saying she should call her supervisor if she wanted to return to work. Barnett had received no such letter. Nolan appeared at the door and said she would admit only two dietary workers. Then she returned and said Barnett and others could go sit in the staff dining room. Barnett went inside with six or seven employees, including Dennis Dunn, Marcia Cover, Angela McDermott, Domingo and others whose names she could not recall. Nolan addressed the employees saying that she did not want any kind of unapproved behavior and she did not want the employees to have gatherings in the hallways. Some employees were told they could not stay and work that day, including Cover, Dunn, Blanca Pagan, Clara and Domingo.

Barnett received a letter the next day; she saved both the letter and the envelope in which it came.[45] The envelope is clearly postmarked September 6, 2005 although the postage meter which was used to stamp the envelope was set for August 31. Thus the documentary evidence shows that the post office received the letter on September 6.[46] The letter received by Barnett was from Nolan and was addressed to "All Wayne View District SEIU 1199 NJ Members". It was dated August 31, 2005. The letter was as follows:[47]

> Attached is a notice that was sent today to Milly Silva, President of SEIU 1199, New Jersey. A copy of this memorandum and attachment are (sic) being provided to you to accurately reflect and inform you of the content of our last best offer, and that we will be implementing it on Tuesday, September 6, 2005
>
> Any employee wishing to return to work at WayneView, beginning on September 6, should contact their (sic) supervisor by telephone and so advise.

Marcia Cover has worked in housekeeping at Wayneview for six years on the 7am to 3pm day shift. On September 6, 2005 Cover was to report back to work after a scheduled vacation. Cover entered the facility with all the unit employees after 6am. She got her cart, assembled her supplies and began cleaning her assigned areas. Cover recalled that the place was "a mess." At about 8am Cover finished cleaning her second assigned room when Paul from maintenance and Leah Develez asked her if she had received a letter. They took Cover to the office where she also saw Ziccone and her immediate supervisor, Director of Housekeeping John Larina. Develez and Ziccone asked, "Did we call you? Did we write you?" Cover replied that they had not and that she had been on vacation but was now returning to work. Develez and Ziccone said, "We don't need you any more." When Cover asked how come they replied that they did not need her until they called or wrote. Paul escorted Cover out of the facility. Later Cover received a letter recalling her to work and she reported back as instructed on September 8. Cover was certain that the letter did not tell her to telephone her supervisor; the letter said return to work on September 8.

Margaly Pierre received a letter from Wayneview on September 7 and was called by staffing coordinator Christopher Irizarry to return to work on September 8. Irizarry was asked what mechanism existed for employees to return to work on or after September 6. He testified that, "We wrote them a letter to call or write saying you want to return." Irizarry believed that this letter was sent a few days before September 6.

Nolan testified that that employees could return to work pursuant to her letter dated August 31 if they contacted their supervisors. She recalled that some employees returned on September 6. Nolan stated that employees came back to work within 24 hours or less of receipt of the letter, "I'm thinking that that's the way that it went." When all the Wayneview employees had returned Nolan still kept the temporary employees on the premises and used "double staffing." Within a handful of days the temporary workers were discharged.

Victoria

Union organizer Neal Gorfinkle testified that he was present on the picket line at Victoria during the strike. Some employees reported that they had been called by supervisors and told

[44] The charges related to instructions to remove Union paraphernalia, threats and assistance with a decertification petition. These and other charges are discussed below.

[45] These are General Counsel Exhibits #37 and #38.

[46] August 31, 2005 fell on a Wednesday. September 6, 2005 was the Tuesday after Labor Day.

[47] The attachment was a letter to Silva reiterating that the two page management proposal of August 22 was the last best offer and that it would be implemented on September 6 at 6 am.

that they could come back to work if they put their names on a list and were willing to cross the picket line. Gorfinkle said some employees went back to work on the Labor Day weekend. Gorfinkle walked into the building with the employees who had not been called back to work on the morning of September 6 and when they got to the time clock they found that many time cards were not in their accustomed places and the employees could not punch in. Gorfinkle and the employees walked up the hall to the reception area outside DelSordo's office near the front door of the facility. DelSordo came out and Gorfinkle told him that the employees were there to work. DelSordo replied that those employees who wanted to return had been required to notify their supervisors prior to the Friday of the Labor Day weekend. DelSordo was asked how the employees could have known that. DelSordo said a letter had been sent to all the employees instructing them to notify their supervisors by Friday so they could return to work Tuesday. Gorfinkle had never seen such a letter and he asked DelSordo to show him a copy but DelSordo did not have a copy of the letter. Then DelSordo announced that those employees who were not on the schedule for that day had to leave or he would call the police. The Union asked about the status of the employees and whether they had been permanently replaced. At this point the police arrived and asked the employees to leave. Gorfinkle and the employees remained while DelSordo left the area for a while. When he returned he stated that the employees were permanently replaced. DelSordo said the employees could place their names on a list to be recalled as vacancies arose. The employees began to leave the area. Gorfinkle told DelSordo that he would return during the lunch break to inform employees who were working that day of the situation. DelSordo said it was not a good idea for Gorfinkle to come back; he said access would be discussed at the next contract negotiation. Gorfinkle testified that a group of Victoria employees remained locked out at least through the end of the year.

CNA Geraldine Morgan attempted to return to work September 6. She testified that DelSordo informed the employees that they were not allowed to work and he threatened to call the police. DelSordo told the employees that they had been permanently replaced. Eventually police officers arrived and told the employees to leave. The next day Morgan received a call from a fellow employee who told her to call management so she could return to work. However, Morgan was never recalled to work and she never received a letter asking her to report to Victoria. In October 2006 Morgan was called by a manager at Victoria and asked if she would come back on an on-call basis.[48] Morgan testified that Victoria would not put her on the full-time schedule. Morgan recalled that in March 2005 when she applied for a job and was hired by Victoria she had chosen to be a benefited employee but now Victoria has informed her that she is a no-frills employee and she is not receiving any benefits. Management has informed Morgan that it could not find her application form. I note that Respondent did not furnish any testimony or evidence relating to Morgan's status.

[48] Beginning in February 2006 Morgan had obtained a full-time job at another facility because she needed the benefits.

Agathe Guillaume, since September 2001 a CNA at Victoria, testified that she attempted to return to work after the strike but she was not admitted to the facility. Guillaume called Director of Nursing Evelyn Savarese on September 10, 2005 asking for her job back. Savarese told her she had called too late. Victoria called Guillaume back to work on January 23, 2006. Guillaume testified that in August 2005 the Victoria personnel office had informed her that she had accumulated 9 holidays and 10 vacation days. Guillaume did not use any of this time before the strike. Guillaume earned six sick days per year. After she was called back to work Guillaume attempted to use a sick day when she was ill. However, Victoria did not pay her. Carol in the office told her that because she was out for five months she would not have any time coming to her until 2007.[49] Guillaume also testified that her regular uniform allowance which used to be paid twice a year in May and November had not been paid in May of 2006. I note that Respondent presented no evidence concerning Guillaume.

K. Alleged Unlawful Activities at the Facilities

Interference with Union Activities

Marcia Cover, a shop steward at Wayneview, testified that she handed out Union flyers, buttons and key rings, and spoke to unit employees about the progress of negotiations in the spring of 2005. Cover testified that Director of Housekeeping John Larina called all the housekeeping employees to a meeting in the laundry before the lock-out. He told the employees that they could not wear Union buttons and could not talk about the Union, and if they went on strike they would lose their benefits, their sick time and a lot of things. Cover quoted Larina as saying, "We have a staff of new people that they're going to hire. And we're [the housekeepers] not going to have a job no more." Larina came up to Cover who was wearing a Union button and told her that she could not wear it. When Cover asked why, he said, "That's how you're going to get in trouble if you wear the button." Cover removed the Union button. Larina did not testify herein. I shall credit Cover's uncontradicted testimony.

Nolan acknowledged that the employees had been told by Larina not to wear the buttons. She told him not to do this again but she did not impose any discipline on Larina for his action. Nolan said that there was Union literature in the staff dining room over the course of a few months and flyers and slogans posted in the elevator and in the bathrooms. Before August 22 about six unit members wore buttons saying how many days left to the job action.

Marjorie Barnett, a shop steward at Wayneview, was the most active Union supporter at Wayneview and she represented employees at grievance proceedings and served on the negotiating committee in 2005.[50] Barnett reported to employees on the progress of negotiations and she rallied them to be strong. In the summer of 2005 about 10 unit members wore stickers saying, variously, "give us a fair contract", "be fair to those who

[49] Guillaume presented the documentary proof of her testimony and this was admitted into evidence.

[50] At the time of the instant hearing Barnett was no longer in support of the Union and she had signed a decertification petition.

care" or just "1199" and a logo. Once the 8 (g) notice was given some employees wore stickers counting down the number of days until August 23; these bore sayings such as "day one" or "day two." After Cover informed Barnett that Larina had told her employees could be fired for wearing the stickers, Barnett confronted Larina about the issue. He told Barnett that Nolan had instructed that workers caught wearing stickers would be fired. If they were not fired they would lose their seniority. Barnett saw the stickers on the glass case in the dining room that was meant to be the Union bulletin board. Barnett did not see the stickers in the elevators. Once in July or early August, Larina told Barnett that the housekeeping employees could no longer eat in the staff dining room. He said, "It's not me, it's Margaret Nolan. She said that she don't want them to eat in the staff dining room because … that's where the Union goes to talk to the members. And she don't want them talking to the Union, otherwise they're going to be fired."

Neal Gorfinkle was an administrative organizer for the Union with responsibilities at Victoria. On Monday, June 27, 2005 Gorfinkle was at Victoria during the morning shift change distributing material to unit employees to keep them informed of the course of negotiations. Gorfinkle was speaking to unit employees near the back door to the facility; this is adjacent to the break room, the employee time clock and the kitchen door. A unit employee pointed out a posting near the kitchen door. Gorfinkle saw a letter affixed to the kitchen wall and he removed it and copied it. The document stated:

> Attn: All Staff
>
> Due to the situation with the Union. (sic) The schedule will stay as is no one will have their days changed. If you are scheduled to work on the holiday you must come to work. If you do not come in or call out it will be taken as your resignation. Anyone who calls out during a strike will be terminated.
>
> Anthony M.

The parties stipulated that Anthony Merez was the dietary supervisor at Victoria and Gorfinkle identified him as such during the relevant time period. Gorfinkle told the employees present that it was not proper or legal to threaten employees' jobs if they were exercising their rights.

Geraldine Morgan was a CNA employed at Victoria. She recalled that a 10-day strike notice was issued by the Union. Several days before the strike occurred Morgan was standing at the nurse's station when Assistant Director of Nursing Rita Burke came to the station. A nurse who was present asked Burke why the employer did not give the unit employees what they want. Burke retorted, "Why don't they give me what I want?" The nurse asked Burke what would happen if the workers went out on strike. Burke replied, "They could all be fired." Respondent did not call Burke to testify herein.

Suspension of Barnett

Barnett returned to work on September 6, 2005. Nolan came over and watched her get linens and equipment to clean the rooms. Barnett addressed Nolan, "I hope I'm not back here for you to harass me, so please if you want to fire me, just let me go." Nolan said, "No, no, no" and Barnett had no further problems the rest of the day. Barnett was out sick on the 7th, 8th and 9th returning to work on September 10. On September 12 Barnett was called to a meeting with her supervisor Susan and Ziccone and Develez. They gave her a document dated September 12 and titled first warning alleging that Barnett did not report to the nurses' station at the 7am start of the shift and came to the nourishment room at 7:15 when report had already begun. Barnett explained that she first went to look at all the patients assigned to her to see whether they were OK. Then, she waited for the usual page to proceed to the nourishment room for morning report. The supervisors said that she was in the dining room at 7am but Barnett told them to ask Mary who saw her come from the patient's room.

The next day Barnett was called to a meeting with Ziccone, Susan and Develez. Nolan was standing in the doorway of an adjoining office. Barnett was given three warnings dated September 6. One warning titled second warning alleged that Barnett failed to make the bed of resident Joseph Ford and failed to obtain a pressure relieving mattress for him. Another warning titled second warning alleged that Barnett failed to put Ford back to bed after his therapy and left him sitting in his room facing his unmade bed. Another warning titled third warning alleged that Barnett did not obtain the weight of Ford despite repeated instructions. These warnings were signed by Department Head Susana (last name illegible) and by Ziccone. Barnett explained that when she came back to work on the morning of September 6 she was shocked at the deteriorated appearance of resident Joseph Ford. A nurse informed Barnett that he had fallen and broken his hip. Ford's bed was soaked, he had a big wound in his back and he had been lying in a wet diaper. Ford's roommate told Barnett that he was happy to see her because no one had been helping Ford to eat, they just put his food down and left. Barnett explained that Ford's bed had to be wiped down. It could not be made up until it was clean and dry and Ford could not be put back to bed until this was done. Barnett explained that at that time the pressure relieving mattresses were not stored at Wayneview and had to be ordered from the maintenance department which would bring one to the patient's room. A CNA had no means of obtaining a mattress on her own. Finally, Barnett explained that in order to weigh a bedridden patient one must obtain a Hoyer lift and a clean pad must be put on the lift before placing the patient on it. When Barnett was asked by the nurse to weigh the patient she told the nurse that she could not find a clean pad and the nurse replied that the task should be left for the next shift.

At the grievance meeting of September 13 Barnett accused the supervisors and managers present of retaliating because she was involved with the Union. Nolan replied, "If you're going to talk to your supervisor like that why don't you just do us a big favor?" At this meeting Barnett was given a three-day suspension and she served this. Barnett then filed a grievance and attended a grievance meeting with Nolan. Some time later Nolan told Barnett that she would be paid for the three days because there were too many discrepancies in the write-ups. Nolan testified that Barnett was the biggest Union supporter at Wayneview. Nolan testified that she rescinded Barnett's discipline and restored her pay "because I don't think there was any intent on Marjorie's behalf to not complete the work detail for

that particular day. . . . [T]there were major obstacles in her way that were precluding her from being able to do that."

The Decertification Petition

Christopher Irizarry was promoted to Staffing Coordinator for CNA employees at Wayneview on August 22.[51] He testified that after August 22 CNA Eileen Rivas and many others from the unit told him they wanted their jobs back. He replied that it was out of his hands. At some point which might have been as early as August 24 or later that week, Rivas called Irizarry at work and asked him to come to the parking lot of Kohl's around the corner from Wayneview. Irizarry told Director of Nursing Ziccone that Rivas wanted to meet him but that he did not want to go alone because he knew she was a Union rep and he did not want any problems.[52] Ziccone suggested that Irizarry take unit clerk Simone Henderson along when he went to Kohl's. Irizarry obtained permission from Ziccone to leave the facility while he was on the clock without punching out. When Irizarry and Henderson arrived at the Kohl's lot there were 20 or 30 employees waiting for them. Rivas gave Irizarry a signed petition stating that the employees no longer wanted the Union and they wanted their jobs back. While Irizarry spoke to Rivas more people came up and signed the petition. Rivas said some people were waiting to sign the petition in the TJ Maxx parking lot. Irizarry and Henderson drove to the TJ Maxx lot following Rivas in her car. Employees were waiting there and Rivas handed them the petition to sign while Irizarry stood by. After all the employees had signed, Rivas handed the petition to Irizarry who drove back to Wayneview and gave the petition to Ziccone. The next day employees called him and asked whether the petition had worked and whether they could have their jobs back. Irizarry replied that it was out of his hands. Irizarry's testimony about obtaining the petition and delivering it to Ziccone while he was on paid work time is uncontradicted and I shall credit it.

Margaly Pierre, who attempted to return to work at Wayneview on August 25 after her vacation was initially welcomed back by Ziccone and Develez. After being admitted to the building by a police officer Pierre asked the two supervisors what was going on. Ziccone replied that a strike was authorized. Ziccone asked Pierre if she would work with Wayneview or if she would work with the Union. Pierre replied that she was a single mother who needed a job and she would choose work. Ziccone told Pierre that she would call Simone and she dialed a number, spoke into the phone and handed the receiver to Pierre. Simone asked if Pierre would work at Wayneview without the Union saying that Pierre would have health benefits, paid vacation and PTO days. Pierre said that was OK. Then Ziccone gave Pierre three pages which Pierre recalled had some language to vote the Union out and contained the signatures of various employees. Ziccone told Pierre to sign; if Pierre wanted to work she must sign the paper. Pierre signed the document. Nevertheless, as described above, Pierre was not permitted to work until September 8. Pierre's testimony was uncontradicted and I shall credit it.

[51] Irizarry had worked at Wayneview as a CNA for 4-1/2 years.

[52] Rivas has not been identified as a Union representative herein.

Nolan testified that no one told her directly that employees were trying to get rid of the Union. She knew that some employees went to the Board to decertify the Union but she did not know when. Nolan acknowledged that Irizarry told her that a CNA had asked him how to decertify the Union and Irizarry also told her that some employees had signed a petition. Nolan thought that the CNAs trusted Irizarry and she did not offer any suggestions to him in dealing with the petition because it was a matter between him and the CNAs.[53] Nolan thought Irizarry had the petition. Ziccone "may have offered" her the petition but she wanted to keep peace and stick to business so she did not take possession of it. Nolan testified that if employees have to leave the facility during their working time they must punch out.

A decertification petition was filed on August 25, 2005 in Case 22–RD–1416.

L. Denial of Access to the Union

Victoria

Neal Gorfinkle testified that in the summer of 2005 he was at Victoria almost every day. During regular business hours if Gorfinkle wished access to Victoria he would inform Melissa Guglielmo, the assistant administrator, of his approximate time of arrival at the building as a courtesy. Gorfinkle testified that he did not need permission to visit Victoria. Gorfinkle understood that the Union had regular access to non-patient care areas near the time clock and break room.[54] Gorfinkle entered the building through the office area entrance. Sometimes he was asked to sign the guest register and sometimes this request was omitted. Outside of regular business hours Gorfinkle entered through the employee entrance near the break room and the time clock. Occasionally Gorfinkle met with employees in the area near management offices in order to prepare for a grievance meeting. This was a rare occurrence. If Gorfinkle intended to hold a formal meeting of employees during breaks or shift changes he might ask management for early release. Formal meetings required the prior approval of management. Gorfinkle could not get employees off the floor without management consent. Gorfinkle cited the visitation clause in the collective-bargaining agreement:

> The Union Business representatives or the Union's designees shall have admission to all properties covered by this Agreement to discharge their duties as representative of the Union but not in any manner which unreasonably interferes with the operation of the facility. . . . The Union may, upon the approval of the Administrator, conduct meetings on the premises provided said meeting is in a non patient care area and attended by employees only during their non-work time.

As discussed above, on September 6 Gorfinkle was informed by DelSordo that he should not come to Victoria to speak to the employees. The next week Gorfinkle called Guglielmo twice to request access to meet with employees. Guglielmo at first told him to wait for the negotiations and then she told him not

[53] At the time Irizarry was involved with the decertification effort he had already been promoted to staffing coordinator.

[54] The Union bulletin board is located in the break room.

to ask her again. On September 27, 2005 Guglielmo faxed a letter to Union agent St. Hilaire concerning his request for access. Citing the duty of Victoria to ensure the "quiet enjoyment" of the facility by the residents, the letter continued:

> The last time union officials were in the facility a major disruption occurred which resulted in Administrator Mike DelSordo having to call the local police to escort those union officials and members from the building. These loud, very disruptive activities occurred while we were attempting to serve breakfast to the residents. In addition there have been other incidents when residents have been drawn into this labor dispute. Including at least one incident where a resident, who was lounging on the facility grounds, returned to the building wearing a union button.
>
> Because of these and other events, when union officials have been disruptive and have drawn residents into this dispute, we can no longer allow those officials, who are not employees of Victoria House, on the premises. Accordingly, please do not attempt to enter the premises tomorrow. If you do, I will be forced to call the police.

Gorfinkle testified that since that day the Union has not been granted access to Victoria to speak to the employees. Union representative Danie Tarrow, who serviced the Victoria employees from November 2005 to the summer of 2006, testified that Guglielmo instructed that the Union could only enter the building when there was a scheduled grievance meeting.

Gorfinkle provided details of his September 6 walk with employees from the area where the time cards were kept to the front of the facility where DelSordo's office is located. Gorfinkle explained that the distance between the two points is about 20 or 30 yards. On the way to DelSordo's office the employees passed a nurse's station. Behind the nurse's station is a wing of resident areas and the patient dining area. In order to get to the DelSordo's office Gorfinkle and the employees did not walk in front of the dining room and did not walk in front of patient areas. These are down the hall from the nurse's station in the side wing. Some residents congregate around the corner from the administrative area which contains DelSordo's office. There is no evidence of the distance involved. Gorfinkle acknowledged that the group may have been loud in trying to get DelSordo's attention in order to go back to work. Gorfinkle could not recall if anyone was carrying a banner on September 6. As noted above, DelSordo did not testify herein. No management witness described this event. There is no evidence that Guglielmo was present during the events of September 6.

I observed Gorfinkle carefully as he testified. He answered forthrightly and was cooperative on cross-examination by Counsel for Respondent. He did not seek to provide evasive answers and I found his calm and professional demeanor to be impressive. I credit Gorfinkle and I shall rely on his testimony.

Wayneview

Marvin Hamilton is the Union's lead organizer at Wayneview. His duties include meeting with the unit employees, educating the employees about their rights and handling grievances. Before August 2005 Hamilton had a variety of access to Wayneview. When he planned to be at the facility he would use Nolan's voicemail to inform her that he was on his way and he would wave at the receptionist as he entered the building and proceed to the break room or lounge where he usually met the employees. Hamilton testified that the only occasion on which Nolan ever told him not to come was when there was a problem with a resident. Hamilton did not need management's permission to visit the employee lounge and place information in the Union bulletin board. Hamilton would often stop by to drop off Union literature or answer some questions for employees. By contrast, Hamilton stated, if he were planning to conduct an "actual meeting" on the premises he would telephone Nolan and tell her the start and end times of the proposed meeting and make sure that the date and time met with her approval. The Union visitation clause in the Wayneview collective-bargaining agreement is the same as that quoted above for Victoria. Hamilton said that the phrase "unreasonably interfere with the operation of the facility" prohibits the Union from trying to remove employees from their assignments or from speaking to them while they are on work time. Hamilton recalled that as the contract negotiations intensified he was at Wayneview almost every day waiting to speak to employees in the break room. At this time he was no longer calling Nolan to inform her that he would be on the premises.

Hamilton was on vacation and he returned to work August 29. From that day when he attempted to gain access to the Wayneview he was told that he could not come in. His admittance was barred by the police on two occasions. When the employees returned to work the Union was not permitted into the building. Hamilton telephoned Nolan and asked whether she was denying him access. Nolan said that Tufariello informed her that Hamilton could not come into Wayneview. Hamilton protested to Nolan that she knew him but she still denied him the right to enter the building. Some time later an employee was discharged and Hamilton wanted to enter the facility to find out what happened. Nolan said he could not come in and she called the police who turned Hamilton away from the property. On September 27, 2005 Hamilton wrote to Nolan, citing the terms of the collective-bargaining agreement, and demanding access "in order to represent … bargaining unit members." The letter said "we plan to go into the break room during non-working times beginning on Wednesday, September 28."

Nolan replied by letter of the same date in language very similar to the language used by Guglielmo in her letter denying Union access to Victoria. Relevant excerpts follow:

> The last time union officials were in the facility a major disruption occurred which resulted in having to call the local police to escort those union officials and members from the building and off the property. There have been other incidents when residents have been drawn into this labor dispute.
>
> Because of these and other events, when union officials have been disruptive and have drawn residents into this dispute, we can no longer allow those officials who are not employees of Wayneview on the premises. Accordingly, please do not attempt to enter the premises tomorrow for the purpose of meeting with Wayneview employees.

Hamilton has no idea what Nolan meant when she referred to a "major disruption" at Wayneview. He has not heard of such an event. Nolan, who was called by Respondent and testified at length herein, did not refer to any disruption caused by Union officials and employees at Wayneview, she did not testify as to any incident involving a resident of Wayneview, and she did not testify about calling the police to quell a disturbance. Nolan did not testify about the letter she sent to Hamilton and she did not testify about denying the Union its visitation right.

Hamilton testified that he is not permitted into the employee break room and he is not able to meet employees on the premises. Hamilton is only permitted into Wayneview to meet with management for a previously scheduled grievance meeting. Hamilton periodically asks Nolan for access to Wayneview but she continues to refuse.

I credit Hamilton's uncontradicted testimony. Hamilton testified in a forthright and open manner and he answered all questions on cross-examination in a cooperative spirit. Hamilton impressed me as a witness who did his utmost to relate his recollection truthfully.

M. Unilateral Changes

Union representative Danie Tarrow received complaints from Victoria employees that they were not receiving a uniform allowance or other benefits. Employees who had not been permitted to return to work on September 6, 2005 but who were taken back at various times through January 2006 said that they were being treated like new hires. Tarrow presented a grievance to Guglielmo on January 25, 2006 naming 10 employees who had not been returned to their previously held positions with full seniority.[55] Tarrow also attempted to discuss the failure to pay uniform allowance at Victoria. Guglielmo refused to discuss the grievance at the meeting. She stood up to leave the room and told Darrow to get out of the office. Darrow testified that the Union will file for arbitration after a first step meeting, but the first step must be held before filing for arbitration. In this case, Guglielmo refused to conduct the first step meeting.

III. DISCUSSION AND CONCLUSIONS

A. Negotiations and Declaration of Impasse[56]

The history of the negotiations for Wayneview and Victoria shows that after some early meetings where the parties bargained separately, Turfariello and Foley agreed to combine the negotiations. In two off the record meetings, the parties explored the current costs of various items and the estimated costs of Union demands. Tufariello stated that he had in mind a total amount he could offer for the successor contracts. The Union adhered vehemently to its demand that the employer agree to participate in the Union's fund for health insurance and other benefits. The Union had statewide goals in this round of bargaining and it wanted to adhere, as far as possible, to those goals in the Wayneview and Victoria contract.[57] By his own admission Tufariello did not understand the Union's economic proposals, but Tufariello was certain that remaining in the employer's current health insurance plan was less costly than participating in the Union fund. Tufariello never changed his mind on this subject. The major economic issues were wages, health insurance, the introduction of a pension, the possible change in the status of no-frills employees, and an increase in the minimum wages of the lowest paid employees known as the "parity" issue. PTO was also a subject with economic impact.

After the negotiations were combined, the parties attempted to write contracts for both Wayneview and Victoria so that there would be, according to Foley's uncontradicted description, "an almost master contract" for both facilities. To further this aim, Tufariello testified, he reluctantly agreed that the subject of PTO, which had been tentatively agreed upon for Victoria, would be reopened in the combined negotiations.

The Union's first full economic demand, described above in detail, was presented on May 10, 2005. Under that proposal, wages would increase 4% on the anniversary date of the contract in each of three years, all facilities would end the contract with 8 holidays, 11 sick days and 3 personal days. Parity increases would apply to raise the lowest rates to a minimum of $10 and $11 per hour, the Union fund would cost 22.33%, other funds were provided for and pension rates would rise to 2% and 1.7%. Very significantly, no-frills employees would be reduced pursuant to a formula and Victoria wages would rise additionally to provide for a shorter work week. Negotiations took place in May and June, with discussions of proposals and their costs. On June 30 the Union dropped its demand for a shorter work week with an extra wage increase at Victoria, a position that was formalized in an August 5 document.

On August 5, 2005 Alcoff first attended as the Union's chief negotiator and he presented a modified economic proposal. The Union's demand continued to provide for parity but it no longer required three 4% wage increases. Instead, a number of smaller increases would have culminated in a total increase of 12% only by the end of the contract and not at the beginning of the third year, thereby reducing the total cost of the wage increases over the three year contract term. There was a later effective date for participation in the Union's benefit fund. The cost of the pension proposal was reduced and demand for a legal fund abandoned. Tufariello presented a wage proposal with 7% increases and $1.50 in extra wages for no-frills employees. The parties had tentative agreement on work in a

[55] The employees were Chrisamine Francois, Geraldine Morgan, Rosette St. Pierre, Jason Nicholson, Sandra Amoteh, Cherly Charon, Agathe Guillaume, Elizabeth Mulan, Anthony Powell, and Marie Monelus.

[56] I credit the testimony of Foley, Alcoff and Silva generally, with some exceptions noted in the decision. I find that Tufariello had an inexact recollection of the events. He did not recall what some documents represented and reading them did not refresh his recollection, he did not display a grasp of the history of the negotiations and his testimony sometimes contradicted the documentary evidence. Further, Tufariello did not even address many of the subjects covered by Alcoff and Foley, and when he did his testimony often lacked detail and precision.

[57] I find that the Union negotiators mentioned the Tuchman agreement because it met many of the goals established by the Union for the present round of negotiations. The employer was aware of the most favored nations clause. I need not determine the precise import of that clause in view of the fact that the Union's proposals during the course of bargaining were not unalterably fixed to the terms of the Tuchman contract.

higher classification, merit increases, direct deposit and transfer to a higher classification. I credit Alcoff's testimony that the parties had reached "conceptual" agreement on the wages of no-frills employees. The employer presented a Victoria PTO proposal.

I note that Respondent's Brief is inaccurate and contrary to the documents and the testimony on the subject of the August 5 session, especially on the issue of a change in the Union's demand for wage increases.

On August 9 the Union responded to the employer's Victoria PTO proposal. I credit Alcoff's uncontradicted testimony that this document represented a reduction in the Union's August 5 demand in both numbers of PTO days and effective dates. I also credit Alcoff's uncontradicted testimony that in a sidebar discussion on August 9 Tufariello identified the two issues of most concern to him. He was intent on maintaining the employees' right to choose whether to be benefited or no-frills and he was opposed to the Union proposal to phase down the number of no-frills employees to a certain percentage. Tufariello told Alcoff that many employees preferred the extra wages they received as non-benefited workers and they would not want to change. Tufariello's second major area of concern was health insurance. The employer was most interested in keeping the employees in its own plan and was adamantly opposed to participation in the Union fund.

The marathon collective-bargaining session of August 18-19 resulted in significant changes in the positions of both parties. The Union presented comprehensive proposals for Wayneview and Victoria at the beginning of the meeting and Alcoff explained the language. Alcoff and Alessi met with the mediators to clarify certain issues. At the mediators' request, each party drafted amended proposals for presentation to the other side. The testimony and documents show that significant movement was made by each party. The Union wage proposal no longer specified certain increases but only required the attainment of a goal at the end of the contract term. Parity increases would now be effective only at the end of the contract. These new wage proposals were especially significant as they reduced the overall cost of the contract and signaled a willingness to be flexible on wages. For the first time the Union abandoned its insistence that employees be covered by the Union benefit fund and agreed to a continuation of health insurance by the employer's plan. This was a major concession in view of Tufariello's desire to avoid the Union fund and his stated belief, described above, that the employer's health insurance was less expensive than the Union fund. The Union agreed to phase in coverage for family members. The Union abandoned its no-frills proposal and agreed that employees would continue to have free choice whether to have benefits or a wage bonus. This was an extremely significant change in view of Tufariello's wish that employees continue to have a choice and especially in view of Tufariello's belief that many employees would continue to choose the no-frills option because they wanted extra money or had coverage from another source. The Union decreased its demands for PTO improvements and a training fund. I credit Alcoff's testimony, supported by documentary evidence, that by August 18 the Union was no longer tying to achieve the same goals at Wayneview and Victoria as it had obtained with other employers, including the Tuchman contract employers.

I credit Alcoff's testimony, supported by documentary evidence, that the employer made many significant changes to its position on August 18–19. The employer increased its minimum rate proposal, there was a new partial-frills proposal and an increase in the Victoria no-frills bonus and an opt-out feature for no-frills employees. The employer proposed reduced employee contributions for health insurance coverage. Alcoff thought a new proposal on PTO at Victoria was "in the ballpark." Finally, Alcoff cited an important new agreement by the employer to the Union's demand for a 2% pension contribution by the end of the contract term at both facilities.

Although Tufariello could not recall much about the session of August 18-19 he testified that the Union's proposal was more expensive but he could offer no reliable specifics to explain how he reached this conclusion. Tufariello inaccurately testified that the parity increase proposed on this day was more expensive than the Union's previous demand. Tufariello said that the Union's health insurance proposal was more expensive because theoretically every employee could take family coverage. But this statement contradicts Tufariello's testimony that the employer's health insurance, which the Union now accepted, was always a cheaper choice. The statement also contradicts Tufariello's oft-stated belief to Alcoff that employees wanted to be able to waive health insurance and many would continue to be non-benefited. I do not credit Tufariello's testimony about the Union's last proposal given to the mediators at the marathon session. I also do not rely on Nolan's testimony about the Union's proposal. Nolan said that the Union wanted the employer to pay as much as $1000 per month for employee health insurance. Nowhere is this figure supported by the testimony or evidence in the record. This statement contradicts Nolan's other stated impression that night: she said both she and Tufariello felt about the negotiations that "we were really getting somewhere." As I have found elsewhere in this decision, Nolan gave inaccurate, inconsistent and evasive testimony in the instant proceeding. Instead I rely on Alcoff's description of the many changes made by both parties to the negotiations.

The Board has noted that *Taft Broadcasting*, 163 NLRB 475 (1967), "sets forth the standards for determining whether parties have exhausted the prospects of concluding an agreement and a bargaining impasse exists. Factors such as the parties' bargaining history, their good faith, the length of time spent in negotiations, the importance of the issues about which the parties disagree, and the parties' contemporaneous understanding of the status of negotiations are all relevant parts of the analysis." *Intermountain Rural Electric Assn.*, 305 NLRB 783, 788 (1991).

Here the parties had bargained for several months and had reached agreement on a number of important matters. Significant movement on major economic items of importance to both sides took place on August 18-19. Both employer and the Union made major concessions and both made new and important changes to their basic approach to the bargaining. The Union's willingness to agree to continue the employer's health insurance plan and its willingness to abandon its previous insistence on phasing out no-frills employees met Respondent's most

important goals as expressed by Tufariello. Other Union concessions decreased the cost of the Union's demands. Similarly, the employer made important advances towards the Union's goals on pension, wages, PTO and affordable health coverage. Thus the parties were coming closer together on the major items about which they had disagreed in the past.

I also find, based on the uncontradicted testimony of Alcoff, that Alcoff told Alessi at the end of the marathon session that he thought there was an opportunity to achieve a contract and that he would drive back from his home if the parties could negotiate further over the weekend. Alcoff gave his telephone numbers to Alessi and the mediators. Alessi told Alcoff that he would speak to Tufariello over the weekend about the negotiations and that he would ask Tufariello to think about the Union offer. Alessi said that Alcoff should communicate with him through the mediators. Indeed, Alcoff made efforts to contact Alessi through the mediators over the weekend and on Monday morning. Thus, I find that both sides were expecting further negotiations. Neither party had told the other that they had reached impasse. The parties' contemporaneous understanding of the negotiations was that further bargaining would be fruitful. In these circumstances no impasse existed as of the morning of August 19.

On the evening of August 22 the Union received another employer proposal. This proposal was regressive in that the health insurance proposal was less generous than the employer's August 18-19 proposal and the 2% pension contribution and partial frills offer were both withdrawn. I find, consistent with the documentary evidence discussed above and Alcoff's testimony, that nowhere on the document received by the Union on August 22 was there any mention that this constituted the employer's "final offer". On August 26 Alessi told Alcoff in a telephone call that the August 22 offer was the employer's "last best offer." Alcoff denied to Alessi that he had received any such notification. Alcoff told Alessi that the Union planned to return to the bargaining table because there "is a deal to be had." Alessi responded that the Union's demand to negotiate over the August 22 offer "will force Tufariello to permanently replace. That's what he's talking about." I have found that Alcoff is a reliable witness and his testimony about the conversation with Alessi was uncontradicted. I find that on August 26 Alcoff asked Alessi for further negotiations on the employer's August 22 proposal and that Alessi said the employer would permanently replace the Victoria employees if Alcoff persisted in his demand for negotiations. Alessi's statements were repeated in his letter of August 26 which said that on September 6 Victoria would hire permanent replacements and implement its "last best offer." Similarly, on August 31 Nolan informed Silva that on September 6 Wayneview would implement the August 22 offer.

I find that the parties had not reached a lawful impasse even after the Respondent presented its August 22 offer as its last best offer. The Union did not reject this offer. The Union was eager to return to negotiations and repeatedly requested that the employer resume bargaining. The Union asked for information so that it could respond to the August 22 offer. Indeed, the changes made by the Union at the August 18–19 session boded well for an ultimately successful outcome because they met many of Tufariello's most urgent concerns. The Union renewed its request for bargaining by letter of September 6, 2005. When the Union met with Alessi for negotiations on September 19 with a mediator present Alcoff asked some questions about the August 22 offer. This was an attempt to further the bargaining process and shows that the parties had not exhausted the prospects for concluding an agreement. *Duane Reade, Inc.*, 342 NLRB 1016–1017 (2004). Where one party does not view the negotiations as having reached impasse and is willing to move further toward an agreement, an impasse cannot exist. *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991).[58] In *Cotter & Co.*, 331 NLRB 787, 791 (2000), Member Brame quoted Judge Posner for the proposition that one party's proffering a so-called final offer is not conclusive on the question of impasse because "[a]fter final offers come more offers."[59] Indeed, the Board stated in a recent case that "Respondent demonstrated that further movement was possible by presenting the Union with multiple final offers". *Coastal Cargo Co.*, 348 NLRB 664 (2006).

When Alcoff tried to further the negotiations on September 19 Alessi repeated that the August 22 offer was the employer's last best offer. I credit Alcoff that Alessi said that the Victoria employees would be permitted to work if the Union accepted the offer and withdrew the charges pending at the NLRB. If the Union did not comply with this demand the employees would be permanently replaced. I credit Alcoff that Alessi walked out of the meeting when Alcoff attempted to discuss the August 22 offer.

Having found that no impasse existed in the bargaining between the Union and Wayneview and Victoria, I find that the threat to implement the terms of the August 22 offer and the actual unilateral implementation of the August 22 offer violated Section 8(a)(5) of the Act.[60] *NLRB v. Katz*, 369 U.S. 736 (1962).

I also find that on September 19 Respondent Victoria conditioned an agreement to a new contract and the return of the employees to work on the Union's agreement to withdraw its pending charges against Victoria and Wayneview. This insistence to impasse on a nonmandatory subject of bargaining violated Section 8(a)(5) of the Act. *Patrick & Co.*, 248 NLRB 390, 393 (1980).

B. Request for Information

An employer has a duty to supply information requested by a Union that is potentially relevant and will be of use to a union in fulfilling its responsibilities as a collective bargaining repre-

[58] In this decision Judges Henderson, Buckley and Sentelle cited numerous instructive cases on the point.

[59] *Chicago Typographical Local 16 v. Chicago Sun Times*, 935 F.2d 1501, 1508 (7th Cir. 1991).

[60] The Union renewed its request for bargaining by letter of January 19, 2006. Alessi replied that the parties had reached impasse after the session of August 18–-19, 2005 and that Wayneview and Victoria had implemented their last best offer. Significantly, the employer, through its counsel, asserted that impasse had been reached after the marathon session of August 18–19. I note that the offer submitted by the employer through the mediators on August 18–19 was not the same as the contract terms of August 22 imposed by the employer after September 6, 2005.

sentative. Information concerning wage rates, job descriptions, and other information pertaining to employees is presumptively relevant. *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd 347 F.2d 61 (3d Cir. 1965).

On August 30 Alcoff asked Alessi for further negotiations and submitted a request for information about the employer's August 22 offer. Alcoff testified that he had never been given a copy of the Aetna health insurance contract. However, Nolan testified that she had sent the health insurance information to Foley as well as information for other benefits. Foley did not contradict this testimony. The Union was thus in possession of the health plan information and benefit information as of early 2005.[61] However, the Union was never given information about changes made or occurring after the implementation of the August 22 offer. A written assertion from Alessi that the Union had information is hearsay as to the actual facts: Alessi was not privy to the early negotiations and he did not testify herein. I credit Alcoff that he was unaware of provisions applicable to non-unit employees referred to in the August 22 offer. Similarly, Alcoff had not seen documents relating to the new training proposal. The Union was also entitled to information about work force changes. The Respondent failed to provide any of the information requested.

Concerning the Union's later information request on September 12 for details of employees performing bargaining unit work, a copy of the current schedule for each department and unit and a copy of all material describing the new terms and conditions of employment for the units at Victoria and Wayneview, I credit Alcoff's uncontradicted testimony that the information provided by Alessi in response to this request was incomplete and inaccurate. The Union's request for information was renewed by letter of January 19, 2006. The Respondent did not provide this information.

The Union was presumptively entitled to all the information which concerned terms and conditions applicable to the unit employees such as changes to the work force, information about current employees, schedules, and the like. To the extent that the early information provided by Nolan with respect to Wayneview differed from relevant information about Victoria, the Respondent should have provided this information to Alcoff. Further, the Union was entitled to any information relevant to understanding the August 22 offer, later implemented by Wayneview and Victoria. Respondents Wayneview and Victoria violated Section 8(a)(5) of the Act by failing and refusing to provide information requested by the Union.

C. The Decertification Petition at Wayneview

The testimony that Staffing Coordinator Christopher Irizarry was given permission by Director of Nursing Ziccone to leave the premises, while still being paid for his time, and observe the Wayneview unit employees signing a decertification petition is uncontradicted on the record. Likewise, Irizarry's testimony that he gave the signed petition to Ziccone is uncontradicted. These events took place on or after August 22, 2005. Administrator Nolan testified that she knew Irizarry was involved in the decertification effort and she knew that Ziccone had the petition. Further, employee Margaly Pierre testified without contradiction that Ziccone gave her a decertification petition to sign. Ziccone told Pierre that if she signed she would be permitted to return to work and Ziccone put Pierre in touch with unit clerk Simone Henderson who promised Pierre health benefits, vacation and PTO days if she signed the petition. The decertification petition was filed in the Regional Office on August 25.

By assisting employees in the solicitation of signatures on a petition to decertify the Union and by promising employees a return to work and increased benefits if they signed a petition to decertify the Union, Respondent Wayneview violated section 8(a)(1) of the Act. *Process Supply*, 300 NLRB 756, 758 (1990).

D. Interference with Union Activities

Wayneview shop steward Marcia Cover testified that Director of Housekeeping John Larina called an employee meeting before August 23 and told employees not to wear Union buttons and not to talk about the Union. Larina threatened the employees with loss of benefits and loss of jobs if they went on strike. Larina instructed Cover to remove a Union button she was wearing and threatened that she would get into trouble if she continued to wear the button. Administrator Nolan acknowledged that Larina had instructed employees not to wear Union buttons. Larina told Marjorie Barnett that Nolan said workers caught wearing Union stickers would be fired or they would lose their seniority. Larina also told Barnett that Nolan said she did not want employees talking to the Union or they would be fired. I credit Cover and Barnett's uncontradicted testimony. By threatening employees that they would be fired if they wore Union buttons or spoke to the Union, by instructing employees to remove Union buttons, and by threatening employees with loss of their jobs or loss of benefits if they participated in a strike, Respondent Wayneview violated Section 8(a)(1) of the Act. *Dayton Newspapers*, 339 NLRB 650, 652 (2003).

Victoria Dietary Supervisor Anthony Merez posted a sign on June 27, 2005 advising unit members that employees who did not work during a strike would be terminated. Victoria employee Geraldine Morgan testified without contradiction that several days before August 23 Assistant Director of Nursing Rita Burke said that if employees went out on strike "they could all be fired." By threatening employees with discharge if they participated in a strike, Respondent Victoria violated section 8(a)(1) of the Act. *Dayton Newspapers*, supra.

The General Counsel argues that the employer's advertising for strike replacements at higher wages than paid to bargaining unit employees was intended to undermine support of the Union in violation of Section 8(a)(1). In *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 638 (2001), the Board found such a violation based on various unlawful actions and "the Respondent's corporatewide and centralized policy of hostility to its employees' rights" and "the unexplained and publicized offer of higher wages to strike replacements." Here, Nolan explained the higher wages as based on the fact that the work was temporary and carried no guarantee that it would ever

[61] As stated above, I assume that the same health plan was in effect at Victoria.

be performed or compensated. The General Counsel's proof in the instant case does not rise to the level of hostility to employee rights made out in the cited case. I shall dismiss this allegation.

E. Denial of Access

The collective-bargaining agreements of Wayneview and Victoria provide that Union representatives have access to the facilities in a manner which does not unreasonably interfere with the operation of the employer. The contracts also provide for the Union to conduct meetings during non-work time with the approval of the Administrator. The uncontradicted testimony of the Union agents, whom I credit, shows that at both Victoria and Wayneview the issue of Union access was handled in a similar fashion. At the Victoria building Union agent Gorfinkle would notify Assistant Administrator Guglielmo of his approximate arrival time and he would regularly meet with employees near the time clock and break room during their non-work time. Gorfinkle also met with employees near the management offices to prepare for grievance meetings. Gorfinkle never asked for permission to enter the building on these occasions. A formal meeting with a group of employees required the permission of management and arrangements for release time. Similarly, at Wayneview Union agent Hamilton would inform Nolan that he was en route to the facility and he would wave at the receptionist and proceed to the employee break room. Hamilton would ask Nolan's permission if he planned to conduct an "actual meeting" to be sure that the start and end time met with her approval.

Beginning on September 6, 2005 Gorfinkle and other Union representatives have been denied access to Victoria for the purpose of meeting with employees. The Union agents may no longer meet with employees at the time clock or in the break room on an informal basis during non-work time. The only occasion when Union agents have been allowed into the building was for a grievance meeting with management. Guglielmo wrote to Gorfinkle citing a "major disruption" and alleged that a resident walking in the grounds once returned to the building wearing a Union button. Guglielmo and Administrator DelSordo did not testify herein. Gorfinkle testified about the occasion on September 6 when he accompanied employees seeking to return to work. Gorfinkle did not state that Guglielmo was present. I have found that Gorfinkle is a reliable witness and I find, consistent with his testimony, that he and a group of employees walked from the time clock area to the management area to speak to DelSordo. The group "may have been loud" in an attempt to get DelSordo's attention. There is no evidence that they were loud while walking the distance from the back time clock area to the front area where DelSordo's office is located. The uncontradicted testimony shows that the group walked past a nurse's station but did not enter the patient care wing behind the nurse's station. The group did not walk in front of the patient dining area. There is no evidence that any patient saw or heard the group and there is no contention, aside from Guglielmo's hearsay letter, that this was a major disruption in patient tranquility. If there had been a disruption Respondent could not have failed to call those who witnessed it and could not have failed to document it by actual witness statements in great detail. Concerning the hearsay allegation that a resident returned from the grounds wearing a union button, even less need be said. There is no evidence that this actually happened, no hint as to when this might have been and no evidence from whom the button was procured or who placed the button on the patient.

I find that Victoria unilaterally effected a change in a mandatory subject of bargaining by denying access to Union agents in violation of Section 8(a)(5) of the Act.

Union agent Hamilton's testimony shows that from August 29, 2005 he was barred from entering Wayneview. Administrator Nolan, who testified herein but did not mention the subject of Union access, informed Hamilton that Tufariello gave the order not to admit him.[62] Hamilton may no longer meet the employees in the break room on non-work time. Hamilton was denied the opportunity to enter the facility to investigate a unit employee's discharge when Nolan called the police. Nolan's formal letter of September 28, 2005 denying access to Hamilton cited a "major disruption" and incidents where residents were drawn into the dispute as reasons for barring the Union from Wayneview. There is no evidence in the record, either testimonial or documentary, about any untoward incidents at Wayneview which could be in any way used to justify the refusal to permit Union agents their usual access to the facility. I find that Wayneview unilaterally effected a change in a mandatory subject of bargaining by denying access to union agents in violation of section 8(a)(5) of the Act.

F. Lock Out of Wayneview Employees

The record shows that on August 12, 2005 the Union sent a 10-day strike notice to Wayneview stating that a strike, picketing or other concerted refusal to work would begin at 7 am on August 23. After the notice was sent various employees and Unions stewards informed Administrator Nolan that the Wayneview employees did not want to strike. Nolan herself testified that the majority if not all the bargaining unit employees at Wayneview did not want to strike. Union agent Alcoff said that he knew the Wayneview employees would never vote to go out on strike.

Nolan prepared for a possible strike by contacting the potential replacement employees she had lined up previously. Wayneview managers prepared a work schedule of replacement employees for two weeks commencing August 23. Nolan testified that she had told the potential replacement employees they might never work at all and that they could be replaced by the original employees at any time. She said the replacements would be brought in "if there were actually a job action."

On August 22 the Wayneview employees voted not to strike and Union president Silva notified Tufariello by fax that the employees would report to work at their usual times and would conduct one day of informational picketing to end at 4 pm. Alessi, who had received the fax at 4:55 pm, responded that Wayneview had placed replacement employees on the schedule and that Wayneview employees should not report to work "until further notice." Nolan did not relate when she learned that

[62] I note that Tufariello was called by Respondent herein but he did not testify on this subject.

the employees had voted not to strike. I note that the vote took place at Wayneview which is Nolan's workplace. I will assume that she learned of the vote no later than 4:55 pm.

Wayneview unit employees were not permitted to work on August 23 and employees returning to their regular schedules after August 23 were not permitted to work. Margaly Pierre returned from vacation and entered the facility. Director of Nursing Ziccone and Assistant Director of Nursing Develez welcomed Pierre back to work. Ziccone told Pierre that the employees were on strike and asked if she would work without the Union. Ziccone gave Pierre a decertification petition saying that if Pierre wanted to work she had to sign the petition. Although Pierre signed the decertification petition Ziccone eventually informed Pierre that "the lawyer" did not want Union members in the building and she was told to leave. As described above in detail, on about August 24 Assistant Administrator Ziccone gave two employees permission to leave the building during their paid work time to collect signed decertification petitions. Ziccone then took possession of the petitions. As described in detail above, Wayneview Director of Housekeeping Larina called the employees to a meeting before the lockout and instructed them not to wear Union buttons and not to talk about the Union. Larina threatened the employees if they went on strike they would lose benefits and would lose their jobs and he told employee Cover to remove a Union button or she would get into trouble. Just before August 23 Larina told employee Barnett that Nolan said employees wearing a Union sticker would be fired or they would lose their seniority. I have found above that Wayneview violated Section 8(a)(1) of the Act by assisting in a decertification effort and by conditioning a return to work and increased benefits on the signing of a decertification petition. I have found above that Respondent Wayneview violated Section 8(a)(1) of the Act by threatening employees.

The anti union animus of Wayneview is clearly shown by these violations of Section 8(a)(1). The record shows that Wayneview managers and supervisors unlawfully sought to discourage employees from supporting the Union in the bargaining effort before the lockout and actively assisted in the preparation of a decertification petition during the lockout. I conclude that Wayneview locked out its employees on August 23 to discourage them from supporting the Union and to encourage them to decertify the Union. The lockout thus had an unlawful motive.

The lockout was also rendered unlawful by Wayneview's failure to inform the Union on August 22 of the employer's stated conditions for reinstating the unit employees. Alessi's letter notifying Silva of the lockout merely said that there was no work for the employees and that they should not report until further notice. "A fundamental principle underlying a lawful lockout is that the Union must be informed of the employer's demands, so that the Union can evaluate whether to accept them and obtain reinstatement." *Dayton Newspapers*, 339 NLRB 650, 656 (2003). I note that conditions relating to the return to work of Wayneview employees were not mentioned in Alessi's August 26 letter to Alcoff.

The employer refused to bargain after transmitting its August 22 offer even though the parties had not reached impasse. Nolan's August 31 letter to Silva that Wayneview would implement its final offer on September 6, 2005 constituted a threat that Wayneview would impose its offer of August 22 in the absence of an impasse in the collective bargaining. A lockout in an attempt to coerce the Union to accept the employer's unilaterally implemented final offer is unlawful. *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991).

As discussed above Nolan gave unreliable and shifting testimony about why employees were not permitted to work after August 23. She stated both that the employees did not want to strike and that the employees themselves had made the decision not to work because "they had a job action that was in full force." She said the unit employees did not actually come to work that day, that she could not recall if anyone came to work, that only one person came to work, and she finally admitted that she herself told the police to bar anyone not on the list so that only replacement employees could enter the facility to work. Having found above that Nolan was not a credible or truthful witness, I do not credit Nolan's testimony about a verbal commitment to temporary workers that they would be employed for two weeks. Further, Nolan did not actually testify that Respondent had any financial obligation to the temporary employees. Finally, Nolan did not actually testify that Wayneview was precluded by practical or other considerations from notifying the temporary employees on August 22 that they should not report the next day. Indeed, Nolan also testified that she told the potential replacements that they might never work and that they might be told to stop work at any time, a reasonable precaution in view of her knowledge that the Wayneview employees did not want to strike. Nolan's testimony is not specific and not worthy of belief and it cannot support a finding that Wayneview had a legitimate and substantial business justification for barring the unit employees from work beginning on August 23, 2005.[63]

Contrary to the assertion in Respondent's Brief, there is no record testimony that Wayneview did not permit unit employees to work because it feared that the employees would work for one day and then walk out the following days.[64] Also, contrary to Respondent's Brief, the Union clearly notified Wayneview that the activity in the Section 8 (g) notice would be "limited to informational picketing" from 7 am to 4 pm on one specified day during the employees' non-working time. The Union also made clear that all employees would report and work their regular schedules. No witness on behalf of Respondent expressed any fear, either verbally or in writing, that Wayneview employees would call an unexpected strike. Further, Alessi's letter stating that there was no work for Wayneview employees did not mention any fear that the employees would change their minds and strike.

Respondent cites *Sociedad Espanola*, 342 NLRB 458 (2004), for the proposition that its commitment to the continuity of patient care justified the lockout. In that case a union repre-

[63] Cf. *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006), where the employer was obligated to pay prospective replacement employees.

[64] Additionally, Respondent's Brief cites transcript pages for this assertion but the pages do not support the matter in the Brief.

senting hospital employees announced two strikes; one two day strike would take place from December 22 to 24 and the second strike would take place from December 31 to January 2. Even though the union officials cancelled the first strike at the 11th hour, the hospital conducted a lockout beginning December 22. The Board held that the lockout was prompted by legitimate and substantial business consideration. The Board relied upon a number of factors in reaching its conclusion: The union intended to strike on December 22 and cancelled only at 8:15 the night before; some unit members might not show up the next morning and it was difficult to recruit replacements during the holiday season; the union did not cancel the second strike; replacements had been hired and a substantial number of them were already sleeping in the hospital and had to be paid for their time; if the replacements were sent home on December 22 they might not show up for the second scheduled strike on December 31. The facts in the instant case are very different: the Wayneview employees had never wanted to strike, they voted not to strike and they were fully aware that a strike was not scheduled; Administrator Nolan knew that the employees did not want to strike and she was notified in the afternoon that employees had voted against a strike; no replacements were on the premises until the morning shift began at the same time that all the unit members presented themselves for work and were excluded from the facility; there was no testimony that Wayneview would be financially liable if the replacements had been sent home without working; there was no indication that Wayneview employees might vote to strike in a few days.

The uncontradicted evidence of Marjorie Barnett shows that some employees were permitted to return to work at Wayneview on September 6 but that some unit employees were sent home. Although Respondent apparently maintains that it sent a letter to employees before September 6 instructing them to contact their supervisors before that date in order to return to work, the only such letter introduced into evidence was postmarked September 6 and received by the employee after September 6. Wayneview employee Marcia Cover never received any such letter and after being permitted to work for a while on September 6, Cover was sent home and recalled for September 8. Employee Margaly Pierre received a letter from Wayneview and was not called back to work until September 8. No valid business justification was advanced by any employer witness for the failure to return all the employees normally scheduled to work on September 6 and to conduct a partial lockout.

I conclude that Wayneview violated Section 8(a)(1), (3) and (5) by locking out and refusing to permit Wayneview employees to work their regular schedules beginning on August 23, 2005.

G. Lockout of Victoria Employees

On August 12, 2005 the Union sent a 10-day strike notice to Victoria stating that a strike, picketing or other concerted refusal to work activities would take place beginning at 7:00 am on Tuesday August 23, 2005. As described above, on August 22 the Victoria unit employees voted to conduct a strike with the condition that after five days the employees would decide whether to return to work. The Victoria employees engaged in a strike beginning August 23. It is undisputed that this was an economic strike. On August 26 Alcoff wrote to Administrator DelSordo stating that the striking employees "unconditionally offer to return to work Sunday, August 28, 2005 . . . at 6:00 am." As described in detail above, Alessi then informed Alcoff that the employer did not view the offer to return as unconditional because the Union had not accepted the employer's "last best offer." When Alcoff said no one had told the Union that the August 22 faxed offer was the last best offer and that he wanted to keep bargaining, Alessi told Alcoff that if the Union persisted in this course Tufariello would permanently replace the employees.

Alessi's August 26 letter to Alcoff reiterated this position. Alessi said Victoria would continue to employ the replacements and "any SEIU members who, of their own volition, choose to cross the picket line." Alessi informed the Union that beginning September 6, 2005 Victoria would implement its August 22 offer and would permanently replace the unit employees.

When the Victoria employees presented themselves for work on August 28 at 6 am Alcoff told DelSordo that the unit members were there to work pursuant to the statement in Alessi's letter that employees who wished could come to work "of their own volition." DelSordo stated that if the employees were not on the schedule they could not work. It is undisputed that the unit employees were not permitted to work on August 28. When DelSordo was asked how the employees could get on the schedule he did not reply. Indeed, after consulting with Tufariello, DelSordo told the Union representatives and the employees that the people were not allowed to work because there was a lock-out. Thus, contrary to Alessi's letter that employees could come to work if they wished, Victoria implemented a lockout on August 28.

I find that Victoria locked out its employees on August 28 after they announced the termination of their economic strike and attempted to return to work pursuant to Respondent's offer that employees could return "of their own volition."

On September 1 the Union informed Respondent that the Victoria employees were told they were locked out on August 28. On September 3 the Union informed Respondent that the Victoria employees sought to return to work on September 6 under the terms of the expired contract. The Union reiterated that the parties were not at impasse and it requested dates for bargaining from the employer.

On September 6 Union agent Gorfinkle accompanied Victoria employees who attempted to return to work. Many of the employees could not find their time cards in the accustomed place. DelSordo told Gorfinkle and the employees that the employees should have contacted their supervisors by September 2 if they wanted to return to work. DelSordo said that employees had been notified of this condition by letter. As noted above, DelSordo did not testify herein and no such letter has ever been produced. I find that no such letter was sent to employees. Further, based on the testimony of Ortiz described above, I find that after she spoke to DelSordo on August 29 she, and perhaps Director of Nursing Savarese, called only some Victoria employees and instructed them to telephone their supervisors so that they could go back to work on September 6. I find that the unit members as a whole were never told how to get placed on the schedule for September 6. Certainly, no re-

sponse was ever made to the Union's requests for information on how the unit employees could be returned to the schedule. I find that on September 6 DelSordo refused to let unit members return to work. I find that DelSordo informed the Union on September 6 that the unit members who were not on the schedule had been permanently replaced.

The record shows that employees who were locked out in this manner were not recalled to their former positions with their former benefits. Geraldine Morgan was called back to work in October 2006 on an on-call basis without her former benefits. Agathe Guillaume was not placed back on the schedule when she called Savarese on September 10, 2005. Victoria reinstated Guillaume on January 23, 2006 but without crediting her with the holidays, vacation and sick days that she had accumulated prior to the lockout and without her uniform allowance. I find that Respondent violated Section 8(a)(3) and (5) of the Act by unilaterally withdrawing benefits from employees because they engaged in a strike and supported the Union.

I find that Alcoff's August 26 letter to DelSordo stating that the striking employees unconditionally offered to return to work was a valid unconditional offer. This offer was made when the conditions of the expired contract were in effect at Victoria and before Victoria had hired any permanent replacements. Economic strikers whose positions have not been filled by permanent replacements are entitled to immediate reinstatement upon their unconditional offer to return. The refusal to reinstate striking employees on August 28, 2005 was a violation of Section 8(a)(3) of the Act. *Harvey Mfg.*, 309 NLRB 465, 466 (1992).

I have found above that no bargaining impasse existed in the negotiations between Respondent and the Union. I have found above that before Alessi's August 26 telephone call and letter to Alcoff the Union had never been informed that Respondent considered the August 22 proposal to the employer's "final offer." In any event, the employer was not entitled to impose a final offer because there was no valid impasse. The record shows that Victoria imposed the terms of the August 22 offer on September 6. The unilateral imposition of the August 22 offer was unlawful in the absence of a bargaining impasse. The striking employees should have been reinstated pursuant to the terms of the expired contract. *Spenton/Red Star Cos.*, 319 NLRB 988, 990 (1995).

Victoria's refusal to reinstate the strikers after their unconditional offer to return on August 28 constituted a lockout. Indeed, DelSordo told Alcoff and the assembled employees that the employees could not return to work because they were locked out. Alessi replied to the Alcoff's request to keep bargaining with threat that if the Union persisted in attempts to bargain on the August 22 proposal the employer would permanently replace the employees. An employer which locks out its employees in an attempt to coerce the Union to accept the employer's unilaterally implemented final offer violates Section 8(a)(1), (3) and (5) of the Act. *Teamster Local 639 v. NLRB*, supra at 1084.

I note that neither DelSordo nor Alessi ever informed the Union that the Victoria employees could not return to work on August 28 because of any commitment to the temporary workers. No Victoria administrator or manager testified concerning any business justification for conducting the lockout. Indeed, as found above, Supervisor Merez posted a sign advising Victoria employees that they would be fired if they struck and Assistant Director of Nursing Burke said if employees went on strike they could all be fired. Thus, even before the unit employees struck the employer was contemplating their discharge and replacement. The employer had received notice on August 26 that the strike would end on August 28 and all the employees normally scheduled to work that day presented themselves at the appropriate hour so that Victoria could staff its facility and ensure patient care. There had been no threats of future strikes. There was no record evidence that Victoria would be financially liable to the replacements if it terminated them on August 28.

Furthermore, Victoria selectively permitted some employees to return to work before September 6 and shortly thereafter, but many employees were not reinstated for some period of time thereafter. This action constituted a partial lockout. Respondent did not meet its burden to show a business justification for not returning all the Victoria employees to work once the strike ended. In the absence of factors justifying a partial lockout, Respondent violated Section 8(a)(3) of the Act. *Field Bridge Associates*, 306 NLRB 322, 334 (1992).

It is unlawful permanently to replace or discharge an unlawfully locked out employee. Respondent's threats permanently to replace employees were first spoken and written by Alessi on August 26 and on September 6 DelSordo informed the Union and the employees that Victoria employees who were not on the schedule had been permanently replaced. This threat constituted a violation of Section 8(a)(1) of the Act.

H. Suspension of Marjorie Barnett

The facts set forth in detail above concerning the suspension of Marjorie Barnett are undisputed. Barnett, the most active shop steward at Wayneview, a person who often filed grievances and who attended the negotiations as a member of the committee, was given a three-day suspension for events occurring on September 6, the first day the locked out employees were permitted to return back to work. Barnett's uncontradicted testimony establishes that the suspensions were for acts of commission or omission that were caused by conditions at Wayneview that were beyond Barnett's control. The patient's bed could not be made up and the patient returned to it until the bed was first dried and cleaned, the pressure relieving mattress had to be brought by the maintenance employees and there was no clean pad available for use with the Hoyer lift. Administrator Nolan did not dispute Barnett's testimony; Nolan acknowledged that there were "major obstacles" that precluded Barnett from accomplishing the tasks for which she had been disciplined.

Factors including Wayneview's knowledge of Barnett's Union activities, Wayneview's demonstrated anti-union animus, the timing of Barnett's written notices dated on the day the unit employees returned to work and the total lack of validity to the warning notices all lead me to conclude that Wayneview suspended Barnett because she supported the Union. I find that Barnett's Union activities were a motivating factor in the three-day suspension imposed upon Barnett. I find that Respondent

has not shown that it would have suspended Barnett in the absence of her Union activities.[65] Indeed, Nolan admitted that Respondent eventually reversed its decision and paid Barnett for the three days during which she had served her suspension because Barnett could not have carried out the work she had been suspended for failing to perform. It is of no moment that Wayneview has now rescinded the suspension. I note further, in connection with the remedial order to be recommended, that Nolan did not testify that the suspension had been expunged from Barnett's personnel file. By suspending Marjorie Barnett because she supported the Union Respondent violated Section 8(a)(3) and (1) of the Act.

I have considered the other points raised in Respondent's Brief and I find them without merit. Many are procedural points not urged during the hearing and many are based on the testimony of witnesses whom I have found not to be worthy of belief.

CONCLUSIONS OF LAW

1. SEIU 1199, New Jersey Health Care Union, is the exclusive collective bargaining representative of the employees of Wayneview Care Center in the following appropriate unit:

> All full-time and regular part-time CNAs, housekeeping, laundry, and dietary employees employed by the Employer at its Wayne facility, but excluding all other employees including managers, statutory supervisors and guards within the meaning of the Act.

2. By suspending Marjorie Barnett, Respondent Wayneview violated Section 8 (a) (1) and (3) of the Act.

3. By assisting employees in the solicitation of signatures on a petition to decertify the Union and by promising employees a return to work and increased benefits if they signed a petition to decertify the Union, Respondent Wayneview violated Section 8(a)(1) of the Act.

4. By threatening employees that they would be fired if they wore Union buttons or spoke to the Union and by instructing employees to remove Union buttons, Respondent Wayneview violated Section 8(a)(1) of the Act.

5. By locking out its employees because they supported the Union and to coerce the Union into accepting unilaterally implemented terms and conditions of employment, Respondent Wayneview violated Section 8(a)(1), (3) and (5) of the Act.

6. By threatening to and by unilaterally implementing new terms and conditions of employment prior to reaching a lawful impasse in collective bargaining negotiations and by refusing to meet with the Union, Respondent Wayneview violated Section 8(a)(1) and (5) of the Act.

7. By denying Union representatives access to the facility, Respondent Wayneview has violated Section 8(a)(5) and (1) of the Act.

8. By failing to provide information to the Union, Respondent Wayneview violated Section 8(a)(5) of the Act.

9. SEIU 1199, New Jersey Health Care Union, is the exclusive collective bargaining representative of the employees of Victoria Health Care Center in the following appropriate unit:

> All full-time and regular part-time CNAs, housekeeping, laundry, and dietary employees employed by the Employer at its Matawan facility, but excluding all other employees including managers, statutory supervisors and guards within the meaning of the Act.

10. By threatening employees with discharge if they engaged in a lawful strike, Respondent Victoria violated Section 8(a)(1) of the Act.

11. By withdrawing benefits and uniform allowances from employees because they participated in a strike and supported the Union, Respondent Victoria violated Section 8(a)(3) and (1) of the Act.

12. By threatening to and by unilaterally implementing new terms and conditions of employment prior to reaching a lawful impasse in collective bargaining negotiations and by refusing to meet with the Union, Respondent Victoria violated Section 8(a)(1) and (5) of the Act.

13. By denying Union representatives access to the facility, Respondent Victoria violated Section 8(a)(5) and (1) of the Act.

14. By failing to provide information to the Union, Respondent Victoria violated Section 8(a)(5) of the Act.

15. By conditioning agreement and return to work of employees on the Union's agreement to withdraw its pending charges against both Victoria and Wayneview, Respondent Victoria violated Section 8(a)(5) of the Act.

16. By threatening permanently to replace unlawfully locked out employees, Respondent Victoria violated Section 8(a)(1) of the Act.

17. By refusing to reinstate striking employees and locking out employees, Respondent Victoria violated Section 8(a)(1), (3) and (5) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents having discriminatorily locked out employees, the Respondents must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of their lockout to date of proper offer of reinstatement, 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).

The information that Respondents Wayneview and Victoria are required to provide to the Union regarding their respective unit employees is all information concerning terms and conditions of employment of non-unit employees that Respondents have applied to the unit employees pursuant to the August 22 offer and its implementation, documents relating to the August 22 training proposal, information about changes to the work

[65] *Wright Line*, 251 NLRB 1083 (1980).

force since the lockout began, the current schedule for each department and unit relevant to the unit employees and all material describing the newly implemented terms and conditions of employment for unit employees.

[Recommended Order omitted from publication.]