JD-02-09
Easton, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MANOR CARE OF EASTON, PA, LLC, d/b/a
MANORCARE HEALTH SERVICES—EASTON,

and

Cases 4–CA–36064
4–CA–36190

SERVICE EMPLOYEES INTERNATIONAL UNION
HEALTHCARE PA.

Decision and Order

DAVID I. GOLDMAN
Administrative Law Judge

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DECISION

DAVID I. GOLDMAN, Administrative Law Judge. These cases arise out of a union's organizing effort at a nursing home in Easton, Pennsylvania. The chief union activist among the employees was given a final warning—subject to termination for further misconduct—for soliciting residents to sign a letter to a Pennsylvania state legislator. The employee denied soliciting residents to sign the letter, which asserted that the facility was short-staffed in a way that affected care and asked the legislator to convene a hearing at which there could be testimony as to the need for more staffing and better care. The Government alleges that the warning for the solicitation was unlawfully motivated retaliation for the employee's general union activism, and that, in any event, the solicitation was protected conduct for which she could not be disciplined. In addition, the Government alleges that, in fact, the employee did not engage in the solicitation. The Government also alleges that as part of its effort to combat the organizing campaign, the employer met with employees and solicited grievances and, in order to discourage employees from seeking union representation, implied that it would remedy the grievances, and in certain cases did remedy the grievances. It is also alleged that the employer transferred disfavored supervisors in order to encourage employees not to support the union. In addition, the Government alleges that in order to discourage employees from supporting the union, the employer increased wages and starting rates, and provided bonuses to employees. Finally, the Government alleges an assortment of unlawful interrogations, directives, and threats, related to union activity.

STATEMENT OF THE CASE

On March 31, 2008, the Charging Party Service Employee International Union Healthcare PA (Union or SEIU) filed an unfair labor practice charge, docketed by the Philadelphia regional office of the National Labor Relations Board (Board) as case no. 4–CA–36064, against the Respondent Manor Care of Easton, PA, LLC d/b/a ManorCare Health Services – Easton (Manorcare or Easton). The Union filed an amended charge June 2, 2008. On June 11, 2008, the Board's General Counsel issued a complaint alleging violations of the National Labor Relations Act (Act) by Manorcare. On June 13, 2008, the Union filed an additional charge, docketed by the Board as 4–CA–36190. On August 25, 2008, the General Counsel issued an order consolidating the two cases and issued a consolidated complaint.

This dispute was tried in Allentown, Pennsylvania, on September 10–12, and 15, 2008. Counsel for the General Counsel, the Respondent, and the Charging Party filed briefs in support of their positions on November 13, 2008. On the entire record, including my observation of the demeanor of the witnesses and other indicia of credibility, I make the following findings of fact, conclusions of law, and recommendations.[1]

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[1]The transcript contains a number of errors and I formally correct the following on my own motion. On page 358, line 22, "MS. GIRER" is inserted in place of "JUDGE GOLDMAN." On page 626, line 28, "(recalled)" is deleted. On page 591, lines 4, 17, 20, 23, and page 592, lines 2, 4, 16, "MR. NELSON" is inserted in place of "MR. LUDWIG." All references to "MR. GIRER" are corrected to read "MS. GIRER." On page 208, line 18, "Lori" is inserted in place of "Barbara." The correct spelling of the following names is as follows: Trisha Miechur, Karolyn Collado; Lorie Heimbach, Paula Kublius, Marionlee Specter, Anne "Pua" Klinger, Ed Schuch. All references to these individuals are corrected to reflect the correct spelling. At the hearing, at the close of the General Counsel's case, the Respondent moved to dismiss certain allegations of the complaint (Tr. 474). I denied that motion on the record, but the ruling has been omitted from the transcript. I amend the transcript to add my denial of the motion.

JURISDICTION

The complaint alleges, the Respondent admits, and I find, that at all material times Manorcare has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. The complaint alleges, the Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

FINDINGS OF FACT

Background

The Manorcare facility in Easton is one of hundreds of short term post-acute and long-term care facilities operated in 30 states (primarily in Pennsylvania, Florida, Illinois, Michigan, and Ohio) by Manor Care, Inc., through its operating group HCR Manor Care (Manor Care). In July 2007,[2] Manor Care Inc. entered into a merger agreement, effective December 21, 2007, with an affiliate of the private equity investment firm, The Carlyle Group (Carlyle). Pursuant to this agreement, substantially all of Manor Care, Inc.'s common stock would be purchased by funds managed by Carlyle. Simply put, Carlyle was purchasing Manor Care, although since the purchase, Carlyle has not been involved in day-to-day operations of Manor Care facilities and the operations have not changed as a result of the change in control of the corporation.

The impending purchase of Manor Care figured prominently in a multi-state effort by the SEIU to organize Manor Care facilities, including the Manorcare in Easton, Pennsylvania. This national campaign was publicly launched on September 19 in Washington, D.C., at an "action" and press conference conducted by the Union at Carlyle headquarters.

As part of its campaign the Union highlighted concerns, reported independently in the national media, about the potentially adverse effect of buyouts by private equity firms on conditions for employees and residents of affected facilities. These concerns were the subject of union leafleting, rallies, and events at Carlyle headquarters in Washington D.C., Manor Care headquarters in Toledo, Ohio, and at a speaking engagement in Philadelphia by a chief executive of Carlyle. These events generated significant media coverage. In addition, union officials testified at hearings on the sale of HCR Manor Care convened by a Pennsylvania state legislator, Phyllis Mundy regarding the sale, a matter that required regulatory approval by the commonwealth. State approval was secured and the buyout went through on December 21.

These events serve as a backdrop for the events directly at issue in these cases, all of which occurred at the (approximately) 226-bed Manorcare facility in Easton.

The Easton Manorcare facility is a rectangular building administratively divided into 4 units, with a courtyard in the middle. Units 1–3 are on the first level. Unit 4 is on level two, on the back side of the building. Trisha Miechur has worked at Manorcare as a certified nurse assistant (CNA) since December 5, 2005. Her grandmother and aunt are residents of the facility. She works the 3 p.m. to 11 p.m. shift on unit 2, which is a rehabilitation unit with some long-term residents, and which is situated on the north and west wing of the first level. Between 4 and 6 CNAs work on unit 2 during each shift. Their direct supervisor is a nursing supervisor working on the floor. There is also an RN supervisor that is "everybody's supervisor." The RN supervisor, in turn, reports to the Director of Nursing (DON) or the DON's equivalent, the

[2] All subsequent dates refer to 2007, unless otherwise indicated.

Administrative Director of Nursing Services (ADNS). The DON reports to the facility administrator. A Human Resources (HR) Director also has significant supervisory authority.

On October 7, the SEIU leafleted HCR Manor Care facilities, including Manorcare in Easton. In late September, and increasingly, in October, Miechur and other employees were aware of the Union campaign and talked among themselves about the Union. According to CNA Anne "Pua" Klinger, "all the CNAs were talking about it."[3] In early October, Manorcare administrator Lynette Seiler played an antiunion video for employees at a mandatory inservice meeting. Although surely not its intended effect, the video presentation led Miechur to go home and search for the SEIU's website devoted to Carlyle/HCR Manor Care. She contacted the SEIU through the website. This contact led to a meeting in Miechur's home with Easton employees on October 18, conducted by SEIU organizer Edgar Arecna. The Union held regular meetings with Easton employees through December 2007.

October 2007 questioning of Miechur and Klinger

Around the time of the October 18 meeting—the record is unclear, whether it was before or after—Miechur was approached in the unit 2 clean utility room by Lori Heimbach. At that time, Heimbach held the positions of Assistant HR Director and Payroll Clerk. A few days later, on October 24, Heimbach was promoted to HR Director. Heimbach asked if she could speak to Miechur. Miechur said, yes, and Heimbach "asked me have I heard about SEIU trying to organize in [the] Easton facility." Miechur said she had, and said, "I believe in it." Heimbach asked her "why do you believe in it" and added, "[t]he Union can't do nothing for you." Miechur replied that "some hope of change" was necessary and then resisted further conversation, saying "is this conversation over. I have residents to attend to." That was the end of that conversation. However, a couple of weeks later Heimbach approached Miechur on the employee smoking deck and asked Miechur if she had changed her mind about the Union. Miechur replied "hell no." That ended the conversation and Heimbach left.[4]

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[3] "Pua" Klinger was a 17-year employee at Manorcare. I found her a particularly credible witness to events. However, I think that the weight of the evidence suggests that she erred slightly in her testimony (to be fair, offered, with uncertainty characteristic of someone seeking to answer accurately) and that events she attributed to September actually occurred in October. These include discussions about the Union with Miechur, attendance at a union meeting at a local diner, and discussion with a supervisor about the Union. Similarly, with regard to when, prior to October 2007, corporate management had last held meetings with employees, it appears that such meetings were held in 2004, and not longer than that as estimated by Klinger at trial. But these are small discrepancies, offered, as I said, with a measure of uncertainty. On the substance of her testimony, Klinger was an excellent witness. Her memory was sharp, her recall of events was clear, and she provided a lot of detail in a direct and nontendentious manner. Unless specifically otherwise noted, her testimony is credited.

[4] This account of these incidents is based on the credited undisputed testimony of Miechur. I found Miechur, for the most part, a creditable witness. Her testimony was presented with honest demeanor, and was free from overstatement or inconsistency. Heimbach on the other hand had an unfortunate tendency to not recall specifics of many of the conversations she was asked about, and in regards to much of the questioning appeared eager to take refuge in a failure to recollect. However, those problems are more relevant in considering other events and conversations. In the case of the two incidents described in the text here, the credibility of Heimbach's testimony is not directly at issue, as she did not attempt to rebut Miechur's testimony on these points. Miechur's undisputed account of these incidents is credited.

At the time of these conversations, Miechur's support for the Union had not been publicly revealed. She had not participated in any of the SEIU's public events, such as the September 19 trip to Carlyle headquarters in Washington D.C., the October 10 press conference in Harrisburg and other state capitals, or the October 17 rally at HCR Manor Care headquarters in Toledo, Ohio, that was followed by a caravan to Washington D.C. the next day. However, employees were talking about the Union among themselves at the facility on a regular basis, and the employer had begun a campaign to "educate" the employees about unions. The first record reference to this is the early October video played for employees by Administrator Seiler. By mid-October, at the latest, supervisors were being assigned to talk to individual employees about the Union.

In October, Pua Klinger was approached by Deborah Kushnerick, a Registered Nurse Assessment Coordinator, who had been specifically assigned to speak to Klinger about unions as part of the employer's antiunion campaign.[5] Klinger was not an open union supporter. When Klinger was coming to work one day Kushnerick approached her and told Klinger she wanted to talk. She ushered Klinger into a small hallway leading to the courtyard and asked if Klinger had "heard that they're trying to get a union in." Kushnerick asked Klinger if she knew anything about unions. Klinger responded that her husband had been a union member for 30 years, and "I know there is good things and I know there is bad things." That was the end of the conversation.[6]

October 29 & 30, 2007 small group meetings

On October 29 and 30, Regional Director of Operations Diana Johnston and Regional Human Resources Director Renee Burns conducted small group meetings, primarily with CNAs, but also with nurses and some other employees at the Easton facility. The stated purpose of the meetings was to solicit complaints and problems from the employees from which an "action plan" was to be created to address the problems raised by employees.

According to Burns, small group meetings have been conducted in the past at various HCR facilities "in one format or another." At Easton the last such meetings—indeed, the only one at Easton shown by the evidence—were conducted in late 2004, and by all evidence,

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[5]Kushnerick's status as a supervisor and agent of the Respondent is admitted by the Respondent.

[6]Kushnerick denied this conversation—sort of. Her denials were unsure and equivocal. Asked if she had asked Klinger if Klinger knew anything about the Union, Kushnerick answered, "I don't think in that context, no. No." The "context" included "lots of conversations" with employees, and Klinger, about the Union as part of an effort by management that Kushnerick characterized as providing "educational" materials to help employees to "choos[e]" on the union issue. With some effort, on cross-examination Kushnerick admitted that "I suppose you could say" that the information she was providing about the Union was negative. Of course, an employer's distribution of antiunion materials is not suspect, but Kushnerick's lack of candor was. Kushnerick's denials of whether she asked Klinger if she knew anything about the Union or whether Klinger had mentioned her husband's union affiliation, were also, decidedly equivocal. As noted, supra, I found Klinger a very creditable witness. I do not believe she made up this conversation. Her account is credited over Kushnerick's denials.

involved larger groups of employees than in October 2007, but did involve the solicitation of employee complaints.[7]

In August 2007, Manor Care established and distributed to managers a policy (R. Exh. 7) providing for small group meetings to be held every other month in specific format and manner, at facilities across the company. The small group meetings were envisioned as a component part of HCR Manor Care's corporate Continuous Employee Communications (CEC) program (R. Exh. 8) also unveiled to managers in August 2007. The CEC program, among other things, established small group meetings and set forth with great detail the procedures to be followed in conducting small group meetings. According to Burns, the CEC document "is really kind of a process document that details, you know, why we do small group meetings, what we hope to accomplish with the small group meetings, how we want the minutes taken, what we want the format of the action plan to look like."

These two documents—the CEC manual, and the small group meeting policy—instruct the managers that small group meetings are to be conducted jointly by the facility manager/ administrator and a representative from the facility's HR department. The new policy also calls for corporate Regional Directors of Operations and Regional Human Resources managers to conduct a small group meeting at each of their locations every 12–18 months. The CEC program designates in great detail the format of the meetings, suggests opening comments, and establishes the structure and procedures to be followed in the meeting. The document provides that a flip chart or easel should be used to list employee concerns in order "to provide added visibility of the commitment to really hear the concerns." The CEC document further instructs that it is preferable to use the same flip chart in subsequent meetings, noting that when an "item is resolved, visibly crossing off that item dramatizes for employees our ability to hear concerns and resolve the issue." The small group meeting procedures call for the establishment of Action Plans which capture all employee concerns and can be posted or referred to in larger staff meetings to show the status of the issues and "dramatize the fact that issues are heard, action is taken and the issue is resolved."

It cannot escape notice that the introductory paragraph of the CEC program document lists "mak[ing] third-party representation unnecessary" as one of the four benefits (along with enhanced productivity, improved retention and ultimately better services) of the environment that Manor Care hopes to create through the CEC program. To that end, the CEC manual suggests that "in locations with significant employee relations concerns or labor activity" it may be "more appropriate" for the regional director of operations and regional HR representative to conduct small group meetings twice yearly. The CEC manual includes as a "key component" of the overall program "vulnerability assessments" which are a method to assess the "overall employee relations climate, focusing on vulnerability to union organizing."

In Easton, on September 29 and 30, Johnson and Burns met with numerous employees, variously estimated at 70–80 by Burns and 100–120 by Johnson, over the two-day period. The meetings lasted 10 to 30 minutes depending on the size of the group and the talkativeness of the employees. For management, Burns did 90 percent of the talking, Johnson said little. Meetings were conducted on all three shifts. According to Burns, in instituting the meeting she followed the procedures set forth in the August CEC document.

[7]Johnson testified that prior small group meetings were "exactly the same," as the October 2007 meetings, but this must be discounted by a noticeable tendency to adapt her testimony to the perceived needs of the Respondent's case.

Although the CEC manual suggests that the small group meetings be voluntary, at Easton, employees were led to believe, or were told outright, that the meetings were mandatory. Miechur and CNA Xavier Cordes were in the same small group meeting, along with one other unidentified CNA. Cordes, testified that Lori Heimbach announced on the intercom that he was to attend the meeting, a directive he reasonably understood as mandatory. Klinger testified that her small group meeting consisted of 8–10 employees, most of whom were CNAs. She too described having her name announced over a speaker and being told to report to a conference room for the meeting. Because of this, she assumed the meeting was mandatory. Miechur also described being paged over the intercom, along with other employees, and testified that she was told directly by her supervisor that the meeting was mandatory. The CNAs were not told what the meeting was about beforehand.[8]

Four employees (Miechur, Cordes, Klinger, and CNA Karolyn Collado) testified about the small group meetings, as did Burns and Johnson. Even with the caveat that the meeting Collado was in was not conducted by Burns and Johnson—but by Heimbach—the employees' accounts of the format and process are largely consistent. Burns and Johnson's accounts are also largely consistent with the accounts offered by the employees with two significant exceptions: first, Burns and Johnson deny that they mentioned the Union (either directly or by reference to an outside party), in the manner claimed by the employees; and second, Burns and Johnson's accounts are dedicated to minimizing or denying any suggestion that they led employees to believe that their complaints would be resolved—as opposed to merely heard—as a result of this process. As discussed below, Burns and Johnson are not credible on these matters.

I will turn to these discrepancies in a moment. However, the bulk of the testimony about the meetings is undisputed. Burns did most of the talking in the meeting and Johnson wrote down the employee complaints, using a large flip chart with paper mounted on a stand. Burns testified that she began the meeting by introducing herself and Johnson, telling the staff that they do these meetings periodically, but that [i]t had been a while since we'd been there and we just wanted to get some feedback on how it was going there and if there was anything we could do to make . . . the building a better place to work." In the conference room there was a "painter's easel" with a large pad of paper on it. Burns said the employees were there "because she wanted to ask each individual if we had any complaints and what the troubles were." The problems cited by employees were written down and "[Burns] said they were going to start something called an Action Plan and post the results of all the things that she was writing down . . . so we can see how it's working." The bulk of the meeting involved going around the table and asking each employee individually about their concerns and complaints. Issues raised included, short staffing, lack of respect from the administration, pay and benefits concerns, lack of help from nurses, complaints about the administrator Seiler and the Administrative Director of Nursing Services (ADNS) Paula Kublius.[9] According to Miechur, "they said that they would try

[8]Burns' testimony that notices were posted at Easton announcing the meetings and that no individual employees were slotted or scheduled for particular meeting times is not substantiated, and has a second hand feel to it. The posting was not produced, and no supervisor or manager involved in the actual logistics of how employees came to attend the meetings testified. Moreover, Burns' claim is contradicted by the employee witnesses' uniform testimony of being directed by name through loudspeaker announcements to attend a particular meeting.

[9]The ADNS was the equivalent of the Director of Nursing (DON) and at various points in the record Kublius is described as the DON.

to fix" the problems raised. Cordes testified that they said "[t]hey were going to try and solve them in a timely manner. They were going to come up with solutions for these." In Klinger's meeting, not every employee had an opportunity to speak because they ran out of time for the meeting. Klinger complained mostly about problems with obtaining supplies. Burns said certain items, like wages, "had to go through Corporate headquarters . . . they don't have the authority to decide . . . to raise anybody's salary, so that would not be fixed overnight. Other things, they were going to try to fix like supplies."

In accordance with the CEC manual, employee complaints were translated into an Action Plan, typed by Burns, with input from a number of managers, and the Action Plan was referenced (and displayed in enlarged form) at subsequent staff meetings in December, and posted by management on a bulletin board in the break room devoted to work-related notices. After a few weeks, the enlarged version of the Action Plan was replaced in the break room by standard 8 1/2 x 11 sheets of paper showing the Action Plan. The Action Plan, which was updated as items were completed, listed issues raised by staff, and showed the response and a target date for completion of the response, if not already completed.

Burns and Johnson, offered transparently tendentious and implausible claims that nothing was said to employees at the meetings about what would happen with respect to problems brought to their attention in the meetings by employees. For example, Burns was the witness in the following exchange with Manorcare counsel:

> Q Was anything said to the employees who attended these meetings about what would happen with respect to the problems or matters that they brought to your attention and were written on the flip chart?
> A No.
> Q Did you say anything about what would happen next, what was, why was this information being collected?
> A No, because we wanted to talk to everybody before we, I mean, we couldn't make any promises to anybody because we didn't know what everybody was going to say. I mean, we needed the feedback first.
> Q Did you tell employees, how did you end the meeting?
> A Thank, we thanked them for coming.
> Q And then they left.
> A. And then they left.

I find this an extraordinary and implausible account of what was said to employees. If true it would have made the meetings mysterious indeed, and thoroughly at odds with the CEC manual format that Burns claims she followed for the meeting, which contains the instruction under "Small Group meeting tips" that "it is important to let the employees know that their concern has been or is in the process of being addressed." The CEC manual also provides that the meeting format "inform the employees that after the meetings are completed, the issues will be categorized . . . and reviewed with others in management who will be charged with validating and looking into the concerns and making recommendations to address the concerns." In fact, later in her testimony Burns conceded that

> "I do believe we told them that there would be an action plan and we would identify ways to fix some of the issues that they were having, but we didn't tell them what they were, what those issues were going to, I mean what the, the fixes were going to be."

This latter explanation is more plausible, and more consistent with the accounts provided by employees, which made clear that Burns and Johnson were not just there to hear complaints but to get them resolved.

Johnson also went to some lengths to obfuscate any suggestion that she and Burns told employees that their problems would be resolved, testifying that at this and other similar meetings in the past,

> we let them know that, you know, we're hear to hear any concerns that they may have, that we're not there to solve any problems, but, and we always let them know what we're going to do with the information, and trend it, and the administrator will work on an action plan and review with the staff, and review progress, you know, over time.

These strike me as litigation-inspired efforts to avoid providing evidence for complaint allegations that involve offering to resolve issues raised by employees. I do not credit Johnson or Burns on these points.[10]

The other discrepancy between the employee and management accounts of the meetings involved references to the Union. According to Miechur, Burns told the employees that they "had heard there was a lot of complaints and concerns. And that they're here to try to fix it without a second party involved." Cordes recalled that they stated that "they were looking for solutions that wouldn't involve an outside party." Klinger testified that Burns "mentioned SEIU . . . and the rumors going through and she also mentioned that if there was a problem in the facility we can take care of those without outside interest, you know, through a party coming in." According to Klinger, Burns said "[s]he heard that [SEIU] ha[d] been contacted."

Burns denied that she or Johnson brought up unions, the SEIU, or second or third parties, but conceded that "at that point, I think the staff was already talking about it, and if it came up we just really, that's not what we were to talk about." She added that "there were some people that said what's going on with the Union and we just said we were not here to talk about that, so we didn't engage in conversation about any Union activity during those meetings." Johnson testified about the small group meetings but did not address this subject.

I credit the employees' testimony that the issue of the Union was, in fact, raised by Burns, and that she referred in some fashion to an outside, second, or other party—i.e., the Union—not being necessary. For one thing, all three of these employee witnesses were good witnesses. Miechur was the most interested, but her testimony rang true. I have noted, supra, my view that Klinger was an exceptional witness. Cordes testified with a demeanor that suggested disinterest, precise recall, and no effort to color or alter his testimony to help one side or the other. The slight variation in how Cordes and Miechur recalled Burns' description of the Union ("second party" compared to an "outside party") does not distract from their credibility. It

[10] Johnson's testimony that she and Burns did not tell employees that they would develop an action plan but that "We told the employees that the administrator would develop that plan," cannot be credited. It is a continuation of the effort to distance the small group meetings from any statements to employees that could be reasonably understood as a suggestion by Burns and Johnson that they intended to resolve the issues raised. The statement not only was contradicted by Burns, but by Johnson's pretrial affidavit which stated, "We said up front that we would develop an action plan based on the trends that were disclosed at the meeting." I do not credit Johnson on this score.

shows their testimony was unscripted and reflected an honest effort to recount an event that carried less importance at the time it occurred.

In contrast, as discussed above, Burns and Johnson demonstrated a lack of candor in their evasions and efforts to make their testimony fit the Respondent's case. And with regard to whether the Union was referenced by Burns, Johnson did not offer testimony to dispute the employees' accounts, further buttressing their testimony. In addition, with regards to determining whether Burns referenced the Union in the meetings, it is not insignificant that a stated purpose of the CEC is to "make third-party representation unnecessary," an aim that increases the likelihood that Burns and Johnson mentioned the Union in their presentation and, indeed, the euphemistic phrasing of which, echoes the testimony of the employees about how Burns referred to the Union.[11]

Finally, at least one of the small group meetings were conducted by Lori Heimbach (as of October 24, the new HR Director of the facility) and another unidentified manager employed locally at the facility. Karolyn Collado testified that the small group meeting she was told to attend (which included 3 or 4 other CNA employees), was led by Heimbach and this other woman. They followed a similar format as the Burns/Johnson meetings and the meeting was consistent with the CEC manual. They wrote down the employee complaints on "a big clipboard." The meeting began with Heimbach stating that "we're going to try to see what we can do to make this facility a better place to work" and that she "wanted to know what our complaints [were] about the facility." Heimbach told the employees that they weren't going to give them answers there, but "she was going to come back with the answers." The meeting ended with the unidentified woman saying "that they were going to write everything down and that was going to be addressed."

Although the conduct of the meetings was guided by the new small group meeting policy, that policy was not the proximate cause of the Johnson and Burns' decision to hold small group meetings in Easton in October. In this regard it is notable that the policy called for local administrators to conduct small group meetings every other month. By all evidence this did not occur at Easton. The only small group meetings occurring since 2004 at Easton were the October 29–30 meetings conducted by Burns and Johnson, with Heimbach conducting at least one of those meetings.

Notably, neither Johnson nor Burns described the motive for the meetings as a matter of compliance with the new policy. Rather, they attributed the meetings to conflict between HR Director Reitnauer and Administrator Seiler, although their explanations were not entirely consistent or credible.

Burns testified that she and Johnson decided to have the meetings "around the end of October" after Reitnauer called "in October and said that the staff wanted to talk [to] Diane and

[11]Finally, I note that on cross examination Miechur was asked if she referred to Seiler as "a f'ing bitch" during the small group meeting, a comment she denied. Miechur was also asked, and denied, if she received counseling for making such a comment during the meeting. Miechur was then asked, "if Ms. Johnson testified that in fact that all occurred, would she be lying?" Miechur answered, "Yes." I note that neither Johnson nor anyone else ever testified that any of that occurred, an omission which I must conclude demonstrates that the suggestion was baseless. Miechur's fortitude in the face of such tactic and can only add to her credibility.

I."[12] Johnson recalled Burns telling her about Reitnauer's call in early September, "right after [Reitnauer] got back from vacation . . . in August." According to Johnson, she and Burns met with Reitnauer and Seiler in mid-to-late September (an event not mentioned by Burns), and thought that the breach between Reitnauer and Seiler had been repaired, until Seiler "called me in hysterics" over an incident she had just had with Reitnauer. According to Johnson, Seiler's call triggered the small group meetings, because of "concern about something that's going on in the building":

> "[a]t that point, I talked to Renee Burns about needing to go in and get to the bottom of what was going on in Easton. I usually rely on the administrator and the facility human resource manager to give me a good temperature check of what's happening in the facility, but it was obvious that that was not going to happen in this case, so I felt that we needed to go in and meet with the staff.

Although she talked to Seiler on an almost daily basis, Johnson denied knowing anything about union activity at the time the meetings were scheduled.[13]

Johnson also testified that she was unfamiliar with Miechur's name prior to the small group meetings. However, Burns knew her name well from an October 18 phone call she received from HR Director Reitnauer. In that conversation Reitnauer conveyed a conversation she claimed to have had with Miechur. Reitnauer told Burns that Miechur told her that a union organizer named Edgar had been at her house conducting a meeting the night before with many of the nurse aides, and they were meeting again after work with the SEIU. Reitnauer told Burns that Miechur had said that the meetings had been going on since September 1, and that Miechur had been the anonymous employee quoted in a recent newspaper article (presumably about the union or about Manorcare). Reitnauer also told Burns that Miechur had said it would take "45 days to get the paper processed, and that in about two weeks they would see where they were going to go with this."[14]

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[12]Reitnauer testified but did not address any of these matters. There was no corroboration for the claim that staff sought meetings with Johnson and Burns.

[13]I note that Marionlee Specter, who reported to Johnson, and did not take over any duties at Easton until November 14, when she became the administrator, learned of active union organizing at Easton in September, "probably" from conversations with Johnson.

[14]Burns' testimony about this phone call was not offered for the truth of the matters stated in the phone call by Reitnauer, but rather to establish that Burns was told this and heard of Miechur's union activity through it. (Tr. 481–482). Reitnauer testified, and confirmed that she called Burns, and confirmed some of the contents of the call, albeit in very vague fashion. Miechur, for her part, retook the stand and denied confiding such details to Reitnauer, and speculated that Reitnauer may have reported things she overheard Miechur talking about to other employees on the smoking deck that they shared. I find based on Reitnauer and Burns' testimony that Reitnauer made this call to Burns, essentially along the lines testified to by Burns. However, whether Miechur told all of this to Reitnauer is a harder but less relevant question. Its relevance is limited to any implications it might have for Miechur or Reitnauer's credibility. Clearly, based on the call to Burns, Reitnauer knew some of the details of the union campaign and knew of Miechur's role. At the same time, some of the details noted by Burns seem off, or at least uncorroborated, exactly as if it was overheard or the product of hearsay. As discussed, above, I found Miechur a credible witness. If I found that she did, in fact, disclose this conversation to Reitnauer, I would discredit only her denial of it, and attribute it to an

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Somewhat remarkably, Burns testified that she did not mention this telephone call from Reitnauer to Johnson, although, according to Burns, she and Johnson decided to go to Easton to hold the small group meetings in late October, after this call had occurred. It was not that Burns saw the matter as unimportant. After she got the call she quickly called corporate HR and told them "that I thought our employees might be looking to organize, and that they were talking about it."[15]

Wage increases and bonuses at the facility

Effective November 21, CNAs at Easton had their pay rates adjusted. They received, at the least, a 2 percent increase, although if an employee was more than 10 percent over the top of scale, the employee received a 2 percent lump sum payment in lieu of an hourly rate increase. In addition, as part of this increase, the starting pay rate at the facility was increased from $10.25 to $11 per hour. Current employees making less than $11 per hour received increases to and in many cases beyond $11 per hour. This wage increase or payment was supplemental to the regular anniversary-date wage increases annually received by Easton CNAs. Many employees received far more than a 2 percent raise.[16]

The genesis of these wage increases rested with corporate management. Regional HR manager Burns testified that she had been working on the wage issue since February 22, 2007, when she requested local market wage averages Manor Care's corporate compensation department. According to Burns, such a market analysis is done periodically, as often as every 6–8 months, but sometimes once a year, and wage adjustments made when necessary to remain competitive. Burns explained that "[t]he goal is not to hire people from the outside for more than what our existing staff is making." From February to August, Burns was collecting competitive data. Her testimony and notes from an August 17, 2007 regional managers meeting suggest that by August Burns was "about 50% done" on a wage proposal covering RN's, LPNs, and CNAs in the Lehigh Valley facilities, which includes Easton.[17] She submitted

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embarrassment at having been revealed to have talked with a management representative about internal union matters. But the denial of this incident would not, in my view, undermine what I found to be her general credibility on other events that she did not feel embarrassed or ambivalent about. Of course, it is long settled that "[i]t is no reason to refuse to accept everything a witness says, because you don't believe all of it, nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 753 (2d Cir. 1950), revd. On other grounds, 340 U.S. 474 (1951); *Conley Trucking*, 349 NLRB 308, 316 fn. 18 (2007), enf'd. 520 F.3d 629 (6th Cir. 2008); *Daikichi Sushi*, 335 NLRB 622, 622 (2001).

[15]Despite this, Burns claimed that at the time of the small group meetings she and Johnson "didn't know at that point that there was any formal labor . . . organizing."

[16]The General Counsel and the Respondent stipulated (GC Exh. 32 at ¶13) that the wage increases and lump sum payments amounted to 2 percent of current pay. However, the stipulation notwithstanding, this does not appear entirely accurate. The Respondent's own evidence suggests that the raises to Miechur and Callodo were 6.4 percent and 5 percent respectively. (R. Exhs. 27 and 26). Documents produced by the Respondent suggest that in most cases the across-the-board increases were far greater than 2 percent (see GC Exh. 39).

[17]The Lehigh Valley facilities include two facilities in Easton, two in Bethlehem, and two in Allentown. Burns explained that "we generally pay the same . . . in all three markets."

the wage proposal for approval to the corporate compensation department in Toledo, Ohio at Manor Care headquarters in late September or early October. She testified that several versions were sent back and forth.

Complaints about wages were a significant topic of discussion at the October 29–30 small group meetings conducted by Burns and Johnson. The Action Plan submitted into evidence states that "a wage proposal is in process" and it is marked "completed." The wage hike proposal was approved by the corporate compensation department sometime in November and definitely by Thanksgiving. Burns testified that the Easton facility, and Old Orchard, another Manorcare facility in Easton, PA, instituted wage increases in November. They were approved and implemented at the "Bethlehem campus" a couple of months later.

Transfer of Easton Administrator Seiler and ADNS Kublius

At the small group meetings numerous complaints regarding local management were registered by employees. The list of employee complaints raised in the meetings (GC Exh. 44) is wide ranging, and covers many topics from wages and benefits, to staffing, to supplies, to patient care, to issues of morale generally. Many of the complaints might be viewed generally as an indictment of management. However, a number of the complaints specifically complained about the administrator and/or nursing management. These include the following from the list compiled by Burns:

> Administrator is not visible; doesn't acknowledge or say "hello"; Feel ignored by Administrator and nurse management team; Administrator, nurse management team and Department Heads are visible and help out when the DOH and/or Corporate staff is in the facility—then they disappear again; Staff on 11–7 doesn't know who the Administrator is – never see her; Told by nurse management "if you don't like it here, you can go to McDonald's; Feel ignored by Administrator; Have never seen the ADNS and/or Administrator doing rounds; Need to see the NHA and ADNS; not just when someone is visiting the facility; Administrator says she has an open door policy but she just sends you to someone else and she never follows up; Management doesn't even say "good morning"; Nurse that drops pills on the floor and doesn't pick them up; ADNS is aware[.]

Even prior to the small group meetings, there had been some problems with Kublius. In June she received a warning (her first) for failing to report to the facility when she received word that a patient had been injured. According to Burns, beginning in the summer, Kublius had been on a performance improvement plan, as she was having "difficulty managing labor, difficulty managing the schedule, getting her ECO room, clinical processes meeting room in compliance with the company's standards." Johnson complained that Kublius, "abdicated the responsibility for labor management to her scheduler. . . . And that was Paula's job." In late October, Seiler developed an "action plan" for Kublius, that designated her duties and was updated week by week.

On November 12, Manor Care transferred Easton Administrator Seiler and ADNS Kublius. The decision to remove Kublius was made by Johnson, along with Burns, after the small group meetings. Johnson agreed with and adopted a statement in her pretrial affidavit

that "after the [small group] meeting, it was decided that [Kublius] lacked the confidence of the staff, and she was transferred to another facility."[18]

Seiler's transfer was also at Johnson's request, and, in a statement endorsed by Johnson, made for "essentially similar reasons" as Kublius, an explanation that echoes Johnson's assertions that prior to the small group meetings she had been told by Burns that staff at Easton had concerns with Seiler's conduct.[19]

The transfers of Kublius and Seiler constituted two changes in what amounted to a complete overhaul of management personnel in October and November. On October 23, days before the small group meetings, HR Director Reitnauer transferred from Easton to a Manor Care in Allentown, in order to be closer to home. She was replaced by her assistant Heimbach, who assumed the position of HR Director on October 24. Seiler was replaced as administrator by Marionlee Specter. Specter had been working as a senior administrator overseeing administrators in two facilities in Allentown. She was notified by Johnson on November 13 to report to Easton the next day to serve as the facility's administrator. Johnson also arranged for Kate Gieroczynski, who was working at another Manor Care facility, to report to Easton on November 14, to serve as Assistant Administrator, a position she continues to hold. Specter and Gieroczynski remained as Administrator and Assistant Administrator in December, when Jacqueline Stolte transferred from a Manor Care facility in Landsdale, and assumed the position of Acting Administrator, and worked as another assistant to Specter. Specter took the title of Executive Director in January 2008 but remained at Easton and overlapped with Stolte, sharing an office with her, until Specter stopped working at Easton near the end of June. Stolte remained at Easton until July 8, 2008, when Ed Schuch became the administrator.[20] Kublius was replaced by Cindy Hummel, who began at Easton on November 12. In addition, Dawne

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[18]See Fed. R. Evid. 801(d)(1), Notes Of Advisory Committee On Proposed Rules ("If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem"). I specifically discredit Johnson's declarations at trial that it was Seiler's decision to transfer Kublius from Easton. Burns testified that "Diane Johnson was the decision maker." Kublius' transfer papers list as the reason for the transfer request "Request of Diane Johnson." And perhaps, most compelling, Seiler attributed the transfer decision to Johnson and Burns, and rejected the suggestion—in what appeared to be an unguarded display of surprise that anyone could suggest such a thing—that she had anything to do with the decision to transfer Kublius. ("I was not involved with her transfer. . . . That was Renee Burns and Diane Johnson.") I credit Seiler on this point, which was not challenged, explained, or even followed-up upon by the Respondent.

[19]Somewhat inconsistently, Johnson at first claimed that she removed Seiler because of "challenges" Seiler had managing Kublius and also with Reitnauer, "[a]nd I felt that for her peace of mind and the betterment of the facility, that it would be best if we transfer her away from the Easton facility." Of course, were this accurate, Reitnauer and Kublius' transfers would have removed any rationale for Seiler's removal. I note that Johnson's April 2007 performance appraisal of Seiler reflected no problems, contained many complimentary comments, and her total score fell between "meeting all expectations" and "exceeding expectations." When Seiler testified she was not asked about the circumstances of her transfer.

[20]Stolte testified that, at least as of April 2008, she reported directly to Johnson, and not to Specter. It is likely this was because, beginning in March, Specter was out on medical leave from "time to time."

Signore was brought in to train Hummel, and they both held the position of ADNS until Hummel was transferred to a Bethlehem facility in July 2008.

Kushnerick finds the Mundy letter; her confrontation with Miechur; Miechur's Discipline

The Pennsylvania Department of Health was responsible for approving the transfer of the ownership license required for Carlyle to assume control of Manor Care. In conjunction with this, on November 13, Pennsylvania state representative Phyllis Mundy conducted a hearing on Carlyle's intended purchase of Manor Care. The hearing addressed concerns about the potential affect that Carlyle's control of Manor Care could have on care for the facilities' residents. Mundy's press release called on the Pennsylvania Department of Health to "not grant licenses to the Carlyle Group until a full investigation is completed that will determine whether or not the Carlyle Group, a private equity firm new to the long-term industry, will be able to take quality care of seniors." Representatives from the SEIU, Manor Care, and the Pennsylvania Department of Health testified at the November 13 hearing.

Miechur was not involved in the November 13 hearing but soon afterward she began to play a public role in the Union's national campaign regarding Carlyle and Manor Care, Inc.

On November 16, the Union brought a group of employees and family members to Carlyle headquarters in Washington D.C. to confront Carlyle representatives. Four employees from Easton participated in the event, including Miechur. Miechur's mother (whose own mother, Miechur's grandmother, was a resident of the Easton facility) also participated in the D.C. event. The union group sought to meet with Carlyle CEO David Rubenstein. He was not available and eventually a Carlyle representative met with the employee/family group. The event, as well as interviews after the event, were videotaped by the Union. The video included interviews with Miechur and her mother. The interview was posted on a union website devoted to the Carlyle/Manor Care buyout. The interview remained posted on the website for a couple of weeks.

The day after returning from Washington D.C., Miechur was approached by Heimbach at work. She told Miechur that she had "seen what you did. I've seen your video on the SEIU website." [21]

The Union attempted to generate support for a second hearing with state representative Mundy. SEIU representative Dennis Short drafted a form letter to representative Mundy asking for a follow-up hearing on the Manor Care transaction. According to Short, the letter was designed to generate support for a second hearing in which employees could talk directly to public officials about staffing issues at the facility and concerns with Manor Care's antiunion campaign. In general the Union wanted to keep pressure on the state to examine carefully the license transfer and, even more generally, to generate publicity for the union activities. The form letter, addressed to Mundy, stated the following:

> My name is _____ and I am a _____at the ManorCare Easton nursing home in Easton PA.

[21] Heimbach could not recall having any such conversation and denied that it occurred. I credit Miechur's account. As discussed, supra, Heimbach's testimony inspired less confidence in the accuracy of her account. Miechur also testified that she thought, but could not recall for sure, that Heimbach had told her during this conversation that she knew that Miechur had contacted the Union. I do not rely on this portion of Miechur's testimony.

I want to thank you for your leadership on the ManorCare/Carlyle buyout and for holding an Aging and Older Adults Services Committee meeting on November 13th.

At my facility, we are very short staffed and it affects the care for our residents.

For example:

I hope you will do all you can to make sure that the Department of Health officials live up to their word when they testified in your committee that:
"*The Department will pursue all avenues necessary to ensure this change of ownership does not negatively impact care provided to residents in the Commonwealth."*

I would like the opportunity to tell my story about the need for more staffing and better care at my facility and I hope you will have a follow up hearing where I can do so.

Please contact me if you have any questions and I look forward to hearing from you.

Sincerely,

Phone Address:

(italics in original).

Copies of these letters were provided to employees at a November 21 union meeting. They were also provided to employees at a subsequent November 28 meeting attended by some of the employees' family members as well as employees. At the November 21 meeting, the Union asked employees to solicit other employees, but also residents and family members sign the letters and return them to the Union.

Miechur testified that the Union "told us that we can give these to residents, and coworkers and family members on break time, but do not do it in resident care areas." Collado, who was also at the meeting, took some of the letters. Miechur did not take letters to distribute because she knew Manorcare was aware of her union activity and she feared retaliation. Miechur told her coemployees that when they had signed the letters, or obtained signatures, they could place the letters in her bag, which she kept in the nourishment room at work.[22]

That evening when she came to work, Miechur placed her bag on the table in the nourishment room, on the far right corner as she typically did. Two other employees also had their bags on the table. In addition, there were a lot of papers scattered around on the table, "a big mess" as described by Collado.

[22]The nourishment room is a room at the Easton facility on unit 2, next to the nurse's stations, and is marked on the door as being for employees only. The room has a refrigerator, freezer, microwave, charting equipment, and procedure and medical books for nurses and aides. Residents' snacks, or food brought by families is kept there. CNAs regularly keep their personal belongings in this room during shifts.

At around 4 to 4:30, an hour to an hour and a half into the shift, Collado was in the north hallway looking down the hall into the nourishment room. She saw Kushnerick in the nourishment room. Her back was to the nourishment room door and she was looking through papers on the table and scattering them as she looked. She reached the corner of the table where Miechur's bag was and—Collado could only see her back—Kushnerick stood there reading something and then walked out of the nourishment room with the piece of paper, and walked to the copy room. Collado went to tell Miechur that Kushnerick "had one of her papers." Miechur went to find Kushnerick and approached her at the intersection of the north and west hallways.

Kushnerick confirmed this account of events, to a certain extent. Kushnerick testified that she was in the nourishment room looking for a "wanderguard bracelet," for a resident being admitted to the facility—an "exit seeking admission." [23] Normally wanderguards are not kept in the nourishment room, but in the nursing office down the hall. However, Kushnerick claimed that someone—she did not identify the person—told Kushnerick that one was in the nourishment room. Kushnerick testified that in looking through the newspapers, personal items, and at least one bookbag on the table, "I saw a paper that was a form and it had a . . . resident's name on it and I . . . didn't recognize the paper. I just took it." According to Kushnerick, she took the paper "[b]ecause I didn't recognize it." She saw it had a resident's name on it, and that it was not a typical Manorcare form. However, she also admitted that she had heard a rumor that residents were being asked to sign such letters by Miechur and other CNAs, and that when she picked up the paper she "couldn't be certain but I thought maybe it was" connected to that rumor.[24] Kushnerick said that the form was on top of a pile that looked to be the same papers underneath. Consistent with Collado's observation, Kushnerick testified that she made a copy.

A few minutes later Miechur approached Kushnerick and asked her, "those papers in your hand, did you just steal [them] out of my bag?" Kushnerick told Miechur that she had been in the nourishment room looking for a wanderguard and she handed the paper back to Miechur. Kushnerick told Miechur, that she "can't be handing these out on work time." Miechur denied handing them out and, pressed by Miechur, Kushnerick admitted that she did not see Miechur handing out any papers. Kushnerick told Miechur, "stop worrying about the Union and worry about your job." Kushnerick then walked away.[25]

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[23] A wanderguard is a bracelet placed on a wrist or ankle that triggers an alarm should the wearer exit the building.

[24] Although uncertain, Kushnerick thought she might have heard that rumor from the administrator. Heimbach also had heard such a rumor, but could not recall its source.

[25] This account is based on the credited testimony of Miechur. Kushnerick denied making any such comments to Miechur. According to Kushnerick, she was approached by Miechur who "said that I had something of hers." Kushnerick testified that she gave the letter back to Miechur and Miechur walked away. Given the charged nature of the incident, along with more general assessments of the credibility of these two witnesses (discussed above) I doubt that conversation would be as short, even perfunctory, as that described by Kushnerick.

I note that Miechur's testimony described seeing Kushnerick with "a bunch of papers," while Kushnerick only described taking one, and handing one back to Miechur. Collado testified that Kushnerick took one paper to copy, and only a copy of one paper was turned into Specter. However, Miechur's discipline notice clearly reads that she is being disciplined for soliciting multiple witnesses. I do not need to and do not resolve this discrepancy.

Kushnerick returned the solicitation letter to Miechur, but kept a copy she had made and that same evening turned it over to facility administrator Specter.

Specter had transferred to Easton just one week before. Although she had not met Miechur, upon coming to the building she was briefed on union matters by Johnson or Burns and "Trisha Miechur's name had come up as somebody who had been actively involved in the organization campaign." Specter had been made aware of union leafleting at Easton in her regional meetings, conducted by Johnson, even before being assigned there. Specter recalled that either Burns or Johnson had told her about Miechur's appearance on the SEIU website.

By her account, Specter asked few questions of Kushnerick, and her testimony regarding what they discussed was very unsure. Kushnerick. for her part, and consistent with the vagueness of her testimony generally, could recall nothing of the conversation she had with Specter when she provided the copy of the letter to Specter. Specter testified that Kushnerick came to her with a copy of the solicitation letter and "said that she had Trisha soliciting people, patients, residents and that she got the letter in the Charting Room."[26]

Kushnerick claimed she gave the copy to Specter without having ever read the paper. Kushnerick could not recall having any further conversations with Specter or anyone else from management regarding what she found.

Instead, that day or the next Specter reviewed the letter with the corporate Director of Labor Relations, Barbara Kilmurry, who had come from corporate headquarters in Toledo, Ohio, and was working onsite in Easton in response to the union organizing. Specter also reviewed the letter with Heimbach, Gieroczynski, and Stolte "to look at where we were going in terms of the disciplinary process." According to Gieroczynski, the Respondent's attorney Nelson participated in at least one meeting by phone regarding the Miechur discipline.

Ultimately, in determining the discipline, Specter consulted with and took "direction" from Burns and Kilmurry. They reached a "consensus" decision that Miechur should be disciplined under Section B–19 of the Employee Handbook. That provision operates as a catch-all provision, requiring an employee to "[p]erform your job according to expectations and conduct yourself properly in other serious instances not specifically listed."[27]

Specter was not involved in writing the disciplinary notice, which she testified "came about through Barbara Kilmurry and Renee Burns in consultation with some others." For appearance, or formal purposes, however, the local managerial staff perceived the ultimate decision on the discipline as Specter's. The disciplinary notice was actually written by Gieroczynski, using language drafted by the Respondent's attorney Nelson, who consulted with the group by phone and provided the language sometime after this meeting.[28]

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[26]The testimony showed that the charting room was the same as the room most witnesses referred to as the nourishment room.

[27]The Handbook lists A, B, and C work rules. Type A rules are "critical" and "will result in suspension, subject to termination, pending a final review for the first occurrence." Type B rules are "major" and will result in termination based on a progressive disciplinary schema. Type C rules are "minor" but can also result in termination based on progressive discipline.

[28]In her testimony Burns did not discuss the disciplining of Miechur. Kilmurry and Nelson did not testify.

Specter made clear in her testimony that "[w]e wanted it to be a final written warning action but not a termination." As she explained, "we weren't looking for a discharge decision." However, the discipline was issued as "a final written warning."[29] According to Gieroczynski, "[w]e all agreed that that was an appropriate discipline. . . . We had not had a situation like this occur before and we decided that it would be appropriate." They were all "well aware" that Miechur was a union activist. Kushnerick was not involved in the meetings and the managers relied upon Specter's account of events.

There is no express work rule prohibiting solicitation of a resident. There are work rules involving solicitation, but not of residents, and they were not relied upon. However, in Specter's view, "our policy is not to solicit residents"—in any area of the facility at any time. Specter agreed, however, that this was not written in the handbook. Indeed, by all evidence it was not written at all, or even orally conveyed at any time prior to the events surrounding this incident. Gieroczynski asserted that "it's a generally known policy that we do not solicit residents" but agreed it was not written down, and offered no support for the statement.

At no time did Specter undertake, or direct anyone to undertake an investigation into the facts of what occurred. She relied on the short exchange with Kushnerick.[30] Beyond, this brief—and not clearly recalled—discussion when Kushnerick reported on the solicitation letter, by all evidence there was no investigation into the incident. No management witness was involved in, or knew of anyone else, talking with Kushnerick, or other employees, residents, or even Miechur about the events underlying the discipline. HR Director Heimbach believed there had been an investigation, but was not involved in it, did not recall who was. It turned out she believed there had been one only "[b]ecause it wouldn't have warranted a discipline at that level without investigating it first." The only explanation for the lack of an investigation was Specter's suggestion that it might "upset" residents for such questions to be asked.

Miechur heard nothing else regarding the incident until November 28. On that evening, at about 11 p.m., as the work shift was ending, Gieroczynski approached and asked if she could talk to her. Miechur was heading toward the office when her supervisor advised her she should not go to the meeting alone. The supervisor and Miechur asked Klinger to go into the meeting with Miechur. Together they went to HR Director Heimbach's office, where Heimbach and Gieroczynski were waiting. At first Gieroczynski and Heimbach resisted Klinger's presence but then acceded to allowing her as an observer.

Gieroczynski announced that Miechur was receiving a final write up. Gieroczynski told Miechur that she had been disloyal to the company, and it was "type B write up." Miechur started crying and denied ever passing out the papers, stating "you are accusing me of something I didn't do." Miechur asked Gieroczynski, "did you see me passing out those

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[29]Specter said that in arriving at this level of discipline, she and Burns and Kilmurry considered a July 2006 suspension given to Miechur for an incident in which Miechur used a patient's telephone to make a call. In relying upon this warning Specter did not speak with anyone involved and did not know that suspension was rescinded and Miechur paid for her time off work after an investigation vindicated Miechur. In relying on this July 2006 warning, Specter (and Burns and Kilmurry) also ignored the Handbook's statement that as a type C violation it was to "become inactive for the purposes of progressive discipline after one year."

[30]Specter denied prior knowledge of rumors of solicitation, something to which Kushnerick admitted and suggested might have been told to her by Specter.

papers?" Gieroczynski said "no." Miechur asked, "did anybody see me pass out those papers." Gieroczynski again said, "no." Miechur refused to sign the paper because she denied committing the solicitation described in the discipline. Gieroczynski and Heimbach signed the notice. Gieroczynski said that the next step would be termination. Miechur asked "how do I go from no write ups to a third and final write up," and Gieroczynski replied that it was a type B violation. Gieroczynski mentioned that she was aware that Miechur contacted the Union. Miechur said, "you are doing this because you know I called the SEIU. Kate [Gieroczynski] said yes, we know that you called the union." Miechur said, "this isn't fair. She said I didn't do what you're accusing me of and they said, well, she's still getting wrote-up and this is her last write-up and next time she will be terminated." Miechur called it harassment, said she wanted to get an attorney, and asked to call her mother.[31]

During the meeting, Gieroczynski read the disciplinary notice to Miechur. It stated:

> Your solicitation of Residents to complain about the Center by distributing pre-printed forms for their signatures constitutes disloyalty towards the company that is not protected by any Federal or State law. Such action can harm the Company's legitimate business interests and is a violation of the HCR Manor Care standards of business conduct. Among other things, the form you distributed and asked the residents to sign states:
>
> "At my facility, we are very short staffed and it affects the care of our residents."
>
> This kind of comment violates the standards we believe every employee should follow because it disparages the care MCHS-Easton and its staff strive to provide. It may also unnecessarily upset residents and raise undue concerns in the minds of some residents and family members as to the level of care which we provide at the facility.

The notice stated that if the behavior continues, "you will be subject to Termination."

Events in 2008

Miechur's prominence in the Union's national campaign continued to grow in 2008. On January 18, along with about 50 other union activists, Miechur attended a conference on private equity firms in Philadelphia at which Carlyle CEO David Rubenstein was speaking. Three Easton employees, including Miechur were present. When Rubenstein was introduced, SEIU supporters entered the room, unfurled a banner saying "Carlyle fix Manor Care now" and leafleted and chanted. When the chanting stopped Miechur, who had been seated at a table near the stage, stood and addressed Rubenstein using a megaphone. Miechur introduced herself as a Manorcare employee and began talking about working conditions and care at the facility and the efforts to form a union. Rubenstein and she talked back and forth in front of the audience for about 10 minutes, until the conversation got heated when Rubenstein criticized Miechur's diction. This resulted in more chanting. The Union activists were escorted out by

[31] This account of the discipline meeting is based on the credited and undisputed account of the meeting provided by Miechur and Klinger. Both Gieroczynski and Heimbach testified, but neither contradicted or gave much of an account at all about the meeting, which, given the care with which this case was litigated, I take as an effective admission of the accuracy of Miechur and Klinger's testimony. I note further, that on cross examination, Miechur denied saying to Gieroczynski "I knew you would do this." I credit her denial of making this statement, which was never asserted by any witness.

police. No charges were filed. The incident was covered by the Philadelphia Inquirer, to which Miechur gave an interview, and the New York Post, as well as other national news outlets. That evening, Rubenstein contacted Miechur and apologized for the remark he had made, and this provided a further opportunity for the two to discuss issues relating to the facility.

The next day Miechur went to work and brought the Philadelphia Inquirer article, which included comments from Miechur's interview. When she was heading up to the dining room she left the paper in the nourishment room. Later, a CNA approached her and said that Heimbach had been in the nourishment room, alone, and that Miechur's newspaper was now gone. Miechur paged Heimbach and asked her if she had seen Miechur's newspaper. Heimbach said no, and said she did not have time to discuss this, and Miechur should come to her office if she wanted to discuss it. She then saw Heimbach in the hallway and Heimbach invited Miechur to her office. In her office Heimbach denied taking the paper, but said to Miechur, "I've seen what you've done. I've known what you've done. You should be ashamed of yourself. . . . [H]ow can you walk in to this facility with your head high after what you've done?"[32]

The following Monday, January 21, Stolte approached Miechur and told her that Specter would like to speak to her. Miechur attempted to have a witness come with her to Specter's office but Specter said that this did not involve discipline and there was no reason for a witness. Stolte was also in Specter's office. Specter had the Philadelphia Inquirer and New York Post articles on the previous week's protest in Philadelphia, and told Miechur, "[y]ou know you want to talk to me." Then, echoing Heimbach's words from the previous week, she asked Miechur, how she could "walk in this facility with my head high." She said that "I need to stop doing what I'm doing because we're not going to get anymore residents in to Manorcare and I should be ashamed of myself." Miechur said she would not stop. They agreed the meeting was over and Miechur left.[33]

Miechur's role in the Union's campaign continued. She traveled to Baltimore to a rally in support of other Manor Care employees. On February 13, Miechur traveled to Washington D.C. where the Union was hosting a conference that brought Manor Care workers from across the country together. As part of this conference, union activists went to the Carlyle headquarters and attempted to talk to a Carlyle official. Miechur attended this conference in D.C.

On March 10, the Union held an event at the Easton facility called "march on the boss." Workers and family members gathered in front of the facility. Then a delegation entered the facility to provide a list of proposals to management for improving working conditions and service-related issues. This event was covered in a local newspaper. Quotes from Miechur and a picture of her (and some family members) were included in the article's accompanying photograph.

Around March 22, Miechur was part of a union group that traveled to Japan to talk to nursing home workers and compare conditions at a chain of nursing homes in Japan bought by

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[32]Although her memory was sketchy, Heimbach admitted the essentials of this conversation and I credit Miechur's account. Heimbach recalled Miechur asking if she had taken her newspaper, recalled denying it, and recalled telling Miechur in reference to a newspaper article about the facility featuring Miechur, "[i]f I were you I would be ashamed."

[33]Both Stolte and Specter testified, but neither disputed Miechur's account. This was a thoughtfully defended case. The failure of these witnesses to address these issues was telling. I credit Miechur's undisputed account.

Carlyle. Upon her return Heimbach mentioned that she had heard that Miechur went to Japan. Miechur told Heimbach she had been on a business trip with her father.

On approximately April 7, Acting Administrator Stolte conducted a series of inservice meetings. Miechur attended one of the meetings attended by several--Miechur estimated three, Stolte said six to eight—CNAs. The presentation consisted of a power point presentation. The first power point slide stated:

You say . . .
. . .MCHS-Easton *IS* a Good Place to Work!

The second slide stated:

During the past five months,
we have lived through:
- Attacks in the newspaper on the care we provide;
- Picketing by the SEIU;
- Comments from a few staff that they will go to the press with problems instead of working together to solve them.

During the second slide, Miechur stood up and walked out of the meeting, remarking "this is bull crap" or "bull shit" a comment that Miechur admitted was inappropriate for her to have made.[34] Miechur returned to her regular work. Later Stolte overheard Miechur from the hallway repeating her "bull crap" comment. She sent supervisor Alija Johnson, a nurse supervisor in training, to ask if she could speak to Miechur. They went to the computer room where they met Stolte. Stolte told Miechur that she left the meeting abruptly, and upbraided her for her unacceptable conduct and for using foul language in the meeting and in the hall, near patient rooms. Miechur told Stolte that she felt like she was being "persecuted" and that she felt that the presentation was attacking her and that she had every right to contact the Union. Miechur continued: "I'm tired of the meeting [ ] being about me and SEIU. I'm tired of working in a hostile environment." Stolte replied, "if you don't like it you can quit."[35] Miechur told Stolte, "I'm not going to quit because I'm here working for my residents." Miechur also told Stolte that "you are going to have to fire me to get rid of me." Stolte told Miechur she was not about to fire her, and she was not going to discipline her for walking out of the meeting.

[34]Miechur testified that she said "bull crap." Stolte testified that she said "bull shit." I have no reason to resolve this minor inconsistency. Either would be considered inappropriate under the circumstances.

[35]Stolte's slightly different admission was that she said "I told her that no one was making her work here." I do not believe it necessary to resolve the discrepancy. In context, the difference between the comments is inconsequential. However, if it mattered to the analysis, I would credit Miechur's version over Stolte's, as her recollection of this incident was more persuasive.

ANALYSIS

a. October 2007 interrogations of Miechur and Klinger (paragraphs 5 and 6 of the complaint)

The General Counsel alleges in paragraph 5 of the complaint that Miechur was interrogated about her union sympathies. Paragraph 6 of the complaint alleges that Klinger was similarly interrogated. The General Counsel alleges that these interrogations violated Section 8(a)(1) of the Act.

Section 7 of the Act grants employees, among other rights, "the right to self-organization, to form, join, or assist labor organizations." 29 U.S.C. § 157. Pursuant to Section 8(a)(1) of the Act, it is "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

The applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985). While the Board has identified a number of factors that are "useful indicia"[36] in making this determination, there are no particular set of factors that are to be "to be mechanically applied in each case." *Rossmore House*, supra at 1178 fn. 20; *Westwood Health Care Center*, 330 NLRB at 939. Rather, the Board has explained that "[i]n the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood*, supra at 940; *Sunnyvale Medical Clinic*, supra. This is an objective standard, and it does not turn on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Generally, it is unlawful for an employer to inquire as to the union sentiments of its employees. *President Riverboard Casinos of Missouri*, 329 NLRB 77 (1999).

In this instance, Heimbach's questioning of Miechur was violative of the Act. Heimbach's inquiry of Miechur was neither casual nor accidental. She isolated Miechur for the purpose of making the initial inquiry. It came in the context of an ongoing antiunion campaign by management—a perfectly lawful response by an employer to concerns about unionization, but one that necessarily impacts the likelihood that an interrogation is coercive. In such a context, the interest is unlikely to be casual. The questioner is not indifferent to the response. This was true here. Heimbach directly approached Miechur, asked if she could speak with her, and "pulled [her] in" the clean utility room, presumably to keep others from overhearing their conversation. Her question—had she "heard about SEIU trying to organize in [the] Easton facility—directly tested Miechur's personal knowledge of union activity in the facility. Heimbach "was clearly seeking information from [Miechur], not conveying well-known information to h[er]."[37] And when Heimbach's questioning led to an acknowledgement of Miechur's "belief" in

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[36] *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998), quoted approvingly in *Westwood Health Care Center*, 330 NLRB 935, 939 (2000).

[37] *Smithfield Packing Co.*, 344 NLRB 1, 2 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006); *Amcast Automotive of Indiana*, 348 NLRB 836, 837 (2006) (no violation where no evidence that supervisor's general question about rumors of union activity was designed or reasonably perceived as effort to uncover the union activities or sympathies of any employee).

the Union, Heimbach questioned the reasonableness of that belief by suggesting the futility of unionization—"[t]he Union can't do anything for you"—itself (an unalleged but) arguably an independent unfair labor practice. Miechur made clear that the questioning was unwelcome, she curtly sought to end the conversation, but this did not end the matter. A couple of weeks later Heimbach approached Miechur and asked if she had changed her mind on her support for the Union. That it had not is irrelevant. There was no valid reason for these inquiries. Nor is there evidence that Heimbach had friendships with Miechur or other rank-and-file employees. See, *Smithfield Packing*, supra. There is no evidence that Miechur was comfortable talking with Heimbach about personal matters. *Amcast Automotive of Indiana*, 348 NLRB 836, 837 (2006). To the contrary, the questioning was obviously unwelcome. Further it should not be forgotten that Heimbach was not a low-level supervisor. At least by the time of the follow-up questioning she was HR Director at the facility, making her one of the top three officials at the facility, according to Heimbach's testimony. Although the date of the initial interrogation is unsettled in the record, it was likely before October 24, at a time that Heimbach was still the assistant HR director. However, she was still a well known, and prominent part of facility's leadership.[38]

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[38]I conclude that the General Counsel has proven that Heimbach was an agent of the employer at the time she interrogated Miechur, even assuming, as is likely, that during the first interrogation Heimbach was an Assistant HR Director/Payroll Clerk and had not yet assumed the position of HR Director. The Board articulated its rule for establishing agency in *Pan-Oston Co.*, 336 NLRB 305, 305–307 (2001):

> The Board applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. *Cooper Industries*, 328 NLRB 145 (1999); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB [426], 428 [(1998)]. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.*, 315 NLRB 725 (1994) (and cases cited therein). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988) (citing Restatement 2d, Agency, § 27 (1958, Comment a)).
>
> The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB [425], 426–427 [1987] (and cases cited therein). The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. *Jules V. Lane*, 262 NLRB 118, 119 (1982).

In short, "[i]t is well established that where an employer places a rank-and-file employee in a position in which employees would reasonably believe that the employee speaks on behalf of management, the employer has vested that employee with apparent authority to act as the employer's agent, and the employee's actions are attributable to the employer." *Mid-South Drywall Co., Inc.*, 339 NLRB 480 (2003).

I find that employees would reasonably believe that Heimbach represented and spoke for management in personnel related matters, including when asking Miechur about her union sympathies. Indeed, other supervisors and managers were engaged in a campaign, directed by management, to "educate" specific employees about the Union. Moreover, Heimbach regularly spoke for management: she spoke for management to groups of current employees, and new employees going through orientation (including employees hired at other Manor Care facilities)

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Finally, Miechur's disclosure of her Union activity to HR Director Reitnauer on October 18 did not make Miechur an "open" union supporter, a factor that may, depending on circumstances, mitigate the coerciveness of questioning. The fact is, as Reitnauer admitted, Miechur talked to her in confidence, and what is more, Reitnauer "always" told employees that they could talk to her in confidence. I pass no judgment on Reitnauer's swift betrayal of that confidence, as HR Director surely she had competing obligations to her employer. But Miechur's decision to confide, even in a supervisor, to someone "she talked to [ ] all the time," to someone "she would come to [ ] when she had problems or issues," hardly makes her an "open" union supporter, and hardly swings a door open to unwelcome interrogation of her knowledge of union activity and declarations about the futility of unionization, followed up two weeks later by inquiry as to whether her sentiments had changed. The fact is, by all evidence, at this point in time Miechur was not open about her union activity. She did not wear union buttons. She was not involved in Union protests or demonstrations. She was not featured in newspapers.

Kushnerick's interrogation of Klinger was less egregious, and a closer call. In this instance there was no follow-up to the interrogation, no suggestion that supporting a union would be futile, and Kushnerick was not as highly placed, or on track to be as highly placed, as Heimbach. However, Klinger was not an open union supporter, and the inquiry was not casual. Kushnerick was specifically assigned to "educate" Klinger about unions, "grabbed her" and took her to an area of the facility in which they could talk alone. The questioning of her knowledge of the union campaign, and if she "knew anything about unions" (i.e., probing her views of unionism) came in the context of spreading the employer's antiunion message. An interrogation that is part and parcel of an employer's antiunion campaign is more likely coercive because the supervisor's hostility to unionism, which is not personal but a manifestation of employer policy, raises the stakes for the employee put in the position of answering questions about union

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on issues relating to payroll and time clock issues. She performed the payroll portion of the orientation for new employees on average every other week. She created postings regarding the new time clock procedures. She coordinated ceremonial awards for employees. As an "employee advocate" she was charged with investigating and answering questions for employees regarding pay and benefits, and spoke for management when she got back to the employees with the answer or resolution to their problems. Specifically, on employee questions related to payroll Heimbach resolved the issues with employees on her own, without consultation with others in management. Heimbach regularly contacted employees over the intercom system. She posted announcements of HR policy. She substituted for the HR Director (indisputably an agent and managerial employee) on an irregular but repeated basis, although did not perform the full range of HR Director tasks while substituting. She was part of the two person HR "team" along with the HR Director. She interviewed applicants. She had access to personnel files, which were maintained in her office, an office in which she was the sole occupant. Whether or not she possessed the indicia of a statutory supervisor, the reasonable employee would consider her a management representative when she spoke on human resource matters, including her interrogation of Miechur. Accordingly, Heimbach was an agent of the Respondent for purposes of this allegation. Notably, Section 2(13) of the Act states: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

activity or what she knows of unions. Given the totality of circumstances, Kushnerick's interrogation was reasonably likely to be coercive and violated Section 8(a)(1) of the Act.[39]

b. Soliciting employee grievances and promising they would be remedied; posting Action Plan as promised (paragraphs 7 and 10 of the complaint)

The General Counsel alleges (¶7 of the complaint) that the Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances in the October 29 and 30 small group meetings and, in order to discourage unionization, implying that it would remedy the grievances. In a related allegation, the General Counsel further alleges (¶10 of the complaint) that the posting of the Action Plans constituted an actual remedying of many of the grievances mooted in the small group meetings, also in violation of Section 8(a)(1).

"Section 8(a)(1) prohibits employers from soliciting employee grievances in a manner that interferes with, restrains, or coerces employees in the exercise of Section 7 activities." *American Red Cross Missouri-Illinois*, 347 NLRB 347, 351 (2006). That manner includes the implied or explicit promise during a union organizing drive to correct the solicited grievances: "it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances . . . that is unlawful." *Uarco, Inc.*, 216 NLRB 1, 2 (1974).

"The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances." *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), enfd. 165 Fed. Appx. 435 (6th Cir. 2006); *Blue Grass Industries*, 287 NLRB 274 fn. 4 (1987); *Uarco, Inc.*, 216 NLRB at 2. "The solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances." *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994).

In this case, it is clear that Manorcare's October 29 and 30 small group meetings were for the precise purpose of and did, in fact, involve the solicitation of grievances, and occurred during an organizational campaign of which the employer was well aware. What is more, there is no reason to consider whether Manorcare implied that it would remedy the solicited grievances, as the evidence shows that the promise to remedy the complaints was expressly made during the meetings. Conveying an intent to fix the problems raised by employees was an integral part of the small group meetings. According to the credited testimony of employee witnesses, "they said that they would try to fix" the problems raised, and "solve them in a timely manner. They were going to come up with solutions." Burns said certain items, like wages, "had to go through Corporate headquarters . . . they don't have the authority to decide . . . to raise anybody's salary, so that would not be fixed overnight. Other things, they were going to try to fix like supplies." Burns told employees, "they were going to start something called an Action Plan and post the results of all the things that she was writing down. . . so we can see

[39]The Respondent's contention (R. Br. at 64–65) as to all alleged interrogations—that "there is simply no showing of harm here, and thus no violation"—is meritless. A violation of Section 8(a)(1) does not depend on the subjective reaction of the employee, or on whether the interference succeeded or failed. Rather, the Board's test is whether the conduct reasonably tends to interfere with the free exercise of the employee rights under the Act. *KSM Industries*, 336 NLRB 133 (2001). The Respondent's citation to *Yellow Ambulance Service*, 342 NLRB 804, 810 (2004) is misplaced. That case involved the dismissal of an 8(a)(3) and (5) allegation (and a derivative 8(a)(1) allegation) because the employer's discriminatory and unilateral changes had no material adverse effect on employees. However, a showing of adverse affect is unnecessary, indeed, irrelevant to an independent 8(a)(1) violation for unlawful interrogation.

how it's working." Consistent with this, subsequent to the small group meetings, Manorcare began posting "Action Plans," which, as promised, showed Manorcare's progress in remedying the grievances solicited in the small group meetings.

Indeed, this was all in accord with the format set forth in the CEC manual. The entire point of telling employees that the Action Plans would be drawn up was, as set forth in the CEC manual, to "dramatize the fact that issues are heard, action is taken and the issue is resolved." The CEC manual that Burns followed in conducting the meetings tells presenters that "it is important to let the employees know that their concern has been or is in the process of being addressed." The CEC manual also provides that that presenters "inform the employees that after the meetings are completed, the issues will be categorized . . . and reviewed with others in management who will be charged with validating and looking into the concerns and making recommendations to address the concerns."

Moreover, the Respondent did not just solicit grievances *and* state that the problems would be redressed, but also made clear that discouraging union representation was the reason for the promises to remedy the grievances. According to Miechur, Burns told the employees that they "had heard there was a lot of complaints and concerns. And that they're here to try to fix it without a second party involved." Cordes recalled that Burns and Johnson stated that "they were looking for solutions that wouldn't involve an outside party." Klinger testified that Burns "mentioned SEIU . . . and the rumors going through and she also mentioned that if there was a problem in the facility we can take care of those without outside interest, you know, through a party coming in." And the CEC manual makes clear that in making these statements, Burns was being candid about the meeting's purpose: the CEC manual states that "mak[ing] third party representation unnecessary" is a stated purpose of the small group meetings and the CEC directs corporate labor relations officials such as Burns to increase the frequency of their participation in small group meetings when faced with "labor activity."

Given, this the Respondent's small group meetings—involving the solicitation of grievances and the explanation that the grievances would be remedied, offered as a reason to reject unionization—are straightforward violations of the Act.

In this context, the Respondent's "past practice" defense is entirely misplaced. "An employer who has a past policy and practice of soliciting employees' grievances may continue such a practice during an organizational campaign" without an inference being drawn that the solicitations are an implicit promise to remedy the grievances. *Wal-Mart, Inc.*, 339 NLRB 1187, 1187 (2003). However, it is also the case that "an employer cannot rely on past practice to justify solicitation of grievances where the employer 'significantly alters its past manner and methods of solicitation.'" Id. (quoting, *Carbonneau Industries*, 228 NLRB 597, 598 (1977)). In any event, without regard to the similarity of the new solicitations to past ones, "it must be borne in mind that the issue is not whether there has been a change in method of solicitation, but rather whether the instant solicitation implicitly promised a benefit." *American Red Cross*, supra at 352.

Manorcare argues that its small group meetings held in Easton on October 29 and 30 merely represented the continuation of a past practice and policy of soliciting grievances. The Respondent also offers a further, related, defense. The Respondent contends that the small group meetings were conducted in accordance with a policy—the CEC manual and small group meeting policy—adopted in August of 2007, before there was any union organizing campaign. These defenses are unavailing under the circumstances of this case.

The Respondent's contention is based on a misapprehension of Board policy. A past practice of soliciting grievances does not immunize an employer from Board sanction for soliciting grievances *and promising to remedy them for the purpose of discouraging unionization.* "[I]t must be borne in mind that"—past practices notwithstanding—"the issue is . . . whether the instant solicitation implicitly promised a benefit." *American Red Cross*, supra. "[I]t is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances . . . that is unlawful." *Uarco, Inc.*, 216 NLRB 1, 2 (1974).

The Board will not draw an inference of implicit promise where solicitations are simply a continuation of an ongoing established practice of soliciting employee grievances. However, an employer is not free during a union campaign—regardless of its past solicitation practice—to solicit new grievances and tell employees as to their grievances, "they would try to fix them;" "[t]hey were going to try and solve them in a timely manner"; "[t]hey were going to come up with solutions for these"; that some issues "would not be fixed overnight" but "[o]ther things, they were going to try to fix." That is what the Respondent did here. Regardless of its past practice of soliciting complaints, an employer is not free during a union campaign to solicit new grievances and tell employees that we are "here to try to fix it without a second party involved," and that we are "looking for solutions that wouldn't involve an outside party," and that "if there was a problem in the facility we can take care of those without outside interest, you know, through a party coming in." That is what the Respondent did here. A past practice of soliciting grievances can protect an employer from an inference that its solicitations include an implicit promise to remedy the grievances. But in the midst of a union campaign, a past practice of solicitation does not sanction express promises to remedy newly solicited grievances in a direct effort to discourage employees from choosing representation. Similarly, as a factual matter, routine implementation of the CEC/small group meeting policy was not the motivation for the October 29–30 meetings. Indeed, neither Burns nor Johnson claimed this. In any event, it is not lawful to establish a policy of soliciting and remedying employee grievances and implement it during a union organizing campaign with explicit assurances to employees that union representation is unnecessary. *House of Raeford Farms*, 308 NLRB 568, 569–570 (1992) ("Further, the Respondent explicitly promised to remedy numerous grievances in these meetings and, as the judge found, the Respondent did in fact make good on some of these promises," which is unlawful unless the grant of benefits was decided upon prior to onset of union activity). Here, the solicitation of grievances and promise to remedy them during the union campaign violated the Act.

The General Counsel also takes issue with the premise of the Respondent's contention that there was a past practice of soliciting grievances, and that, if there were, that the current small group meetings were conducted in the same way. I agree, although, as indicated in the text, I do not believe that such a past practice could immunize the Respondent's present conduct of promising to remedy grievances to discourage employees from choosing union representation. The Respondent's witnesses testified that small group meetings had been a longstanding practice and policy and recalled a handful of meetings over the years at Manor Care facilities. Despite this general assertion, the evidence uncovered only one remotely similar meeting at Easton and that was, as best the record reveals, in 2004, and involved larger groups of employees than in the October 2007 small group meetings, and no evidence of specific questioning of employees as was utilized in 2007. Further, the 2004 meeting was a follow-up to an employee survey, a feature missing from the 2007 meetings. Thus, there was no ongoing practice of small group meetings at Easton—one instance three years ago does not a practice make—and, by all evidence, its manner and methods in the past solicitation meeting was altered for the 2007 union-inspired meetings.

Moreover—and perhaps this is just another way to approach the point made above—the 2007 meetings differed in a very important way from prior meetings: the 2007 meetings involved express references by the corporate representatives to the unionization efforts and the assurance that they had come "to try to fix [problems] without a second party involved." This would seem to be the precise opposite of what must be shown if an employer is to rely on a past practice of solicitation as grounds for the Board to permit it to carry on with solicitations in the midst of a union campaign.[40]

Here, the referencing of the desire to avoid a union put the October 2007 meetings on a wholly different footing from past meetings. The point of the "past practice" exception for solicitation of grievances is that the solicitation is not reasonably perceived as an implied promise to remedy grievances to discourage union representation when it is merely the continuation of business as usual for employer and employee. In other words, because it is an ongoing practice, and would be expected to have occurred without regard to the union campaign, the solicitations will not reasonably be perceived as a change in practice and policy designed to interfere with employees' choice of whether or not to select union representation. See, *Yale New Haven Hospital*, 309 NLRB 363, 365 (1992) (no violation where in reestablishing employee grievance committees to recommend changes management "Respondent did what it had done in the past and in all likelihood would have done in the absence of any union activity"). That defense is not satisfied where, as here, in the midst of a union campaigning, the employer holds meetings where it explains to employees that they don't need a union and that we can "fix" your problems without a union. Indeed, the reference to avoiding union representation goes to the heart of what the Board is trying to prevent when it posits its general rule against solicitation of grievances and implies a promise of their remedy during a union campaign. In this case, the expressed antiunion rationale for the promise to remedy employee grievances makes the 2007 meetings fundamentally different from anything conducted by the Respondent in the past. For this reason alone, the Respondent cannot rely on its alleged past practice of soliciting employee grievances to justify the October 2007 small group meetings.

Finally, I reject the contention by the General Counsel (GC Br. at 83) that the posting of the Easton Action Plans, promised in the small group meetings and posted a few weeks later, constituted an independent unfair labor practice. The posting of the Action Plans was clearly part and parcel of the employer's solicitation and promise of redress. The Action Plans support the case against Manorcare. However, the substance for the Action Plans was developed in the small group solicitation meetings. The Action Plans highlight the issues solicited in the small

[40]See, *Aldworth Company, Inc.*, 338 NLRB 137, 179, 186, 191 (2002) (solicitation meeting during union campaign differed from past practice in, among other ways, that in solicitation meeting during union campaign management tied solicitation of grievances to the union organizing effort); *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153, 1156 (1980) (employer "contends that it previously solicited employees' complaints . . . . by having a suggestion box, by holding meetings with employees and asking what, if any, problems they had, and by having voluntarily imposed a grievance procedure in its policy book which encouraged the filing of the complaints. Respondent is correct up to the point, that point being that the solicitation of grievances complained of herein was specifically geared to finding out what brought out the interest in the Union and how to discourage that interest. What was a legal act prior to the commencement of the union campaign switched to an attempt to induce the employees not to exercise their right to self-organization").

group meetings and announce the (often the already accomplished) promised remedy. But I see no grounds to frame the posting as an independent unfair labor practice.[41]

c. Providing a wage increase or lump sum bonus to employees (paragraph 14 of the complaint)

The General Counsel alleges that the November wage increase and bonuses to employees, and an increase in the starting rate for CNAs, unlawfully interfered with, restrained and coerced employees in the exercise of their rights, in violation of Section 8(a)(1). The General Counsel further alleges that wage and rate increase and bonus payments were a discriminatory effort to discourage employee from supporting the Union, in violation of Section 8(a)(3) of the Act.

An allegation that an employer has violated Section 8(a)(1) by granting benefits in response to union organizational activity is analyzed under *NLRB v. Exchange Parts*, 375 U.S. 405 (1964). In *NLRB v. Exchange Parts*, the Supreme Court held that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize. "Similarly, an employer cannot time the announcement of the benefit in order to discourage union support, and the Board may separately scrutinize the timing of the benefit announcement to determine its lawfulness." *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002). Notably, the rule set out in *Exchange Parts* is also applicable to promises or conferral of benefits during an organizational campaign but before a representation petition has been filed. *Hampton Inn NY—JFK Airport*, 348 NLRB 16, 17 (2006).

"Although 8(a)(1) allegations are typically analyzed under an objective standard, and motive is irrelevant, see *American Freightways Co.*, 124 NLRB 146, 147 (1959), the 8(a)(1) analysis under *Exchange Parts* is motive-based." *Network Dynamics Cabling Inc.*, 351 NLRB No. 98, slip op. at 2 (2007), citing *Hampton Inn NY—JFK Airport*, 348 NLRB 16, 18 fn. 6 (2006). In other words, the motive for the conferral of the benefit during the organizational campaign must be to interfere with—i.e., an effort to influence—the union organizing.

Under settled Board precedent, "[a]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act." *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992); *Kanawha Stone Co., Inc.*, 334 NLRB 235 fn. 2 (2001), citing *Mariposa Press*, 273 NLRB 528, 544 (1984).

In this case, the wage increases and lump sum payments were granted in November, and received by employees in their pay in December, dates by which the Respondent was well aware of the organizing campaign, and by which it had made its opposition to the campaign well-known. The wage increases and lump sum payments were in addition to the individual increases typically received by employees on the anniversary date of their hire. They were received just weeks after the small group meetings at which employee complaints about pay had been a significant feature. Many promises were made at the small group meetings. Employees receiving these "extra" wage increases after the small group meetings, and in the middle of the union campaign, would reasonably view the wage increases and bonuses as related to the union campaign, and an attempt to interfere with the employees' choice in the

[41]The cases cited by the General Counsel, *The Register Guard*, 344 NLRB 1142, 1143 (2005), and *Carbonneau Industries*, 228 NLRB 597, 599 (1977) are not to the contrary.

campaign. The employees would reasonably view the wage increases as remedying the wage complaints made at the small group meetings. Thus, absent the employer's showing of a legitimate reason for the wage increase and lump sum payments, a violation must be found.

The Respondent maintains that it did have a legitimate business reason for the increases: in granting the pay changes it was just following through on an analysis of market wage conditions and the appropriateness of a market-driven pay adjustment that it had begun in February of 2007, long before the advent of the union campaign. While the Respondent admits that the pay adjustments were "approved, and instituted in November. . . . [t]hat increase, however, reflected the many months of work that had come before, and simply had no connection to the Union whatsoever." (R. Br. at 60).

The difficulty with the Respondent's argument—in addition to its inapplicability to the lump sum bonuses—is that while it admits that the increases were first approved in November, well after the commencement (and after the Respondent's knowledge) of the organizing campaign, it offers nothing to show that the wage increases were likely, much less planned, or a foregone conclusion, or "essentially decided on prior to the commencement of any union activity." *International Baking Co.*, 342 NLRB 136, 142 (2004), aff'd. 185 Fed. Appx. 691 (9th Cir. 2006); *LRM Packaging Co.*, 308 NLRB 829 (1992) ("granting of medical benefits was promised and set into motion months before the union campaign began"). At most, the Respondent has proven that prior to the union campaign it was looking into the possibility that it would give a wage increase.

I accept that Burns started looking at wage issues in February 2007, many months before the commencement of the union campaign. By her own testimony this was done periodically, at least yearly, ideally more often, and it did not mean that a wage adjustment was in the offing. The record evidence of the Respondent's deliberations or decisionmaking on the wage increase was very limited. Burns collected data from February to August. By August 17, Burns was "about 50% done" with a "wage proposal," but this represented a proposal to be submitted to individuals at corporate headquarters whose approval was needed for any wage adjustment. There is no claim, or record evidence, that Burns was the effective decisionmaker or that her views were predictably followed by the relevant officials at headquarters. I recognize that Burns testified that, based on her review of data, by July "I knew we had to" have a wage adjustment. If that was her view, the thrust of her testimony was that the decision was not in her hands but in the hands of the corporate compensation department at Manor Care headquarters in Toledo. Burns first submitted a wage proposal to her boss and to the corporate compensation department in late September or early October, and after that "it bounced back and forth a few times." And although Respondent's elucidation of the issue was murky, it appears (compare GC Exh. 55 to GC Exh. 39) that the increases proposed early in the process were miniscule compared to the significant increases actually granted. The decision to grant the increases was made, of course, after the small group meetings exposed the importance of the issue to the employees, and, it appears, to the employer's antiunion efforts.

Notably, no one from corporate compensation testified. No one who made the decision to implement or approve the wage increase testified. It was the Respondent's burden to show that the decision to give the wage increase when it did was the product of a legitimate business decision unrelated to the union campaign. The Respondent has failed to shoulder that burden. *Mercy Hospital*, 338 NLRB 545, 545–546 (2002) (employer failed to meet its burden of showing legitimate basis for wage increase when its only witness on the subject had no knowledge of or participation in the timing of the wage increase announcement). What the Respondent has shown is that prior to the union campaign it was considering the possibility of giving employees a wage increase, a process it engages in on a yearly basis. The decision to give an increase

was not explained by any witness in a position to know why the wage adjustment was finally approved when it was. On this record the inference of improper motive that attaches to a wage increase granted during the union campaign must stand. The Respondent's implementation of the wage and rate increase, and lump sum bonus, was violative of Section 8(a)(1) of the Act.

The complaint also contends that the wage increase was violative of Section 8(a)(3) of the Act. There is some support for this in Board precedent,[42] but most of the relevant cases find the unlawful grant of an across the board benefit during an organizing campaign to be an 8(a)(1) violation—i.e., an interference with the Section 7 right of employees to choose whether or not to join and support a union. I find it unnecessary to reach the 8(a)(3) allegation as the remedy for the additional violation is the same as the remedy for the 8(a)(1) violation. *In Home Health Inc.*, 334 NLRB 281, 284 (2001).

d. The transfer of Administrator Seiler and ADNS Kublius (paragraph 9 of the complaint)

The General Counsel also contends (paragraph 9 of the complaint) that the transfers of Kublius and Seiler were an unlawful effort by Manorcare to discourage unionization. The General Counsel contends (GC Br. at 84) that the decision to transfer Kublius and Seiler "arose directly out of the small group meetings and Johnson's perception after the meetings, that they had lost the confidence of the staff."

It is clear that the removal of an unpopular supervisor is viewed by the Board as a conferral of a benefit, and, like the conferral of more traditional benefits during an organizing campaign, absent a showing of a legitimate business reason for the granting of the benefit during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act. An employer may rebut this inference by establishing an explanation for its action other than the union campaign. *The Inn at Fox Hollow*, 352 NLRB No. 127, slip op. at 2 (2008); *Ann Lee Sportswear*, 220 NLRB 982, 993 (1975).

The General Counsel recognizes, and I agree, that the decision to transfer Kublius and Seiler was part of an overall response to the Union campaign. Between October and November the management structure at Easton was completely overhauled and augmented. There is nothing unlawful about an employer replacing managers as a reaction to a union drive or bolstering management personnel in order to oppose a union drive, but it is problematic to make managerial changes in order to remedy grievances solicited from employees. Had the Respondent's witnesses testified persuasively that Seiler and Kublius were transferred because they had not been effective in opposing the Union, or because the Respondent thought others would be better at it, this allegation of the complaint would have to be dismissed. But the Respondent's witnesses did not claim any such thing.

Johnson first claimed that she removed Seiler because of "challenges" Seiler had managing Kublius and also with Reitnauer, "[a]nd I felt that for her peace of mind and the betterment of the facility, that it would be best if we transfer her away from the Easton facility." This certainly did not ring true given that both Reitnauer and Kublius were transferred. Johnson first claimed that the decision to transfer Kublius was made by Seiler, a shifting of responsibility

[42]See, *In Home Health Inc.*, 334 NRLB 281, 284 (2001) (referencing *Cooper Industries*, 328 NLRB 145, fn. 4 (1999) (8(a)(3) found), but also referencing *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 833 (D.C. Cir. 1998), refusing to enforce *Cooking Good Division of Perdue Farms, Inc.*, 323 NLRB 345, 352 (1997) on this point).

at odds with the documentary evidence and credibly disavowed by Seiler. In addition to these discredited motives for the Kublius and Seiler transfer, when confronted with her pretrial affidavit, Johnson agreed with and adopted the affidavit's claim that "after the [small group] meeting, it was decided that [Kublius] lacked the confidence of the staff, and she was transferred to another facility" and that Seiler's transfer was made for "essentially similar reasons." Thus, the essentially admitted (and I conclude, the real) reason for Seiler and Kublius' transfers was that, based upon meetings with employees for the purpose of soliciting employee complaints and remedying those complaints, Johnson decided that Seiler and Kublius "lacked the confidence of the staff." As discussed, those meetings were for the purpose of soliciting grievances and remedying the concerns raised in an effort to discourage unionization. In this instance, in accordance with Johnson's admission, the complaints about Seiler and Kublius were redressed. The redress of a grievance unlawfully solicited during a union campaign violates the Act. *Carbonneau Industries*, 228 NLRB at 599 (unlawful to take action against supervisor where chief cause was solicited employee sentiment, even where employer had grounds for taking action against supervisor that predated union campaign). See, *Aldworth Company, Inc.*, 338 NLRB at 189, 191 (announcement by employer that it had taken action on solicited employee grievances regarding supervisors violated Act).[43]

e. *Miechur's discipline; threatened loss of a job, and confiscation of the Mundy letter (paragraphs 8 and 15 of the complaint)*

The General Counsel alleges that the Respondent's issuance of a final written warning to Miechur on November 28 violated Section 8(a)(1) and (3) of the Act. Section 8(a)(3) of the Act provides, in relevant part, that it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). An employer's discharge or discipline of an employee for the purpose of thwarting pr retaliating against union activity violates Section 8(a)(3). As any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 rights, any violation of Section 8(a)(3) is also a derivative violation of Section 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 933 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]. 29 U.S.C. § 158(a)(1). Rights guaranteed by section 7 include the right to engage in "concerted activities for the purpose . . . of mutual aid or protection." 29 U.S.C. § 157. An employee's discipline independently violates Section 8(a)(1) of the Act, without regard to the

[43]The Respondent asserts (R. Br. at 58) that "the events underlying the transfers were already in motion long before the Union campaign started, and Respondent was not required to ignore a major and ongoing personnel issue simply because the Union had appeared." But while there is evidence that Seiler and Kublius had some personnel problems prior to the union campaign (although, also, positive performance reviews), there is no evidence prior to the small group meetings of even a suggestion of a transfer. The Respondent ignores the evidence—admitted to by Johnson—that it was the employees' reaction in the small group meetings that resulted in the transfer. In other words, even if previous problems with these supervisors factored into the decision, nothing was done until the employer confronted the employee sentiment against the supervisors. *Carbonneau*, 228 NLRB at 599. I note that, even assuming, arguendo, that action would eventually have been taken against Seiler or Kublius, a violation is made out because the facts do not show that Seiler and Kublius would have been transferred when they were absent union activity. *Burlington Times*, 328 NLRB 750, 755 (1999).

employer's motive, and without regard to a showing of animus, where "the very conduct for which employees are disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). Moreover, Section 8(a)(1) of the Act is independently violated when an employee is disciplined for engaging in concerted protected activity, even where the employer honestly and in good faith, but wrongly, believes that the employee has engaged in misconduct in the course of that protected activity. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964).

In this case, the Government advances three theories in support of its position that the discipline of Miechur violated the Act.

First, applying the Board's decision *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel contends that the motivating factor in Manorcare's decision to discipline Miechur was not—as claimed by the Respondent—the Respondent's belief that Miechur had engaged in solicitation, but rather, her overall union activity, rendering the discipline violative of Section 8(a)(3) of the Act. Manorcare disputes this, and contends that it was motivated solely by its good faith belief that Miechur solicited residents.

Second, the Government contends, even assuming that Manorcare disciplined Miechur for solicitation of residents with the Mundy letter, that is a violation of Section 8(a)(1) of the Act. In this regard, the Government contends that the solicitation was protected activity for which Miechur may not be punished.

Third, the Government contends that—apart from whether or not solicitation of a resident with the Mundy letter was protected activity—Miechur did not, in fact, engage in such solicitation. Rather, she simply served as the person who collected and held the signed Mundy letters solicited by others. Thus, contends the Government, Miechur was disciplined for conduct in which she did not engage, and the employer's mistaken belief that she solicited residents is not a defense to disciplining her for conduct which she did not undertake.

Given the Government's various theories of violation, each of which, if sustained, independently establishes a violation, there are a number of ways to approach the issue.

I will first use *Wright Line* to analyze the motivation for Miechur's discipline. If the General Counsel meets his initial burden and shows that Miechur's union activity (apart from any conduct involving the November 21 solicitation of residents) was a motivation for the discipline, the burden will shift to the Respondent to show that in the absence of Miechur's union activity it would still have disciplined Miechur, as it claims, for the incident involving the solicitation letters. If the Respondent's contention is found to be a pretext, or if it is found to be a motive, but the Respondent failed to meet its burden to prove that it would have taken the same action against Miechur in the absence of her union activity, then a violation will be found. In that case, the question of whether Miechur, in fact, engaged in solicitation as accused, and whether such conduct is protected or unprotected, is irrelevant.[44]

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[44] *Ben Franklin Plumbing*, 352 NLRB No. 71, slip op. at 1 fn. 1, 14 (2008) (unnecessary to reach question of protected nature of conduct for which employer claimed it terminated employee where employer failed to meet its *Wright Line* burden of showing that employee would have been terminated in the absence of other protected activity that was shown to have motivated discharge); *New York University Medical Center*, 261 NLRB 822, 824 (1982) (unnecessary to reach question of whether activity was protected where employer failed to meet its *Wright Line* burden of showing that employee would have been discharged for allegedly

Continued

1. The Wright Line analysis

The General Counsel's first theory of a violation puts at issue the employer's motivation for disciplining Miechur. As referenced, the Supreme Court-approved analysis in 8(a)(3) cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management. Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line* the Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that employee protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. mem. 179 LRRM (BNA) 2954 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). This includes proof that the employer's reasons for the adverse personnel action were pretextual. *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive . . . .") (internal quotations omitted)).

Under the *Wright Line* standards, the General Counsel meets his initial burden by showing "'(1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action.'" *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (quoting *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enf. 314 NLRB 1169 (1994)).

Such a showing proves a violation of the Act subject to the following affirmative defense available to the employer: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by demonstrating by a preponderance of the evidence that the same adverse employment action would have taken place even in the absence of the protected conduct. *Williamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line*, supra. For the employer to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the action in question or to show that the legitimate reason factored into its decision to take action against the employee. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1183 (2006). In the face of the General Counsel's meeting of its initial burden, in order for the employer to avoid a finding of violation, it must persuade by a preponderance of the evidence "that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1989; *T. Steele Construction*, supra ("the Respondent must show that the legitimate reason would have resulted in the same action even in the absence of the employee's union and protected activities"); *Carpenter Technology Corp.*, 346 NLRB 766 (2006) ("The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union

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unprotected activity in the absence of other protected activity that was a motivating cause of discharge), enf't. denied on other grounds, 702 F.2d 284 (2d Cir. 1983). See, *Waste Management of Arizona*, 345 NLRB 1339, 1340 (2005) (applying *Wright Line* to determine whether employer would have terminated employee for his unprotected conduct in the absence of his protected activity); *Mountain Shadows Golf Resort*, 330 NLRB 1238 (2000) (remanding case for the judge to determine under *Wright Line* whether a disloyal flyer would have caused employer to discharge employee in the absence of other protected activity).

activities"); *Yellow Ambulance Service*, 342 NLRB 804, 805 (2004) ("Once a discharge has been show to be unlawfully motivated, an employer must establish not merely that it *could have* discharged the employee for legitimate reasons, but also that it actually *would have* done so, even in the absence of the employee's protected activity").

With regards to Miechur's discipline, the first two elements of the *Wright Line* analysis—that Miechur engaged in protected activity and that Manorcare was aware of it—are not seriously contested. Miechur was the lead union activist at Easton, involved in discussing the Union with other employees, contacting the Union, arranging a meeting in her home, and by November 16 she had traveled with the Union to a rally in front of Carlyle headquarters in DC, an event that was videotaped and put on the SEIU website, and included an interview with Miechur. At least by the time of the event for which she was disciplined on November 21, she had told Heimbach, in response to her questioning that she "believed in" the Union, and reaffirmed it two weeks later. Moreover, Heimbach told her on November 17 that she had seen Miechur on the SEIU website. In addition, as of October 18, Manorcare was well aware of Miechur's role in the organizing campaign, as Reitnauer had contacted Burns and provided significant detail to her on this score. Burns, in turn, reported this to corporate HR, and at that time Miechur was the only employee at Easton she knew to be involved in union organizing. Thus, by the time of the November 21 solicitation incident, Miechur had been engaging in significant protected activity and the Respondent had knowledge of it.

The third element of *Wright Line* requires the General Counsel to show that Miechur's union activity was a motivating factor for the employer's action against Miechur. This factor can be proved "based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole." *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). "To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity." Id.; *Robert Orr/Sysco Food Services*, supra.

In this case the evidence strongly supports the finding that Miechur's union activity was a motivating factor for the discipline meted out to her.

There is direct evidence of animus by Manorcare that supports the General Counsel's case. There are the prediscipline episodes of interrogation. There is the unlawful effort to discourage employees from choosing union representation through the small group meetings and promises to remedy complaints. These provide some direct evidence of animus towards union activity, and in the case of the interrogation, toward Miechur's union activity. However, even more powerful than this direct evidence is the inferences that may be drawn from the record evidence regarding Miechur's discipline.

First, it is notable, that the discipline occurred just days after Miechur publicly supported the Union for the first time, traveling to Carlyle headquarters with the SEIU and being featured in a video on the SEIU website that discussed the trip. Manorcare management knew before this November 16 trip that Miechur was a union supporter. But her first foray into public advocacy for the Union did not go unnoticed. The day she returned from the trip HR Director Heimbach approached Miechur and told her that I "seen what you did. I've seen your video on the SEIU website." Specter admitted she was "probably" briefed by Johnson or Burns about Miechur and the union activity at the building upon her arrival to the building as administrator on November 14. Specter specifically testified that within her first week at Easton she learned of Miechur's appearance on the SEIU website video from Johnson or Burns and attempted (unsuccessfully)

to view the video. Thus, Miechur's appearance on the SEIU video heightened concern about her activities and drew attention to her now open role as a union supporter. The incident for which she was discipline occurred just a few days later, on November 21.

Second, the genesis of the incident is suspect. I am not convinced one way or the other about Kushnerick's claim that she entered the nourishment room looking for a wanderguard. Normally they are not kept in the nourishment room, but Kushnerick, asserted that an unnamed person told her she would find one in the nourishment room that evening. I will assume that is true and she entered the nourishment room in search of a wanderguard. But I do not believe that she was looking for a wanderguard—a grey device packaged in bubblewrap when she was rifling through the papers on the table in the nourishment room, particularly an area of the table where employees kept personal belongings. There is no evidence, or testimony, or reasonable likelihood, that anyone told Kushnerick that this is the area of the room—the tabletop where employees keep personal belongings—that she would find a packaged wanderguard.[45] As Collado testified, Kushnerick was "looking through papers." I do not believe she was looking through them, in the precise area where Miechur kept her personal belongings, in search of a wanderguard. It should be remembered that Kushnerick admitted that she had heard "rumors" that Miechur was asking residents to sign letters and she admitted that when she saw the Mundy letter thought it might be "connected to that rumor." The Respondent's contention is that this was all coincidence. I do not accept that. Kushnerick found what she was looking for and—and took it. It is not proven (although it is possible) that Kushnerick knew or suspected the materials were in Miechur's possession. I am unsure (although it is possible) that the Mundy letter was removed from Miechur's bag. But it hardly matters. In any event, Kushnerick knew she was taking a union-related paper. She knew she was taking it from an area of the table where individuals kept personal belongings. It was not laying open and unclaimed for her to take. She looked for it. She knew it did not belong to her and she took it. I agree with the General Counsel that this is confiscation of union literature—it literally was a letter created by the Union, for use in the organizing campaign—and a violation of the Act. *Alle-Kiski Medical Center*, 339 NLRB 361, 366 (2003); *NCR Corp.*, 313 NLRB 574, 577 (1993). (unlawful to confiscate union literature from employee; "Even if the Company's no-distribution rule were valid, the Company had no legitimate basis for taking such action").

Third, in an adumbration of the antiunion animus that motivated the coming discipline, when confronted by Miechur, Kushnerick warned Miechur to "stop worrying about the Union and worry about your job." This directive is clearly unlawful, as alleged by the General Counsel. It is a very thinly veiled threat, positing, as it does, a conflict between union activity and job security. See, *Fieldcrest Cannon*, 318 NLRB 470, 488 (1995), enfd. in relevant part, 97 F.3d 65 (4th Cir. 1996) (unlawful threat of job loss for supervisor to tell employee he "had a right to go to the Board, but that it was his job he should worry about"). And it provides pointed evidence of animus directly threatening Miechur's job because of her union activity. *Brandt-Airflex Corp*., 316 NLRB 315, 315–316 (1995) (evidence that subsequent discharge of union steward was unlawfully motivated supported by prior statement to steward that he should "worry more about his job than about [employer's delinquent] benefit payments").

[45] Kushnerick was very vague in her testimony. She claimed she found the wanderguard, but could not recall if it was before, after, or at the same time that she noticed the Mundy letter. She could not recall providing the wanderguard to anyone, and no one testified that they received a wanderguard from her. Her story relies on the wanderguard to justify her presence and her search but it disappears from her recollection after that.

Fourth, it is very troubling that in the disciplinary meeting, when Miechur accused the Respondent of disciplining her because "you know I called the SEIU," Gieroczynski did not take the opportunity to deny it, but rather, responded, "yes, we know that you called the Union." This comment, testified to by Klinger and Miechur, and undenied by any management witness, amounts to more than inferential evidence of animus—it is a direct explanation of motive. Stripped from context, Gieroczynski's bare comment—that the Respondent knows that Miechur called the Union—is bad enough. It is a suspicious and inappropriate comment to make in an allegedly nondiscriminatory disciplinary meeting of the lead union activist. But in context, it is worse. Miechur voiced her suspicion that the discipline was attributable to her union activity. Gieroczynski did not deny it, but appears to endorse that suspicion. The message was sent.

Fifth, it is obviously suspect that in order to determine the discipline for Miechur, the Respondent involved nearly its entire management team, including its outside labor counsel and the head of corporate labor relations Kilmurry, who was at the plant to advise on the antiunion campaign, and whose involvement in plant disciplinary actions was admitted by Heimbach to be atypical.

Sixth, in the face of the Respondent's claim that it was motivated to discipline Miechur solely for her role in soliciting residents to sign a letter complaining, inter alia, of staffing shortages, it is most striking that the Respondent's process for disciplining Miechur demonstrated a total lack of interest in what she did or did not do, or the extent of the solicitation "problem," or who else might have been involved in committing this "offense."[46]

While the preparation of Miechur's discipline notice involved the entire management of the facility, as well as the head of corporate labor relations, and outside labor counsel who drafted the disciplinary language, this frenzy of activity involved zero investigation or interest in the underlying events. It must be remembered that, according to Kushnerick, she saw had seen "a stack" of Mundy letters, which suggests that the solicitations at issue may have been extensive. Nonetheless, after Kushnerick reported to Specter that "she had Trisha soliciting people," the case was closed. This short conversation, which neither Specter nor Kushnerick could recall much of, exhausted the employer's interest in the underlying events.

There was no attempt to find out which, if any, residents had been solicited. There was no effort to talk to any residents about it. There was no effort to find out whether the "stack" of solicitation letters indicated that many residents had been solicited. There was no effort to talk to other employees to find out what if anything they knew. There was no effort to talk to Miechur, to get her side of it, or to find out what she knew about the incident. There were no announcements to employees, residents, families, or anyone else, indicating concern. There was no written internal documentation or written discussion of these matters introduced into evidence.

Under the circumstances, the Respondent's actions are extremely suspect, for a couple of reasons. First, they are suspect because the lack of due process in disciplining Miechur was

[46]That is, until the hearing in this matter, when the Respondent suddenly declared it to be vital to its interests that it be permitted to question employees about their union activities and their involvement in the solicitation campaign. I will return to this issue below, and the evidentiary ruling I made barring such inquiries. For now, the point that must be drawn is that contemporaneous with Miechur's discipline and its discovery of the solicitation issue, the Respondent evinced no interest in these matters.

an unexplained departure from the Respondent's normal practices, and bespeaks of interest in "getting" Miechur rather than a concern with her conduct in soliciting residents. As Heimbach, the HR Director at the time explained, discipline at the level meted out to Miechur—a final warning with termination promised for a subsequent offense—" wouldn't have [been] warranted . . . without investigating it first." This was not the HR Director's musings about her personal views of fairness in the workplace. This was an admission that at Easton people are not typically disciplined to the edge of termination "without investigating it first."[47] This bespeaks of an effort to "get" Miechur, as opposed to a legitimate concern with her conduct. That Miechur had denied to Kushnerick that she solicited any of the letters, and denied it again in her disciplinary hearing, makes ever clearer that the lack of interest in Miechur's side of the story—or any information at all—is highly suspect.[48]

The Respondent's lack of interest in the facts surrounding Miechur's discipline calls into question the Respondent's motives in a second way as well. On brief the Respondent knows no limit to the damage it claims that the dissemination of the Mundy letter could cause. It contends (R. Br. at 41) that the dissemination of the letter could cause residents "unnecessary distress, thereby hampering their treatment, or interfering with their medical care," and that the letter "sought to threaten its entire operation by preventing—or at least impeding—the grant of the license necessary to operate in Pennsylvania." This is grandstanding. We know it is grandstanding because the Respondent's response at the time the letter was discovered—

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[47]Notably, Miechur's July 2006 suspension for using a resident's telephone was reduced to a warning—Miechur was paid for her time off—after the Respondent's investigation revealed that the resident had permitted Miechur to use the telephone.

[48]*Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 984 fn. 40 (2007) ("Enforcement of rules against employees without sufficient prior investigation of their alleged misconduct, including withholding from the accused details of the accusation and denying them an opportunity to explain or deny their alleged misconduct, is evidence of unlawful motive"); *All Pro Vending, Inc.*, 350 NLRB 503, 514 (2007); (*Diamond Electric Mfg*, 346 NLRB 857, 860 (2006) ("the failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain may, under appropriate circumstances, constitute an indicia of discriminatory intent. The Board has considered this factor in several recent cases to find discharges unlawful where employees were denied the opportunity to provide a potentially exculpatory explanation prior to being discharged, and to dismiss allegations of unlawful discharge where such an opportunity was provided") (Board's bracketing) (footnotes omitted) (quoting *K&M Electronics.*, 283 NLRB 279, 291 fn. 45 (1987) ("failure to conduct a meaningful investigation or to give the employee an opportunity to explain has been regarded as an important indicia of discriminatory intent"); *Amptech, Inc.*, 342 NLRB 1131, 1146 (2004) (failure to inquire of [disciplined employee] as to what had occurred constituted a rush to judgment attributable to Respondent's unlawful motivation to take adverse action against the leading pro-union employee on the premises"), enfd. 165 Fed. Appx. 435 (6th Cir. 2006); *Southern Electronics Co., Inc.*, 175 NLRB 69, 72 (1969), enfd. 430 F.2d 1391 (6th Cir. 1970) (investigation . . . was a one-sided affair with the purpose not being to determine precisely what occurred in the stockroom that morning, but rather to secure sufficient reasons to justify a discharge").

none, with the exception of the swift convening of management and counsel to find a basis to discipline Miechur—belies such claims.[49]

Seventh, in revealing contrast to the lack of interest in the actual facts of the matter at hand, stands Manorcare's vigorous interest in disciplining Miechur. This interest was paramount, and overshadowed the professed interest in the offense of solicitation. This may be gleaned in a number of ways. It is not just the extent of the involvement of corporate management and even outside counsel in determining the discipline that was extraordinary, but the manner in which the discipline was determined. One can see the emphasis on discipline, and not the offense, from Specter's explanation that the management group came to a decision on the discipline, "We wanted it to be a final written warning action but not a termination" and the clear suggestion in Specter's testimony is that the work rule violation was determined after the group decided on the appropriate penalty. The point was to penalize Miechur. Indeed, finding an appropriate work rule violation was a challenge. There is no work rule against what Miechur did. No work rule against soliciting residents. No rule against asking employees to sign a letter to a political figure. With regard to Miechur, the "offense" was an afterthought, even a prop, the point was to take the opportunity to discipline Miechur.

Notably, Specter testified that Miechur's July 2006 warning had been considered in determining the appropriate level of discipline. It is troublesome, and unexplained by the Respondent, that Specter (and Burns and Kilmurry) did not speak with anyone involved in the July 2006 suspension and did not know that an investigation had largely vindicated Miechur and that she had been paid for the time she was suspended. Moreover, Specter, Burns, and Kilmurry apparently paid no attention to the Manorcare policy that would render the July 2006 suspension too dated to be relied on for a November 2007 incident. This unexplained deviation from Manorcare's disciplinary policy is highly suspect and supports an inference of discrimination. In fact, I suspect, based on the record as a whole, that Specter's reliance on the past discipline was perfunctory. The larger picture is of an employer determined, without much regard to the facts or the offense, to punish, albeit short of discharge, the leading union activist who had recently taken her activism to a new public national level. The larger picture is of an employer bent on putting Miechur on notice that she could be retaliated against and that she needed to step out of the limelight with her union activism. Indeed, such a suggestion would be made to Miechur in coming months.

Based on what I find was a transparent effort to "get" Miechur revealed by the Respondent's conduct, the General Counsel has amply satisfied his burden under *Wright Line*. There is a strong basis on which to infer that Miechur's discipline was motivated in significant part by her union activities.

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[49]Specter, at the hearing, and the Respondent, on brief (R. Br. at 44), defend the lack of investigation on the grounds that "it had already been acknowledged where the letter came from." The Respondent knew all it wanted to know. The letter had been found among Miechur's belongings. It did not have any interest in learning more. Specter suggested that residents were not asked about the solicitations because Manorcare did not want to "upset" the residents. This was hard to accept. With regard to allegations of far more serious breaches, such as matters of patient abuse, neglect, or substandard care, Manorcare undertakes—indeed, is required by state authorities to undertake—investigations that involve interviewing residents about the allegations. If the potential to upset a resident was the reason for the lack of an investigation into the allegations against Miechur, then, clearly, Manorcare was not particularly concerned with the solicitation.

As explained, supra, under *Wright Line*, a discharge motivated even in part by unlawful considerations is unlawful, subject to the employer's demonstration that in the absence of protected activity the adverse employment action would have been taken anyway. The question, then, is whether the Respondent has proven that, even in the absence of Miechur's union activity, it would have taken the same action against Miechur.

The Respondent has not met its burden on this record. I accept that the Respondent contends that the soliciting of residents is a punishable offense unprotected by the Act.[50] I will assume that it might have taken (lawfully, or unlawfully) some form of action against any employee that it found to be soliciting a resident. But the Respondent's burden is to prove by a preponderance of evidence that it would have taken *the same* action against Miechur had she been otherwise uninvolved in protected activity. The Respondent has proven no such thing.

As to comparing other instances of discipline with that issued to Miechur, I agree, to some extent, with the Respondent's argument that the solicitation at issue in this case is different from soliciting a resident to buy hospital scrubs. Thus, the fact that CNA Shah apparently sold scrubs openly at the facility—to employees, residents, and even a supervisor—without triggering much of a response (when finally "caught" in April 2008, she was given a nondisciplinary "coaching" form reminding her that this was not allowed), does not shed much light on how the Respondent could be expected to respond to the solicitation here, were it acting without regard to Miechur's union activity. But, with the caveat that this action was unique, or at least considered unique by the Respondent, still the overall picture of discipline at the facility raises a question as to whether, in the absence of protected activity, a final warning would have been issued. Counsel for the General Counsel placed into evidence, without objection, all disciplinary warnings she found (based on a search pursuant to a subpoena duces tecum issued to the Respondent) that related to abuse, communications with residents, or inappropriate comments or communications by CNAs to residents. A summary of these disciplinary warnings is included in Counsel for the General Counsel's brief (G.C. Br. at 29 fn. 39), and my independent review of the record establishes that it is an accurate reflection of the record evidence. That summary is as follows:[51]

Date	Employee	Warning	Misconduct
4-22-03	Employee 1	1st written	CNA yelled at resident, grabbed and pulled resident, resulting in bruises
7-18-03	Employee 1	2nd written	CNA released confidential medical information
12-26-03	Employee 2	1st written	CNA refused to provide care for a resident (putting splints on resident)
9-17-04	Employee 3	Action Plan	CNA was rude to resident; complained to a resident about her supervisor
10-23-05	Employee 4	1st written	CNA required resident to say "please;" and made fun of resident

[50] I do not accept this view, but for purposes of *Wright Line* analysis I accept that the Respondent so contends.

[51] I have deleted the names of the employees cited. None of the cited employees otherwise appears in the transcript and inclusion of their names is unnecessary. The disciplinary warnings on which this summary is based is included in the record as General Counsel's Exhibit 35.

1-22-06	Employee 5	Coaching	CNA raised voice; argued with resident, shook finger in resident's face
4-11-06	Employee 6	Coaching	CNA used threatening tone of voice with resident
9-7-06	Employee 7	Coaching	CNA says inappropriate things in front of residents and families
3-14-07	Employee 8	Coaching	CNA told resident she was not here to wait on you hand and foot
5-27-07	Employee 9	1st written	CNA had poor attitude toward residents and did not provide necessary care
12-12-07	Employee 10	Coaching	CNA told resident that he could not "pull resident's brief out of rear end""
2-27-08	Employee 11	Coaching	Pointing at patient and needs to use more soothing tone with patients
7-7-08	Employee 12	3rd Final	Failure to report abuse (resident's wife slapped resident in face)

Miechur received a third and final warning for soliciting residents with the Mundy letter. The *only* third and final warning in the record was given to an employee who failed to report a resident being slapped in the face. An incident in which a resident was yelled at, pulled, and bruised, resulted in a 1st written warning, as did the failure to provide necessary care, making fun of a resident, and refusing to provide care to a resident. Three months after the employee received a written warning for yelling, pulling, and bruising a resident, she received a second written warning for releasing confidential medical information. Rudeness, threatening tones, and inappropriate comments warranted an action plan, or a nondisciplinary coaching citation, as did Shah's selling of hospital scrubs to residents in the spring of 2008.

In deference to the Respondent's contention that soliciting residents to sign the Mundy letter is different than other solicitations, and other disciplinary events, I did not (and do not) rely on a finding of disparate disciplinary penalties as evidence in support of the General Counsel's initial burden under *Wright Line*. As demonstrated above, there are other indicia that amply satisfy that burden. But I have included this review of other disciplinary actions taken by the Respondent because it is clear that—even if not relied upon to advance the General Counsel's initial *Wright Line* burden—the disciplinary history of the facility is also not supportive in the least of an effort by the Respondent to claim that it would have disciplined Miechur with the same severity had she not been a union activist. Putting aside the procedural irregularities in Miechur's discipline, it is impossible for the Respondent to show that, on this record, Miechur's penalty for asking residents to sign a letter fits within the typical punishments provided to employees. The assertion (and I hasten to add that the Respondent does not actually make the argument) that asking a resident to sign a letter equates with watching a resident be slapped in the face would be, to put it mildly, not self-evident. In sum, one does not review the list of disciplinary warnings for resident-related issues and conclude that it aids the Respondent in meeting its burden of showing that it would have taken the same action against Miechur for soliciting the Mundy letter even in the absence of her protected activity.

At bottom, Respondent's claim is a bald appeal that in its judgment the solicitation was so egregious an offense that (assuming, a good faith belief that Miechur committed it) it would have taken the same action against Miechur even in the absence of her protected activity.

However, the record leads me to disbelieve this defense. The claim is contradicted by some of the same factors from which the inference of discrimination arise. Kushnerick found "a stack" of the Mundy letters. Yet Manorcare seemed willing, without investigation, to attribute everything to Miechur, and showed no interest in whether other employees were involved in the

activity. If Manorcare sincerely believed that the solicitation of the Mundy letter, without regard to Miechur's union activism, warranted such a harsh response it would not have been indifferent to the potential scope of the solicitation or the potential involvement of other employees. But the Respondent was indifferent to the potential involvement of other employees—other employees without a record of union activity. This suggests that Manorcare's interest was in punishing Miechur, not in punishing the offense of soliciting residents without regard to union activism. Similarly, the Respondent brazenly ignored, without explanation, its own disciplinary policies in its zeal to discipline Miechur. It has not proven that it ignores its disciplinary rules with regard to other employees. It has not offered an explanation for doing so here. The obvious conclusion is that it has failed to prove that it would have acted the same way in the absence of Miechur's union activity.[52]

2. Was Miechur's alleged conduct protected?

Utilizing a *Wright Line* analysis, I have found that Manorcare has failed to persuade by a preponderance of the evidence that it would have given Miechur a third and final warning in the absence of her protected union activities. This makes it unnecessary to determine whether, as asserted by the General Counsel, the conduct for which the Respondent disciplined Miechur was protected activity. However, as an alternative to the *Wright Line* analysis, I conclude that the activity for which Miechur was disciplined was protected by the Act. Therefore, assuming that the Respondent disciplined Miechur only for the motivations it asserts—i.e., because it believed she solicited residents with the Mundy letter—this provides an independent basis for finding a violation, without regard to my findings pursuant to the *Wright Line* analysis. *Nor-Cal Beverage Company, Inc.*, 330 NLRB 610, 611 (2000) (*Wright Line* analysis inappropriate where causal connection between protected activity and discipline is undisputed, the only issue is whether that activity lost its protection under the Act because of conduct by employee).

According to the Respondent, Miechur was disciplined for soliciting residents, but, in particular, for soliciting them to sign the Mundy letter, a form letter intended to be sent to a state representative to seek a legislative hearing. The Respondent contends that the letter disloyally disparages the Respondent in a manner that renders the solicitation unprotected activity.

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[52]The Respondent cites *Tom Rice Buick*, 334 NLRB 785 (2001) in support of the claim that it has met its burden of proving it would have disciplined Miechur in the absence of union activity. However, *Tom Rice Buick*, a case in which an employee was discharged for leaving work early, is a very different case from that at bar here. In *Tom Rice Buick*, the General Counsel's prima facie case rested on a compelling array of earlier unlawful actions involving the discharged employee. While the inference of unlawful motivation was compelling, *none* of the evidence supporting the General Counsel's case concerned the employer's conduct in the disciplining of the employee for leaving early. The employer's conduct in the discharge did not involve improprieties, a rush to judgment, or other suspicious conduct that itself provided the basis for the inference of unlawful motivation. Here, by contrast, it is the Respondent's process of disciplining Miechur that is a large part of the case against the Respondent. It therefore cannot reasonably equate itself to the employer in *Tom Rice Buick*, which convinced the ALJ, and a Board majority, that, notwithstanding its earlier unlawful conduct, the discipline taken against the employee would have occurred notwithstanding the employee's unrelated protected activities. Here, by contrast, the actual process of disciplining suggests an effort to "get" Miechur, thus fatally undermining the Respondent's bald claim that it would have similarly treated anyone accused of soliciting a resident with the Mundy letter.

First, putting aside for the moment the claims of disparagement and disloyalty, the fact of soliciting residents cannot be a basis for disciplining Miechur in this case. "Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations." *NCR Corp.*, 313 NLRB 574, 576 (1993). "[T]he Board has found employee communications to third parties seeking assistance in an ongoing labor dispute to be protected where the communications emphasized and focused upon issues cognate to the ongoing labor dispute." *Allied Aviation Service Co.*, 248 NLRB 229, 230–231 (1980), enfd. w/o op. 636 F.2d 1210 (3d Cir. 1980); *Five Star Transportation*, 349 NLRB 42, 45 (2007) ("employees do not lose their Section 7 protection simply because they seek 'to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship'") (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978), enfd. 522 F.3d 46 (1st Cir. 2008)).

In *Misercordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 812 (2d Cir. 1980), the Court of Appeals upheld the Board's finding of a violation[53] where a hospital discharged a nurse for providing information about "serious deficiencies in the quality of care" to a body charged by law with determining the hospital's state and Medicare accreditation. The Court explained:

> The Supreme Court has [ ] rejected the view that employees lose their § 7 protection "when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The Court noted in *Eastex* that § 7 repeatedly has been interpreted as protecting employees who "seek to improve working conditions through resort to administrative and judicial forums" or through "appeals to legislators." Id. at 566 (citing cases).

In the instant case, the Easton employees were seeking to improve working conditions through, "appeals to legislators." They did so through letters to Representative Mundy and they solicited, at least in one or more instances, patients to send letters to Mundy as well. It is clear that in health care settings, employers may impose more "stringent prohibitions" on solicitations, but absent special circumstances, employees' retain substantial rights to communicate with other employees and third parties:

> In recognition of the fact that a hospital's primary function "is patient care and that a tranquil atmosphere is essential to carrying out that function," the Board has permitted health care facilities to impose somewhat more "stringent prohibitions" on solicitation and distribution than are generally permitted. A hospital may prohibit solicitation and distribution at any time in immediate patient care areas (such patients' rooms, operating rooms, X-ray areas, therapy areas), even during nonworking time. However, a hospital may not ban solicitation and distribution in other areas to which patients and visitors have access (such as lounges and cafeterias) unless the evidence shows that such a ban is necessary to avoid a disruption of patient care.

The Carney Hospital, 350 NLRB 627, 643–644 (2007) (citations and footnote omitted).

[53] *Misercordia Hospital Medical Center*, 246 NLRB 351 (1979).

In *The Carney Hospital*, the Board specifically rejected the employer's contention that a total prohibition on solicitation of patients could pass muster under the Act (absent a showing that such a ban is necessary to avoid disruption of patient care). In *The Carney Hospital*, the Board found that the employer violated Section 8(a)(1) by maintaining a rule barring employee solicitation of patients. As the ALJ explained, in reasoning adopted by the Board:

> The Respondent contends that its rule is permissible because employees only have the right to solicit and distribute to "other employees, not clients of the institution." It is unsurprising that the Respondent cites no authority for this proposition since it is contrary to applicable law. In *UCSF Stanford Health Care*, 335 NLRB 488, 535-536 (2001), enfd. 325 F.3d 334 (D.C. Cir. 2001), cert denied [ ], the Board affirmed that a hospital violated the Act when it maintained a policy that prohibited solicitation and distribution to nonemployees. The United States Court of Appeals for the D.C. Circuit upheld the Board's decision, stating:
>
> > [N]either this court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and solicitation of nonemployees. To the contrary, both we and the Board have made clear that [National Labor Relations Act] sections 7 and 8(a)(1) protect employee rights to seek support from nonemployees.
>
> *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2001). Similarly, in *NCR Corp.*, 313 NLRB 574, 576 (1993), the Board stated that "Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations" by distributing union literature to them. See also *Santa Fe Hotel & Casino*, 331 NLRB 723, 730 (2000) ("[T]he fact that off-duty employee distributions . . . were to customers rather than to other employees . . . is an irrelevant consideration.") Therefore, the Respondent's argument based on the nonemployee status of patients and visitors fails.

Thus, Respondent's position that it can absolutely prohibit solicitation of residents, their families, or the public is at odds with Board precedent.

No considerations have been shown that would justify a total ban on solicitation to avoid disruption of patient care or to avoid disturbance of patients. Specter relied upon the fact that the facility is a permanent "home" to many patients as grounds for claiming they should be insulated from all solicitation in all areas of the facility. I do not think that follows, or that it may be assumed that all solicitation is upsetting to patients. Certainly, no evidence was offered to support this view. Indeed, as the Union points out, the Commonwealth of Pennsylvania takes a decidedly different view of efforts to insulate nursing home residents from those who would encourage the residents to agitate for change. Respondent's employees are (by virtue of state law) trained to comply with Pennsylvania regulations, including 28 Pa Code § 201.29, which states that residents of nursing homes:

> "shall be encouraged and assisted throughout the period of stay to exercise rights as a resident and as a citizen and may voice grievances and recommend changes in policies and services to the facility's staff or to outside representatives of the residents' choice."

I do not suggest that the Pennsylvania regulations directly govern the employees' right to solicit residents. But the regulations reflect a considered and different view of the best interests of residents, at odds with the Respondent's unsubstantiated view that the solicitation of a resident to complain to a state representative about facility conditions should be banned on

grounds that it will "upset" the resident. In the absence of any evidence to support Specter's assertion, it cannot justify a total ban on solicitation.[54]

Thus, the Respondent has failed to demonstrate circumstances that would justify a total prohibition on solicitation to families or residents. Accordingly, Gieroczynski and Specter's claims that there was an unwritten, undocumented rule barring all solicitation of residents could not justify Miechur's discipline, were it true. In fact, I do not believe there was any such rule.[55]

That there is *no* rule prohibiting solicitation of patients and the public would call into question the ability of the Respondent to discipline an employee for soliciting a resident even in a patient care area. However, that distinction is not at issue. Miechur's discipline was not predicated, at any time, or in any manifestation of Respondent's explanation of its actions, on the claim that Miechur solicited a patient in a patient care area. There is no evidence that she

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[54]I note that the fact that the facility is a longterm home to some patients renders more not less important the distinction between patient care areas—where solicitation can be restricted—and nonpatient care areas—the veritable neighborhood of the residents—where solicitation may not be restricted absent a showing of a likelihood of disturbance to patients or interference with patient care. When a patient goes out to sit in common sitting area, open to families and patients alike, or when the patient walks through the lobby to the hair salon or cafeteria, or to do laundry, the presumption cannot be that they want Manorcare to insulate them from noncoerced conversation, including with an employee, about matters of common concern. The Respondent suggests (R. Br. at 41–42) that the presence in its facility of patients suffering from dementia provides a basis to prohibit and punish the solicitation of all residents. This is an untenable and quite objectionable suggestion. The evidence is limited on the number of residents or patients afflicted with dementia, or the extent of this disability, but CNA Xavier Cordes estimated that at least half of the residents of Unit 2, where Miechur worked, were "alert and oriented." Limiting the solicitation of patients who are disoriented would be appropriate, as are many limitations with regard to infirm patients. However, this does not justify the banning of the solicitation of all patients. The Section 7 right of an employee to seek support from third parties, and, just as important, the desire of an alert and oriented patient or resident to receive information and make a decision to send a letter to a state representative, cannot so easily be jettisoned. The prospect of Manorcare barring the right of all residents to receive information and to sign a letter to a public official is no less frightening, and no less an incursion on their dignity, than the prospect alluded to by the Respondent of an infirm patient being pressured by an employee to sign or adopt a statement or position. Neither need nor should be tolerated. In this case, the Respondent offers no evidence, makes no claim, and, indeed, made no effort to find out, that an infirm resident was asked to review, much less asked to sign the Mundy letter. But the presence of the infirm in the patient population cannot satisfy the employer's burden to show circumstances warranting a total ban on solicitation that would sweep away of the rights of employees to discuss with any patient matters of mutual concern, including, and perhaps, particularly, the right to petition the government.

[55]I recognize that Gieroczynski testified that it was "a generally known policy that we do not solicit residents," and Specter testified that "[o]ur policy is not to solicit residents." I reject and discredit this testimony. Nothing substantiates either claim. There is no evidence that anyone was told of such a rule, it is not included in or alluded to in the multiple written work rules (including those limiting solicitation of other employees), and there is no evidence that managers ever had discussions with employees, or among themselves to this effect. At best, Gieroczynski and Specter were testifying as to their view of what the rule on solicitation should be. However, their preferred rule would be unlawful and an unlawful basis to discipline Miechur.

did this, and the Respondent has never expressed concern with that delineation. Miechur was disciplined for soliciting a resident with the Mundy letter—without regard to where it happened. A prohibition on such solicitation is unlawful unless in its particulars this solicitation had some characteristic—in the manner in which it was carried out or in its content—that caused the employee soliciting to lose the protections of the Act.

In this case the nub of the Respondent's claim is that the contents of the Mundy letter places the soliciting employee beyond the protection of the Act. As indicated in Miechur's disciplinary notice, the Respondent maintains that the Mundy letter is disparaging and its distribution constituted disloyalty on the part of Miechur. In the Respondent's view, the offensive part of the Mundy letter was its statement that "[a]t my facility, we are very short staffed and it affects the care of our residents," and its exhortation to representative Mundy that she make sure that Pennsylvania Department of Health officials ensure that the change of ownership of Manor Care to Carlyle "does not negatively impact care provided to residents in the Commonwealth."

I do not agree that a Manorcare employee distributing the Mundy letter would lose the protections of the Act.

First, subject of the Mundy letter squarely concerned issues of working conditions that had already been a prominent feature of SEIU's labor dispute with Manor Care. That the letter expressed concern with patient welfare does not contradict this conclusion. The Board has recognized that "[i]n the health care field, patient welfare and working conditions are often inextricably intertwined. In this connection, employees' statements regarding patient care and/or staffing levels have been found protected where it was clear from the context of the statements that they related to a labor dispute and/or employees' terms and conditions of employment." *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252 (2007) (citations omitted); *Misercordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980) (discussing relationship between welfare of patients and working conditions of hospital staff). In this case, the Mundy letter statements about staffing and care were very much a part of both the Union's labor dispute with the employer and the employees' demonstrated concern with terms and conditions of employment. The Mundy letter added to concerns with staffing and other terms and conditions of employment that had already been part of the SEIU organizing campaign,[56] had previously been voiced in hearings convened by representative Mundy in November, and repeatedly raised by employees to management in the small group meetings held at the end of October. The letter urged that state officials ensure that Carlyle's assumption of the company did not negatively affect care—a goal that Manor Care, the SEIU, and the state officials all claimed in hearings to share. At the November 13 hearings before the Pennsylvania House Aging & Older Adult Services Committee, Stephen L. Guillard, Executive Vice President

[56]See e.g., GC Exh. 27 (SEIU "white paper" released October 10 at press conference in Harrisburg, Pennsylvania, raising concerns about potential affect on staffing and other issues affecting employees and patients of the Carlyle purchase of Manor Care); GC Exh. 26 (September 20 Washington Post article "Union Protests Carlyle's Bid for Manor Care," quoting SEIU official: "Its not that we are against private equity, but we believe companies like Carlyle, because of their huge size, have to match that size with responsible actions in terms of the impact of their deals on workers and seniors."); GC Exh. 18 (November 16 SEIU press release, "'There are not enough certified nurse assistants at this facility and Carlyle needs to do something about that,' said Josephine Miechur [Trisha Miechur's mother] whose mother lives in a Manor Care nursing home in Easton, Pennsylvania").

and Chief Operating Officer of HCR Manor Care pledged that "[w]e will not reduce staffing of caregivers in our nursing centers or assisted living centers and our staffing levels are well above requirements set by the Commonwealth of Pennsylvania." Concern over staffing issues was very much a part of the previous hearings chaired by representative Mundy. Thus, this is a case where the Board's recognition that "[i]n the health care field, patient welfare and working conditions are often inextricably intertwined" is particularly apt.

However, even an otherwise protected statement will be found unprotected if the Board evaluates the communication and determines that it is "so disloyal, reckless, or maliciously untrue as to lose the Act's protection." *Endicott Interconnect Technologies*, 345 NLRB 448, 450 (2005), enf't. denied, 453 F.3d 532 (D.C. Cir. 2006). As the Board recently explained, "[i]n determining whether employee conduct falls outside the realm of conduct protected by Section 7, we consider whether 'the attitude of the employees is flagrantly disloyal, wholly incommensurate with any grievances which they might have, and manifested by public disparagement of the employer's product or undermining of its reputation . . ." *Five Star Transportation*, supra at 46 (quoting *Vandeer-Root Co.*, 237 NLRB 1175, 1177 (1978)).

In evaluating the alleged disloyalty and disparagement of employee solicitation with the Mundy letter, the case of *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1982), enfd. 742 F.2d 1438 (2d Cir. 1983) is instructive. In that case, a maid worked for a cleaning company that provided maid services to a nursing home. She and coworkers wrote to the nursing home complaining that her employer was using poor products, had taken necessary supplies away from the maids and that because of this "the floors are not really being cleaned" and "this facility is deteriorating." The letter urged the nursing home to "take a good long look at what [Respondent] is doing to your facility" and stated that "we feel that it is our duty to inform you of the situation before it is too late." The cleaning service discharged the employee who instigated the letter. The Board found that the discharge violated the Act. In doing so, the Board specifically rejected the contention that the letter constituted disparagement removing the employee from the protections of the Act. The Board explained that it "has traditionally been careful to distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues. We have observed that 'absent a malicious motive, [an employee's right to appeal to the public is not dependent on the sensitivity of [an employer] to his choice of forum." 263 NLRB at 139 (footnotes omitted) (Board's bracketing) (quoting *Richboro Community Mental Health Council, Inc.*, 242 NLRB 1267, 1268 (1979)). Reviewing the letter sent by the cleaning maid, the Board found that the "purpose of the letter was not to injure Respondent by impugning its operation. On the contrary, by urging [the nursing home] to take a "good long look" at the facility and by stating that it was their duty to inform him of the situation 'before it is too late,' [the employee] and the other employees demonstrated that their purpose was to encourage [the nursing home] to remedy the various problems they were encountering in their working conditions." Id.

In this case too, the Mundy letter's concern with patient care was not intended to disparage or harm the Respondent. Rather, it added to the already well-established efforts by the Union and the employees to ensure that their terms and conditions of employment, including staffing levels, would not suffer as a result of the Carlyle takeover. Its goal was to protect employees from adverse changes to terms and conditions of employment such as staffing issues. Contrary to the suggestion of the Respondent, the letter, and the employees' efforts, did not seek to block, or advocate that state officials block, Carlyle from taking over Manor Care. The letter and the employees' efforts, were not directed at harming the Respondent, but rather, by all evidence constituted an effort to push the Respondent to redress problems at the facility and advocate for unionization. Those are lawful and protected goals. That the forum was political, and therefore, in a democracy, public, does not militate against this conclusion. As in

Professional Porter & Window Cleaning, "the sensitivity of [an employer] to [employees'] choice of forum" does not control the employees' rights to appeal to the public.

Notably, there was nothing "maliciously untrue" about the Mundy letter. To the contrary, the employees' sincere concerns with short-staffing could hardly be news to Manorcare management: the employees had complained of staffing issues at the small group meetings and resolution of staffing issues was the lead item on the Easton Action Plan introduced into evidence at the hearing. The employees testified at the hearing about their personal experiences with and concerns about staffing issues. There is not the slightest evidence that the concerns were not sincerely held, or not based on employees' personal experiences. See, *Valley Hospital*, supra at slip op. at 4 (statements, including statements regarding staffing cuts, not "maliciously false" when based on employees' own observations and conversations with other employees).

Nor can the Mundy letter be said to be inflammatory. It is a soberly written letter, entirely free of reckless, coarse, or even arch rhetoric. Moreover, it is worth noting that while the letters, once signed were intended to be sent to representative Mundy, and could lead to public testimony, the solicitations at issue were not publicly and indiscriminately distributed to the broader public. The solicitation for which Miechur was disciplined was made to residents, presumably also to family members, and employees. The letters were made public only once the resident (or other signatory) had signed the letter—in essence, converting it to their own. The Board has recognized that in assessing whether arguably disloyal or disparaging conduct loses the protection of the Act, the extent of the publicity and extent of the public nature of the communication is significant. See, *Mountain Shadows Golf Resort*, 338 NLRB 581, 583 (2002) (pointing out that public nature of flyer, among other factors, increased justification for discipline of employee compared to private document criticizing employer that employee had previously authored). Thus, the solicitations at issue were not made by employees to the public at large, but were provided to more narrowly interested parties—that is, parties vitally interested in the issue of staffing at this facility. Whatever else staffing is, it is, undeniably, a core term and condition of employment, the discussion of which is entitled to the Act's protection.

On this record, even assuming that Miechur engaged in the conduct for which she was disciplined—soliciting a resident to sign the Mundy letter—the conduct is protected activity in support of better working conditions. Although I do not believe I need to reach the issue, were it necessary, I would find that if, as the Respondent claims, it would have disciplined Miechur with a final warning in the absence of her other union activity, then the discipline was violative of the Act. *Burnup & Sims, Inc.*, 256 NLRB 965 (1981).[57]

[57]Given my findings, I decline to consider the General Counsel's third claim, which is based on the Supreme Court's decision in *NLRB v. Burnup & Sims* : I decline to consider the General Counsel's contention that Miechur did not engage in soliciting of a resident, that the mere possession of the signed Mundy letters was protected activity (even if the solicitation was not), and therefore that the disciplining of Miechur for conduct she did not engage in, occurring in the course of protected activity, violated the Act. See, *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964) ("§ 8 (a)(1) is violated if it is shown that the [disciplined] employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct").

3. The evidentiary ruling barring the Respondent from obtaining the identify of employees who engaged in union activity

At the hearing I sustained the General Counsel and Union objections to the Respondent's effort to inquire into the identity of employees—other than Trisha Miechur—who were engaged in union activity (Tr. 73–81). Inquiry into Trisha Miechur's union activity was permitted.

In its brief, the Respondent has renewed its objection to my ruling. I have considered the additional argument set forth in the Respondent's brief. However, upon consideration, I renew my ruling.

Board precedent is clear that in considering this issue, I must balance the confidentiality interests of employees to engage in union activity—interests the Board views as an "overriding concern"—against the Respondent's right to full and effective cross examination. In this case, the confidentiality rights of employees to not have their union activity disclosed to the Respondent far outweighs the largely irrelevant—if we stretch to make a point we can call it marginally relevant—facts concerning the union activity of employees other than Miechur.

National Telephone Directory Corp., 319 NLRB 420 (1995), involved a strikingly similar situation to that at bar here. In that case, as here, the General Counsel alleged that an employee was unlawfully disciplined (discharged in *National Telephone Directory*) for engaging in union activity. Similar to here, a union organizer in *National Telephone Directory* testified that the discharged employee assisted in organizing employee support for the union and arranged meetings between the union organizer and the employees. On cross-examination, the employer sought to have the union organizer reveal the names of employees who attended these union meetings, and demanded production of notes and cards signed at the meeting that would reveal those in attendance. Here too, the issue arose when Manorcare's counsel asked union organizer Dennis Short about Easton employees who were involved in union activities.

In *National Telephone Directory*, the Board rejected the employer's effort to compel testimony (and quashed subpoenas seeking information) revealing the identity of employees engaged in union activity. The Board explained:

> The confidentiality interests of employees have long been an overriding concern to the Board. Generally, an employer who seeks to obtain the identities of employees who sign authorization cards and attend union meetings violates the Act. Indeed, an employer may not surveil its employees to obtain such information, and may not give its employees the impression that it has surveilled--or will surveil--them to obtain such information. Further, an employer violates the Act if it questions its employees about this information.
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> * * * * * * * * *
>
> In addition to the employees' confidentiality interests, the other concern raised here is the Respondent's right to cross-examine the General Counsel's witnesses about events testified to on direct examination. Generally, all parties are afforded an opportunity for full cross-examination of witnesses in unfair labor practice proceedings. See the Board's Statements of Procedure Section 101.10(b)(2) ("Every party has the right . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts."). A full cross-examination includes the right to test the credibility of the General Counsel's witnesses by asking legitimate questions about subjects brought out on direct examination.

> In balancing these two legitimate interests, we are guided by the policies set forth in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). There, the Supreme Court balanced the confidentiality interests of employee affiants who had not testified in a hearing, with an employer's interest in obtaining their affidavits for the purpose of preparing its defense of unfair labor practice allegations. The Court, in holding that the investigatory affidavits are protected from disclosure under the Freedom of Information Act, recognized that such disclosure would create a risk that recipients of the affidavits would intimidate employees "to make them change their testimony or not testify at all." Id. at 239. The Court further suggested that potential witnesses might "be reluctant to give statements to NLRB investigators at all" without assurances of confidentiality because of the "all too familiar unwillingness [of employees] to 'get too involved' [in formal proceedings] unless absolutely necessary." Id. at 240–241.
>
> As our discussion above concerning employee confidentiality interests shows, we take very seriously the possibility of intimidation of employees by employers seeking to learn the identity of employees engaged in organizing. We conclude that the danger of employee intimidation would be severely heightened if an employer could obtain the names of employees who signed cards or attended meetings.
>
> Therefore, we believe the policies of the Act are best effectuated by prohibiting the Respondent from obtaining on cross-examination the names of the employees who attended union meetings and signed authorization cards. That the Respondent has sought this information through cross-examination, rather than through surveillance or interrogation of employees, does not reduce the potential chilling effect on union activity that could result from employer knowledge of the information. (footnotes omitted).

With this precedent, and within this framework, I must consider the Respondent's demand to know the identities of employees engaged in union activity. The most salient fact is the utter marginality if not complete irrelevance of this information to the allegations of the complaint of this inquiry. Only one employee's union activity is placed at issue by the complaint. That is, of course, the union activity of the only alleged discriminatee, Trisha Miechur. As to her union activity, the Respondent was allowed free range without limitation to ask her, and all other witnesses questions about Miechur's union activity.

But what is the relevance of *other* employees' union activity? The answer is very little or none. The Respondent contends that employees' union activity is relevant because it will aid in determining the truth of Miechur's assertions that she did not, in fact, engage in solicitation. And whether Miechur, in fact, engaged in solicitation, was an element of one of the General Counsel's alternative theories.

This is not compelling. In the first place, given that my decision in this case does not turn on whether, in fact, Miechur engaged in solicitation, the issue has turned out to be irrelevant to the outcome in this case. As discussed above, my conclusion that Miechur's discipline violated the Act is based on my conclusion, utilizing a *Wright Line* analysis, that antiunion animus motivated the discipline and she would not have been similarly disciplined in the absence of her union activity. That ruling renders wholly irrelevant the truth of the matter of whether Miechur actually engaged in the solicitation for which she was disciplined. Similarly, my alternative ruling is that, even assuming, arguendo, that Miechur engaged in the solicitation

for which she was disciplined, that conduct was protected activity. Again, whether Miechur, in fact, engaged in solicitation is irrelevant.[58]

Having said, that, even were the issue of whether the Miechur actually engaged in the solicitation still at issue, the relevance of *other* employees' union activity would still be of extremely marginal relevance, at best. It is indeed, a fishing expedition, and one with potentially insidious purpose and effect. If permitted to learn the identities of employees who engaged in union activity, the most that the employer would gain would be a pool of employees who *might* be better situated, by virtue of their own union activity, to corroborate or contradict Miechur's claim that she did not engage in solicitation. But there is no guarantee that these other union activists could shed light on whether Miechur actually engaged in solicitation. At the great cost of exposing union activity at the facility, what is netted is a pool of employees whose shared interest in the Union *might* make them knowledgeable witnesses about Miechur's activity. And if the Respondent's questions were more pointed—if, as it sought to, it could ask which employees engaged in solicitation, this is more problematic still. The Respondent has made clear that it considers the solicitation of residents to be a punishable act. The pressure on an employee accused of soliciting to contradict Miechur to protect his or her own employment is an unseemly and unsettling prospect.

Such an outcome cannot seriously be contemplated, particularly when the relevance to the complaint is of such marginal relevance. In light of the Board's ruling in *National Telephone Directory*, with its explicit recognition that "the danger of employee intimidation would be severely heightened if an employer could obtain the names of employees" engaged in union activity, I cannot accept the perversity that Board proceedings should become a forum for employer investigation into union activity, using questioning that would be unlawful outside the hearing room, and, perhaps unlawful *in* a hearing room, an issue I need not reach only because my ruling foreclosed the questioning. *Guess?, Inc.*, 339 NLRB 432, 434 (2003) (unlawful for employer's counsel to ask employee in a workers compensation deposition about identity of those attending union meetings).[59] "That the Respondent has sought this information through cross-examination, rather than through surveillance or interrogation of employees, does not

[58]The Respondent's contention on brief (R. Br. at 51) that knowledge of other employees' union activity would have helped its *Wright Line* defense is meritless. The Respondent claims that it could have used the information to show that others who engaged in union activity were not disciplined, thus allegedly giving credence to its claim that it was not motivated by antiunion animus when it disciplined Miechur. This does not merely miss the point, it makes the General Counsel's point. That point, of course, is that when the Respondent disciplined Miechur, it was aware of her union activity, but not others. That is, I have concluded, why the Respondent disciplined Miechur and was indifferent to the potential participation of any other employees in the solicitation it claims it was punishing. It does not advance the Respondent's *Wright Line* defense to show that of all the employees engaged in union activity, the Respondent disciplined only the employee of whose union activity it was aware. In any event, even if the Respondent knew of other employees' union activity and disciplined only Miechur, "[t]he Board and the courts have long held that a finding of discriminatory motive 'is not disproved by an employer's proof that it did not weed out all union adherents.'" *All Pro Vending, Inc.*, 350 NLRB 503, 515 (2007) (quoting *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964)).

[59]See, *Chinese Daily News*, 353 NLRB No. 66 (2008) (not reaching issue of lawfulness of asking deponent in federal court lawsuit about attendance at union meetings and involvement in union activities, where such finding would be cumulative, given finding that questioning of how deponent voted in union election was unlawful).

reduce the potential chilling effect on union activity that could result from employer knowledge of the information." (footnotes omitted). *National Telephone Directory*, supra.

The Respondent's only effort to distinguish *National Telephone Directory* from the instant case is to point out that *some* of the union activity it was foreclosed from inquiring into involved employee union activity that was conducted in public settings. The Respondent contends that employees who engage in union activity in public settings have waived their right to confidentiality. There is no force to this contention. First, it is important to note that the identity of employees participating in public events constituted only some of the information sought by the Respondent. It also sought the identities of employees attending private union meetings and those engaged in solicitation. As to those inquiries, the Respondent offers not even an argument to distinguish *National Telephone Directory*. But even as to employees who increased the risk of disclosure of their union activity by participating in more public events, I do not accept that they have "waived" their rights. No doubt, by engaging in a public rally, an employee increases the risk that the employer will learn of their involvement in union activity. That is the employee's risk to take. But if the employer does not learn of their involvement (and, of course, that is the situation, else the issue would not exist), by no sound logic is the employee obligated thereafter to disclose his union activity and by no logic is the employer free to demand an accounting of who participated in the public event. There is no rationale for the Board to abet that process through its enforcement proceedings. And the point is reinforced by the fact that in this case, the more public and more removed the union activity from the solicitation events at Easton, the less and less conceivable relevance the employee's identity could have to any issue in this case.

Miechur testified three times in this hearing. Her union activity was open for inquiry and questioning in each instance. Other employees testified, and there was no limitation on the Respondent's right to ask them about Miechur's union activity. The only area that the Respondent was barred from asking questions, of Miechur or other witnesses, was as to *other* employees' union activity. I reject the contention that this burdened the Respondent's defense in any meaningful way. In sum, when the employee confidentiality rights are balanced against the marginal (at best) interests of the employer in learning the identity of employees engaged in union activity, this is not a close case. Indeed, I question how seriously the Respondent takes its position.[60]

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[60] I say this because I could not help but notice that when CNA Collado testified and admitted her own activity in support of the Union, the Respondent did not take the opportunity to ask her anything regarding Miechur's union activity. In other words, presented with a witness providing the precise type of information it claims it needed to defend its discipline of Miechur, the Respondent asked no questions regarding Miechur. Rather, it simply attempted to pry further into Collado's activities on behalf of the Union and attempt to have Collado reveal additional employees engaged in union activity. At best, this demonstrates the disingenuousness of the employer's claim that it has been hindered by an inability to inquire into employees' union activities. At worst, it raises the specter that its inquiries are unrelated to the defense of this case.

f. Unlawful conduct alleged to have occurred in 2008 (paragraphs 11–13 of the complaint)

The General Counsel alleges three 8(a)(1) violations occurring in 2008.

The first two are appropriately considered together. As described above, the day after the Friday, January 18 confrontation with Carlyle CEO Rubenstein in Philadelphia, Miechur returned to work. She brought a copy of the Philadelphia Inquirer containing an article about the protest. Miechur believed that Heimbach had taken the paper out of the nourishment room and confronted her about it. Heimbach denied taking the paper, but said to Miechur, "I've seen what you've done. I've known what you've done. You should be ashamed of yourself. . . . [H]ow can you walk in to this facility with your head high after what you've done?." That Monday, on January 21, Stolte called Miechur into Specter's office. With news articles about Heimbach's activities out in her office, and in front of Stolte, Specter admonished Miechur to "stop doing what [she was] doing because we're not going to get anymore residents in to Manorcare and I should be ashamed of myself." She asked Miechur how she could "walk into this facility with [her] head high."

I find that the comments of Heimbach and Specter together, the similarity of which I do not believe to have been coincidental, were coercive. If either comment was an impromptu response, indicating distaste for the Heimbach's public and confrontational appearance on behalf of the SEIU campaign, a different analysis might be appropriate. But these comments were calculated and coordinated. They appeared, in fact, to be literal efforts to "shame" and denigrate Miechur for her activities, as opposed to mere criticism of the campaign tactics. Indeed, both Heimbach and Specter asked Miechur how she could "walk into this facility with [her] head high." These comments from two (and in front of another) of the highest ranking members of local management come very close to containing a suggestion that—had she the appropriate shame—she would not have returned to the facility and would have quit. While not an explicit request that Miechur quit, these comments would reasonably be understood as coercive, threatening, and an unlawful response to Miechur's protected activity. See, *Legget Department Store*, 137 NLRB 403, 404 (1962) (finding 8(a)(1) when on day of newspaper article about Board trial examiner's decision, supervisor asked employee-witness "did you read the morning paper?" and then "Weren't you ashamed to come through that door this morning?").[61]

[61]Heimbach suggested in her testimony that her comments were motivated by what she perceived as Miechur's criticism of care given by coworkers and not by anything that could be considered protected activity, but I do not believe she spelled that out to Miechur. It is settled, of course, that in determining the coerciveness of remarks, the Board applies an objective standard and evaluates whether the remarks reasonably tend to interfere with the free exercise of employee rights. The Board does not consider the motivation behind the remarks. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F3d. 1307 (7th Cir. 1998). See, *United States Postal Service*, 350 NLRB 441, 445 (2007). A reasonable and objective understanding of Heimbach's comments would be that it was in response to Miechur's participation in January 18 protest and the comments attributed to her in the Philadelphia Inquirer. That article did not contain remarks by Miechur criticizing her coworkers for poor care. Rather, the article attributed to Miechur the comment that Manor workers were worried that Carlyle would be tempted to make spending cuts and the comment that coworkers had asked the SEIU to help form a union because they were worried Carlyle could not afford to improve both profits and patient care.

The final 8(a)(1) alleged by the General Counsel concerns Stolte's comments to Miechur after Miechur stormed out of the April 22, 2008 slide show conducted by Stolte. As Miechur admitted, she acted inappropriately in response to the slide show's reference to the SEIU and implicit reference to her. When Stolte spoke with Miechur after the meeting Miechur complained that "I'm tired of the meeting [ ] being about me and SEIU. I'm tired of working in a hostile environment." Stolte replied, "if you don't like it you can quit."[62] Miechur told Stolte, "I'm not going to quit because I'm here working for my residents." Miechur also told Stolte that "you are going to have to fire me to get rid of me." Stolte told Miechur she was not about to fire her, and she was not going to discipline her for walking out of the meeting.

The suggestion to Stolte that "if you don't like it you can quit" (or, in Stolte's version, "no one is making [you] work here"), was in direct response to Miechur's complaint that she did not like her union activity and the SEIU being the focus of meetings. Manorcare does not violate the law by having meetings in response to union activity. It does violate the Act by suggesting that employees that do not like it are free to work elsewhere. *Chinese Daily News*, 346 NLRB 906, 906, 919 (2006) (violation of 8(a)(1) to tell employee to resign if she was not happy with her job); *McDaniel Ford, Inc.*, 322 NLRB 956, 956 fn. 1 and 962 (1997) ("It is well settled that an employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that support for their union or engaging in other concerted activities and their continued employment are not compatible, and implicitly threaten discharge of the employees involved."). *Intertherm, Inc.*, 235 NLRB 693, 693 fn. 6 (1978) (unlawful to tell employee that if "he was not happy with the Company, he should look elsewhere for a job"). Stolte's comment violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent Manor Care of Easton, PA, LLC d/b/a Manorcare Health Services—Easton is an employer within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Charging Party Service Employee International Union Healthcare PA is a labor organization within the meaning of Section 2(5) of the Act.

3. In October 2007, the Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union sympathies.

4. On or about October 29 and 30, 2007, the Respondent violated Section 8(a)(1) of the Act by soliciting employee complaints and grievances and, in order to discourage employees from seeking union representation, promising to remedy the complaints and grievances.

5. On or about November 12, 2007, the Respondent violated Section 8(a)(1) of the Act by transferring supervisors Lynette Seiler and Paula Kublius in order to discourage employees from seeking union representation.

[62] I have credited Miechur's account. I note that Stolte's slightly different admission was that she said "I told her that no one was making her work here." I find that in context, whether Stolte or Miechur's version of the comment was credited would make no difference to the analysis.

6. On or about November 21, 2007, the Respondent violated Section 8(a)(1) of the Act by instituting a wage increase and/or lump sum bonus to CNAs and increasing the starting hourly wage for CNAs, in order to discourage employees from seeking union representation.

7. On or about November 21, 2007, the Respondent violated Section 8(a)(1) of the Act by threatening employee Trisha Miechur with job loss if she continued her union activities.

8. On or about November 21, 2007, the Respondent violated Section 8(a)(1) of the Act by confiscating union literature.

9. On or about November 28, 2007, the Respondent violated Section 8(a)(1) and (3) of the Act by disciplining employee Trisha Miechur in retaliation for her activities in support of the Union.

10. On or about January 19 and again on January 21, 2008, the Respondent violated Section 8(a)(1) of the Act by admonishing an employee for her activities in support of the Union and directing her to stop engaging in such activities.

11. On or about April 7, 2008, the Respondent violated Section 8(a)(1) of the Act by telling an employee that she could quit if she did not like the employer's meetings regarding the Union.

12. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having unlawfully disciplined employee Trisha Miechur on November 28, 2007, shall rescind the discipline and remove from its files, including Miechur's personnel file, any reference to the discipline, and shall thereafter notify Miechur in writing that this has been done and that the discipline will not be used against her in any way.

The Respondent shall post an appropriate informational notice, as described in the Appendix, attached. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 4 of the Board what action it will take with respect to this decision.

In its brief (CP Br. at 55), the Union has indicated that it will not be requesting rescission of the wage increase or the return of Kublius and Seiler. Accordingly, the remedy in this case will not include an order to take such action at the request of the Charging Party.

The Union (but not the General Counsel) also requests a broad range of what the Board refers to as "extraordinary remedies." These include a broad cease and desist order covering

all Manor Care facilities within the Easton region, a posting at all such facilities, a reading of the posting to employees, access to the names and addresses of Easton employees and access to the facility for two years, equal time to respond at the facility to meetings held by the employer regarding unionization, recognition upon attainment of a card majority, and reimbursement from the Respondent for the Union and General Counsel's litigation expenses and for the Union's organizing expenses. While the unfair labor practices the Respondent has found to have engaged in are serious matters, I do not find the Respondent's conduct in violation of the Act supports such extraordinary remedies under current Board precedent. I therefore decline to direct them. As to the requested reimbursement of expenses, I note that, as the General Counsel pointed out (GC Br. at 37), "[t]his case turns to a large degree on credibility." Because that is the case, and because I do not believe that the Respondent's defenses were frivolous, I decline to order reimbursement as requested by the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[63]

ORDER

The Respondent, Manor Care of Easton, PA, LLC d/b/a ManorCare Health Services—Easton, Easton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating any employee regarding his or her union sympathies.

(b) Soliciting complaints and grievances and, in order to discourage employees from selecting union representation, promising to remedy the complaints and grievances.

(c) Transferring supervisors in order to discourage employees from selecting union representation.

(d) Instituting wage increases/lump sum bonuses and/or increasingly hourly rates in order to discourage employees from selecting union representation.

(e) Threatening any employees with job loss for continuing their union activities.

(f) Confiscating union literature.

(g) Disciplining any employee in retaliation for their union activity.

(h) Admonishing any employee for engaging in activities in support of the Union and directing any employee from continuing to engage in union activity.

(i) Inviting union supporters to resign employment.

[63]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

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

(a) Within 14 days from the date of this Order, rescind the November 28, 2007 discipline issued to Trisha Miechur, remove from its files, including Trisha Miechur's personnel file, any reference to the discipline, and within three days thereafter notify Trisha Miechur in writing that this has been done and that the discipline will not be used against her in any way.

(b) Within 14 days after service by the Region, post at its facility in Easton, Pennsylvania, copies of the attached notice marked "Appendix."[64] Copies of the notice, on forms provided by the Regional Director for Region 4, 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 October 18, 2007.

(c) 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.

Dated, Washington, D.C. January 23, 2009.

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David I. Goldman
Administrative Law Judge

[64] 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."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL 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 coercively question you about your union sympathies.

WE WILL NOT solicit complaints from you and promise to remedy them in order to discourage you from selecting union representation.

WE WILL NOT transfer supervisors in order to discourage you from selecting union representation.

WE WILL NOT institute wage increases in order to discourage you from selecting union representation.

WE WILL NOT threaten you with job loss for continuing to engage in union activities.

WE WILL NOT confiscate union literature.

WE WILL NOT discipline you in retaliation for engaging in union activity.

WE WILL NOT admonish you for engaging in union activity or direct you to stop continuing to engage in union activity.

WE WILL NOT invite union supporters to resign employment.

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

WE WILL, within 14 days from the date of this Order, rescind the unlawful discipline issued to Trisha Miechur and remove from our files any reference to the discipline, and WE WILL, within three days thereafter, notify Trisha Miechur in writing that this has been done and that the discipline will not be used against her in any way.

Manor Care of Easton, PA, LLC d/b/a ManorCare Health Services—Easton,

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor

Philadelphia, Pennsylvania 19106-4404

Hours: 8:30 a.m. to 5 p.m.

215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.