The Salvation Army *and* Kalaveeta Dean. Case 13–CA–39080

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 12, 2002, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

In so holding, we deny the Respondent's motion to reopen the record to adduce evidence relating to the contention that the Board lacks jurisdiction pursuant to the test for religiously affiliated educational institutions established by the United States Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (2002).[2] In that case, the Board asserted jurisdiction over faculty members at a university owned by a Roman Catholic religious order. The Board sought to apply the *Catholic Bishop*[3] "substantial religious character" test and found the university's purpose and function to be primarily secular. The Court disagreed with the Board and found that the Board had applied the wrong test. The Court held that the Board should decline to assert jurisdiction over an educational institution if it (1) "holds itself out to students, faculty and community as providing a religious educational environment"; (2) "is organized as a nonprofit"; and (3) "is affiliated with, or owned, operated or controlled, directly or indirectly, by a recognized religious institution, or with an entity, membership of which is determined, at least in part, with reference to religion. . . ."[4] The Court then found that the *University of Great Falls* met those criteria and was therefore exempt from the Board's jurisdiction.

For the purposes of this case, we assume that the Court's test governs the exercise of the Board's jurisdiction over religiously affiliated educational institution. In addition, we accept as true the evidence that the Respondent wishes to adduce. We nonetheless find it appropriate to assert jurisdiction herein. Although the Respondent is a religious institution, the function involved herein is not one of religious education, and the employee at issue in this proceeding is not a teacher. The Board's decision in *Hanna Boys Center*, 284 NLRB 1080, 1083 (1987), enfd. 940 F.2d 1295 (9th Cir. 1991), cert. denied 504 U.S. 985 (1992), is instructive. That case involved a Catholic residential facility for boys and a bargaining unit consisting of childcare workers, recreation assistants, cooks, cooks-helpers, and maintenance employees. The Board asserted jurisdiction. In doing so, the Board said that "[t]he sensitive first amendment issues surrounding the assertion of jurisdiction over teachers noted by the Court in *Catholic Bishop* are not involved in the assertion of jurisdiction over the child-care workers and other unit members in the present case."

The Board's observations in *Hanna* apply in the present case. The Salvation Army is an international not-for-profit organization engaged in many charitable and social service programs. The program involved in the instant case is the Community Correctional Center (CCC) that the Salvation Army maintains within the City of Chicago. The Salvation Army contracts with the Federal Bureau of Prisons to provide prerelease services for

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

In excepting to some of the judge's credibility findings, the Respondent cited an affidavit given by Resident Advisor Kalaveeta Dean. The Respondent cited portions of the affidavit beyond what was read into the record and admitted as evidence. The General Counsel moves to strike the Respondent's exceptions that rely on the unread portions. We grant the General Counsel's motion. The judge specifically sustained the General Counsel's objection to the Respondent's attempt to introduce Dean's affidavit and placed Dean's affidavit in the rejected exhibit file. Dean's affidavit is therefore not part of the record. See *G. M. Mechanical, Inc*., 326 NLRB 35 fn. 1 (1998); *Natural Heating Systems*, 252 NLRB 1082 fn. 1 (1980).

We also note that the judge specifically discredited the Respondent's claim that Dean refused to talk to the Respondent's Director Claudia Rowland. Accordingly, we find it unnecessary to pass on whether Dean's conduct would have been protected had Dean so refused.

Finally, we find it unnecessary to rely on the adverse inference drawn by the judge in sec. II,B, fn. 7, of his decision. The judge noted that Rowland did not specifically deny telling Dean that Rowland could not tolerate that type of conduct (meaning Dean's alleged refusal to speak to Rowland). The judge found Rowland's lack of specificity warranted an adverse inference that Rowland, in fact, had made such a statement. The adverse inference is unnecessary, because the judge implicitly credited Dean's testimony that Rowland made the statement at issue. Moreover, Rowland's own testimony confirmed that Rowland and Dean spoke, and the judge specifically discredited the Respondent's claim that Dean refused to talk to Rowland.

[2] The D.C. Circuit Court of Appeals issued that decision on the same day that the judge issued his decision here. The Respondent previously admitted jurisdiction but now requests that the record be reopened under the Board's Rules and Regs. 102.65(e)(1) in light of the D.C. Circuit Court opinion.

[3] *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

[4] *University of Great Falls*, 278 F.3d at 1343 (citations and internal quotations omitted).

persons released from prison and for persons serving probationary sentences. It operates in a residential setting, and it provides transitional services and assessments to ascertain what is necessary to assist the residents in returning to their communities as law abiding citizens. Common services include drug treatment and job readiness. The residents are assigned a case manager or resident advisor (RA), the employee at issue here. There are usually 8 to 12 RAs employed by the Salvation Army at the Chicago CCC, and each RA is assigned 15 to 20 residents. The RA is responsible for working with the resident through the intake process, performing assessments, providing orientation, and monitoring residents as they progress through the program. The RA helps formulate, for each resident, a personal plan that will assist the resident with community living. The RA meets with each resident at least once a week to ensure that the residents are fulfilling the requirements of their individual program contracts (see infra). The RA also issues "passes" which allow residents to leave the facility.

Claudia Rowland, the CCC's director, testified that the July 1, 1999 RA job description, "fairly accurately" described what the RAs do for the CCC. The RA description summarizes the job as follows:

> "Carries an assigned case load. Provides comprehensive case management and other services targeted to enhance resident competencies related to a successful transition into the community. Works with each resident to promote a constructive life style, reduce the risk of recidivism, and address specific factors that impact the individual resident's criminality and rehabilitation. Oversees the resident's progress through the Community Correction Center (CCC) from intake to release. Ensures that all case files are properly organized, up to date, and accurate. Contributes to promoting an overall rehabilitative environment at the CCC."

The RA description lists 22 enumerated job responsibilities, some administrative, some substantive, including the following:

> "3. Provides counseling to address criminal thinking and behavior, reduce the risk of recidivism, and facilitate a constructive return to the community.
>
> 4. Works with the resident to establish an individualized rehabilitative program with specific achievable goals such as procuring employment; developing necessary life skills; re-establishing healthy family and community ties; and undergoing treatment for mental health or substance abuse problems that contribute to criminal behavior. These goals are to be written into an *Individual Program Contract* agreed to by the resident and designed to address the needs identified in the initial assessment.
>
> 9. Works with the Learning Resource Center to assist the resident in obtaining employment; provides vocational counseling; assists the resident in overcoming obstacles to employment; monitors job status; and ensures that employment spot checks are performed.
>
> 10. Facilitates referrals to outside agencies in situations where the CCC is unable to directly provide services essential to the resident's rehabilitation. May act as a liaison, resident advocate and coordinator of services with such agencies.
>
> 14. Maintains case files that are complete, accurate, current, and in a readily auditable condition." None of the job responsibilities refer to the Salvation Army.

Finally, the RA description lists four qualifications for the job. They are:

> "1. MSW or related degree. Experience in case management and counseling strongly preferred.
>
> 2. Personal maturity and a demonstrated ability to be firm and compassionate. Also an ability to build effective attitude-and-behavior-change relationships with residents who differ widely in terms of their personality, education, employment skills, race, and socioeconomic status.
>
> 3. Excellent organizational skills as well as skills in verbal and written communications.
>
> 4. Has integrity; a strong commitment to the Salvation Army's vision of human service and social justice; and a clear personal desire to assist in accomplishing the CC's mission of rehabilitation, restorative justice, and human healing."

Only the final qualification refers to the Salvation Army, and that reference is to the "Salvation Army's vision of human service and social justice."

The Board, with court approval, has previously asserted jurisdiction over Salvation Army facilities similarly devoted to the Salvation Army's "vision of human service and social justice." In *The Salvation Army Williams Memorial Residence*, 293 NLRB 944 (1989), enfd. without opinion 923 F.2d 846 (2d Cir. 1990), the Board asserted jurisdiction over kitchen and maintenance workers at a Salvation Army residential facility for seniors. The Board noted that there was no evidence that the facility served anything other than a secular function; that the secular work performed by the unit employees was unrelated to religious observance and indoctrination. In *The Salvation Army of Massachusetts Dorchester Day Care Center*, 271 NLRB 195 (1984), enfd. 763 F.2d (1st Cir. 1985), the Board asserted jurisdiction over teachers, a janitor, a cook, and a social worker at a Salvation Army

childcare center. The Board noted that the day care center was primarily concerned with custodial care of young children. The Salvation Army here is also primarily concerned with rehabilitative care, albeit of adults.

We are satisfied that the sensitive issues raised by the Board's assertion of jurisdiction over religiously affiliated educational institutions are not present in this case. Accordingly, we deny the Respondent's motion to reopen the record with respect to this issue.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Salvation Army, Chicago, Illinois, its officers, agents, successors and assigns, shall take the action set forth in the Order.

MEMBER SCHAUMBER, concurring.

I join my colleagues in denying the Respondent's motion to reopen the record to adduce evidence that the Board lacks jurisdiction over it as a religious organization. For the purposes of this decision, I, like my colleagues, accept the analysis of the D.C. Circuit Court of Appeals in *University of Great Falls v. NLRB*, 278 F.3d 1335 (2002), and I accept as proved the evidence that the Respondent would introduce: that the Salvation Army is, and holds itself out to the community as, a "recognized religious organization," and that it operates on a nonprofit basis. I also agree, after considering the court's decision in *Great Falls*, that the Respondent, in its operation of the Community Correctional Center in Chicago (CCC), is not exempt from Board jurisdiction under the Supreme Court's decision in *NLRB v. The Catholic Bishop of Chicago*.[1] I write separately to provide a fuller discussion of the applicable case law.

First, I find that the Salvation Army has not shown that it is exempt from Board jurisdiction under the *Great Falls* court's tripartite test, as set out by my colleagues and discussed below. In this regard, although the Respondent asserts, and I agree, that it is a religious institution, it does not contend that its employees in the CCC provide, as in *Catholic Bishop* and *Great Falls*, education that has as at least one of its purposes the inculcation of religious values. This is a crucial element of the *Great Falls* test. See *Great Falls*, 284 F.3d at 1341.

Further, as the facts set out by my colleagues, and which I incorporate into my concurrence, amply demonstrate, it is clear that the Center's services are essentially secular in nature. See, e.g., *The Salvation Army Williams Memorial Residence,* 293 NLRB 944 (1989), enfd. without opinion 923 F.2d 846 (2d Cir. 1990). Based on these factors, I find that the constitutional risks the Supreme Court found inherent in Board jurisdiction over teachers in church-operated schools in *Catholic Bishop* are not presented by the duties of the resident advisors (RAs) employed in the Respondent's prison-to-community transition program.

A. Legal Background: Principles Governing Board Jurisdiction Over Religiously Controlled Employers

The analyses used by the Board and the courts to determine whether the Board has jurisdiction over church-operated employers providing human services have had a varied history. For our purposes, such cases fall into two rough categories: educational institutions and noneducational organizations.

1. Board jurisdiction over church-affiliated schools and their teachers

Prior to the issuance of the Supreme Court's decision in *Catholic Bishop* in 1979, the Board exercised jurisdiction over teachers employed by private schools, secular or religious, except those schools found to be "completely religious" in nature. The Board distinguished between such schools and schools that were "merely religiously affiliated." The latter category of private school was defined as one that performed the secular function of educating young persons and was concerned only in part with religious instruction. *Andrew G. Grutka*, 238 NLRB 1643, 1645 (1978). In adopting this standard, the Board dismissed arguments that such a broad conception of jurisdiction courted the danger of conflict with the Religion Clauses of the First Amendment. *Catholic Bishop*, 440 U.S. at 493, 498.

Against this background, the Catholic Bishop of Chicago challenged the Board's finding that it had jurisdiction over lay faculty at high schools operated by the Catholic Church in Chicago and in Indiana. *The Catholic Bishop of Chicago*, 224 NLRB 1221 (1976). The Seventh Circuit denied enforcement of the Board's order. *The Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (1977). The Supreme Court affirmed the circuit court, finding that Board jurisdiction over teachers at such institutions raised serious constitutional questions. The Court emphasized the "critical and unique role of the teacher in fulfilling the mission of a church-operated school" in which "[r]eligious authority necessarily pervades the system," id. at 501 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971); and that "the raison d'etre of parochial schools is the propagation of a religious faith," id. at 503, quoting *Lemon v. Kurtzman*, 503 U.S. at 628 (Douglas, concurring). In the Court's view, "the very process of inquiry leading to findings and conclusions"

[1] 440 U.S. 490 (1979) (*Catholic Bishop*) (Supreme Court declined to interpret the Act as bestowing on the Board jurisdiction over teachers in church-operated schools).

in Board procedures risked intrusion on religious freedoms because such procedures "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the schools' religious mission." *Catholic Bishop*, 440 U.S. at 502. The Court also predicted that the Board would be unable to "avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining." Id. at 502–503. In sum, the Court saw "no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." Id. at 504. Therefore, to avoid constitutional questions and in the absence of a clear affirmation by Congress that it intended that the Act cover teachers in church-operated schools, the Court declined to construe the Act as bestowing such jurisdiction. Id. at 507.[2]

Applying *Catholic Bishop*, the Board has decided on a case-by-case basis whether religiously-operated schools possess a "substantial religious character" such that an assertion of the Board's jurisdiction would present a significant risk of infringing on First Amendment rights. *University of Great Falls*, 331 NLRB 1663 (2000); *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987). In *University of Great Falls*, the Board, applying its "substantial religious character" test to a unit of faculty members at the University of Great Falls, a private, independent Catholic university sponsored and owned by a Catholic religious order under the jurisdiction of the local Catholic bishop, reaffirmed the underlying finding that jurisdiction was appropriate.[3]

On appeal, the D.C. Circuit reversed the Board. *NLRB v. University of Great Falls*, supra, 278 F.3d 1335. The court held that the Board had misapplied the *Catholic Bishop* test and erred in finding that it had jurisdiction over the faculty members under the principles enunciated in that case.[4] The court found that the Board's investigation into whether the university had a "substantial religious character," which included inquiry into the degree to which the school has a religious mission, "boils down to 'is it *sufficiently* religious?'" and subjected the university to exactly the type of intrusive inquiry that had been found to risk impingement of constitutional freedoms in *Catholic Bishop*. Id. at 1343 (emphasis in original).[5] The court set out as the proper test for determining jurisdiction under *Catholic Bishop*: whether the educational institution (1) "holds itself out to students, faculty and community as providing *a religious educational environment*"; (2) "is organized as a nonprofit"; and (3) "is affiliated with, or owned, operated or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. . . ." Id. (citations and internal quotations omitted; emphasis added).[6]

[2] In its decision, the Supreme Court rejected the position taken by the Board that the 1974 amendment to the Act removing the exemption for nonprofit hospitals evidenced Congressional approval for the Board's exercise of jurisdiction over church-operated schools. The Court found that nothing in the history of the amendment reflects such tacit approval. In its view, Congress simply gave no consideration to the issue. Compare with *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302, 305–306 (1982) (Third Circuit Court of Appeals found *Catholic Bishop* inapplicable to Board's assertion of jurisdiction over a Lutheran nursing home and pointed to legislative history of the 1974 amendment wherein the Senate rejected an amendment which would have excluded hospitals affiliated with religious organizations).

[3] The Board noted that neither a religious order nor the Catholic church were directly involved in the university's daily operations, and the largely lay board of trustees had final authority over personnel, financial, academic, and student issues. Finally, the Board noted, "the propagation of a religious faith is not the primary purpose of the university; rather, its purpose and functions are "primarily secular," finding, inter alia, that emphasis on the Catholic faith is not required in the curriculum; university policies need not be consistent with Catholicism; the president and administrators need not be Catholics; faculty members are not required to be Catholics or to teach or support Catholicism; no preference is extended to Catholic students and only about 32 percent of students are Catholics; and although students are required to take one religion course, it need not involve Catholicism.

[4] Id. at 1343–1344.

[5] The Court took strong issue with the Board's analysis, which concluded that, with respect to the University, "the purpose and function of the institution are primarily secular." *Great Falls* at 1345, quoting the Decision and Direction of Election, slip op at p.11. It found that the facts upon which the Board relied, e.g., attendance at Mass is not required, only one-third of the student body is Catholic, faculty members need not be Catholic, other religious views are tolerated, etc., minimized the University's religious nature. After quoting from an observation of Laurence H. Tribe in *Disentangling Symmetries: Speech Association Parenthood*, 28 PEEP. L.REV. 641, 650 (2001) (relating to "the artificiality [of limiting a right] to associations that formally and consistently disparage people of the type that those associations seek to exclude"), the court said that "[i]f the University is ecumenical and open-minded, that does not make it any less religious, nor NLRB interference any less a potential infringement of religious liberty." Id. at 1346. According to the Court:

> [t]o limit the *Catholic Bishop* exemption to religious institutions with hardnosed proselytizing, that limit their enrollment to members of their religion, and have no academic freedom, as essentially proposed by the Board in its brief, is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause—not to prefer some religions (and thereby some approaches to indoctrinating religions) to others. See *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Id.

[6] The court based its test in part on the reasoning of then-Judge Breyer, writing for the plurality denying enforcement of a Board order in *Universidad Central de Bayamon*, 793 F.2d 383, 398–403 (1st Cir. 1985). The court sitting en banc was evenly divided. The panel voting to deny enforcement found that "*Catholic Bishop* applies to a church-operated college—a college that seeks primarily to provide its students with a secular education, but which maintains a subsidiary religious mission." Id. at 398.

Applying that test, the court looked to the university's detailed mission statement, which it found reflected education in an "overtly religious Catholic environment," id. at 1345, the expressions of Catholic faith found in icons placed in every classroom, and the facts that the university was a not-for-profit, held itself out to the public as a Catholic educational institution, and was sponsored, owned by, and under the ultimate control of a Catholic religious organization. The court concluded that the Board lacked jurisdiction over the university faculty, and that "to probe further into the University's beliefs is to needlessly engage in the 'trolling' that . . . *Catholic Bishop* . . . sought to avoid." Id.

2. Board jurisdiction over religiously affiliated employers and their employees not involved in education

The Board, with court approval, has exercised jurisdiction over various employers affiliated with religious organizations where the unit of employees is not involved in education. For example, in *Hanna Boys Center*, 284 NLRB 1080, 1083 (1987), enfd. 940 F.2d 1295 (9th Cir. 1991), cert. denied, 504 U.S. 985 (1992), the Board asserted jurisdiction over a bargaining unit of childcare workers, recreation assistants, cooks-helpers, and maintenance employees at a Catholic school for troubled youths. The Board relied on its decision in *Jewish Day School,* supra, 283 NLRB 757, in which it held that "*Catholic Bishop* precludes the Board from exercising jurisdiction where a union seeks to represent a unit of teachers in a school whose purpose and function in substantial part are to propagate a religious faith." 284 NLRB at 1082–1083, quoting 283 NLRB at 760 (fn. omitted). The Board held that "[t]he sensitive First Amendment issues surrounding the assertion of jurisdiction over teachers noted by the Court in *Catholic Bishop* are not involved in the assertion of jurisdiction over the child-care workers and other unit members in the present case." 284 NLRB at 1083. The Board found that despite the reference to "teaching values" in the childcare workers' job description, there was no evidence that they involved themselves "in the religious or secular teaching of the entrants." Id.

While the Ninth Circuit enforced the Board's order, it disagreed with the Board's decision to the extent it implied that *Catholic Bishop* applies only to teachers in parochial schools. It acknowledged that there were two questions before the Supreme Court in *Catholic Bishop*: first, whether teachers in church-operated schools are within the Board's jurisdiction under the Act, and second, if they are, whether the exercise of jurisdiction by the Board would violate the First Amendment. The court pointed out that in the absence of a clear expression of Congressional intent on the issue of the Board's jurisdiction over church-operated schools, the Supreme Court "answered the first question in the negative, to avoid having to answer the severe constitutional problems presented by the second." 940 F.2d at 1301. Nevertheless, the court said that while the facts in *Catholic Bishop* are confined to teachers at parochial schools, the "rationale of *Catholic Bishop* would also support the exclusion from the Board's jurisdiction of other employment relationships *if they involved the same constitutional problems* inherent in the relationship between teachers and church-operated schools." Id. at 1303 (emphasis added). The court concluded, however, that no such constitutional questions were raised by the assertion of Board jurisdiction over the employees at issue in *Hanna*, none of whom were involved in teaching, and whose duties were "overwhelmingly secular."[7]

In *Denver Post of the National Society of the Volunteers of America v. NLRB*, 732 F.2d 769 (1984), the Tenth Circuit Court of Appeals enforced a Board order requiring the VOA, a religious organization, to bargain with the Union over its petitioned-for unit of counselors employed in six of the VOA's social service programs.[8] The court held that the "serious constitutional questions" the Supreme Court found in *Catholic Bishop* were not present. Quoting from the Second Circuit Court of Appeals' decision in *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 828 (1980), cert. denied 450 U.S. 996 (1981), the court observed that "the First Amendment conflict in *Catholic Bishop* arose from 'the suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed.'" 732 F.2d 772. The court found that "although the VOA's social programs are expressive of its religious philosophy, the two are not overtly intertwined. It is clear from the record that despite the religious purposes underlying these programs, they function in essentially a secular fashion." Id.

Consistent with the analyses employed in the above cases, the Board has previously asserted jurisdiction over Salvation Army facilities devoted to advancing the Salvation Army's "vision of human service and social justice." In *The Salvation Army Williams Memorial Residence*, supra, 293 NLRB 944, the Board asserted juris-

[7] Id. at 1304. Since the court found that the Act authorized the Board to exercise jurisdiction, it considered the question as to whether its exercise would violate the First Amendment's Religion Clauses. The court concluded it would not.

[8] The Regional Director found that although the VOA was a religious organization, the services being provided were secular in nature and did not involve the dissemination of the VOA's religious doctrine.

The Board entered its bargaining order based on a stipulation between the parties reached for the purpose of having the circuit court determine the propriety of the Board's exercise of jurisdiction.

diction over kitchen and maintenance workers at a Salvation Army residential facility for seniors. In doing so, the Board noted that there was no evidence that the facility served anything other than a secular function, and that the secular work performed by the unit employees was unrelated to religious observance and indoctrination. Similarly, in *The Salvation Army of Massachusetts Dorchester Day Care Center*, 271 NLRB 195 (1984), enfd. 763 F.2d (1st Cir. 1985), the Board asserted jurisdiction over teachers, a janitor, a cook, and a social worker at a Salvation Army childcare center. The Board again noted that the daycare center was concerned primarily with the secular function of custodial care of young children.

B. Application of Law to the Facts

Under the above precedent, the jurisdictional issue here is whether the duties of the Respondent's RAs, and the relationship of those duties to the Salvation Army's religious principles, raise the serious First Amendment issues the Supreme Court found inherent in the relationship of teacher and school in *Catholic Bishop*. I find they do not.

The evidence in the record, set out by my colleagues, establishes the following:

- *The purpose of the CCC is secular, not religious*. The materials cited by my colleagues reveal that the CCC is operated to enable offenders to return to life in the community without committing crimes or otherwise becoming subject to incarceration. There is no evidence that the propagation of the Salvation Army's religious tenets is a goal of the program in general or of the counseling, supervision, and case-tracking that the RAs perform. It is true that the Salvation Army seeks individuals with "integrity" and "a strong commitment to the Salvation Army's vision of human service and social justice," but common sense tells us that any employer seeks employees with integrity and that any social service agency seeks professional employees with a commitment to "human service and social justice." The materials suggest no link between this goal and the religious beliefs of the Salvation Army, and there is no basis for inferring one.
- *The CCC operates on a nonsectarian basis*. The materials make no mention of a requirement that the RAs or the clients of the program belong to the Salvation Army or subscribe to its tenets. The fact that the CCC operates pursuant to contracts with the Federal Bureau of Prisons makes it manifestly unlikely that the CCC would make such distinctions.
- *The services performed by the RAs are secular*. All of the goals the program sets for the client and the RAs assist in achieving—reintegration into the community, freedom from addiction, steady employment, social responsibility—are secular goals that are compatible with any faith or with no faith at all. There is no evidence that the CCC or the Salvation Army as a whole links living crime-free in today's world to a body of religious belief.
- *The RAs' job duties differ in fundamental respects from those of teachers in church-operated schools*. While the counseling and rehabilitative services that the RAs perform may involve imparting information, the Salvation Army does not contend that the CCC is an "educational institution." Even if those aspects of the RAs' duties could be viewed as instruction of a sort, there is no overarching religious control of the CCC's operation by a religious institution that rendered the teachers' duties in church-run schools constitutionally sensitive.
- *Inquiries into the CCC's operations do not intrude on any activity substantially religious in nature*. The record contains no evidence of an argument or position by any party that bears on religious belief of practice. The relationship between the RAs and the Salvation Army, as discussed above, does not involve propagation of or adherence to faith; there was no hint that religion played any role in the facts before the Board.

As is readily apparent, then, the CCC is not an educational program. Thus, it does not "'hold[] itself out to students, faculty and community' as providing a religious educational environment." *Great Falls*, 278 F.3d at 1341, quoting *Bayamon*, supra, 793 F.2d at 400. As such, the Respondent fails to meet the first step of the *Great Falls* tripartite test for determining whether the First Amendment concerns expressed by the Supreme Court in *Catholic Bishop* bar the Board's exercise of jurisdiction. Furthermore, the services provided by the Respondent through the CCC program are like the services provided by other social service programs operated by religious organizations over which the Board has exercised jurisdiction.[9] They are provided in a secular atmosphere. They are not intertwined whatsoever with the Salvation Army's religious beliefs but are fundamentally secular in nature. Thus, while the Salvation Army's "vision of human service and social justice" may have its genesis in the Army's religious beliefs, the CCC is not an instrument for the propagation of the Army's faith. Accordingly, the relationship between Respondent and its employee counselors in the CCC does not present the

[9] In addition to those cited above, see, e.g., *VOA-Minnesota-Bar None Boys Ranch v. NLRB,* 752 F.2d 345, 349 (8th Cir. 1985) (treatment center for children), cert. denied 472 U.S. 1028 (1985); *Denver Post of the National Society of the Volunteers of America v. NLRB,* 732 F.2d 769, 773 (10th Cir. 1984) (shelters for women and children).

same constitutional problems inherent in asserting jurisdiction over teachers in church-operated schools.

For these reasons, I join my colleagues in adopting the administrative law judge's findings.

Diane E. Emich, Esq. and *Claire Brosnan, Esq*., for the General Counsel.

Keith A. Reed, Esq. and *James R. Cho, Esq*., of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Chicago, Illinois, on August 6 and 7, 2001. The charge was filed by Individual Charging Party Kalaveeta Dean, on January 16, 2001.[1] The complaint, which issued on April 12, 2001, alleges that on December 6, 2000, the Respondent violated Section 8(a)(1) of the Act by terminating Charging Party Kalaveeta Dean and by failing to reinstate her employment status because she engaged in protected concerted activity. The Respondent's timely answer denied the material allegations of the complaint. The parties have been afforded a full and fair opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Chicago, Illinois, provides community correctional housing for prerelease referrals from the Federal Bureau of Prisons. During the 12-month period ending December 31, 2000, the Respondent derived gross revenues in excess of $500,000 from operations at its Chicago, Illinois facility and purchased and received goods valued in excess of $50,000, directly from points outside of the State of Illinois. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

1. Was Charging Party Kalaveeta Dean engaged in protected concerted activity on December 6, 2000.

2. If so, did her conduct render her concerted activity unprotected under the Act.

3. If not, was Charging Party Kalaveeta Dean discharged for engaging in protected concerted activity.

B. Facts

1. Background

The Respondent, The Salvation Army (SA), has a correctional services program that provides transitional housing for prerelease referrals from the Federal Bureau of Prisons, as well as for individuals sentenced to probation by Federal courts. At any given time, approximately 175–180 residents live at the Respondent's facility located in Chicago, Illinois. These residents are monitored by 8–2 resident advisers (RAs) each of whom is responsible for 15–20 residents. On September 1, 2000, there were nine resident advisors employed by the Respondent: Charging Party Kalaveeta Dean, Karen Kinte, Anna Sanders, Helen Banta, Carla Campbell, David Hickman, Edward Logan, Cleo Holiday, and Mary Salazar.

Claudia Rowland is the Respondent's director of community correctional program. Paul Hall is a program supervisor, who reports directly to Rowland. Rick Buterbaugh is a case management coordinator/program manager, who reports to Hall. On September 1, Buterbaugh supervised Charging Party Kalaveeta Dean.

Charging Party Kalaveeta Dean began working for Respondent as a resident advisor in early 2000. She managed the caseloads of 18–20 residents serviced by the Respondent. During her employment tenure with Respondent, Dean received the highest performance ratings possible and was never disciplined. (GC Exh. 11).

Notably, in August 2000, Dean was selected as the "Employee of the month." (GC Exh. 14.)

2. The August grievance

In August 2000, several RAs, including Dean, met and discussed their dissatisfaction with various terms and conditions of employment. Specifically, they opined that RAs were disrespected by staff, provided inadequate job training, forced to work under stressful conditions, and poorly paid. In a letter, dated August 17, 2000, signed by RAs Dean, Logan, Campbell, Kinte, Hickman, Banta, and Sanders, the group memorialized their complaints.[3] (GC Exh. 5.) Dean distributed copies of the letter to the mailboxes of Program Manager Buterbaugh, Program Supervisor Hall, Program Manager Richard Hart, and hand-delivered a copy to the secretary to Program Director Rowland.

3. The September grievance meeting

On September 1, Rowland, Hall, Buterbaugh, and a few other managers met with the RAs to address the concerns delineated in the August 17 letter. During this meeting, Kinte and Logan expressed anxiety over being overworked, poorly trained, and underpaid. Campbell spoke about the lack of sufficient time to complete necessary counseling, the removal of the pass system from the RAs, and her being overloaded with pa-

[1] All dates are in 2000, unless otherwise indicated.

[2] At trial, I rejected General Counsel's proffer of a position statement letter prepared by Respondent's former counsel dated, February 8, 2001, in response to the charge. Upon further consideration, I find that my ruling was in error and that the letter should have been received in evidence because the substance of the document is material to the issues being litigated and the document itself was not previously disavowed. (Tr. 290–292, 301–304.) *Hogan Masonry*, 314 NLRB 332 fn. 1 (1994). Accordingly, the letter marked for identification as GC Exh. 2 and proffered by General Counsel, is now received into evidence.

[3] RA Mary Salazar refused to sign the grievance, as well as the followup grievance that was submitted in November 2000.

perwork. Helen Banta offered her ideas for improving case management and for reducing the amounts of paperwork. Although much was discussed, nothing was resolved. Rowland told the RAs that "it's one thing to give general complaints but when they're not specific it's really hard for me to understand how things work for you." (Tr. 255.) Rowland asked the RAs to meet as a group to develop ideas that would help ease the workload and would contribute to improving their working conditions. She also requested that they present their recommendations in writing.

4. The resubmitted grievance

RAs Dean, Hickman, Logan, Campbell, Kinte, and Cleo Holiday collaborated on writing another grievance to Rowland. (GC Exh. 6.) In a memorandum, dated November 5, 2000, signed by eight resident advisors, the group clarified their concerns and specified how they could be resolved. With respect to a wage increase, Dean purportedly attached a 2-page position description for a Bureau of Prisons' correctional counselor to illustrate the wage disparity between two arguably similar positions, i.e., a resident advisor and a correctional counselor.[4] She then placed copies in the mailboxes of Hall, Buterbaugh, and Hart and gave the original memo to Rowland's secretary.

5. The November individual conferences

On November 8, Rowland responded in writing to the November 5 memorandum, advising the RAs, who signed the memorandum, that she was scheduling individual conferences with them to discuss the issues raised in their memo. (GC Exh. 7.) In her written response, Rowland specifically stated that she was "particularly interested in hearing specific concerns relating to your own experiences. It is sometimes difficult in a group forum for both you and administrative staff to talk freely."

RAs Hickman, Logan, Campbell, Holiday, and Dean all met in Holiday's office to discuss Rowland's request for individual conferences. They decided to reply to Rowland by requesting a group meeting. By memo, dated November 9, the group stated:

> In response to your memo dated November 8, 2000, we the Resident Advisors would like to request a group meeting. All (7) issues presented in the Resident Advisor Grievance are collective concerns and not individual.
>
> We are particularly interested in listening to administrative staff address the collective concerns that we submitted, in this kind of forum so that each response from administrative staff is not misinterpreted (as it sometimes can in individual meetings) by any one of the Resident Advisors. This kind of format will undoubtedly, enhance the likelihood of totality in understanding for the Resident Advisors.
>
> We thank you for responding so expeditiously, and it is our sincere wish that the exchange of dialogue will be received. [GC Exh. 8.]

The memo was typed by Dean and signed by seven RAs. The following day, November 10, Rowland sent a memo to each RA entitled, "Refusal to Meet with the Director." It stated:

> I was disappointed by your response to my correspondence. My request for personal appointments was not intended to be optional. It was, and is, important for me to speak with each Resident Advisor individually to discuss items related to your memo which would be inappropriate for group discussion.
>
> After I have met with each RA, I will be happy to hold a group discussion where your "collective" concerns may be brought forth. [GC Exh. 9.]

As required, Dean scheduled a conference with Rowland. When she arrived for her appointment, coworker Helen Banta was outside Rowland's office waiting for her conference. Banta asked Dean to attend her conference as a witness. Rowland permitted Dean to attend. A joint conference was conducted for both RAs, which was attended by Program Supervisor Hall. In the course of the conference, Dean discussed several concerns including compensation and overtime. Rowland responded to Dean's compensation concerns by stating that when she had checked the RAs' timesheets, payroll sheets, and file log, she found that no one worked beyond 40 hours. (Tr. 320.) Dean stated that she worked overtime, but never documented the hours. Rowland told her that such action was against agency policy. Dean also complained that she was earning less than the Respondent's business manager. Although Rowland tried to explain why the business manager received a higher salary, Dean would not accept her explanation.

6. Mandatory December 6 meeting

On December 6, 2000, Rowland called a group meeting to discuss the issues raised in the RAs initial grievance memo, dated September 1, as clarified in their November 5 memo, and as amplified in their individual conferences. All of the RAs attended the meeting, except Ann Sanders, who was absent from work. In addition to Rowland, Hall, and Buterbaugh, the group meeting was attended by Program Manager Richard Hart, Clinical Supervisor Helen Glick, and Clinical Administrator Irwin Reynolds.

Rowland addressed the group using a typewritten agenda that she prepared.[5] She planned a two-part presentation. First, she wanted to review with the RAs all of the information that she had gleaned from their individual conferences concerning the issues raised in their grievance. After that she planned to respond to each of the RAs' concerns. During the first part of her presentation, several individuals left the room at different times and returned. Carla Campbell and Cleo Holiday left the meeting to get a copy of the grievance. Mary Salazar left twice because she was having a "coughing jag." Richard Hart left two

[4] Several management recipients of the November 5 memorandum testified that the position description was not attached to their copy of the memorandum.

[5] R. Exh. 4 is the meeting agenda prepared by Rowland. The first main topic, entitled "I. Summary of Individual Concerns" is a misnomer because each subtopic listed thereafter was addressed by the resident advisor group in their August 17 and November 5, 2000 grievances (GC Exhs. 5 and 6) and was also discussed in a group meeting held in September.

or three times to answer telephone calls. (Tr. 162.) Charging Party Kalaveeta Dean also left the meeting to use the bathroom. When she returned, Rowland asked her to shut the door, which she did. According to Rowland, Dean slammed the door when she closed it. Rowland nevertheless continued with her agenda without saying anything to Dean.

As Rowland spoke, Dean, who was sitting directly across from Rowland, became increasingly impatient. She fidgeted, rolled her eyes, shook her head, and put her head down on the table. Eventually Dean asked, "You look like you have something to say" to which Dean responded, "Well, you know, I do." Rowland replied, "Say what you have to say." According to Dean, she stated, "You've been sitting here for over an hour pontificating about the issues. You've gone into great detail talking about everything that we've talked about in individual meetings. We know what we've said, but what we want to know is what you're going to do about the problem that we raised." (Tr. 33.) Rowland testified that Dean stated: "I really don't want to hear you tell me what I already know." (Tr. 277.)

Immediately after Dean's remark, Resident Advisor Mary Salazar, who refused to sign the grievances, stood up and told the other resident advisors that they did not know what hard work was—the thrust of her comments was that they did not appreciate how good they had it. (Tr. 347.) At that point, decorum dissipated. Resident Advisor Helen Banta asked Salazar why she came to the meeting in the first place. Salazar stated that she was asked to attend by supervision and that she did not "need to sit here and take all this bullshit." According to Banta's credible testimony, Salazar stormed out of the meeting, and closed the "door forcefully." (Tr. 105.) Several people began talking out of turn and were talking over each other. At some point, Cleo Holiday accused Supervisor Buterbaugh of being disrespectful for putting his feet up on the table and for repeating over and over what sounded like, "this is garbage."

When the pandemonium subsided, Rowland continued with her agenda. She eventually told the resident advisors that there was no plan to give them a pay increase. (Tr. 280.) There are two versions of what occurred next. Dean, Hickman, and Logan, all testified that they stood up and without saying anything left the room together. Their testimony was corroborated by Holiday and Campbell. (Tr. 163–164, 210.) In contrast, Rowland, Hall, and Buterbaugh testified that Dean walked out of the meeting and slammed the door behind her. They stated that Hickman and Logan followed momentarily behind her. After the trio exited, Rowland continued with her agenda. The meeting ended about 20 minutes later when it was suggested that everyone "needed a cooling off period" to think things over.

7. The termination of Kalaveeta Dean

Minutes after the group meeting ended, Rowland went to Dean's office for a one-on-one conversation with Dean behind closed door.[6] There are two versions of the conversation that took place.

Rowland testified that "[w]hen I went into Kalaveeta's office, I said to her, Kalaveeta, I feel, I felt very disrespected when you walked out of my meeting and slammed the door. As your employer, when you walk out of the meeting like that and you cut off the communication, you make it impossible for me to work with you." (Tr. 285–286.) Rowland stated that Dean told her that she felt disrespected by other people, whereupon Rowland replied, "Kalaveeta, I'm not talking about other people. I'm talking about you and me, I'm your employer, and we have to be able to talk with each other. And if you don't speak with me, then, there's no way for us to work together. (Tr. 286.) Rowland stated that Dean paused and then stated, "You're intimidating and threatening me" to which Rowland responded, "No, Kalaveeta, I'm talking reality. I am your employer and you need to talk with me." Rowland testified that at that point, Dean told her, "Well, I don't care to hear what you have to say. I don't want to talk to you. So I said, well, you need to pack your things and go."

Dean testified that Rowland came to her office and stated, "you know, Kalaveeta, I think you were very rude and unprofessional and disrespectful in leaving the meeting" to which Dean responded, "I don't feel that I was being rude and disrespectful. I think that that was the right thing for me to do at the time so that I wouldn't do something or say something that would have been construed as rude and disrespectful." (Tr. 36.) Dean stated that Rowland repeated, "I just believe that you were being rude and disrespectful and unprofessional, and I can't have this in my building." According to Dean, when she asked Rowland to clarify what she meant by "rude and disrespectful," Rowland simply repeated that she was rude and disrespectful. Dean testified that at that point she asked Rowland, "do you think I'm rude and disrespectful because I spearheaded the grievance?" (Tr. 37.) Rowland replied, "I think you were rude and disrespectful because you slammed the door." Dean told Rowland that she did not "slam" the door. Dean testified that Rowland also told her, "I just can't have this in my building."

According to Dean, she asked Rowland, "you're going to threaten me now because I don't agree with you" to which Rowland responded, "that's reality." (Tr. 37.) Dean testified that she told Rowland, "[y]ou can't just threaten someone just because they don't agree with you" and Rowland replied, "I thought you were just being rude and disrespectful."

Dean testified that she told Rowland that she thought she (Rowland) was being disrespectful for not dealing with problems brought to her by the RAs, whereupon Rowland told her, "I thought that we could work together, but this just doesn't seem like it's going to work." (Tr. 38.) When Dean asked if she was being fired, Rowland told her, "let's call this a termination. Pack your little things and get out."

After leaving Dean's office, Rowland went to Program Supervisor Hall's office. He testified that Dean told him that she had to terminate Dean "because she went over to talk with her to try to get some closure on the issues of the disrespectful behavior in the meeting and what have you. She wouldn't talk

[6] Rowland stated that she chose to seek out Dean after the meeting, rather than Hickman and Logan, because she perceived Dean as the person who was acting out, that is, "the slamming of the door, folding of the arms, the huffing. And also, making some comment in the meeting regarding didn't want to hear what I had to say in the meeting either." (Tr. 285.)

with her. And said she didn't want to talk with her, is what she told us." (Tr. 329.) Hall recalled Rowland telling him that she informed Dean, "well, if you can't talk we can't communicate and we may as well part."

When Rowland returned to her office, she was visited by RA Cleo Holiday, who had heard that Dean had been fired. Holiday testified that he asked Rowland why Dean had been fired and that she told him it was "because she was disrespectful to her, and also stated something that she would not talk to her." (Tr. 166.) Holiday stated that when he asked Rowland why she did not speak to anyone else at the meeting, Rowland told him that she did not have time to discuss it, grabbed her coat and exited.

By letter, dated December 12, 2000, Dean was advised in writing that her employment with the Respondent had been terminated on December 6. (GC Exh. 10.)

C. Credibility Resolutions

Rowland testified that when Kalaveeta Dean returned to the meeting after leaving the first time, she asked her to close the door. According to Rowland, Dean "put out her arm and just slammed the door shut . . . it was very loud and disruptive. And disruptive of our meeting." (Tr. 275–276.) The implication is that Dean intentionally slammed the door in order to show disrespect toward Rowland. The evidence does not support Rowland's characterization of the incident. The undisputed evidence shows that Dean was rather quiet at the meeting up until that point. There is no evidence that she did anything to call attention to herself before leaving to go to the bathroom. The Respondent does not point to anything that happened up until that point of the meeting that might have arguably triggered Dean to act out. Notably, the evidence shows that after Dean closed the door, she returned to her seat and Rowland simply continued talking without saying anything to her. The failure of Rowland to comment on the so-called disruptive conduct when it happened and the failure of the Respondent to point to anything that may have caused Dean to intentionally slam the door, raises a suspicion that Rowland's post hoc characterization of the incident was embellished.

Other evidence also leads me to believe that Rowland's testimony on this point was exaggerated. The only individual other than Rowland to testify that Dean "slammed" the door closed was RA Mary Salazar (Tr. 346), who the other RAs viewed as a persona non grata at the meeting. In contrast, RA Carla Campbell testified that Dean did not slam the door when Rowland asked her to close it. (Tr. 209.) Program Supervisor Hall testified that Dean closed the door rather hard. (Tr. 325) Case Manager Buterbaugh stated that she closed the door loudly. (Tr. 339.) However, neither management official went as far as to state that Dean "slammed" the door closed. The failure of these management officials to describe specifically the door closing as a "slam" negates an inference that Dean purposefully closed the door loudly.

The most plausible testimony on this point came from RA Cleo Holiday, who testified that "yes, the door did make a noise, but whenever anyone closed the door because of the type of the door and the age of the building, it's going to make a noise anyway." (Tr. 182.) In this connection, RA Helen Banta's unrebutted testimony shows that Salazar herself closed the "door forcefully" after she became upset and left the meeting before it ended. (Tr. 105.) Based on the evidence taken together, I do not credit Program Manager Rowland's testimony that Charging Party Kalaveeta Dean "slammed" the door closed after she returned to the meeting room, that is, I do not infer that she intentionally closed the door loudly in order to be disrespectful.

Claudia Rowland also testified that there came a point in the meeting when she asked Dean, who was fidgeting and rolling her eyes, if she had something to say to which Dean responded, "I really don't want to hear you tell me what I already know." (Tr. 277.) Program Supervisor Hall testified that he heard Dean state "something like I don't need you to sit here and tell me what I already know. And also heard, we're not talking about the money, what are we talking about here. We're not talking about any more money." (Tr. 326.) RA Mary Salazar testified that Dean "basically said, oh I don't want to hear the same thing over that you've been telling me before. You know, and that was basically what she said. I guess, we're not getting anywhere in this meeting." (Tr. 346.)

Dean denied that she told Rowland that she was not interested in what she had to say. (Tr. 38.) Rather, Dean testified that she told Rowland, "you've been sitting here for over an hour pontificating about the issues. You've gone into great detail talking about everything that we've talked in the individual meetings. We know what we've said, but what we want to know is what you're going to do about the problems that we raised." (Tr. 33.) Her testimony was corroborated by RA Cleo Holiday, who credibly testified on rebuttal that Dean did not state, "I don't want to hear you tell me what I already know?" (Tr. 354.) RA Cleo Holiday testified that Dean told Rowland that she needed to address the issues raised in the grievance and RA Carla Campbell testified that Dean told Rowland that she was "pontificating" and that "she also needed to address the specific items on the November grievance." (Tr. 209.) While I am not convinced that Dean responded entirely in the first person plural "we," thereby creating an unmistakable impression that she was speaking for the group, I find that she was not speaking solely on behalf of herself. Rather, the credible evidence supports a reasonable inference that Dean was speaking for the group by telling Rowland that she needed to adequately address the issues in the grievance. (Tr. 161, 166, 209.)

Equally unpersuasive was Rowland's testimony that Dean stood up and stormed out of the meeting alone when Rowland told the group that there would be no pay increase. Rowland stated that Dean slammed the door closed and that Logan and Hickman followed behind her a few seconds later. (Tr. 280.) Although Program Supervisor Hall corroborated her testimony, I thought his testimony was melodramatic and rehearsed. (Tr. 328.) I had the impression while watching him and listening to him testify that he was not being candid. For demeanor reasons, I do not credit his testimony on this point. Case Manager Buterbaugh, on the other hand, did not testify that Dean, Logan, and Hickman left the room separately. He was asked by Respondent's counsel, "[a]nd do you recall her leaving the room the second time in front of Ed Logan and Dave Hickman?" In response to this leading question, Buterbaugh stated, "Yes. Very, yeah, very, very much so." (Tr. 339.) Buterbaugh did not

specifically state that Dean left alone. Rather, his testimony at best shows that Dean was the first of the three out the door.

In contrast, everyone else who was present at the group meeting when the trio left, and who testified at trial, stated that the three RAs left together. Logan testified that "we all walked out together." (Tr. 200.) Hickman stated "[w]e left together." (Tr. 152, 141–142.) Campbell testified that "they all left at the same time." (Tr. 219.) Holiday stated that they left together. (Tr. 161, 354.) Helen Banta stated that they left together. (Tr. 103.) Ample credible evidence therefore corroborates Dean's testimony that she left the meeting with Logan and Hickman. Thus, for these, and demeanor reasons, I do not credit Rowland's testimony that Dean left the room alone the second time. Rather, I find credit Dean's testimony that she, Logan, and Hickman left the meeting together.

Rowland's assertion that she went to Dean's office after the meeting to "settle things down a bit" is dubious. (Tr. 284.) First, the existing circumstances render it very unlikely that Rowland could have had a calm and rationale discussion with Dean or any other RA at that point in time. Rowland and the RAs had spent more than an hour in a mercurial meeting during which four RAs, or half of those in attendance, walked out of the meeting upset and/or angry before the meeting officially ended: to wit, Salazar, Dean, Logan, and Hickman. The credible evidence shows that Rowland eventually suggested that everyone needed a cooling off period so she adjourned the meeting. (Tr. 105, 178.) Next, Rowland herself testified that "[w]hen I went into Kalaveeta's office, I said to her, Kalaveeta, I feel, I felt very disrespected when you walked out of my meeting and slammed the door. As your employer, when you walk out of the meeting like that and you cut off the communication, you make it impossible for me to work with you." (Tr. 285–286.) Those are not the words of a manager seeking to "settle things down a bit." (Tr. 284.) Those are the words of an upset manager seeking to reprimand an employee for her conduct during a group meeting.

The evidence also fails to support Rowland's assertion that Dean refused to talk to her during their one-to-one meeting and therefore that is why she was discharged. Both individuals testified that Rowland entered the office asserting that Dean had been rude and disrespectful for walking out of the meeting. Both essentially testified that Dean disagreed with Rowland's assessment of her conduct during the group meeting. Rowland added that Dean sought to shift culpability by asserting that she felt disrespected by others. Dean testified that she told Rowland that Dean felt disrespected because Rowland did not deal with the issues in the grievance. The evidence supports a reasonable inference that neither individual was willing to make any concessions to the other. Dean perceived Rowland as threatening her because she disagreed that she had acted rude and disrespectful. Rowland did nothing to disabuse Dean of the notion. Instead, she told Dean "that's reality" and she also told her that she could not tolerate such conduct in the building.[7] Eventually it became obvious that nothing would be resolved by continuing the conversation, and at that point Rowland told Dean "I just don't think this is going to work and pack [your] things and get out." (Tr. 38.) Contrary to Rowland's assertion that Dean would not talk to her, there is ample evidence that the two talked and disagreed, and that the inability to reconcile their disagreement about Dean's conduct during the meeting resulted in Rowland discharging Dean.

Finally, I do not credit Dean's testimony that she asked Rowland during the one-to-one meeting if she thought that she was rude and disrespectful because she spearheaded the grievance. First, the evidence falls short of showing that Dean "spearheaded" the grievance. Although she was an active participant in the group, there is no evidence that she was elected, appointed, or perceived by most of the group as their leader (official or unofficial). In addition, there is no evidence that Rowland or any other management official knew, or should have known, that any one of the RAs, whether it be Dean or anyone else, "spearheaded" the grievance. Finally, the reference to "spearheading the grievance" simply does not fit into the context of their debate over whether Dean was rude and disrespectful. The one-to-one discussion focused solely on Dean's conduct during the group meeting and not her activity outside the meeting.

D. Analysis and Findings

1. The applicable legal standard

The Respondent argues that a *Wright Line*[8] analysis is the appropriate legal standard to be applied in this case. The Board has stated, however, that where the conduct for which the Respondent claims to have discharged the employee was protected concerted activity, the *Wright Line* analysis is not appropriate. *Felix Industries,* 331 NLRB 144, 145 (2000). See also, *Saia Motor Freight Line, Inc.,* 333 NLRB 784 (2001); *Robert F. Kennedy Medical Center*, 332 NLRB 1536 (2000). The credible evidence shows that Rowland was upset over Dean's conduct during the group meeting, that she went to her office to reprimand, but not necessarily discipline, her for such conduct, and that the two disagreed about whether Dean's conduct was rude and disrespectful. The disagreement, which was a logical outgrowth of Dean's conduct during the group meeting, prompted Rowland to discharge her. Because the evidence shows that the disagreement which led to her discharge evolved from Dean's protected concerted activity during the group meeting, I find that the *Wright Line* analysis is not appropriate in this case.

2. The protected concerted activity

Section 7 of the Act gives employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." No union need be involved. Any activity by a single employee may be protected if it seeks

[7] Rowland did not specifically deny telling Dean that she could not tolerate that type of conduct. Rather, she testified "I do not recall saying that." (Tr. 286–287.) An adverse inference is warranted where a witness does not deny, or only generally denies without further specificity, certain adverse testimony from an opposing witness. *Asarco, Inc.,* 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds *Ascaro, Inc. v. NLRB*, 86 F.3d 1401 (1996). I find Rowland's failure to specifically deny that she told Dean that she would not tolerate her conduct warrants an adverse inference that she, in fact, made such a statement.

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

to initiate, induce, or prepare for group action. *Prill (Meyers Industries) v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The Act also protects discussions between two or more employees concerning terms and conditions of employment and more specifically discussions about wages. *Trayco of S.C.,* 297 NLRB 630, 633 (1990). Both the courts and the Board have stated that "[d]issatisfaction due to low wages is the grist on which concerted activity feeds on." *Whittaker Corp.,* 289 NLRB 933, 934 (1988), citing *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976). See also *CKS Tool & Engineering, Inc. of Bad Axe,* 332 NLRB 1578, 1582 (2000). The Board also has stated that where discussions about employment terms and conditions are held "in a group-meeting context, a concerted objective may be inferred from the circumstances." *Whittaker Corp.,* supra at 934.

a. The December 6 meeting

The credible evidence shows that Charging Party Kalaveeta Dean and the other resident advisors were called to the mandatory meeting on December 6 by Program Director Rowland, to discuss the issues raised in their November 5 grievance. (Tr. 247, 191.) As reflected by the Rowland's written agenda (R. Exh. 4), the December 6 meeting was the culmination of a series of discussions between the resident advisors themselves and the resident advisors with management concerning various workplace concerns expressed by the group. Among those concerns was a wage increase that was important to all, including Kalaveeta Dean. Rowland testified that during the meeting, a rather upset Salazar told her colleagues, "this is a lot of nonsense. You folks, all this is about is money, you folks don't know what hard work is." (Tr. 277.) Salazar's comment is compelling evidence that wages were a principle source of dissatisfaction among the majority of the resident advisors. Thus, the evidence shows that the December 6 meeting was focused solely on terms and conditions of employment pertaining to the resident advisors as a group.

The evidence also shows that when Dean responded to Rowland's directive to "say what she had to say," she expressed a common sentiment of the resident advisors, that is, that Rowland was not dealing with the issues raised in the group's grievance. (Tr. 161, 166, 209.) Regardless of whether Dean used the first person plural "we" when she spoke, see *Grimmway Farms,* 315 NLRB 1276, 1279 (1995), the unrebutted testimonies of RAs Holiday and Campbell disclose that they concurred with Dean's assertion that Rowland was not addressing the specific issues raised in the November grievance. (Tr. 161–163, 209.)

The most demonstrative display of protected concerted conduct occurred when Dean, Hickman, and Logan, together, walked out of the meeting together without saying a word. (Tr. 200.) RA Helen Banta testified that "it was obvious that they just were leaving in protest." (Tr. 123.) RA Hickman testified that he left because he was "pretty fed up" with all the shouting and arguing between the resident advisors and management about issues ranging from wages to workload. (Tr. 142.) RA Edward Logan stated that he stood up and left because, "when we were talking about the monetary compensation, Claudia [Rowland] didn't elaborate. She says it is what it is and she moved on." (Tr. 194.) Thus, the evidence supports a reasonable inference that Dean, Hickman, and Logan, walked out of the meeting together in a demonstration of their dissatisfaction with Rowland's failure to address the workplace issues raised by the group, and more specifically, a demonstration of their dissatisfaction with her response to the wage increase issue.

Accordingly, I find that the evidence, viewed as a whole, shows that Charging Party Kalaveeta Dean was engaged in protected concerted activity during the mandatory December 6 group meeting as reflected by her response to Rowland's solicitation to say what was on her mind and by her conduct in walking out of the meeting, together with coworkers Hickman and Logan.

b. The confrontation in Dean's office

The evidence further shows that after the group meeting ended Rowland went to Dean's office to confront her about her conduct during the meeting. Rowland testified that when she entered Dean's office she told her, "Kalaveeta, I feel, I felt very disrespected when you walked out of my meeting and slammed the door." (Tr. 285.) Program Supervisor Hall testified that immediately after the one-to-one meeting, Rowland went to his office and told him that "she had to terminate her because she went to talk with her to try to get some closure on the issue of the disrespectful behavior in the meeting and what have you." (Tr. 329.) The combined testimonies of Rowland and Dean show that their discussion during their one-to-one meeting was directed solely at whether Dean's conduct was rude and disrespectful. Thus, I find that the discussion in Dean's office between Rowland and Dean which ultimately ended with Dean's discharge was a logical outgrowth of Dean's protected concerted conduct in the group meeting and therefore was also protected concerted activity.

The issue now becomes whether Dean's conduct was so egregious as to remove it from the protections of the Act.

3. The *Atlantic Steel Co*. analysis

In *Atlantic Steel Co.,* 245 NLRB 814, 816 (1979), the Board stated:

> [T]he Board and the courts have recognized . . . that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act.
>
> The decision as to whether the employee has crossed the line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

a. The group meeting conduct

Despite the Respondent's assertions to the contrary, the evidence viewed as a whole shows that Dean's conduct during the group meeting was no worse than anyone else's. Several RAs, in addition to Dean, left the meeting and returned while Rowland was making her presentation. Holiday and Campbell left to retrieve a copy of their grievances. Salazar testified that she left twice because of a nagging cough. Program Manager Hall left several times to answer phone calls.

While Dean may have closed the door loudly when she returned, the evidence does not show that she intentionally "slammed" the door in response to Rowland's request to close it. That Rowland continued speaking after Dean closed the door without mentioning anything undercuts her assertion that Dean disrupted the meeting. Moreover, RA Cleo Holiday credibly testified that the door made noise whenever anyone closed it because of the type of door and the age of the building. (Tr. 182.) According to RA Helen Banta's unrebutted testimony, RA Mary Salazar also closed the door forcefully when she left after arguing with other RAs in a loud voice. (Tr. 105.)

Nor is there any evidence that Dean interrupted Rowland's presentation with questions, comments, or outbursts. The evidence shows that she spoke only in response to Rowland's directive to "say what she had to say." Although she bluntly told Rowland that she was not addressing the issues in the November grievance, there is no evidence that she made any threatening or abusive remarks. The only evidence of anyone using profanity during the group meeting was Salazar, who testified that she told the other RAs "I says I don't need to sit here and take all this bullshit." (Tr. 347.)

The worst that can be said about Dean is that she fidgeted, rolled her eyes, put her head down on the table, and that she raised her voice with everyone else, including Rowland and the supervisory staff.[9] I find that while the fidgeting, eye rolling, and the head on the table may have been a distraction during the meeting, that conduct, standing alone, does not constitute egregious or opprobrious conduct falling outside of the protections of the Act. I further find that such conduct in the overall context of group meeting, and in light of everyone else's conduct, was hardly noteworthy.

Finally, the evidence supports a reasonable inference that Rowland was most upset by the fact that Dean, Logan, and Hickman left the group meeting together. Although Rowland testified that Dean slammed the door a second time, there is no credible evidence showing that she slammed the door. If Buterbaugh can be believed, he stated that Dean was in front of Logan and Holiday as they left, which makes it unlikely that she slammed the door. Moreover, Holiday testified that the door did not slam as the trio left. (Tr. 164.) But whether or not someone slammed the door is of no significance because there is no credible evidence that it was slammed by Dean.

The undisputed evidence also shows that when the three RAs left together, they did so without saying a word. Their speechless exit pales in comparison to the remarks made by the Individual Charging Party in *Alpha Resins Corp*.,[10] who declared as he exited a meeting by himself, "The best thing for me to do is get up and get out of here before I wind up saying something and I'll regret it and I'll kick your ass and I'll get fired." Id. There, the Board held that the remark did not convey a threat of actual physical harm and was not so egregious as to render his concerted activity unprotected. Id. at 1219. Here, the undisputed evidence shows that not a word was spoken as the trio walked out.

I find therefore that neither Dean's comments nor her conduct during the December 6 group meeting rendered her concerted activity unprotected.

b. The one-on-one meeting

In applying the *Atlantic Steel Co*. analysis to the one-on-one meeting between Rowland and Dean, the undisputed evidence shows that it took place in Dean's office behind closed doors, which precludes the possibility that it was viewed or overheard by any other RA, management official or staff. The discussion focused directly on Dean's protected concerted activity during the group meeting and more specifically on whether Dean's conduct was rude and disrespectful. Although Dean disagreed with Rowland's assessment that she had acted disrespectfully, there is no evidence that she raised her voice or used threatening or abusive language toward Rowland at any time during the one-to-one meeting.

In addition, the credible evidence reflects that Rowland initiated the meeting and pursued the discussion, even though she was aware that Dean had left the group meeting very upset and even though she had openly acknowledged at the end of the group meeting that a "cooling-off period" was probably a good idea to allow emotions and tempers to subside. (Tr. 178.) Thus, under all of the circumstances, the evidence supports a reasonable inference that Rowland provoked the argument with Dean which ultimately lead to her discharge.

Accordingly, I find that Dean's conduct in the one-to-one meeting with Rowland did not render her concerted activity unprotected. I further find, based on all of the evidence, that as a result of a disagreement with Rowland about her conduct during the group meeting, Dean was discharged. Thus, I find that the Respondent discharged Charging Party Kalaveeta Dean for engaging in protected concerted activity.

Based on all of the foregoing, I find that the Respondent violated Section 8(a)(1) of the Act by discharging Kalaveeta Dean on December 6, 2000.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. By discharging Kalaveeta Dean on December 6, 2000, the Respondent violated Section 8(a)(1) of the Act.
3. The aforesaid unfair labor practice 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 discriminatorily discharged Kalaveeta Dean in violation of Section 8(a)(1) of the Act, I shall recommend that the Respondent be ordered to immediately offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of her suspension to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[9] Not everyone agreed that Dean raised her voice during the meeting. (Tr. 161.)

[10] 307 NLRB 1219 (1992).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, The Salvation Army, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging Kalaveeta Dean because she engaged in concerted protected conduct.

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

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

(a) Within 14 days from the date of this Order, offer Kalaveeta Dean full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Kalaveeta Dean whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Kalaveeta Dean and within 3 days thereafter notify Kalaveeta Dean in writing that this has been done and that the discharge will not be used against her in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 December 6, 2000.

(f) 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.

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 discharge Kalaveeta Dean because she engaged in concerted protected conduct.

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

WE WILL within 14 days from the date of this Order, offer Kalaveeta Dean full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Kalaveeta Dean whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against her, less any net interim earnings, plus interest.

THE SALVATION ARMY

[11] 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.

[12] 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."