

**Albert Einstein Medical Center and Pennsylvania Nurses Association. Case 4-CA-9620**

September 21, 1979

**DECISION AND ORDER**

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On June 18, 1979, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions, a supporting brief, and a motion for consolidation and the General Counsel filed a brief in answer to Respondent's exceptions and motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.<sup>2</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Albert Einstein Medical

<sup>1</sup> Respondent's only exception is to the Administrative Law Judge's finding that the Charging Party, Pennsylvania Nurses Association (PNA), is a labor organization within the meaning of Sec. 2(5) of the Act. Respondent asserts that PNA's labor organization status is not relevant to this case and states that it has excepted to the Administrative Law Judge's finding in this regard solely to preserve its position in Case 4-CA-7024, which is currently pending before the Board, and which, according to Respondent, involves the issue of PNA's labor organization status. Respondent urges that this finding be "deleted" from the Decision or, in the alternative, that this proceeding be remanded for a hearing on issues of conflict of interest under *Sierra Vista Hospital, Inc.*, 241 NLRB 631 (1979). In addition, Respondent filed a motion for consolidation of this proceeding with Case 4-CA-7024.

Case 4-CA-7024, however, involves the question of PNA's qualification to serve as representative of certain of Respondent's employees, rather than the issue of PNA's labor organization status. As the Board held in *Sierra Vista*, "The question of statutory labor organization status is . . . distinct from the question of a statutory labor organization's qualification to act as a bargaining representative in all instances and without regard to the circumstances under which bargaining takes place or will take place." It is clear that PNA's qualification to serve as representative of Respondent's employees is not in issue in the instant case, and the Administrative Law Judge specifically made no findings with respect to that issue. Accordingly, we hereby deny Respondent's request that the instant proceeding be remanded for further hearing and its motion for consolidation.

Finally, inasmuch as the stipulated evidence herein establishes that PNA is an association in which employees participate and which exists, at least in part, for the purpose of collective bargaining, we find no merit in Respondent's exception and adopt the Administrative Law Judge's finding.

<sup>2</sup> The notice recommended by the Administrative Law Judge has been modified to conform with all the provisions of his recommended Order.

Center, Philadelphia, (Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

WE WILL NOT promulgate or maintain any rule or regulation which prohibits employees for soliciting on behalf of any labor organization on our premises other than in immediate patient care areas, or which prohibits the distribution of union literature, which is protected under the National Labor Relations Act, as amended, in nonworking and nonpatient care areas during employees' nonworking time.

WE WILL rescind our rule restricting the areas in which employees may solicit on behalf of a labor organization during their nonworking time insofar as it applies to other than immediate patient care areas, and prohibiting distribution of union literature, protected by the Act, in nonworking and nonpatient care areas of our operation during employees' nonworking time.

WE WILL not interfere with or prohibit the distribution of union literature, protected under the Act, by employees in the vestibule area of the cafeteria during nonworking hours.

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

ALBERT EINSTEIN MEDICAL CENTER

**DECISION**

**STATEMENT OF THE CASE**

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard before me on March 28, 1979, in Philadelphia, Pennsylvania. The complaint alleges that Respondent maintained an unlawful rule prohibiting the distribution of literature in nonpatient care areas of its hospital during nonworking hours and unlawfully prevented employees from distributing literature in violation of Section 8(a)(1) of the Act. Respondent denies the essential allegations of the complaint.

Based on the entire record herein, the briefs of the parties, and the testimony of the witnesses and their demeanor, I make the following:

## FINDINGS OF FACT

## I. THE BUSINESS OF RESPONDENT

It is admitted that Respondent, a nonprofit corporation, organized under the laws of Pennsylvania, which provides full medical and hospital care to patients at its Northern Division, York and Tabor Roads, in Philadelphia, which had gross revenues during 1978 valued in excess of \$500,000 and which purchased goods valued in excess of \$50,000 directly from outside the State of Pennsylvania, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION

Respondent denies the allegation that the Charging Party (hereinafter PNA) is a labor organization. The parties stipulated to certain facts in the instant case which establish that PNA was certified by the Pennsylvania State Labor Board as bargaining representative of a unit of nurses and that PNA has sought unsuccessfully to bargain with Respondent since about April 1974. Respondent's refusal to bargain with PNA is the subject matter of another unfair labor practice case now pending before the Board (Case 4-CA-7024).

Although I do not make any findings concerning whether PNA may act as the bargaining representative of the nurses in view of the fact that it admits supervisors to membership, the stipulated facts clearly establish that PNA is a labor organization within the meaning of Section 2(5) of the Act. "[T]he willingness . . . to represent the employees in issue is controlling under the Act, not the eligibility of employees to membership nor the exact extent of the [Union's] constitutional jurisdiction." *Fox Deluxe Foods, Inc.*, 96 NLRB 1132 (1951) fn. 1. See, also, *N.L.R.B. v. N.L.R.B. v. Cabot Carbon Company and Cabot Shops, Inc.*, 360 U.S. 203 (1959).

## III. THE UNFAIR LABOR PRACTICES

## A. The Facts

On August 23, 1978, employees Mary Dignetti, Judy Survetnick, and Diane Hollingshead began distributing PNA literature in the vestibule at the entrance to Respondent's cafeteria. They were accompanied by PNA official Steven Zuback. Survetnick and Hollingshead were both on their day off and were wearing street clothes. Dignetti was working her regular shift and was on her lunch hour. She was wearing a white lab coat over a green hospital scrub dress. She also wore her orange employee identification badge.

The vestibule is 13 by 6 feet, has vending machines on three walls, and contains four tables with chairs. Although the cafeteria is restricted to employees, the vending machines area is open to anyone. It is used by nonemployees, including ambulatory patients with permission to leave their rooms, about 20 to 25 percent of the time. No patient care areas are located near the cafeteria.

At about 11:30 a.m., Zuback and the three employees began distributing literature to employees as they entered the vestibule on their way into the cafeteria. The literature

consisted of PNA buttons and brochures as well as a newsletter, Pulse, which was written and prepared by employees of Respondent who support PNA.

After about 15 to 20 minutes, Melvin Goldberg and Alex Sikora, Respondent's director and assistant director of security, respectively, approached the employees and Zuback. They introduced themselves to Zuback and inquired about the distribution. Zuback, Goldberg, and Sikora left the vestibule and went out to the corridor. Goldberg stated that he had been directed to instruct Zuback to stop the distribution of the literature. Zuback stated that it was within his legal rights to conduct such a distribution and he refused to stop. Goldberg then requested that Zuback accompany him to the personnel office to discuss the situation. Zuback agreed. Zuback briefly reentered the vestibule to inform the three employees where he was going, and then, he, Goldberg, and Sikora left for the personnel office. On the way, Sikora asked Zuback to save them all a lot of trouble and voluntarily cease the distribution. Zuback refused. Hollingshead, Survetnick, and Dignetti remained behind and continued to hand out their literature.

William Schwabe, Respondent's director of personnel, met Zuback and the security men at his office. Schwabe stated that hospital policy prohibited the distribution of literature on the premises without specific authorization. Zuback protested, stating that he had the legal right to pass out his literature and he suggested that Schwabe contact his attorney. Schwabe stated that he had already done so and had been advised that the distribution should not be permitted. Zuback then asked if he could telephone his attorney in Harrisburg. Schwabe agreed and left the office.

At this point, Goldberg and Sikora returned to the vestibule area. They approached the three employees and introduced themselves. Sikora introduced Goldberg to Survetnick, indicating that he had had previous contact with her. Hollingshead and Dignetti also introduced themselves as employees. Goldberg explained to the employees that they would have to stop their distribution because it was in violation of hospital policy. When the employees protested by arguing that they had the right to hand out their pamphlets, Goldberg stated that they did not have that right and that if they did not stop, he would confiscate their materials. The employees said that they would not stop until they saw Zuback and Goldberg agreed to take them to the personnel office. Dignetti stated that she had to leave in order to return to her work station. She left at approximately 12:10 p.m., so that she could be back at work prior to the expiration of her lunch period at 12:14 p.m. While the employees waited, Goldberg conducted a search of Respondent's records and confirmed that all three were in fact current employees. He informed Schwabe of this.

Meanwhile, after Zuback completed his phone call, he resumed his conversation with Schwabe. Zuback was given a copy of the pertinent provisions of Respondent's policy book and told that the distribution was prohibited under Respondent's policy. Zuback then pointed out that permission can be granted for solicitation or distribution within the hospital, and he inquired as to whom such a request should be directed. Schwabe replied that he had the authority to grant such permission. Zuback asked for permission to resume his distribution, but Schwabe denied the request.

When Zuback pointed out that book and drug salesmen were routinely granted such permission, Schwabe stated that the present situation was different. The conversation ended at this point, and Zuback, Hollingshead, and Survetnick all left the personnel office.

The cafeteria is in Respondent's Hackenburg building and is located just off a long corridor running between the Lifter and Levy buildings. There are two bulletin boards located in this corridor near the cafeteria. One is by the nursing office and contains available nursing positions and other information for nurses. The other board is located near the entrance to the vestibule and lists job descriptions for open positions throughout the hospital. The vestibule itself is used four times per year for solicitations for Respondent's blood donation drive. It is also used by hospital volunteers taking surveys concerning cafeteria use. Respondent also sponsors a benefits week program each year. During this period, a booth is set up in the corridor next to the entrance to the vestibule. At this time, officials of Respondent inform employees of various employee benefit plans. The booth is also set up whenever any changes in existing benefits are implemented. Further down the same corridor, towards the Hackenburg building, tables are set up for salesmen from medical, book, and drug companies to display their wares and solicit employees. These salesmen are routinely granted permission to set up these displays. The cafeteria itself is open from 11 a.m. to 2 p.m. daily. The heaviest traffic occurs between noon and 12:30 p.m., when, at times, a line of employees waiting to enter the cafeteria will extend into the vestibule.

Employees often return to Respondent's facility on their days off for a number of personal reasons, picking up paychecks, meeting or visiting with on-duty employees, and picking up or dropping off personal items. Despite the requirements of hospital regulations, off-duty employees sometimes fail to wear their employee identification badges while on the premises.

#### B. Discussion and Analysis

##### 1. Maintenance of a no-solicitation and distribution rule

It is well settled that an employer's prohibition against employee solicitation on work time and against employee distribution in work areas at all times is presumptively lawful. Conversely, prohibitions against nonwork time solicitation or distributions on nonwork time and in nonwork areas are unlawful unless justified by business reasons based on discipline or other legitimate factors. *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793, 797-798 (1945); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962). With respect to hospitals, the Board rule is that, while a hospital may lawfully ban employee solicitation and distribution, even during nonworking time in immediate patient care areas—such as patients' rooms, operating rooms, and places where patients receive treatment—a ban on that activity in other areas to which patients and visitors have access is invalid absent a showing by the hospital that such a ban is necessary to avoid a disruption of patient care. *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976). See, also, *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483 (1978).

At the time of the incident in question, Respondent had a policy in effect on the subject of "Activities Interfering with Service to Patients." The policy stated in part:

#### Purpose

In order to maintain an atmosphere conducive to patient care, to permit uninterrupted services to patients and to protect the rights of medical center employees, it is essential that activities which may interfere with the orderly rendering of services be restricted. The purpose of this policy is to define activities which are not permitted on hospital premises.

#### Policy

The hospital will take appropriate steps at its disposal to prevent disturbances and/or disruptive activities which may interfere with services to patients.

Solicitations for any cause or distribution of materials of any kind is permitted only with express approval of the General Director or his designee.

\* \* \* \* \*

This policy applies to all persons connected with the medical center, all visitors and patients.

This was Respondent's basis for prohibiting the distribution of union literature in the instant case.

Applying the pertinent principles herein, I find that Respondent violated Section 8(a)(1) of the Act by maintaining the above rule. The rule prohibits "solicitations for any cause or distribution of materials of any kind (emphasis supplied)" without the express approval of Respondent. As stated, the rule applies to both working and nonworking, patient care and nonpatient care, areas. Additionally, it governs both the on- and off-duty conduct of employees, and is therefore unlawfully overbroad. *St. John's Hospital and School of Nursing, Inc.*, *supra*. Moreover, the rule is unduly restrictive because it requires the express authorization of Respondent's administration before solicitations or distributions may be conducted. As the Board has stated, "Respondent cannot lawfully require an employee to secure permission as a precondition to engage, without fear of management interference or retaliation, in protected concerted activities on company property in nonwork areas on the employees' free time." *AMC Air Conditioning Co.*, 232 NLRB 283, 284 (1977).

In these circumstances I find that Respondent violated Section 8(a)(1) of the Act by maintaining an unlawfully restrictive no-solicitation and distribution rule.

##### 2. Interfering with distribution of literature in the vestibule of the cafeteria

*Beth Israel Hospital v. N.L.R.B.*, *supra*, involved the legality of hospital rule barring solicitations or distributions in any area to which patients had access. Thus, such activities could be conducted only in certain employee locker rooms and restrooms. The Court upheld the Board's finding that the employer had violated the Act by preventing union distributions in its cafeteria. In its decision, the Court approved the Board's approach in *St. John's Hospital & School of Nursing, Inc.*, 437 U.S. at 495, that:

the balance should be struck against the prohibition in areas other than immediate patient-care areas such as lounges and cafeterias absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas. The Board concluded, on a record devoid of evidence which contradicted that assessment, that the possibility of disruption to patient care in those areas must be deemed remote.

As in *Beth Israel*, the facts herein support the inference that Respondent's blanket prohibition of employee distributions of union literature in the vestibule outside the cafeteria was violative of Section 8(a)(1) of the Act. Here, as in *Beth Israel*, the use of the area in which the distribution took place by patients is minimal. No patient care areas are nearby, but ambulatory patients may, on occasion, use the vestibule area. It is unlikely that they use it during the lunch hour, when the instant distribution took place, since the cafeteria, which is used exclusively by employees, is accessible only through the vestibule. More importantly, in order to go to the vending machine area a patient must receive a doctor's permission to leave his or her room or ward. As the Board stated in *St. John's Hospital and School of Nursing, Inc., supra*, "[o]n balance, the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation." 222 NLRB at 1151. In addition, Respondent's use of the vestibule and the corridor adjoining the vestibule for other types of solicitation activities demonstrates that the area was thought to be an appropriate one for solicitations and distributions as a general matter. Thus, appeals to employees to join the blood drive were made in the vestibule—during the lunch hour—and a booth for Respondent's officials to explain employees' benefits was permitted in the adjoining corridor some 6 feet away from the entrance to the vestibule. Further down the corridor were two employee bulletin boards. Moreover, the vestibule and the cafeteria were natural congregating areas for employees during the noon hour when the distributions involved herein were taking place. There were no other places for employees to congregate since Respondent has no lounge for employees. The nurses' locker rooms are all locked and employees have keys and access only to their own locker rooms. Furthermore, Respondent, director of security testified that distributions by employees were not permitted anywhere except on the public sidewalks surrounding the hospital. Thus, there are no other areas available in the hospital to sufficiently counter balance a prohibition of protected activity in the vestibule to the cafeteria. In these circumstances, the right of employees peacefully to distribute literature on their own time counterbalances any rights Respondent might have in restricting such right based either on general property or business interests or the more specific interest in protecting patients from undue interference.

Thus, Respondent's blanket proscription against employee distribution of PNA buttons and materials in the vestibule to the employees' cafeteria on August 23, 1978, was violative of Section 8(a)(1) of the Act. See, *Beth Israel, supra*.

Respondent contends that it was not until the second visit to the vestibule by the security officials that they knew

that employees were involved in the distribution. Therefore, Respondent contends that the rule *N.L.R.B. v. The Babcock & Wilcox Company*, 351 U.S. 105 (1956), applies to the distribution. That rule provides that an employer may exclude outsiders from distributing literature from its property absent special circumstances. I reject Respondent's contention. First of all, the evidence indicates that one employee, Dignetti, was dressed in hospital garb and it should have been obvious that she was an employee. There is a conflict in testimony as to whether she was wearing her employee identification badge, but it is clear that the security officers did not initially ask for employee identification. One security officer had previous contacts with Survetnick, knew her, and introduced her to Goldberg. Thus, it is fair to infer that the security officials knew that the distributors other than Zuback were employees. Moreover, the security officials refused to permit the distribution even after they were admittedly told that the distributors were employees. In any event, interference with employee rights is traditionally measured by objective rather than subjective standards. Thus, the prohibition against employee distribution had a coercive effect on the Section 7 rights of the employees, notwithstanding Respondent's good intentions. Cf. *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

Respondent also argues that PNA distributions had been and could in the future be made by alternative means and at alternative locations without serious disruption. Although ordinarily an inquiry into alternative means of the communications is not relevant in assessing employee distribution rights,<sup>1</sup> even considering such alternatives in this case, the restriction of the distribution in the vestibule was an unreasonable interference with employee rights. Distributions were made outside the hospital at exits used by 90 percent of the nursing staff and in the nurses' locker rooms. However, this factor does not counterbalance the interference with employee rights in the prohibition of distribution in the vestibule of the cafeteria which the record shows was a "natural gathering area" for employees. See *Beth Israel Hospital v. N.L.R.B., supra*, 437 U.S. at 505. It was such a natural gathering area that other solicitations and activities, such as blood drives, took place in the vestibule and the nearby corridors. That such other activities took place in or near the vestibule also shows that Respondent had no fear that such activity would interfere with the few ambulatory patients who passed through these areas. Moreover, although distributions could be made in the nurses' locker rooms, the evidence is that nurses did not have access to any locker rooms besides their own. Each floor had a locker room and they were kept locked. There was no other place in Respondent's facility where union distributions would be permitted.

Respondent also contends that part of the Pulse newsletter included a "knowingly baseless charge of racism" that Respondent was somehow responsible for the fact that registered nurses were comprised primarily of whites and practical nurses primarily of blacks—and, thus, the employees who distributed the document lost the protection of the Act. I do not pass on whether distribution of the Pulse newsletter was unprotected activity because (1) Respon-

<sup>1</sup> Cf. *Beth Israel, supra*, 437 U.S. at 505.

dent's objection to the distribution did not focus either on the newsletter or the allegedly baseless charge, but rather on the location of the distribution; and (2) Respondent's blanket prohibition of distributions interfered with the distribution of clearly protected material—the PNA buttons and literature. Thus, Respondent's prohibition was one which broadly interfered with protected activity.<sup>2</sup>

#### CONCLUSIONS OF LAW

1. By maintaining the overly restrictive no-solicitation and distribution rule set forth in its policy and procedure manual from June 20, 1977, to the present, Respondent has violated Section 8(a)(1) of the Act.

2. By prohibiting the distribution by employees of union literature and buttons in the vestibule of the employees' cafeteria during the lunch hour on August 23, 1978, Respondent violated Section 8(a)(1) of the Act.

3. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby recommend the following:

#### ORDER<sup>3</sup>

The Respondent, Albert Einstein Medical Center, its officers, agents, successors and assigns, shall:

<sup>2</sup> Respondent is not prejudiced from alleging in the future that certain material being distributed is objectionable because the order I shall recommend will include a prohibition against interfering only with protected activity.

<sup>3</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

#### 1. Cease and desist from:

(a) Promulgating or maintaining any rule or regulation prohibiting its employees from soliciting on behalf of any labor organization on Respondent's premises other than immediate patient care areas during nonworking time or prohibiting the distribution of union literature, which is protected under the Act, in nonworking and nonpatient care areas during nonworking time.

(b) Prohibiting the distribution of union literature, which is protected under the Act, by employees in the vestibule of the employee cafeteria during nonworking time.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Rescind its rule restricting the areas in which employees may solicit on behalf of a labor organization during the employees' nonworking time insofar as it applies to other than immediate patient care areas, and prohibiting the distribution of union literature, which is protected under the Act, during employees' nonworking time in nonworking and nonpatient care areas of its operations.

(b) Post at its hospital copies of the attached notice marked "Appendix."<sup>4</sup> Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

<sup>4</sup> In the event that 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."