

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 27, 2000

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Engineers and Architects Association 506-4033-1200
Case 21-CA-33655 506-4033-7500
506-4033-7600
506-4067-7500
512-5012-0133-2200
512-5012-0133-5000
530-6050-5825

This case was submitted for Advice on the issue of whether an Employer's rule against, *inter alia*, expressing views on internal Employer policies, may chill employee exercise of Section 7 rights under Lafayette Park Hotel, 326 NLRB No. 69 (1998).

FACTS

The Employer, Engineers and Architects Association (EAA), is a labor organization that represents certain employees of the City of Los Angeles. A Board of Governors, herein called the BOG, whose members are elected annually by the EAA membership, manages the Employer. According to the Employer's constitution, "[t]he [Employer's] business and fiscal affairs shall be governed by the [BOG], which shall have complete financial and policy setting authority." The Union represents approximately 7 employees of the Employer, who are employed as clericals and labor representatives.¹ Although the employees are supervised and directed by managers of the Employer, the labor agreements are negotiated directly with BOG members.

¹ The Union represents two separate bargaining units: administrative (clerical) and labor (labor representatives). Each unit has its own labor agreement.

On about September 7, 1999, the BOG fired [*FOIA Exemptions 6 and 7(C)*.] Some members of the Employer immediately complained about [*FOIA Exemptions 6 and 7(C)*] discharge via e-mail on the Employer's website, demanding that the entire membership body vote on whether the termination was proper, and alleging that he was fired, in part, because the labor representatives (unit employees) were not performing their jobs adequately. The Union demanded that the Employer issue a statement denying that [*FOIA Exemptions 6 and 7(C)*] firing was due to poor job performance by unit employees. The Employer did not issue the statement. In addition, certain members of the Employer wrote e-mails stating that the Employer's staff employees should not be involved in the political process of the BOG. About October 1999, the BOG decided to mass mail information to the Employer's membership explaining [*FOIA Exemptions 6 and 7(C)*] termination. To carry this out, the BOG sought assistance from the administrative staff (unit employees) for tasks like stuffing envelopes. The administrative staff, through their Union representative, sought clarification from BOG Vice President Tom Casey as to whether there was a conflict of interest for them to assist the BOG with the mass mailing. Casey responded that staff employees had to obey BOG policies. The Union representative stated that the employees did not want to campaign, but that they had that right. Casey responded that he thought the staff should not campaign.

On November 3, 1999, the BOG adopted the following policy without prior notice to or bargaining with the Union.

Because the Association's business and fiscal affairs are within the sole custody and discretion of the Board of Governors who are responsible to Association members, it is imperative that all members of EAA staff - executive, labor representatives and support staff - act with complete impartiality concerning policy and internal political matters. Equally important, staff personnel must not be perceived by the Association membership as interfering, by any form of participation, in the internal, political affairs of the Association. To that end, it is the policy of the Engineers and Architects Association that:

EAA staff personnel shall not become involved, either directly or indirectly, in EAA's internal governance or in the election process for EAA's Board of Governors. Staff of EAA shall not

campaign for, support, or oppose any candidate for an elected position in the Association. Further, staff shall not participate in, support, oppose, assist or instigate others to commence the recall of any elected official of the Association. Failure to abide by these precepts may result in discipline up to and including termination.

EAA staff shall not publicly support or engage in campaigning activities for any policy or position which contravenes official Board policy, position or other actions taken by the Board on matters of importance to the Association and its members. The circulating of petitions, campaign literature, referendums or flyers by staff, unless it is an official Board approved campaign or policy, is prohibited. The expressing of policy positions that are in opposition to official Board policy to the news media, elected officials, management representatives or other labor organizations is also prohibited. Violation of these restrictions on internal EAA political activities by staff may result in disciplinary action up to and including termination.

There is no evidence that the Employer's staff employees have engaged in protests or campaigning regarding either [FOIA Exemptions 6 and 7(C)] discharge or the makeup of the BOG, or that any staff employees have been disciplined under the rule.

ACTION

We conclude that a Section 8(a)(1) complaint should issue, absent settlement, regarding paragraph 2 of the Employer rule, because its proscriptions are over-broad and cover activities protected under Section 7 of the Act; but should not issue regarding paragraph 1 because it is not unlawfully over-broad as analyzed under Lafayette Park. A Section 8(a)(5) allegation should also issue, absent settlement, regarding the Employer's unilateral implementation of the rule.

I. The 8(a)(1) Charge

a. Paragraph 1 of the Employer's Rule

Paragraph 1 of the Employer's rule addresses what would appear to be unprotected employee activities, i.e. employee activities seeking to influence the makeup of the BOG. Employee action seeking to influence the identity of management hierarchy is normally unprotected activity because it lies outside the realm of legitimate employee interest. NLRB v. Oakes Machine Corp., 897 F.2d 84 (2nd Cir. 1990); Retail Clerks Union, Local 770, 208 NLRB 356, 357 (1974). Such employee activity may be protected, however, if the identity or actions of the supervisor have a direct impact on the employees' terms and conditions of employment.² This determination is a factual question to be determined by the totality of the circumstances. Oakes, 857 F.2d at 89.

In the instant case, it is not self-apparent that the BOG has a direct enough impact on the employees' working conditions so as to automatically fit into the exception regarding unprotected conduct aimed at affecting the identity of management. The BOG is the highest management level of the Employer, providing general fiscal and policy

² See, e.g., West Texas Hotels, Inc., 324 NLRB 1141 (1997) (employee unlawfully fired for relating employees' concerns that a husband-wife management team had a detrimental impact on the employer's "open door" policy for registering employee complaints); Atlantic-Pacific Construction Co., Inc. v. NLRB, 52 F.3d 260 (9th Cir. 1995) (employee protest over selection of supervisor protected, because supervisor would have immediate authority over protesting employees, directing daily work activities and having the authority to hire, fire, and set wages with only minimal consultation with higher management); The Hoytuck Corp., 285 NLRB 904, n. 3 (1987) (employee letter seeking discharge of cook-supervisor because of cook-supervisor's treatment of employees protected because cook-supervisor's conduct had direct impact on employee working conditions); Caterpillar, Inc., 321 NLRB 1178, 1179 (1996) (employees seeking removal of employer CEO protected because of CEO's impact on employee working conditions).

direction. BOG members do not oversee the regular, daily work of the unit employees. Although scenarios could be imagined where activities of the BOG might have a direct impact on the working conditions of the staff employees, such an analysis is too attenuated and speculative to invoke the exception in the instant case.³ It is irrelevant that the conduct prohibited under Paragraph 1 includes employee solicitation, because the object of the prohibited conduct is unprotected.⁴ Viewed under the totality of the circumstances, a potential employee protest regarding the makeup of the BOG would not be protected by Section 7.

Further, under Lafayette Park, a reasonable employee would not be "chilled" in the exercise of protected Section 7 rights as a result of paragraph 1. Although Lafayette Park arguably is in some ways a departure from prior Board law, it leaves intact the well-established principle that maintenance of an ambiguous rule violates the Act if the rule reasonably would chill employees in the exercise of activity protected by the Act.⁵ Further, the Board reaffirmed the principle that if a rule is ambiguous, any ambiguity in the rule must be construed against the employer as the promulgator of the rule.⁶

In determining whether the mere maintenance of Paragraph 1 would have a chilling effect on Section 7

³ In its submission, the Region notes that "there is no employee protest activity in question at present, but there could be in the future as the labor agreements are negotiated with the BOG." The fact that the BOG negotiates the unit employees' labor agreement, in itself, does not invoke the exception, for were that the case, the "narrow" exception would devour the rule.

⁴ See Harrah's Lake Tahoe Resort Casino, 325 NLRB 1244 (1992) (no violation where employee discharged for soliciting other employees to join employee stock option plan [ESOP] in order to engage in leveraged buyout of Employer's parent corporation, because primary thrust of activity was to advance employee interest as owners/managers, not as employees).

⁵ 326 NLRB No. 69, slip op. at 2.

⁶ Id. at 5, citing Norris/O'Bannon, 307 NLRB 1236, 1245 (1992).

activity, Lafayette Park requires a contextual analysis. When viewed in context, a reasonable employee would read the Employer's rule as only prohibiting the unprotected activity described above, i.e. campaigning for or against members of the BOG. The rule's introductory paragraph, for example, clearly sets forth that its purpose is to prevent staff employees from becoming involved in internal BOG politics lest the membership perceive that the process is not being conducted fairly and honestly. In addition, the Employer had previously circulated a memorandum to its staff stating, in pertinent part, "one of the Board's concerns is that with the upcoming EAA Elections all staff should remain neutral..." Further, the incidents leading to the promulgation of the rule demonstrate that the rule was promulgated in response to member concerns that the Employer's staff should not be involved in the political process regarding removal or retention of BOG members. To the extent that paragraph 1 might be construed as ambiguous and arguably impact on protected activity when read in isolation, it is clear that when read in context, a reasonable employee would not believe that its proscriptions encompass activities protected by Section 7. Therefore, there is no 8(a)(1) violation as to Paragraph 1.

b. Paragraph 2 of the Employer's Rule

The language of Paragraph 2, on the other hand, is so broad that it would reasonably chill employees in the exercise of their Section 7 rights under a Lafayette Park contextual analysis. Paragraph 1 was limited to campaigning, whereas the second paragraph is much more expansive, covering all policy matters, emphasizing thought content and non-BOG campaign conduct as opposed to the prior paragraph's emphasis on campaigning activity. Given the restrictive nature of the first paragraph, a reasonable employee would read the second paragraph broadly as restricting unit employee solicitation, distribution, and other protected activity concerning the Employer's policies with regard to labor relations with its unit employees. For example, "official Board policy" and "matters of importance to the Association and its members" could encompass the unit employees' terms and conditions of employment. Even if the intent of the drafter was to further legitimate Employer interests in preventing unit employees from engaging in internal EAA politics and campaigns, the rule's language is not sufficiently tailored to protect those legitimate business objectives without chilling Section 7 activities.

The no-distribution policy found in the second sentence of paragraph 2 is similarly over-broad. In Adtranz, 331 NLRB No. 40 (2000), the Board found the employer's no-solicitation no-distribution rules, which required prior employer authorization, were overly broad and failed to limit or define the kinds of solicitations and or distributions that require management approval. In the instant case, not only does the rule prohibit distributions regarding internal political campaigns, but also any distributions regarding matters that are not "official Board approved...policy." The language is so broad that, even read in context under Lafayette Park, it would lead a reasonable employee to believe that protected activity would be subject to discipline. As such, the no-distribution clause in the second paragraph of the Employer's rule is over-broad, and chills protected activity.

The third sentence of paragraph 2 prohibits "the expressing of policy positions that are in opposition to official Board policy to the news media, elected officials, management representatives or other labor organizations." Employees might reasonably interpret this to prevent them from seeking mutual aid and protection not only from each other, but also from entities outside the Employer.⁷ This sentence, like the others in paragraph 2, is so broad that a reasonable employee would fear discipline for engaging in protected activities under a Lafayette Park analysis. The language of paragraph 2 is not narrowly tailored to the employer's legitimate business interests and thus violates Section 8(a)(1).

None of the contextual factors in the instant case would lead a reasonable employee to read Paragraph 2 narrowly as not prohibiting protected Section 7 conduct. Under Lafayette Park, where language is arguably "ambiguous" (susceptible to two or more possible meanings), the rule's context may provide sufficient clarity for an employee to reasonably read it as not prohibiting conduct protected by Section 7. In the instant case, however, the rule's prefatory paragraph, the last sentence in Paragraph 2, and the facts surrounding the rule's origin, which all suggest the Employer objective of ensuring unit employee neutrality regarding internal political and BOG campaign matters, are not sufficient to overcome the over-breadth of the language in Paragraph 2. An employee reading Paragraph 2 would reasonably conclude that though one of the

⁷ See Eastex v. NLRB, 437 US 556, 565 (1978).

Employer's objectives was to prevent employee interference with EAA's internal political process and BOG campaigning, the rule was written so broadly as to restrain other activities protected by Section 7.

II. The 8(a)(5) Charge

The Employer's unilateral implementation of the rule violates Section 8(a)(5) of the Act. The rule is a mandatory subject of bargaining, as it involves employee discipline.⁸

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⁸ Peerless Publications, Inc. (Pottstown Mercury), 283 NLRB 334 (1987) ("[A]s a general principle, rules and their constituent penalties should not be artificially [severed] from each other for the purposes of collective bargaining under the Act. This is so because the attachment of express or implied penalties for breach of the substantive content is what transforms rules or codes of conduct from mere expressions of opinion or aspiration into terms and conditions of employment"). The Employer's defense that its rule is not a mandatory subject of bargaining under Peerless is without merit. First, the narrow "core purposes of the enterprise" exception in Peerless would not apply to the Employer's rule in this case because its legitimate business interest in excluding staff employees from the political process of its highest management tier is common to many types of businesses and is not unique to the Employer's business. See generally Resthaven Corp., 322 NLRB 750, 752 (1996). Moreover, even if the threshold "core purposes of the enterprise" test were satisfied, Peerless also requires that the rule "must on its face be (1) narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous..." Id. at 335. Paragraph 2, at least, is not narrowly tailored.