

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

# Advice Memorandum

DATE: June 25, 2009

TO : Dorothy L. Moore-Duncan, Regional Director  
Region 4

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

SUBJECT: Tenet Healthcare Corporation and  
Hahnemann University Hospital 512-5018-2500  
Cases 4-CA-36588 and 4-CA-36666 512-5018-3300  
512-5084  
California Nurses Association/ 518-0120  
National Nurses Organizing Committee 518-4020  
Case 4-CB-10283 536-2548  
536-2570  
536-2581  
601-2514

These cases were submitted for advice on several issues arising from a neutrality agreement. We agree with the Region that the charges should be dismissed, absent withdrawal.

Tenet Healthcare, Inc. and Hahnemann University Hospital (collectively, the "Employer") are party to an Election Procedure Agreement ("EPA") with the Union that regulates the parties' conduct during an organizing campaign.<sup>1</sup> Briefly, the EPA requires the Employer to provide the Union with nurses' contact information; permits nonemployee Union organizers to access conference rooms, employee break rooms, and the cafeteria; limits the content of the parties' communications during the campaign; and prohibits the Employer from assisting any individual or group pursuing an anti-Union campaign. The EPA also provides that the Union's majority status will be determined by a Board consent election; that any disputes over unit or eligibility issues must be resolved via

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<sup>1</sup> The same EPA was the subject of a recent Advice memorandum involving two Tenet facilities in Texas, Tenet Healthcare Corp. and Park Plaza Medical Center ("Park Plaza"), Cases 16-CA-26363, et al., Advice Memorandum dated January 28, 2009. An earlier version of the EPA was the subject of an Advice memorandum involving a Tenet facility in California, Tenet Healthcare, Inc. d/b/a Los Gatos Community Hospital ("Los Gatos"), Cases 32-CA-21266-1, et al., Advice Memorandum dated February 23, 2005.

arbitration; and that, in the event the Union wins the election and the parties cannot agree on an initial collective-bargaining agreement, its terms will be established via interest arbitration.

The Union began an organizing campaign pursuant to the EPA at Hahnemann in January 2009. Shortly thereafter, the Charging Party, a nurse at Hahnemann, began an anti-Union campaign. She requested nurses' contact information, a copy of the EPA, and access to Employer conference rooms to hold anti-Union meetings. Her requests were denied, while the Employer provided the Union with nurses' contact information and access to conference rooms pursuant to the EPA.<sup>2</sup> On March 12, 2009, about six weeks after the Employer denied the Charging Party's request for conference room access, it reversed that decision and posted notices throughout the facility stating that it would not discriminate against anti-Union employees with respect to conference room access. Since then, the Charging Party has used conference rooms for about 12 anti-Union meetings. However, the Employer denied the Charging Party's additional requests to receive her choice of available conference rooms; set up a table in the cafeteria to communicate with employees; access a locking, glass-enclosed bulletin board outside the cafeteria; and bring nonemployees into employee break rooms and lounges to speak with employees.

The Charging Party alleges that the Employer and Union have violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) by: (1) executing certain EPA provisions; (2) refusing to furnish the Charging Party with a copy of the EPA; (3) unlawfully assisting the Union by providing it with nurses' contact information and access to its facilities; and (4) unlawfully discriminating against anti-Union employees by granting unequal access to its conference rooms and other facilities.<sup>3</sup> For the reasons discussed below, we agree with the Region that these allegations should be dismissed, absent withdrawal.

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<sup>2</sup> Although an arbitrator ruled that, initially, the space granted to the Union did not constitute a "conference room" as envisioned in the EPA, it is undisputed that the Employer has since provided the Union with access to conference rooms.

<sup>3</sup> Pursuant to the EPA, a consent election was held on June 16 and 17, 2009. The Region has impounded the ballots pending resolution of the ULP allegations.

**1. The Legality of EPA Provisions**

The Charging Party alleges that the EPA unlawfully supplants and subverts the Board's role in the election process by requiring that all pre-election and post-election procedures be decided by an arbitrator rather than the Board; unlawfully infringes on protected speech by contractually limiting what the Employer or its agents can say about the Union; and constitutes unlawful pre-recognition bargaining because it provides for interest arbitration in the event the parties are unable to reach an initial collective-bargaining agreement.

In Park Plaza,<sup>4</sup> we rejected the same allegations regarding the validity of the EPA, and do so here for the same reasons. In short, the EPA did not unlawfully supplant or subvert the Board's role and procedure for certifying employees' bargaining representatives, because unions and employers may enter into a contract to resolve representational issues even where those agreements might bypass Board procedures.<sup>5</sup> Nor did the EPA unlawfully infringe on protected speech, because it is not unlawful for an employer to agree voluntarily to silence itself during union organizing campaigns.<sup>6</sup> Finally, the EPA's interest arbitration provision did not constitute unlawful pre-recognition bargaining because it did not establish terms and conditions of employment; it merely required the parties to submit their proposals to a neutral panel if the Union won the election and the parties could not reach a contract within a specific timeframe.<sup>7</sup> The Region should therefore dismiss these allegations, absent withdrawal.

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<sup>4</sup> Cases 16-CA-26363, et al., Advice Memorandum dated January 28, 2009.

<sup>5</sup> See Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp., 961 F.2d 1464, 1468 (9th Cir. 1992); Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 566 (2d Cir. 1993).

<sup>6</sup> See UAW v. Dana Corp., 278 F.3d 548, 558 (6th Cir. 2002) (enforcing neutrality and card-check agreement, pursuant to LMRA §301), citing Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp., 961 F.2d at 1470.

<sup>7</sup> See Columbia University, 298 NLRB 941, 941 (1990) (interest arbitration clauses that represent the contracting parties' agreement to resolve future disputes by interest arbitration are nonmandatory subjects of bargaining because they have no immediate effect on

## **2. Refusal to Provide Copies of the EPA**

The Charging Party alleges that the Union and the Employer unlawfully refused to provide the Charging Party with a copy of the EPA. We agree with the Region that the Union did not violate Section 8(b)(1)(A) by refusing to provide a copy of the EPA to the Charging Party under a duty of fair representation theory, because it was not the exclusive bargaining representative.<sup>8</sup> And, the refusal did not otherwise "restrain or coerce" employees' exercise of Section 7 rights to oppose the Union.<sup>9</sup> The Employer also lawfully refused to furnish the Charging Party with a copy of the EPA, because employers generally have no affirmative duty under the Act to provide information to employees.<sup>10</sup> And, while the General Counsel has concluded that a neutrality agreement that contains terms and conditions of employment cannot lawfully be kept confidential from

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employees' terms and conditions of employment), citing Tampa Sheet Metal, 288 NLRB 322, 326 n.12 (1988). Compare Plastech Engineered Products, Inc., Cases 10-CA-35554, et al., Advice Memorandum dated June 27, 2005 (neutrality agreement unlawful where binding interest arbitration provision was quid pro quo for specific pre-negotiated terms and conditions of employment).

<sup>8</sup> See SEIU Local District 1199 and Rescare, Inc., Cases 6-CB-11371, et al., Advice Memorandum dated November 30, 2007 (union lawfully refused to provide copy of neutrality agreement to employees it might seek to organize). Compare Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency), 260 NLRB 419, 420 (1982) (union, which was an exclusive bargaining representative, violated its duty of fair representation under Section 8(b)(1)(A) by refusing to provide a copy of the contract and the health and welfare plan to a unit employee).

<sup>9</sup> See, e.g., Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133, 138 (1995), citing NLRB v. Teamsters Local 639 (Curtis Brothers, Inc.), 362 U.S. 274, 285-292 (1960) (peaceful, non-coercive picketing by a minority union to compel an employer to grant exclusive recognition does not violate Section 8(b)(1)(A) based upon legislative history interpreting that section narrowly).

<sup>10</sup> See, e.g., Rochester Mfg. Co., 323 NLRB 260, 262 (1997) (employer owes no "affirmative obligation" to spell out for employees the precise extent of a contractual union-security requirement), affd. 194 F.3d 1311 (6th Cir. 1999), cert. denied 529 U.S. 1066 (2000).

employees,<sup>11</sup> the EPA here does not contain terms and conditions of employment.<sup>12</sup>

**3. Unlawful Assistance Allegations Regarding Nurses' Contact Information and Access to Facilities**

The Charging Party alleges that the Employer unlawfully assisted the Union, in violation of Section 8(a)(2) and (1), by providing the Union with employees' names and addresses pursuant to the EPA while refusing to provide that information to the Charging Party, and by granting the Union broad access to the Employer's facilities.

We agree with the Region that the Employer did not unlawfully assist the Union for the same reasons we rejected the unlawful assistance allegations in Park Plaza<sup>13</sup> and Los Gatos.<sup>14</sup> In short, it is well settled that a certain amount of employer "cooperation" with the efforts of a union to organize is lawful.<sup>15</sup> Here, there is no evidence that Employer representatives were in a position

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<sup>11</sup> See Dana Corporation, Inc., Cases 7-CA-46965-1, et al., General Counsel's Minute (September 3, 2004).

<sup>12</sup> As noted above, the interest arbitration provision contained in the EPA does not establish terms or conditions of employment.

<sup>13</sup> Cases 16-CA-26363, et al., Advice Memorandum dated January 28, 2009.

<sup>14</sup> Cases 32-CA-21266-1, et al., Advice Memorandum dated February 23, 2005.

<sup>15</sup> Longchamps, Inc., 205 NLRB 1025, 1031 (1973) (no unlawful assistance where employer permitted union to address employees on company property during work time and directed some employees to enter room where a union representative would speak to them; employer did not urge employees to support the union, no management representatives were present when employees signed cards, and local governmental procedures were used to verify union's majority); Jolog Sportswear, Inc., 128 NLRB 886, 888-889 (1960) (no unlawful assistance where employer permitted union to address employees on company time; management officials were not present when cards were signed, card check was conducted by independent authority, and employer issued statements assuring employees of their free choice and its neutrality).

to view employees signing Union authorization cards, or that the Employer required employees to attend Union meetings, paid them for their attendance, or threatened employees for their Union support or lack of support. Moreover, the Employer's notice to employees pursuant to the EPA assures employees of its neutrality with respect to unionization. Under these circumstances, providing the Union with nurses' contact information and granting the Union access to its facilities would not inhibit employees' free choice regarding a bargaining representative or interfere with the Union's maintenance of an arm's length relationship with the employer. The Region should therefore dismiss this allegation, absent withdrawal.<sup>16</sup>

#### **4. Discrimination Regarding Access to Employer Facilities**

The Charging Party alleges that the Employer engaged in unlawful discrimination along Section 7 lines by: granting the Union exclusive access to conference rooms for six weeks; subsequently granting the Union "preferred" access to conference rooms by permitting its representatives to tour the facility and choose which conference rooms to use; prohibiting the Charging Party from bringing nonemployee representatives into employee break rooms and lounges; prohibiting the Charging Party from setting up tables in the cafeteria to communicate with employees; and granting the Union access to a glass-enclosed, locking bulletin board outside the cafeteria, while denying the Charging Party's requests for identical access rights.

We agree with the Region that the Employer unlawfully discriminated against the Charging Party by denying her the use of its conference rooms for a six-week period, but that it would not effectuate the purposes and policies of the Act to issue complaint on that allegation. The Employer's refusal to grant conference room access clearly was based on the content of the Charging Party's anti-Union message. Thus, the Employer previously had granted employee requests to use conference rooms for a variety of non-work-related purposes and had never denied use to an employee group in the absence of a scheduling conflict.<sup>17</sup> The only reason the

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<sup>16</sup> Because the Employer did not unlawfully assist the Union, any allegation that the Union accepted unlawful assistance in violation of Section 8(b)(1)(A) must also be dismissed.

<sup>17</sup> Compare Los Gatos, Cases 32-CA-21266-1, et al., Advice Memorandum dated February 23, 2005 (employer's refusal to permit antiunion employees to reserve conference rooms, while granting nonemployee Union representatives access to conference rooms, did not constitute unlawful disparate

Employer gave for the refusal was the EPA's requirement that the Employer not assist employees conducting an anti-Union campaign. Under these circumstances, the Employer discriminated against the Charging Party along Section 7 lines.<sup>18</sup> However, about six weeks after refusing the Charging Party's request, the Employer changed its position and granted the Charging Party access to its conference rooms to hold anti-Union meetings. Furthermore, the Employer posted notices throughout the facility containing language similar to what would be included in a Board settlement notice. In these circumstances, it would not effectuate the purposes and policies of the Act to issue a complaint over the temporary denial of conference room access.<sup>19</sup>

We further conclude that the Employer did not violate Section 8(a)(1) by denying the Charging Party's request to bring nonemployees into break rooms and lounges to communicate with employees while permitting nonemployee Union representatives to access those areas. Disparate treatment involves similarly situated groups that are treated differently with respect to the exercise of Section 7 rights,<sup>20</sup> and the Charging Party and the Union are not similarly situated.<sup>21</sup> Thus, the Union received access rights to the Employer's property, to which it was not otherwise entitled,<sup>22</sup> as a quid pro quo for ceasing a "corporate campaign" that disparaged Tenet and the quality

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treatment where the employer historically had not allowed employees to reserve conference rooms for any non-work-related purpose).

<sup>18</sup> See Park Plaza, Cases 16-CA-26363, et al., Advice Memorandum dated January 28, 2009.

<sup>19</sup> [*FOIA Exemptions 2 and 5*

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<sup>20</sup> See Register Guard, 351 NLRB 1110, 1117 (2007) ("discrimination means the unequal treatment of equals").

<sup>21</sup> See Los Gatos, Cases 32-CA-21266-1, et al., Advice Memorandum dated February 23, 2005 (Union and anti-Union employees were not similarly situated where anti-Union employees, unlike Union, had unfettered access to facility and knowledge of onsite employees' identities).

<sup>22</sup> See Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

of health care it provided.<sup>23</sup> The EPA limits the Union to one pre-screened flyer on each bulletin board, prohibits its representatives from spending more than 90 minutes per shift in a break room, and requires them to respect the wishes of any employee who does not wish to engage in a discussion or accept literature. In contrast, the Charging Party is an onsite employee who may freely access the facility and communicate with her coworkers regarding Section 7 matters in ways not available to the Union under the EPA. For example, the Charging Party may access break rooms and lounges during any nonwork time, engage in negative campaigning, and post multiple flyers, which are not pre-screened. And, unlike the Union, she has not agreed to circumscribe any of her rights in exchange for more extensive access rights. Moreover, the Employer's denial was consistent with its past practice; there is no evidence that the Employer had previously granted employee requests to bring nonemployees into break rooms and lounges to meet with employees.<sup>24</sup> Under these circumstances, the mere fact that the Charging Party was not granted identical access to break rooms and lounges (i.e. permission to bring in nonemployee speakers) was not disparate treatment along Section 7 lines in violation of Section 8(a)(1).<sup>25</sup>

Finally, the evidence does not support the allegations that the Employer gave the Union "preferred" access to conference room space; permitted Union representatives to set up tables in the cafeteria for the specific purpose of meeting with employees; or permitted Union postings in a locked, glass-enclosed bulletin board outside the cafeteria. Accordingly, the allegations that the Employer discriminated against anti-Union employees in this regard should be dismissed, absent withdrawal.

B.J.K.

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<sup>23</sup> The EPA arose from a settlement agreement that resolved several unfair labor practice charges, a strike, and numerous grievances and other labor disputes, in addition to ending the corporate campaign.

<sup>24</sup> While nonemployees have, in the past, been present in break rooms to meet with nurses, their presence was arranged by the Employer and was for work-related purposes, such as education and training.

<sup>25</sup> We further note that, notwithstanding the Employer's denial, the Charging Party has brought nonemployees into break rooms and lounges to communicate with employees without repercussion.