

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

Advice Memorandum

DATE: April 19, 2000

TO : Sandra Dunbar, Regional Director
Region 3

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

SUBJECT: Wilson Memorial Hospital, a Division of
United Health Services, Inc.
Case 3-CA-22271

506-6070-5000
506-6080-0800
506-6090-0500
512-5012-0100
512-5012-0125
512-5012-1725-1183
512-8380-5000

This case was submitted for Advice as to whether the employer's rules regarding standards of conduct reasonably chill employees' Section 7 rights under Lafayette Park Hotel, 326 NLRB No. 69 (1998).

FACTS

Wilson Memorial Hospital (the Employer) is an acute care hospital located in Johnson City, New York. Since the early 1970's the Employer has had a collective-bargaining relationship with Local 19990, International Brotherhood of Painters (the Union) in a unit consisting of certain engineering department employees. There are currently approximately 30 employees in the bargaining unit. The remaining work force of approximately 3,000 employees is unrepresented. The most recent collective-bargaining agreement expired on February 1, 2000. Since late October 1999, the parties have been engaged in negotiations for a successor agreement. The Employer's chief negotiator is Michael McNally, vice president for human resources.

In mid-November 1999,¹ during their lunch period, several bargaining unit employees distributed a leaflet in the hospital cafeteria, which is open to the public. The leaflet, entitled "What is Mike McNally Hiding," refers to the Union's October 29, 1999, request that collective-bargaining negotiations be videotaped because "history has

¹All dates are in 1999 unless otherwise noted.

proven, time and again, Mike McNally/UHS suffers from chronic amnesia when it comes time to deliver on UHS's promises." It further provides, "Videotapes don't lie. Employers who make phony promises to employees hate being caught on videotape. It's time for Mike McNally/UHS to come clean. Videotape the promises. Cure amnesia."

In Case 3-CA-22236, the Region concluded that the leaflet is protected by Section 7,² and that the Employer violated Section 8(a)(1) based on its security guards' November 16 attempt to prohibit the cafeteria leafleting of the above flyer.³

The Union asserts that the Employer had failed to abide by certain representations during the previous negotiations, and that prior Board and arbitration proceedings regarding bonuses have been resolved largely on the basis of statements made during the previous contract negotiations. Thus, the Union sought to have the current negotiations videotaped. The Employer rejected this, asserting that it is permissible to engage in "posturing" during negotiations, and that any statements made during negotiations should not be used against it in any subsequent Board or arbitration proceedings.

²While the language of the leaflets questions McNally's veracity, the Board has held that otherwise protected activity will lose its character as such only if it is so offensive, defamatory, malicious, or opprobrious as to remove it from the Act's protection. The Board has found similar language to be protected. Emarco, Inc., 284 NLRB 832, 833 (1987); New York University Medical Center, 261 NLRB 822, 824 (1982); Alaska Pulp Corp., 296 NLRB 1260, 1273-74 (1989); U.S. Postal Service, 215 NLRB 488, 490 (1974); Ben Pekin Corp., 181 NLRB 1025, 1028-29 (1970).

³"The Board, with Supreme Court approval, has established rules regarding restrictions on the exercise of Section 7 rights in health care institutions. These rules require striking a balance between employees' statutory rights and the needs of the health care employer to provide undisrupted patient care in a tranquil atmosphere. Thus, the Board has held that health care facilities may prohibit solicitation in immediate patient care areas." Aroostook County Regional Ophthalmology Center, 317 NLRB 218 (1995), enf. denied, 81 F.3d 209 (DC Cir. 1996); Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978); NLRB v. Baptist Hosp., 442 U.S. 773 (1979).

In a December 6 letter to Union counsel Furlong, Respondent attorney Millus claimed that the "McNally leaflet" was per se defamatory under New York State law and is thus subject to a defamation action. The letter further provides that the leaflet was not protected by the Act and that employees engaged in its distribution are subject to discipline, since the Employer's Human Resources Policy lists "any other form of dishonesty" and "willful damage to...reputation of USHS or those associated with UHSH" as grounds for immediate termination.⁴ In the letter, Millus asserted that McNally was requesting an apology for the leaflets as well as a promise to refrain from distributing defamatory materials. Furlong conveyed the contents of the letter to two Union officers/unit employees. By letter dated December 9 to Millus, Furlong replied that if a defamation suit is filed by the Employer, the Union will file a counterclaim and a Bill Johnson's charge.

By letter to the Region dated January 30, 2000, the Employer asserts that it has refrained from taking any disciplinary or legal action pending action on the instant charge. The Employer further asserted that the Union is not acting in good faith in that it has continued to distribute the McNally leaflet, and has highlighted the liar aspect of the leaflet by underlying the phrase, "Videotapes don't lie."

ACTION

We conclude that the Employer's rules Section 5.3(4) and (10), which state, respectively, that "Theft of hospital, employee or patient property (regardless of value) or any other form of dishonesty" and "[w]ilful damage to property or reputation of UHSH or those associated with USHS" is grounds for immediate termination, are unlawful.

In Cincinnati Suburban Press,⁵ the Board concluded that the employer's maintenance and enforcement of a rule prohibiting "unlawful, improper or unseemingly conduct on or off the Company premises ... which [affects] the Company's

⁴Section 5.3 of the Employer's Human Resources Policy and Procedure includes the following as grounds for immediate termination:

4. Theft of hospital, employee or patient property (regardless of value) or any other form of dishonesty.
10. Willful damage to property or reputation of UHSH or those associated with USHS.

⁵ 289 NLRB 966 (1988).

product, reputation or good will in the community" was unlawful. In Lafayette Park Hotel,⁶ the Board concluded that a similar rule prohibiting, inter alia, improper conduct which affects the hotel's reputation or good will in the community, was lawful, and distinguished Cincinnati Suburban Press because that finding was "made in the context of the respondent's 'actions' in that case", namely, enforcing the rule against union activity. Id.

Rule 5.3(10) is similar to the rule in Cincinnati Suburban Press, and has also been enforced against Union activity. Thus, we conclude that the rule is unlawful on its face and overly broad. A rule prohibiting any action that damages the Employer's reputation clearly unlawfully restricts Section 7 conduct. In this regard, we note that any criticism of the Employer or of anyone associated with the Employer, common Section 7 activity, can result in immediate termination. In addition to being unlawful on its face, the Employer's rule is overbroad because it was enforced in a manner that interfered with employees' Section 7 rights, and that unlawful enforcement will further signal to employees that the rule applies to Section 7 activity.⁷

Further, although Section 5.3(4), on its face, appears to pertain only to acts of dishonesty, and would not implicate or give the impression of implicating protected Section 7 activity, the Employer enforced this rule in an unlawful manner when it notified the Union that protected leafleting violated Section 5.3(4). Thus, this rule is distinguishable from the Lafayette Park Hotel rule, which was not unlawfully enforced, and similar to the rule and employer's unlawful enforcement thereof in Cincinnati Suburban Press.

Accordingly, complaint should issue, absent settlement, alleging that the Employer's rules Section 5.3(4) and (10) violate Section 8(a)(1) of the Act.


B.J.K.

⁶ 326 NLRB No. 69, slip op. at 4.

⁷ Lafayette Park Hotel, Cincinnati Suburban Press.