

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**HILLS AND DALES GENERAL HOSPITAL**

**Respondent**

**and**

**CASE**

**07-CA-053556**

**DANIELLE L. CORLIS, an Individual**

**Charging Party**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Jennifer Y. Brazeal, Counsel for the Acting General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits this Answering Brief to the Exceptions to the Administrative Law Judge's Decision (JD) filed by Respondent in this matter.<sup>1</sup>

**I. Introduction**

Respondent has filed eight exceptions to the JD in this matter. The crux of Respondent's exceptions and the argument in its accompanying brief in support of its exceptions is that the ALJ erred in finding that the Respondent violated Section 8(a)(1) of the Act by maintaining the rules set forth in paragraphs 11 and 21 of Respondent's Values and Standards of Behavior policies. These rules state:

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<sup>1</sup> The following abbreviations are used in this brief: JD- Administrative Law Judge Decision; GC Ex – General Counsel Exhibit; JT Ex –Joint Exhibit; Tr - Transcript

### **Teamwork**

11. We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other.

### **Attitude**

21. We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.

(Jt Ex 4)

In Respondent's Brief in Support of Its Exceptions, Respondent defines the issues as: did the ALJ err in analyzing the rules based solely on the language of the rules themselves (Exceptions 1, 2, and 3); should the ALJ have considered rules in the context of the work environment in which they were issued (Exceptions 1, 2 and 3); and do rules that prohibit negativity and negative comments violate the Act when no evidence exists that the rules were directed at protected concerted activity and such rules were developed with employee input (Exceptions 4, 5, 6, 7, and 8).

Respondent argues that the ALJ erred in analyzing the rules solely on the language of such; that the ALJ should have considered the context in which the rules were developed, and that rules discouraging negativity and negative comments, if not directed at protected concerted activity and developed with employee input, do not violate Section 8(a)(1) of the Act.

Respondent's arguments in support of its exceptions fail as a matter of law. As will be discussed below, Board law clearly establishes that the rules set forth in paragraphs 11 and 21 are unlawful, as they infringe upon employees' ability to engage in protected concerted activity.

## **II. Analysis**

### **A. The ALJ Rightly Examined the Rule's Language in Determining Whether the Rules are Overbroad Prohibitions of Section 7 Activity.**

Respondent asserts that the ALJ erred by making the statement that "the merits of the Acting General Counsel's challenges to the Hospital's work rules turns solely on the language of the rules themselves." (JD 6, Exceptions 1) The premise upon which Respondent excepts to this statement is flawed. Perhaps conveniently, and somewhat ironically, Respondent omitted the first half of the sentence. The entire sentence, particularly when read within the confines of the entire paragraph, puts the ALJ's remark in its proper context:

"In presenting its case, the Acting General Counsel essentially argued that the text of the work rules themselves establishes that the rules are unlawful. There is no evidence that the Hospital made statements or engaged in conduct that affirmatively linked its rules to protected activity, and thus the merits of the Acting General Counsel's challenges to the Hospital's work rules turn solely on the language of the rules themselves." (JD 6)

This passage clearly shows that the ALJ was characterizing what he deemed to be the Acting General Counsel's argument in this matter, and how the evidence limited the extent to which a violation could be found. In that regard, he noted that the record contained no evidence of Respondent conduct linking its

rules to protected concerted activity. Such evidence would only bolster the Acting General Counsel's case.

These sentences do not, as Respondent suggests, indicate that the ALJ looked only at the language of the rules and not the context in which the rules were promulgated and enforced. In fact, the ALJ examined the context in which the rules were promulgated in several paragraphs of the decision, and repeatedly made references to the particular context and other facts and circumstances leading to the creation and enforcement of the rules. (See e.g. JD 2, 3) Indeed, the ALJ found that one of the rules alleged by the Acting General Counsel to be unlawful was lawful *because of the context* in which it was applied.<sup>2</sup> (JD 7)

Additionally, the Board requires a careful examination of a rule's language when determining whether the maintenance of it is lawful. In *Lafayette Park Hotel*, 326 NLRB 824 (1998), the Board held that an employer may violate Section 8(a)(1) of the Act through the maintenance of work rules even in the absence of enforcement. The appropriate inquiry is whether the rule in question would reasonably tend to chill employee protected concerted activity covered in Section 7 of the Act. In determining whether a rule is unlawful, the Board must give it a reasonable reading. *Id.* at 825. The Board expounded on this standard in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004), articulating a two prong test to determine whether the maintenance of rules violates Section 8(a)(1) of the Act. First, the rule is clearly unlawful if it explicitly restricts protected

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<sup>2</sup> The ALJ states "Rather, in the context of the Hospital's efforts to improve its reputation in the community, paragraph 16's call for employees to represent the hospital in a positive and professional manner is a lawful call....." (JD 7) It should be noted that the Acting General Counsel does not agree with this particular finding, as set forth in cross exceptions filed by Counsel for the Acting General Counsel.

concerted activities. Second, if the rule does not explicitly restrict protected concerted activities, it violates Section 8(a)(1) if: (1) employees would reasonably construe the language to prohibit protected concerted activity; (2) the rule was promulgated in response to protected concerted activity; or (3) the rule has been applied to restrict such activity. *Id.* at 646, 647. Accordingly, the ALJ was correct in critically examining the language of the rules in order to comport with Board law. If he did not do so, it would have been plain error.

**B. The ALJ Correctly Found that the Rule in Paragraph 11 was Unlawful**

Rule 11 states: “We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other.” The term “team member” refers to everyone who works at the hospital including managers and employees. (JD 6) The ALJ agreed with the Acting General Counsel in finding that rule 11 is unlawful because employees would reasonably construe the language of the rule to prohibit Section 7 activity. (JD 6) The ALJ rightly added that the paragraph 11 implicitly includes protected concerted activities because it prohibits negative comments about managers. (JD 6)

Respondent asserts that the ALJ erred in finding that the rule contained in paragraph 11 is unlawful. (Exceptions 2, 4, 6, 7, and 8) Despite Respondent’s assertions, the ALJ’s finding was correct.

The Board’s decision in *Claremont Resort and Spa*, 344 NLRB 832 (2005), is directly on point. In *Claremont Resort and Spa*, the Board held that a rule prohibiting negative conversations among employees about associates and managers would reasonably be construed to bar employees from discussing with

their coworkers complaints about their managers that affect working conditions. Thereby, the rule would cause employees to refrain from engaging in protected concerted activities. *Id.* at 832. As in *Claremont Resort and Spa*, rule 11 prohibits employees from making “negative” comments about managers, which could affect terms and conditions of employment.

**C. The ALJ correctly found that Rule in Paragraph 21 was Unlawful.**

Rule 21 states: “We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.” The ALJ found that this rule was unlawful inasmuch as it prohibited negativity.<sup>3</sup> (JD 8) The ALJ found that the rule was so patently ambiguous, imprecise, and overbroad that a reasonable employee would construe it as prohibiting protected discussions about working conditions and terms and conditions of employment. (JD 9, citing *2 Sisters Group*, 357 NLRB No. 168 slip op at 2 (December 29, 2011).

Respondent asserts that the ALJ erred in finding that the rule contained in paragraph 21 was unlawful because the context in which the rule was created does not suggest that it was intended to infringe upon Section 7 activity. (Exceptions 3, 5, 6, 7, and 8) Despite Respondent’s assertions, the ALJ was correct.

For the same reasons discussed with respect to rule 11 regarding broad prohibitions against negativity, rule 21 is unlawful. In addition, the ALJ correctly noted that the Board (as recently as December 29, 2011) finds fault in rules that

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<sup>3</sup> The ALJ found that the prohibition against gossip was not unlawful. (JD 8)

are ambiguous and imprecise, and could thus reasonably be interpreted to infringe upon protected concerted activity. (JD 8, 9). In *2 Sisters Group*, supra, the Board found that a rule that subjected employees to discipline for their inability or unwillingness to work harmoniously with other employees was unlawful. *Id.* at slip op 2. The Board found that the employer did not define what it meant to “work harmoniously,” and the employer’s rule can be reasonably encompass “any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7, and that employees would reasonably construe the rule to prohibit such activity.” *Id.*

As in *2 Sisters Group*, Respondent never defined “negativity,” leaving it up to the employees to define negativity for themselves. When asked by Counsel for the Acting General Counsel if she ever defined negativity in rules 11 and 21, Respondent’s executive assistant to the Vice President of Human Resources testified: “We don’t specifically define that and say ‘You can say this,’ or ‘You can’t say that.’” (Tr. 41, JD 3) Just as the Board reasoned in *2 Sisters Group*, employees in the instant case could reasonably construe the prohibition against engaging in and/or listening to negativity as encompassing any behavior that may paint other employees, including managers, in a bad light, including behavior related to protected concerted activity. See also *Flamingo Hilton-Laughlin*, 330 NLRB 287, 295 (1999), where the Board found a rule that prohibited using loud, foul, or and abusive language unlawful because the employer did not define those terms. Furthermore, the Board has consistently held that when an unlawful and lawful interpretation may be garnered from the reading of a rule, an employer is

liable for the unlawful interpretation. *Nova Southeastern University*, 357 NLRB No. 74, pg. 20 (August 26, 2011), citing *Laidlaw Transit, Inc.*, 315 NLRB 79, 83 (1994).

**D. The Context in Which the Rules Were Created and Enforced Support a Finding that They are Unlawful.**

Respondent asserts that none of the rules contained in the Values and Standards of Behavior policies were created in response to employee expressions of protected concerted activity. Respondent further asserts that the rules, read as a whole, do not pertain to protected concerted activity. Therefore, Respondent argues that the rules are lawful.

It is true that rules should not be read in isolation, and the entire context of the rules' creation and enforcement should be analyzed. *Lafayette Park Hotel*, supra at 825, 827. In the instant case, Respondent created 28 rules to address a workplace environment rife with discord. For example, Respondent's departments were not cooperating with each other, employee relationships were suffering due to back-biting and back-stabbing, employee satisfaction was low, employees were looking for job opportunities outside the hospital, and patients were seeking care at other facilities. (JD 2) In other words, the employees were concerned about their terms and conditions of employment, and this discontent in the workforce was affecting the way the public viewed the hospital. Respondent reacted by creating rules to address these concerns, which included employee concerns about terms and conditions of employment. Rules 11 and 21 reach too

far.<sup>4</sup> Protected concerted activity includes employee discussions about terms and conditions of employment. *Mastec Advanced Technologies*, 357 NLRB No. 17, slip op. 20 (July 21, 2011); *Jeannette Corp.*, 217 NLRB 653 (1975), enfd. 532 F.2d 916 (3rd Cir. 1976). Therefore, the rules pertain to Section 7 activity, and employees could reasonably interpret them to constrain such activity.

Furthermore, Respondent disciplined the Charging Party for a Facebook post she made regarding a discharged employee and the discharged employee's supervisors on the basis of these rules. The complaint in the instant matter did not allege the Charging Party's discipline as violation of Section 8(a)(1) of the Act; however, the fact that Respondent disciplines employees based upon comments they make to others about workplace issues signals to employees that Respondent, through its rules, intends to limit conversations employees have among each other about workplace issues. The vagueness and magnitude of the rules, combined with the fact that such were created in response to protected concerted activity, and further combined with employee expectations that the rules prohibit discussions among themselves related to terms and conditions of employment support that the rules at issue herein violate Section 8(a)(1) of the Act.

### III. CONCLUSION

For the reasons set forth above and in the Administrative Law Judge's Decision, it is urged that Respondent's Exceptions be denied in their entirety. It is further requested that the Board affirm the ALJ's findings of fact, conclusions of law, and recommended

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<sup>4</sup> Counsel for the Acting General Counsel contends that Rule 16 also reaches too far; however, as already noted, Counsel for the Acting General Counsel filed cross-exceptions challenging the ALJ's ruling in that regard.

Remedy, except as provided in Counsel for the Acting General Counsel's Cross-  
Exceptions to the Administrative Law Judge's Decision.

Dated at Detroit, Michigan, this 30th day of March, 2012.

  
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CERTIFICATE OF SERVICE OF COUNSEL FOR THE ACTING GENERAL  
COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE, COUNSEL FOR THE ACTING GENERAL  
COUNSEL'S CROSS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION  
AND COUNSEL FOR THE ACTING GENERAL COUNSEL'S BREIF IN SUPPORT OF CROSS  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I, the undersigned employee of the National Labor Relations Board, certify that on the date indicated above I caused the above-entitled document to be served by Certified Mail –OR– Regular Mail, by placing copies into the U.S. Mail, postage paid, addressed to the following persons at the following addresses:

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