

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

**PECKHAM VOCATIONAL INDUSTRIES, INC.**

**Respondent**

**and**

**CASE 07-CA-081429**

**UNITED PECKHAM EMPLOYEE ASSOCIATION**

**Charging Party**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO  
RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Complaint in the instant case alleges that, in response to a nascent organizing campaign, Respondent promulgated an overly broad no-solicitation rule, threatened employees with closure of its facility, repeatedly observed employee distribution of literature, announced a change in its rules to require pre-approval of postings on its bulletin board and selectively enforced its bulletin board rule by removing union literature while permitting non union postings. In a motion filed on August 23, 2012, Respondent seeks a partial summary judgment with respect to the Complaint allegations set forth in paragraphs 12(a), 12(b), 13(a), and 13(b) related to Respondent's restrictions on the use of its bulletin boards. Respondent's motion should be denied because of its failure to serve Counsel for the Acting General Counsel until August 27, and because the matters addressed in Respondent's motion raise genuine issues of material fact, as supported by the following.

**I. Respondent's Delay in Serving Counsel for the Acting General Counsel with Its Motion Requires that the Motion Be Denied**

Respondent filed its motion for partial summary judgment with the Board on August 23, 2012. Counsel for the Acting General Counsel did not learn of the motion until August 27, during a conference call with the Administrative Law Judge. Respondent has acknowledged its failure to timely serve Counsel for the Acting General Counsel with the motion. (Exhibit A)

The Board's Rules and Regulations Section 102.24(b) provides that all motions for summary judgment or dismissal shall be filed with the Board no later than 28 days prior to the scheduled hearing. The hearing in the instant matter was scheduled for September 20, 2012.<sup>1</sup> Respondent filed its motion exactly 28 days prior. However, the motion was not properly served on Counsel for the Acting General Counsel within the requisite time period.

Section 102.24(a) of the Board's Rules and Regulations provides that "[a]ll motions filed with the Board, including motions for default judgment, summary judgment, or dismissal shall be filed with the Executive Secretary of the Board in Washington, DC . . . together with an affidavit of service on the parties." Respondent's affidavit of service was clearly defective in this case. Respondent's proffered excuse, that a Board "clerk" indicated that the "Amended Answer" did not require service, does not obviate Respondent's responsibility to follow the Board's Rules and Regulations regarding motions for summary judgment. The Board has frequently held that it is not bound by informal advice, including misrepresentations, received by parties from Board personnel. *Allied Lettercraft Co.*, 280 NLRB 979, 981 (1986); *United*

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<sup>1</sup> The hearing has been postponed until October 22, 2012. However, the hearing was scheduled for September 20<sup>th</sup> when Respondent filed its motion.

*Hydraulic Services, Inc.*, 271 NLRB 107 n. 2 (1984), *Galesburg Construction Co.*, 259 NLRB 722 (1981).

**II. Respondent Repeatedly Misconstrues the Standards for Summary Judgment in its Motion**

Respondent's brief in support of its motion is replete with inaccurate descriptions of what is required to prevail in a motion for summary judgment. Respondent states that the Charging Party "has not established any facts demonstrating that Peckham disparately removed or prohibited bulletin board postings." Respondent states that paragraph 13 of the Complaint fails because the allegations are "false." Respondent states that it did not make any announcement changing its bulletin board policy. These are factual issues.

The standards for summary judgment are clear. "It is well settled that, in order for a matter to be appropriate for summary judgment, it must affirmatively appear in the record (1) that there is no genuine issue as to any material fact and (2) that the moving party is entitled to a judgment as a matter of law." *Stephens College*, 260 NLRB 1049, 1050 (1982), *Conco Chemicals Company*, 275 NLRB 39, 40 (1985). Respondent's assertion that facts have not yet been disclosed or that allegations are false highlights that there are material facts in question, and that the motion for partial summary judgment should be denied.

**III. Respondent's Alleged Disparate Enforcement of its Pre-existing Bulletin Board Rule Raises Issues of Material Fact.**

Respondent claims that Complaint paragraph 12, which alleges that Respondent enforced its solicitation rule selectively and disparately by removing and prohibiting bulletin board

postings in support of the Charging Party while permitting nonunion bulletin board postings, “fails as a matter of law” because Respondent applies its valid nondiscriminatory policy equally to all postings.

Respondent asserts that since at least August 2010, it has never posted on its bulletin boards or allowed any person or entity to post on its bulletin boards any document, material, information, solicitation or other posting related to any protected activity, or for that matter, any outside organization or group. In addition, Respondent contends that it has never posted or allowed postings related to any pro or anti-union activity nor has it allowed any other solicitations or information unrelated to Company information or notices to be posted on its bulletin boards. Respondent’s claims raise material issues of fact, not law.

Disparate enforcement of an existing rule requires factual analysis as to whether an employer has allowed posting in the past. See *Loparex*, 353 NLRB 1224, 1232 (2009)(Board adopted ALJ’s finding there had been no restriction on employees who used company bulletin boards to communicate non-work information), *Starbucks Coffee Co.*, 354 NLRB No. 99 slip op. at p. 1, 13 (2009)(“evidence suggests . . . Respondent’s stated policies had either been unenforced or applied in a very liberal manner by store management.”) The Board in *Register Guard I*, 351 NLRB 1110, 1116 (2007) reviewed which emails were allowed by the respondent in order to determine whether there was discrimination along Section 7 lines. Similarly, in this case, evidence from witnesses concerning which postings were allowed by Respondent to remain

on the bulletin board in front of a trier of fact will be required to determine whether there has been a violation.

**IV. Respondent’s Contention that its Pre-existing Bulletin Board Rule Was Not the Product of Improper Motivation and Is Facially Valid are Immaterial**

Respondent asserts that the pre-existing policy bulletin board policy was not the product of improper motivation because the policy enactment date precedes the operative paragraphs of the Complaint. In addition, Respondent asserts that the pre-existing rule is facially valid. However, both arguments are irrelevant because the pre-existing bulletin board rule is not the basis of the Complaint. Complaint paragraph 12(a) alleges that Respondent enforced the pre-existing rule selectively and disparately and Complaint paragraph 12(b) alleges that Respondent did so in order to discourage employees from forming, joining, and assisting the Charging Party or engaging in other concerted activities. At issue is whether the enforcement of the rule is invalid, not the rule itself, nor the motivation behind adopting the existing rule. Respondent has conflated separate issues which must be distinctly analyzed. *Register Guard I*, 351 NLRB 1110, 1116 (2007), (rule facially lawful; discriminatory enforcement is a separate issue), *Register Guard II*, 357 NLRB No. 27 (2011) (respondent had inconsistently enforced its otherwise valid policy by” permitting other employees to email non-union-related solicitations of a personal nature.”)

**V. The Question of Whether There Has Been a Change to Respondent's Pre-Existing Bulletin Board Rule and the Motivation Behind the Change Constitute Issues of Material Fact**

Complaint paragraphs 13(a) and 13(b) allege that Respondent's agents and supervisors announced a change to its pre-existing bulletin board rule by requiring employees to obtain management permission to post bulletin board items in order to discourage its employees from forming, joining, and assisting the Charging Party or engaging in other concerted activities.

Respondent's bulletin board policy, as set out in Complaint paragraph 6 and admitted in

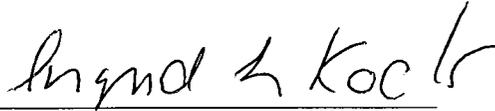
Respondent's Answer provides:

The Company maintains bulletin boards and electronic communication to communicate Company information to employees and to post notices required by law. These bulletin boards or communication are for the posting of Company information and notices only, and only persons designated by the Administration may place notices on or take down material from the bulletin boards.

Despite Respondent's assertion, the plain language of the policy does not state that one must have "management permission" to post material on the bulletin board. Respondent claims that there has been no change to the policy. Whether agents or supervisors of Peckham made any announcements changing the policy, as alleged in the Complaint, is a matter of proof to be determined by the trier of fact. Respondent's assertion that it has long required that any postings on its bulletin board be approved in advance by designated Peckham management personnel raises yet another issue of material issues of fact. Finally, the issue of whether Respondent was motivated to do so due to its animosity towards unions involves questions of factual context, including timing and other displays and expressions of animus. See *LA Film School*, 358 NLRB No. 21, slip op. at 10 (March 26, 2012)(new security policy imposed two days after an unlawful eviction and in tandem with "an array of other ULPs")

WHEREFORE, Counsel for the Acting General Counsel requests that Respondent's Motion for Partial Summary Judgment be denied in its entirety.

Respectfully submitted this 30<sup>th</sup> day of August, 2012.



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## Kock, Ingrid

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**From:** David J. Houston [DHouston@dickinson-wright.com]  
**Sent:** Monday, August 27, 2012 10:22 AM  
**To:** Kock, Ingrid  
**Cc:** Michelle D. Spiker; Allison R. Kellogg  
**Subject:** m/sj

Hello Ms Kock.

I had understood that we had emailed the motion simultaneously with filing but this was handled by a substitute secretary and I was physically out of the office. It turns out that we did not serve you by email, I have just asked my secretary to provide the filings by email immediately.

It is my understanding that service is not required (my office checked this by telephone with a clerk in Detroit with regard to the Amended Answer), but I had instructed nevertheless that you be served as a routine practice. I apologize for any inconvenience.

***David J. Houston***

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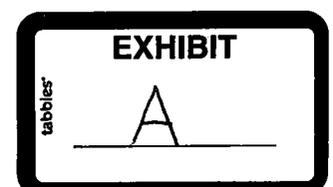
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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 07**

**PECKHAM VOCATIONAL INDUSTRIES, INC.**

Respondent

and

**UNITED PECKHAM EMPLOYEE  
ASSOCIATION**

Charging Party

**Case 07-CA-081429**

**CERTIFICATE OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
OPPOSITION TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

I, the undersigned employee of the National Labor Relations Board, state under oath that on August 30, 2012, I served the above-entitled document(s) by email upon the following persons at the following email addresses:

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August 30, 2012

\_\_\_\_\_  
Date

Karen A. Roock, Designated Agent of  
NLRB

\_\_\_\_\_  
Name

  
\_\_\_\_\_  
Signature