UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

SHANDS JACKSONVILLE MEDICAL CENTER, INC.	)	
	)	
Respondent,	)	
	)	
And	)	12-CA-26649
	)	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 79, AFL-CIO,	)	
	)	
And	)	12-CA-27197
	)	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 1328,	)	
	)	
And	)	
	)	
DELLA HIGGINBOTHAM, an Individual,	)	12-CA-26829
	)	
Charging Parties	)	

RESPONDENT'S REPLY BRIEF TO
ACTING GENERAL COUNSEL'S ANSWERING BRIEF

NOW COMES Shands Jacksonville Medical Center, Inc., Respondent herein, and files its Reply Brief to the Answering Brief filed by the Acting General Counsel, as follows:

STATEMENT OF CASE

This case arises out of unfair labor practice charges filed by American Federation of State, County, and Municipal Employees, Council 79 and Local 1328, (collectively the "Union"), alleging that Respondent violated sections 8(a)(1) and (3) of the Act in certain respects. The Acting Regional Director issued a Consolidated Complaint on November 29, 2011. Respondent filed a timely Answer, denying the material allegations of the Consolidated

Complaint and asserting certain affirmative defenses. On April 18, 2012, Respondent filed an Amended Answer. This matter was heard in Jacksonville, Florida on April 22, 23, and 24, 2012 before Administrative Law Judge Ira Sandron. During the course of the hearing, the parties reached a private settlement agreement respecting charge number 12-CA-27197 (Jacqueline Cangro), which was approved by the ALJ on April 23, 2012. (Resp. Exh. 1).[1] The remaining charges were not settled.

On July 3, 2012, ALJ Sandron issued his Decision finding a single violation of section 8(a)(1) of the Act based on an overly broad no solicitation/distribution rule. (JD 16: 6-40). ALJ Sandron dismissed on credibility grounds an allegation that Respondent had violated section 8(a)(1) by threatening to go after an employee's nursing license if she pursued a grievance. (JD 16: 1-4). He further dismissed the allegation that Respondent had violated sections 8(a)(3) and (1) by discharging Mishaun Palmer, finding that deferral to an arbitrator's award that had reinstated Palmer without backpay or interim seniority accrual was warranted. (JD 13-15). On July 31, 2012, the Acting General Counsel filed exceptions to the ALJ's decision to defer and his dismissal of the allegations regarding Palmer's discharge, along with a supporting brief. The Acting General Counsel did not file exceptions to the judge's dismissal of the alleged threat to employee Della Higginbotham.

Respondent timely filed an Answering Brief in opposition to the Acting General Counsel's Exceptions, as well as limited cross-exceptions and a supporting brief. The Acting General Counsel filed an Answering Brief. Respondent now files this Reply Brief.

[1] References to the transcript are designated as "Tr." followed by the appropriate page number(s). References to exhibits are designated either as "Resp." or "GC" Exh., followed by the appropriate exhibit number(s). References to Judge Sandron's Decision are designated as "JD" followed by the appropriate page and line numbers.

STATEMENT OF FACTS

The pertinent facts are fully set out in the ALJ's decision and in Respondent's prior briefs.

ARGUMENT

A. Independent Of *Spielberg/Olin*, The Board Is Required To Respect Arbitrator Potter's Award And Is Without Jurisdiction To Nullify Or Vacate It.

In its cross-exceptions and supporting brief, Respondent argued, alternatively, that even if deferral was not deemed appropriate under *Spielberg/Olin* (or any revision of the deferral policy that the Board might adopt), the Board nevertheless is required to respect Arbitrator Potter's Award and is without jurisdiction to nullify or vacate it. In opposition, the Acting General Counsel makes two contentions: (1) the CBA did not authorize the arbitrator to penalize Palmer based on her perjury at the arbitration hearing, and (2) the arbitrator's denial of backpay was based on her protected activity. Neither contention has merit, and both are addressed in Respondent's Answering Brief to the Acting General Counsel's Exceptions and Respondent's Brief in Support of Cross-Exceptions.

Respondent further notes, however, that the Acting General Counsel's contention that the CBA restricts the arbitrator's authority is simply not within the province of the Board. It is Arbitrator Potter who was commissioned to interpret the agreement, which is what he did. If he acted outside the scope of his authority (which he did not), the remedy was for the Union to move in federal district court under § 301 of the Act to vacate the award. No such suit was brought, and the Board's concern is not with the correctness of Arbitrator Potter's award, but with whether it is repugnant to the Act. No repugnancy has been shown, and the award must be respected by the Board.

B. Palmer Deliberately Perjured Herself Before The Board And Should Be Denied All Relief.

Respondent further argued, alternatively, that Palmer perjured herself before the Board and that she should be denied backpay and interim seniority accrual based on this perjury. In opposition, the Acting General Counsel contends that there has been no finding that Palmer perjured herself before the Board. This contention lacks merit.

It is clear from Arbitrator Potter's award that he believed Palmer had perjured herself. Inasmuch as Palmer repeated the exact same story before the ALJ and the ALJ concurred with Arbitrator Potter's assessment, (JD 4: 4-5), it is difficult to characterize Palmer's Board testimony as anything other than perjury. Indeed, having already been discredited by Arbitrator Potter, Palmer had an opportunity to set the record straight before ALJ Sandron. She chose, however, to repeat the same preposterous story on the most critical matter in dispute. This issue involved not a matter of perception, but a matter of objective fact involving a discrete incident that occurred at a specific time and place. As for current Board law, there is nothing that precludes the Board from revisiting this issue, and Respondent urges it to do so.

C. Respondent Did Not Maintain An Unlawful Rule Regarding Distribution.

Respondent further contends that the ALJ erred in finding a violation of the Act based on a no-distribution rule found in Respondent's work rules. In opposition, "[t]he Acting General Counsel acknowledges that the rule concerning distribution in the collective-bargaining agreement is lawful," (Brief at 11), but contends that employees might not read the CBA and even if they do, they might view the CBA as being trumped by the Respondent's work rules. These contentions are without merit.

Employees are bound by the CBA regardless of whether they read or understand it. The notion that employees would view a cryptic rule not encompassed within the CBA as overriding

the CBA is illogical. There certainly is nothing in this record to support such finding. Indeed, it is apparent that the Union distributed leaflets in non-work areas and during non-work time without specific "authorization" from management and without penalty. The only reason that Palmer came under scrutiny was because she distributed the flyer in a work area and during working time and because the Respondent erroneously believed that the tenor of the flyer violated the no-strike clause.

The Acting General Counsel also makes a tortured argument regarding the impact of HR 02-019. This policy (as the Acting General Counsel concedes) is not alleged to be unlawful, and the Acting General Counsel's strained attempt to suggest that distribution of literature could be deemed equivalent to "distribution . . . of products, articles or materials . . . for personal gain" turns the English language on its head. Any such interpretation is patently unreasonable. *See Costco Wholesale Corp.,* 358 NLRB No. 106 (2012) (Board declines to interpret rule prohibiting employees from leaving premises during work without permission as applying to strike or other concerted activity). "In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Village Heritage-Livonia,* 343 NLRB 646, 646 (2004).

Here, the challenged rule, particularly in the context of the lawful rule in the CBA, cannot be deemed unlawful. Further, even if Rule 4 is presumptively overbroad, Respondent has carried any burden that it may have of rebutting the presumption. Respondent requests that this allegation be dismissed.

CONCLUSION

Respondent requests that the Consolidated Complaint be dismissed in its entirety.

Respectfully submitted this 26th day of September 2012.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing REPLY BRIEF by electronic mail on the following parties:

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This the 26th day of September 2012.

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