JD(ATL)–32–12
Houston, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

JONES & CARTER, INC./
COTTON SURVEYING COMPANY

and **CASE 16−CA−27969**

LYNDA A. TEARE, an Individual

Dean Owens, Esq., for the Acting General Counsel.
Barham Lewis, Esq. and Sunita P. Shirodkar, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Houston, Texas, on June 4, 5, and 6, 2012. The initial charge in Case 16-CA-27969 was filed by Lynda A. Teare (Teare) on April 11, 2011. Teare filed an amended charge on May 16, 2011, and a second amended charge on May 24, 2011.[1] Based on the allegations contained in the amended charges, the Acting General Counsel issued the complaint on March 28, 2012.

The complaint alleges that since October 2010, Jones & Carter, Inc./Cotton Surveying Company (Respondent) has unlawfully maintained a rule in its employee handbook that prohibits discussions among employees about their salaries. The complaint further alleges that on January 4, 2011, Respondent terminated Teare because she engaged in concerted activities with other employees for the purposes of mutual aid and protection by discussing salaries and because she violated Respondent's unlawful rule.

[1] All dates are in 2010 unless otherwise indicated.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel[3] (General Counsel) and Respondent, I make the following

FINDINGS OF FACT

Respondent, with an office and place of business in Houston, Texas, has been engaged in the business of providing engineer consulting and surveying services. During the 12-month period ending February 29, 2012, Respondent, in conducting its operations, purchased and received at its Houston, Texas facility goods valued in excess of $50,000 directly from points outside the State of Texas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

A. Issues

There are two threshold issues in this case. One of these threshold issues is whether Teare is a statutory supervisor and thus without protection of the Act. The second threshold issue is whether Respondent maintains an overly broad confidentiality rule that prohibits employees from discussing their salaries. Beyond the threshold issues, the remaining issues involve a determination as to whether Teare was unlawfully terminated because she engaged in protected activity by discussing employee salaries and/or whether she was terminated for violating Respondent's unlawful confidentiality rule.

During the course of the unfair labor practice hearing, counsel for the General Counsel amended the existing complaint to further allege that Respondent violated Section 8(a)(1) of the Act by issuing a subpoena to Teare that required the production of the affidavit and other statements given to the Board during its investigation of her charge.

B. Background

Respondent operates a civil engineering and consulting firm employing approximately 255 employees in nine offices located across the State of Texas. Approximately 125 of Respondent's employees work in Respondent's headquarters in Houston, Texas. Bob Jones (Jones) is the chairman of Respondent's board of directors and the highest-ranking management official for Respondent. At the time of the hearing in this matter, Bryan Jordan served as Respondent's president and chief executive officer. During the relevant time period for the complaint allegations, however, Jones served as Respondent's president and chief executive officer. For all relevant time periods, Carlos Cotton has served as Respondent's

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[2] On August 3, 2012, counsel for the General Counsel filed a motion to correct the transcript. Respondent filed no opposition to the motion and on August 10, 2012, I granted counsel for the General Counsel's motion in its entirety.

[3] The Acting General Counsel is referenced as General Counsel.

chief operating officer and chief financial officer. Kimberly Williams has served as Respondent's human resources manager.

C. Whether Teare is a Supervisor Within the Meaning of the Act

Respondent alleges that Teare is a statutory supervisor and thus without the protection of the National Labor Relations Act (the Act). The General Counsel argues to the contrary.

1. The parties' positions

Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Respondent asserts that Teare is excluded from the protection of the Act; contending that she was a supervisor using independent judgment and discretion in making employment decisions which affected Respondent's engineering staff. Respondent also contends that Teare made effective recommendations regarding the Respondent's promotion and training decisions and that she enjoyed benefits that were not granted to nonsupervisory employees.

Citing *Oakwood Healthcare*, 348 NLRB 686, 694 (2006), counsel for the General Counsel submits that the burden of proving supervisory status rests on the party asserting that such status exists. Counsel for the General Counsel asserts that the Respondent has not met such a burden and that Respondent relies on misleading and fragmentary evidence as well as self-serving leading questions as a basis for its supervisory status argument.

2. Teare's duties and responsibilities

Teare worked for Respondent from June 16, 2008, to January 4, 2011, as a training coordinator. Teare began her education in the United Kingdom. After coming to the United States, she earned a master's degree in business and human resources as well as a Ph.D. in educational administration and educational law. She does not, however, have any training in engineering. Teare testified that when she was hired President Jones told her that Special Services Coordinator Sandy Hennes would supervise her and give her the information that she needed to help coordinate and organize the training program. Neither Hennes nor Jones testified in this proceeding. Carlos Cotton (Cotton) testified that Hennes supervised the secretarial staff and directed the administrative staff in Respondent's Houston metro department. Teare testified that because Hennes had been with the Company for 9 years she was familiar with the policies of the training program. Cotton also testified that he and Jones made the decision that Hennes would initially supervise Teare. The record reflects that later in 2009 Cotton was designated as Teare's supervisor.

Although there had been a prior training program, the program was not functioning when Teare was hired. Teare's initial task was to review the previous training curriculum for the engineers in training (EITs) and then to organize the materials in some order. Teare reported back to Jones concerning the status of the materials' organization and then continued to work with him on the content of the training curriculum.

The EITs are college graduates and engineers that are required to go through 4 years of preparation before they qualify for their professional engineering degree for the State of Texas. Jones directed Teare to assess the organization of the existing training materials and then to organize the materials into formal lesson plans. With Jones' guidance, Teare constructed a template for organizing the training materials into formal lesson plans which she presented to the senior engineers who served as trainers in the program for the EITs. Teare also conducted training with the trainers to educate them on how to organize their lessons. Once the trainers created their formal lesson plans, they worked directly with Jones to revise and modify their lesson plans sufficient for his approval.

In addition to developing the training format for the technical engineering training, Teare also developed professional development training that dealt with the development of communication and presentation skills, as well as time management, etiquette, and marketing. As did the other trainers, Teare presented her proposed lesson plans for the professional training to Jones for his review and approval. When Jones met with Teare each week, he reviewed any new lesson plans and he also gave her books and topics to review for additional training.

Because of the time needed to organize the training materials, the training program was not functional until 6 months after Teare was hired. After the training program began, Teare attended each training session whether or not she or another trainer was conducting the training. Teare could not require any of the engineers to attend the training sessions. Normally, the training sessions were held during lunchbreaks and the engineers were free to attend or not. Jones directed Teare to maintain attendance records of those who attended the sessions. If attending, the trainees completed a sign-in sheet. Teare collected the sign-in sheets and then included the information in an attendance spreadsheet for Jones' review. Ultimately, an attendance certification was placed in the employee's file for those engineers who attended the various training sessions. Although Teare signed the sheet to document the employee's attendance, the form was created by Hennes.

Teare also served as Respondent's librarian. The progression of training engineers through the various levels of competency required EITs to read a certain number of books from an established reading list. The reading list was posted on Respondent's intranet site and Teare was given a copy of the list. Teare maintained copies of the required-reading books in her office and she checked out the books to the EITs on their request.

Teare held the title of training coordinator until approximately November 2010. At that time, she asked Cotton if she could have a more professional title. After considering it for a week, Cotton agreed that she could use the title of training director. There is no

evidence that her duties changed as a result of the change in title. Teare had no role in hiring, transferring, or disciplining other employees. She testified that she did not grant time off, assign overtime, or assign work for other employees. Teare further testified that she had no involvement with employee performance evaluations. She was not asked to give an opinion concerning other employees' work or consulted by management concerning whether the employees should be promoted, granted wage increases, or granted bonuses. Teare testified that she did not know the training criteria that were required for employees to receive promotions. Although Teare attended operational meetings to report the status of training, she did not attend managerial meetings and had no responsibilities for formulating management policies, employment policies, or labor relations matters. Teare did not have access to employee personnel files. Teare testified that she had never been told that she had any supervisory authority. She recalled that she had in fact been told that she did not have any supervisory authority. She recalled a particular occasion when Respondent had an open day for new engineering recruits. Williams and her two staff members, as well as Hennes, were present in the training room with Teare. Teare testified that she started out of the room at the same time as Williams. Teare testified that just before exiting the room Williams stopped and commented to her employees: "Don't listen to anything that Lyn tells you. She is not a manager." Although Williams was present at the hearing, she was never called to contradict or to address her alleged comment to Teare.

In asserting that Teare was a supervisor, Respondent contends that Teare "used her authority and independent judgment to delay promotions based on her belief that an engineer had not met certain training requirements, or to allow an engineer to be promoted despite not having met specific training requirements." Respondent devoted a considerable amount of hearing time in eliciting testimony and offering exhibits concerning what is identified as an "EIT checklist." Respondent offered numerous EIT checklists for engineers who were progressing through their respective succession from engineer levels I through IV. Each checklist contains a heading identifying the document as "Technical Engineering Requirements Checklist" and the checklist contains the technical engineering requirements for the engineer's advancement to the next engineering level. Each checklist contains a range of review criteria relating to such things as the engineer's experience, completion of a license and the EIT examination, completion of a project design, knowledge of basic design standards, regulations, and requirements, as well as demonstrated knowledge of Respondent's Quality Assurance/Quality Control program and project compliance. In addition to such criteria as a certification on survey and drafting competency, there are checklist sections documenting the engineer's attendance at inspector meetings, documenting hours in specific kinds of field surveying, and hours attending training classes and labs as well as documenting the number of hours for attending professional development training. The form also lists a section to document that the engineer has read the requisite training reading materials and to document that the engineer has attended the requisite progress meetings concerning the engineer's progress in meeting the criteria.

During argument and in its posthearing brief, Respondent stresses the significance of the fact that the last section of the form contains the signature of the engineer, the engineer's division manager, and the training coordinator. Respondent argues that Teare's signature on these forms is tantamount to a recommendation for the engineer's promotion to the next level.

By way of example, Respondent points to the checklist for a specific engineer whose first year review was completed in January 2010. The checklist is included in the record as Respondent's Exhibit 2, pages 24, 25, and 26. Respondent argues that Teare "approved the promotion" of this engineer even though he failed to complete the required inspector meetings and labs necessary for promotion.

Although Teare signed the document as the training coordinator, the record evidence does not establish that such signature constitutes an approval of the engineer's promotion. On the 3-page form, Teare initialed only the sections of the form corroborating the dates that the engineer attended the professional development training and documenting that the engineer read the required reading included in the training template. It is significant that all the remaining criteria on the checklist required the initials of the engineer's supervisor and department manager.

In support of the argument that Teare's signature at the bottom of the checklist represented her recommendation of promotion for the engineer, Respondent presented the testimony of two engineers who dealt with Teare concerning their individual training. Engineer Drew Crowe (Crowe) testified that Teare did not give him training credit for watching training DVD's rather than attending a live seminar under the newly devised training program. Crow was also required to complete 80 hours of field inspection time before he was eligible. Crow testified that when he wanted time spent with his supervisor to count toward the 80 hours, Teare declined to count the time as meeting the required training as it was not time spent with an inspector. Although Crow complained to his supervisor about Teare's interpretation of the training requirements, his supervisor told him to talk with Teare and to complete the training accordingly. Crow testified that because it took more time for him to complete the training he was delayed for several months in qualifying for his promotion. In contrast, engineer Bethany Miller testified that Teare signed off on her training record even though part of her field inspection time was with an engineer rather than an inspector. Despite the testimony of Crowe and Miller, their EIT checklists do not reflect that Teare had a significant role in delaying or expediting their respective promotions.

Crowe's technical engineering requirements checklist for level I engineer reflects that he was hired on July 30, 2007, and the date of the checklist review was November 25, 2008. These dates reflect that his review occurred almost 4 months after his 1-year anniversary. While Crowe credits Teare as solely responsible for this delay, the checklist reflects otherwise. The form reflects that Crowe completed 10 of the 13 criteria in July and August 2008. It was not until November 13, 2008, that Crowe initialed the form signifying that he had completed the 80 hours of field inspection experience and his supervisor initialed this completion on October 17, 2008. As evidenced by his initial on the form, Crowe did not complete the requisite 2 days in field service experience until November 20, 2008, and the completion was initialed by his supervisor on the same day. Furthermore, the checklist included the requirement that the engineer participate in two individual training sessions; one with the engineer's division manager and one with the training coordinator. Crowe initialed the form on November 25, 2008, indicating that he had done so and his supervisor confirmed the completion of the requirement when he also initialed the form on the same day. Thus, as evidenced by Crowe's initials on the form, Crowe's completion of the checklist was delayed

by more than just his failure to complete the 80 hours of construction field experience. Furthermore, it is noteworthy that Teare did not sign off on the completion of the requisite 80 hours. This requirement, as well as all of the other 13 requirements, was initialed by Crowe's supervisors. Teare merely signed the bottom of the form, in addition to the division manager.

A review of Miller's checklist reflects that she was hired on May 19, 2008, and the date of review was May 28, 2009. Each engineering requirement was initialed by Miller's supervisor. As with other EIT checklists submitted into evidence, Teare signed the form as the training coordinator. Miller testified that she discussed the checklist at length and countless times with her supervisor. She recalled discussing with her supervisor whether her work as a part-time employee would count toward the checklist requirements. She also acknowledged that the form included the initials of her supervisor who approved using certain field work to satisfy the check list criteria. Miller further admitted that Teare was not an engineer and had no knowledge of whether Miller performed the requisite work described on the checklist.

Although Respondent did not present any of the department or division managers who signed the EIT checklists and initialed the completion dates for the checklist criteria, Respondent presented its president, Bryan Jordan, to testify concerning the EIT checklist. At the time that Teare was employed by Respondent, Jordan was Respondent's Houston Metro Regional manager. In that capacity, he managed the employees working in the Houston office, the Woodlands office, and the Rosenberg office. Jordan estimated that approximately 80 percent of the engineers who attended training with Teare reported to him. Jordan testified that he often met with Teare to discuss the progress of engineers in the training program. Jordan asserted that during those conversations Teare commented on the engineers' performance in the training program and offered recommendations when engineers requested variances on their checklist. Jordan further contended that Teare was required to sign the EIT checklist for an approval for an engineer's promotion. He asserted that her signature on the form represented that the engineer had completed the training criteria and Respondent could go forward with the engineer's promotion.

Counsel for the General Counsel submits that during his direct examination Jordan only referenced the EIT form in support of his assertions that Teare played a role in approving promotions. He did not reference the role played by the EIT supervisor who not only signed the form but also initialed the completion of the various requirements. Although Jordan asserted that Teare gave him recommendations on promotions for various engineers, he also admitted that he made the decision whether an engineer would be promoted and he never made the decisions without speaking with the engineers' supervisors who were in a better position to evaluate the engineers' work. He acknowledged that Teare had no experience on an engineering project and that she could never come to him with a recommendation concerning an engineer's qualifications in such requirements as water well experience or other related engineering criteria. He agreed that if she did so he would not pay any attention. He admitted that in making promotion decisions he would rely on the supervisor's opinion concerning the engineer's competency on the subject matter of the training program. He explained that there are certain qualifications for each engineer to progress in their training

and that the EIT checklist is just a checklist of what has been completed for the required qualifications.

During additional examination, Jordan also admitted that the checklist is only one document that is included in a promotion packet that is given to Jordan for consideration. The packet also includes a separate recommendation form that is completed by the engineer's supervisor. Jordan admitted that he was unaware that Teare had ever signed such a recommendation form. As counsel for the General Counsel points out, Respondent submitted a large composite exhibit that included EIT checklists that were signed by Teare as training coordinator. Respondent did not, however, submit any of the recommendation forms that were submitted to Jordan for his consideration of engineers' promotions. Citing *Mammoth Coal Co.*, 354 NLRB 687, 724 fn. 63 (2009), and other[4] cases, counsel for the General Counsel argues that Respondent's failure to introduce these documents that are central to its defense demands an inference that these documents would have been adverse to its position that Teare had Section 2(11) authority. Counsel's argument has merit. Respondent's failure to submit any recommendation forms that were submitted from Teare undercuts Jordan's testimony and negates Respondent's argument that Teare made any meaningful recommendations on the engineers' promotions.

Furthermore, Respondent's assertion that Teare had control over the engineers' promotions and that she made effective recommendations in promotional decisions is implausible. If merit is found to Respondent's argument, one must conclude that Respondent allowed an individual with no engineering training to make effective decisions concerning the qualifications of engineers. The record reflects that as a training coordinator Teare facilitated the training that was directed and approved by Jones and she maintained the attendance records for engineers who voluntarily attended the training. Teare does not dispute that she met with the engineers and reviewed the checklist with them. If engineers sought any variances from the checklist requirements, the requests were made to Jordan. The total record reflects that Teare performed her duties at the direction of Jones and her involvement with the engineering checklist was merely ministerial.

Respondent also alleges that Teare assigned work to several of Respondent's employees, including Tammie Janik. Respondent argues that Janik typed documents, created training materials, and provided telephone support for Teare. Respondent also contends that Janik handled Teare's scheduled and organized meetings and ordered lunches for Teare. Carlos Cotton hired Janik as a temporary employee in November 2010. He directed her to cover the receptionist duties for the corporate area of the facility. He also told her to support all of the administrative staff, including Teare. These duties included typing and scheduling as well as covering the telephone if the calls rolled over to her telephone. Janik had the responsibility for handling correspondence for Cotton concerning the building operations and Respondent's physical plant. Furthermore, Janik handled administrative functions for the accounting and marketing departments. Janik also handled the routing of the corporate mail. She testified that when she was hired she was directed by Cotton and Williams to assist Teare.

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[4] *Weldun Intern, Inc.*, 321 NLRB 733, 750 (1996); *Galesburg Construction*, 267 NLRB 551, 552 (1983).

Although Janik was initially hired as a temporary employee she was ultimately given responsibility for document control and she directed the work of two other employees in document control. Overall, there is no evidence that Teare had any role in hiring Janik or in assigning her duties. Although Janik provided clerical support to Teare in her training function, there is no evidence that Teare exercised any Section 2(11) authority with respect to Janik and her work.

The overall evidence does not reflect that Teare responsibly directed or otherwise exercised statutory authority over Janik or any other employees. There is no evidence that Teare controlled Janik's work schedule, leave, benefits, or pay. While Teare may have asked Janik to perform some clerical tasks Teare did not assign Janik any duties that were not clerical or routine. The total record demonstrates that any work that Janik performed to assist Teare was clearly clerical and routine and was performed because of Cotton's initial assignment of work to her.

Accordingly, I find that based on the record as a whole there is insufficient evidence to establish that Teare was a supervisor within the meaning of Section 2(11) of the Act and therefore she is afforded the full protection of the Act.

D. Whether Respondent Unlawfully Discharged Teare

The complaint alleges that since October 2010 Respondent, through its employee handbook, has unlawfully maintained a rule prohibiting discussions among employees about their salaries. Furthermore, the complaint alleges that about December 20, 2010, Teare engaged in protected concerted activities with other employees for the purposes of mutual aid and protection by discussing their salaries. The General Counsel contends that in discharging Teare because she engaged in protected concerted activity and because she violated Respondent's employee handbook policy Respondent violated Section 8(a)(1) of the Act. The Respondent denies these allegations and further asserts that Teare did not engage in any protected and/or concerted activity. Furthermore, Respondent asserts that to the extent that it maintains any policies regarding salary discussion among employees such policy is not enforced.

1. Controlling authority

Quoting from an earlier decision in *Triana Industries*, 245 NLRB 1258, 1258 (1979), the Board recently noted in *Taylor Made Transportation Services,* 358 NLRB No. 53 (2012), that the Board has long held that Section 7 "encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital terms and condition of employment." The Board further noted,[5] "In fact, wage discussions among employees are considered to be at the core of Section 7 rights because wages 'probably the most critical element in employment,' are 'the grist on which concerted activity feeds.'"

[5] Citing *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996); *Whittaker Corp*., 289 NLRB 933, 933-934 (1988).

Thus, the Board has long held that an employer cannot lawfully prohibit employees from discussing matters such as their pay raises, rates of pay, and perceived inequities. *Automatic Screw Products, Inc*., 306 NLRB 1072 (1992); *Brunswick Food & Drug*, 284 NLRB 663 (1987). Accordingly, when an employer forbids employees from discussing their wages among themselves without establishing a substantial and legitimate business justification for its policy, the employer violates the Act. *Waco, Inc*., 273 NLRB 746, 748 (1984). Over the years, the Board has dealt with an abundance of cases involving employers' confidentiality rules and the issue of employees' Section 7 rights. In its recent decision in *Flex Frac Logistics*, 358 NLRB No. 127 (2012), the Board reiterated that an employer violates the Act when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. Citing its prior decisions in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), and *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), the Board went on to explain that nondisclosure rules with overly broad language interfere with employees' Section 7 rights when employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment.

In its decision in *Lafayette Park Hotel*, the Board developed a standard for analyzing workplace rules in this regard. The Board also looked to whether the mere maintenance of a confidentiality rule would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rule is likely to have a chilling effect on Section 7 rights, the Board may conclude that such maintenance is an unfair labor practice, even absent evidence of enforcement.

In its decision in *Lutheran Heritage Village-Livonia*, above, the Board further developed a framework for evaluating an employer's confidentiality rule and employees' Section 7 rights. The rule is first examined to determine whether it explicitly restricts Section 7 activity. If it does not, the circumstances are further examined to determine if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity, (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 activity. If any of these circumstances apply, the rule will be found to be unlawful unless the employer can articulate and establish a substantial business justification for the rule that outweighs the infringement on employee rights. *Caesar's Palace,* 336 NLRB 271 (2001).

2. Events preceding Teare's discharge

As of the date of the hearing in this matter, Cotton and Janik were friends and had known each other for approximately 30 years. They lived near each other and they worked together in community events. In November 2010, Carlos contacted Janik and offered her a temporary receptionist position for the corporate office. Teare was on vacation when Janik was hired. Teare returned from vacation at the end of November and worked another 2 weeks and then left again for vacation; returning on January 3, 2011.

On or about the same time that Janik was hired, an executive assistant position became open. There is no dispute that Janik was interested in applying for the open position and that

Janik and Teare discussed this vacancy. Their individual recollections of their discussions differ, however. Teare recalls that during the 2-week period in December when both she and Janik were working at Respondent's facility, Janik came into her office and told Teare that she was interested in applying for the executive secretary's position. Teare recalls that she told Janik that she would need to go through human resources and also to speak with her supervisor. Teare recalls that in a second conversation initiated by Janik, Janik told Teare that she had an interview scheduled for the job and that she would be meeting with Jordan and Williams. Teare recalls that on or about December 6, 2010, Janik spoke again with Teare and reported that she had completed the interview. Teare also recalled that during this conversation the subject of the salary for the executive secretary position was discussed.

In contrast to Teare's testimony, Janik testified that the subject of salary first came up on her third day on the job. Janik recalled that at that time, Teare represented that she was part of the HR department and asked Janik what she was being paid in her temporary job. Janik recalled that although she avoided answering the question about her pay Teare continued to talk about salaries in later conversations. Janik recalled that Teare had also discussed her own salary and that she had shared that she felt that she should be paid more because of her doctorate. She told Janik that she intended to talk with Jones to see if he would either increase her pay or reduce her hours. Janik acknowledged that she had not felt brave enough at the time to ask "the people" who could really tell her the salary for the executive secretary position and so she asked Teare about the salary for this position. Teare told her that she had an idea of what the salary might be. Teare also asked Janik what salary she would want if she were offered that position.

Janik did not get the executive secretary position and the position was ultimately given to Holly Boyter. Janik testified that after Boyter began working in the position Teare told Janik that she had been able to determine Boyter's salary based on Teare's contact with the placement agency. Janik testified that because Teare had found out the commission paid by the placement agency Teare was able to determine the salary paid to Boyter. In describing her response to Teare's comments, Janik testified that she had felt that Teare's talking about a fellow employee's salary "was wrong."

The next morning Janik spoke with Cotton and told him about her conversations with Teare. Janik reported to Cotton that Teare had not only asked her what she made, but that Teare had also discussed the salaries paid for other positions and described Teare's discussions about her own pay. In addition to reporting Teare's comments on salary, Janik also added that she believed that Teare misused the corporate vehicle by not returning it to the office at the end of the day when she was conducting training out of the Houston office.

3. Teare's discharge

After speaking with Janik, Cotton consulted with Williams. Cotton testified that he made the decision to terminate Teare because she was harassing and bothering Janik. He added that he had also learned that Teare had asked employee Megan Jordan about her earnings as well. He then added that in deciding to terminate Teare, he also considered that she had gone outside the Company to determine the salary for the new executive secretary

position and because she had told Janik that she was a part of the HR department. Although Cotton referenced Teare's alleged harassment of Megan Jordan, Jordan was not presented as a witness and Respondent submitted no proof concerning this allegation.

Before making his decision to terminate Teare, Cotton did not speak with Teare or ask her for any information concerning Janik's allegations. He accepted Janik's version of her conversations with Teare. At the end of the same day that he spoke with Janik, Cotton brought Teare into the office where he and Williams informed her that she was terminated. Cotton testified that he told Teare that she was terminated because she went outside the Company to get information about the Company and because she had badgered and pestered Janik.

4. An analysis of the record evidence

a. Respondent's explanation for Teare's discharge

During examination by counsel for the General Counsel, Williams was asked to explain the basis for Teare's termination. In explaining the basis for the discharge, Williams responded:

> For the continual harassment and badgering of employees regarding salary information. Not to mention other things. Abusing her authority. The constant harassing. Poor performance. I'll get it out there. But bottom line, it was the harassing, the constant harassing.

Williams explained that the primary problem was Teare's harassment of Janik. She further explained that Respondent has an employment policy that prohibits employee harassment by co-workers, subordinate employees, and supervisors. Williams asserts that this is the policy that Teare violated and for which she was terminated.

During the underlying unfair labor practice hearing, counsel for the Acting General Counsel asked Williams if Respondent had a policy that prohibits employees from discussing wages or salaries. Williams replied, "No, sir." When asked if Respondent's managers had ever told employees that they could not discuss wages with other employees, Williams responded, "Not that I am aware of."

b. Respondent's prior testimony concerning Teare's discharge

After her termination, Teare filed for unemployment benefits through the Texas Workforce Commission (TWC). On January 20, 2011, Respondent, through its HR department, filed its initial written response to Teare's unemployment claim. Respondent's written response specifically confirmed that Teare was terminated by Cotton for discussing confidential information pertaining to an employee's salary. In further explanation, Respondent's response to TWC clarified that Teare was discussing a new employee's salary with another new employee and that both employees informed HR and management of the discussions.

TWC held telephonic hearings on March 29 and on April 4, 2011. Williams represented Respondent during the hearing on March 29, 2011.[6] Williams told the hearing officer that Teare was terminated because she discussed salary information with other employees. When asked the basis for Teare's discharge, Williams testified that it was brought to Respondent's attention that Teare was discussing salary information with other employees. Williams went on to explain that Teare's doing so violated a company policy that prohibits employees from discussing other employees' salaries unless the employee is discussing his or her own salary with the employee's supervisor. Williams clarified that the company policy provides that under no circumstances will financial matters concerning either Respondent's clients or the firm be discussed with outsiders or friends. When asked by the hearing officer if this policy prohibited the discussion of employees' salary information, Williams responded "Yes ma'am." Later in the hearing, the hearing officer appeared to clarify if there was anything more or different in Teare's violation of the policy and she asked:

> Okay, so it's not the very fact that she was discussing salary information that you believe violated the policy?

Williams reiterated:

> No, it is the fact that she was discussing the salary.

During the TWC hearing, Williams also explained that the prohibition for employees to discuss salary and bonus information is a company policy. She confirmed that when she presents employee orientation, she always tells employees that salary discussion is a part of the confidentiality rule.

Although Jones did not testify during the unfair labor practice hearing, he briefly testified during the TWC hearing. During his testimony, the hearing officer asked:

> Ms. Williams had previously told me that she [Teare] had been fired for discussing another person's salary. And I was wondering if you had ever given her warnings that you felt were similar to what she was fired for.

Jones simply responded:

> Not for discussing a salary. No.

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[6] During the underlying hearing in this matter, counsel for the General Counsel offered into evidence a tape recording of the TWC hearing as well as a typewritten transcript of the hearing. Respondent objected on the basis of that such testimony was hearsay evidence. In receiving the tape recording and transcript into evidence, I explained to the parties that I did so with certain reservations and limitations. I clarified that while the entire tape recording and transcript were received for purposes of having a complete and full document, I would consider only the testimony included in the TWC hearing that was inconsistent with the testimony given during the unfair labor practice hearing. Accordingly, such evidence would be considered and analyzed as it would fall within an exception to the hearsay rule.

Jones did not contradict the hearing officer's perception of Williams' testimony nor did he deny that Teare's termination was based on her discussion of salaries.

When Cotton testified during the TWC hearing, he also confirmed that Respondent's confidentiality agreement prohibits the discussion of salaries. Cotton went on to testify that employees' discussing salaries is not only a pet peeve of the Company but also a violation of company policy. He added that Respondent did not want the employees to discuss salaries among themselves. He explained that even in letters to employees where there is notification of raises employees are told that they are not to discuss their pay with other employees. He testified that it was not simply that Respondent did not "want" salaries discussed, but Respondent's policy requires that employees not discuss their pay.

c. Credibility issues concerning Respondents' witnesses' testimony

As referenced above, Williams and Cotton gave markedly different testimony at the TWC hearing as compared to their testimony in these proceedings. During the hearing before the Board, both Williams and Cotton maintained that Teare was terminated for harassing Janik rather than for discussing salary information. During the TWC hearing, however, both Williams and Cotton asserted that Teare's discharge resulted from her violation of Respondent's confidentiality policy. Williams admitted that while Respondent submitted a copy of the confidentiality policy to the TWC in support of its case, Respondent did not submit a copy of the harassment policy. Cotton admits that Respondent did not even discuss the harassment policy during the TWC hearing.

Williams also admits that the testimony she gave before the TWC concerning Teare's discharge was not consistent with the testimony that she gave in the instant hearing. She contends that she "misspoke" during the TWC hearing. After Williams testified at the TWC hearing, she provided a sworn affidavit to a Board Agent during the Board's investigation of the underlying charges. When asked by the Board Agent why Teare was terminated, Williams testified that she did not make the decision and she did not know why Teare was discharged. Williams further admits that she told the Board Agent that Respondent did not have a policy that prohibited employees from discussing wages. Thus, in three separate instances of providing sworn testimony, Williams gave three different responses concerning the basis for Teare's termination.

The Board and the courts have previously found that an employer's shifting reasons for discharge may provide evidence of an unlawful motivation. *NLRB v. Henry Colder Co*., 907 F.2d 765, 769 (7th Cir. 1990); *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 581 (2d. Cir. 1988). As the Board also noted in *U.S. Coachworks, Inc*., 334 NLRB 955, 957 (2001), shifting assertions strengthen the inference that the true reason for an employer's decision to discharge an employee is the employee's protected activity. The contradictory testimony of Williams and Cotton in the unfair labor practice hearing as compared with their testimony at the TWC hearing indicates just such a "shifting of reasons" from which discriminatory motive may be inferred. In this case, the varying and shifting reasons advanced by Williams and Cotton significantly undermine Respondent's attempts to depict its

discharge of Teare as based on anything other than her protected activity. When Williams responded in writing to Teare's claim with the TWC, no charge had been filed with the Board. When Williams testified at the TWC hearing on March 29, 2011, and when Cotton testified at the TWC hearing on April 4, 2011, no charge had been filed with the Board. It was not until April 11, 2011, that Teare filed the unfair labor practice charge with the Board. Thus, the basis for Teare's discharge presented by Respondent's witnesses to the TWC is the more plausible basis for her discharge. Therefore, I find that the total record evidence supports a finding that Teare was terminated because of her protected activity in discussing salary information with Janik as asserted by Williams during the TWC hearing.

The Board has long found that an employee's discipline independently violates Section 8(a)(1) of the Act, without regard to the employer's motive, and without regard to a showing of animus, where the conduct for which the employee is disciplined is protected concerted activity. *Burnup & Sims*, 256 NLRB 965, 976 (1981). Furthermore, a violation may still be found when the employee is disciplined for engaging in protected concerted activity, even though the employer honestly and in good faith, but wrongly, believes that the employee engaged in misconduct in the course of that protected activity. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964). Thus, because the employer's motivation is not in issue and the Board's analysis in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is not applicable; the issue is whether the employee engaged in any conduct which would take away the protection of the Act. *Phoenix Transit System*, 337 NLRB 510 (2002).

When an employee is disciplined for conduct that is part of the res gestae of protected activities, the relevant question becomes whether the conduct is so egregious that it would take away the protection of the Act. *Stanford Hotel,* 344 NLRB 558 (2005); *Consumers Power Co*., 282 NLRB 130, 132 (1986). Respondent contends in its brief that Teare was discharged for her harassment of Janik and employee Megan Jordan concerning their salaries. Additionally, Respondent asserts in its brief that Teare was additionally discharged for misrepresenting herself as a member of human resources to Janik and for acquiring another employee's salary by contacting an external recruiting agency. Respondent did not, however, present either the testimony of Megan Jordan or any other corroborating witness to support the allegation of alleged harassment of Jordan. Additionally, there is no dispute that prior to terminating Teare, Respondent did not talk with her to determine whether she had misrepresented herself as a member of human resources or to verify Janik's version of her conversations with Teare. During her testimony, Janik acknowledged that all of her conversations with Teare were consensual. Although Janik testified that she felt that Teare's discussions about employee salaries were wrong and deceptive, there is no credible evidence that Teare harassed Janik or engaged in conduct that would have been so egregious that she lost the protection of the Act.

Furthermore, despite the assertions of Cotton and Williams during the unfair labor practice proceeding, the total record evidence supports a finding that Respondent maintained a confidentiality rule that prohibited employees from discussing salaries. Both Williams and Cotton testified during the TWC hearing that such a policy was in place. Williams admitted that employees were cautioned about such discussions during their orientation. Cotton

acknowledged that he included similar instructions in his letters to employees when they were notified of salary increases or bonuses. Both the testimony of Williams and Cotton during the TWC hearing reflects that Teare was terminated for violating this overly broad confidentiality policy.

Interestingly, the facts of this case strongly parallel those facts before the Board in a decision that issued the day after the hearing closed in this matter. In its decision in *Taylor Made Transportation Services,* 358 NLRB No. 53, slip op. at 1 (2012), the Board found that the employer took action against an employee because she violated the employer's unlawful rule against disclosing wage rates. The Board noted that its decision was governed by the standard set forth in *Continental Group, Inc.,* 357 NLRB No. 39 (2011), wherein the Board found that discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. Furthermore, the Board explained that they need not pass on the judge's finding that the employee in question engaged in protected concerted activity when she violated the unlawful rule, inasmuch as the employee was clearly "engaged in conduct that otherwise implicates the concerns underlying Section 7 of the Act"; the second prong of the *Continental Group* test. Accordingly, following the Board's analysis in *Taylor Made Transportation Services* and *Continental Group*, the record supports a finding that Teare was terminated pursuant to an overly broad confidentiality rule.

E. Respondent's Subpoena to Charging Party Lynda Teare

1. Background

On May 21, 2012, Respondent served Teare with an undated subpoena seeking the production of various documents. The first two document requests included:

> Statements of witnesses who were contacted during the investigation of the charge brought by Charging Party Teare against Respondent Jones & Carter.
>
> Documents used by witnesses who will testify in the Board proceedings involving Charging Party Teare and Respondent Jones & Carter.

At or about the same date as the subpoena served on Teare, Respondent also served an undated subpoena on Region 16 of the Board, including the identical request for witness statements. On May 18, 2012, counsel for the Acting General Counsel filed a petition to revoke both the subpoena to the Region and the subpoena to Teare. On May 25, 2012, Respondent filed an opposition to the General Counsel's petition to revoke both subpoenas. In Respondent's opposition, counsel for the Respondent withdrew its request for "all witness statements and affidavits taken by the Board in conjunction with its investigation of Charging Party Teare's unfair labor practice charge."

Respondent asserts that on or about May 31, 2012, Teare was presented with an amended subpoena that also requested the production of documents related to Teare's charge.

The subpoena specifically provided, however, that the requests did not seek witness statements or affidavits taken by the NLRB. Based on Section 102.118(a)(1) of the Board's Rules and Regulations, I issued an order on May 31, 2012, granting the Acting General Counsel's petition to revoke with respect to witness statements provided to the Board during the investigation. In essence, the order provided that Respondent could not obtain from Teare that which would otherwise be unavailable to Respondent as set forth in Section 102.118(a)(1) of the Board's Rules and Regulations. Although Teare denied that she received the second or "amended" subpoena, Teare produced no documents in response to either subpoena prior to the beginning of the June 4, 2012 unfair labor practice hearing. On the first day of the hearing, Teare produced a copy of her curriculum vitae; a document requested in both subpoenas. Teare acknowledged that she had been given the opportunity to read my May 31, 2012 order and she asserted that the vitae was the only document within the scope of the subpoena that had not been provided to the Board during its investigation and otherwise producible under my order.

2. Whether Respondent's subpoena violated the Act

a. The parties' positions

During the course of the unfair labor practice hearing, the General Counsel moved to amend the outstanding complaint to allege that Respondent's subpoena to Teare violated the Act. The General Counsel argues that by issuing a subpoena to Teare that directed her to produce her Board affidavit or any other affidavits or statements in her possession that were given to the Board Respondent violated Section 8(a)(1) of the Act. Counsel for the General Counsel submits that Respondent's demand for affidavits provided to Board Agents in connection to the unfair labor practice investigation was inherently coercive and violative of the Act.

Respondent argues that the General Counsel has not offered "a single authority" for the proposition that a subpoena for Board affidavits by itself constitutes an independent violation of Section 8(a)(1). Respondent further asserts that even if such authority exists it has taken measures to remedy the original subpoena. Respondent contends that it withdrew its requests for Board witness statements just 4 days after issuing the original subpoena. Respondent also points out that it issued an amended subpoena to Teare explicitly instructing her that Respondent was not seeking the production of Board affidavits and witness statements. Finally, Respondent argues that my order granting the General Counsel's petition to revoke the subpoena rendered the matter moot.

In his posthearing brief, counsel for the General Counsel submits that Respondent's unlawful conduct has not been remedied. Counsel for the General Counsel acknowledges that Teare was apprised of the content of my order concerning Respondent's subpoena. Counsel argues, however, that only a remedial statement by Respondent can remedy an 8(a)(1) violation and that Respondent's original subpoena to Teare remains the operative document for establishing an 8(a)(1) violation.

b. Applicable authority

As counsel for the General Counsel points out in his brief, the Board has a well-established policy against disclosure of witness statements except as provided in Section 102.118(b)(1) of the Board's Rules and Regulations and that such policy has long been upheld by the Supreme Court in *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214 (1978). Citing *W. T. Grant Co.,* 144 NLRB 1179, 1180-1181 (1963), and *Joy Silk Mills v. NLRB*, 185 F.2d 732, 743 (D.C. Cir. 1950), cert. denied 341 U.S. 914 (1951), counsel asserts that an employer's request for a copy of a statement that an employee has given to a Board Agent is in substance an attempt to engage in interrogation that is prohibited by the Act.

In further support of his position, counsel for the General Counsel cites a number of cases that involve an employer's request for statements or affidavits given to the Board during a Board investigation or in advance of an unfair labor practice proceeding. As explained more fully below, I find the circumstances of these cases to be sufficiently distinguishable from those in the instant case. The facts before the Board in *Inter-Disciplinary Advantage, Inc*., 349 NLRB 480, 505 (2007), involved an employer's attorney not only questioning an employee about statements she may have made to the Board Agent in the underlying case, but also the attorney's request for a copy of the affidavit that the employee gave to the Board. Unlike the circumstances involved in the instant case, however, the attorney's request for the affidavit occurred during his conversation with the employee and after the attorney had threatened to subpoena the employee if she did not cooperate. The employee testified that she turned over the affidavit because she did not want to anger the attorney and the judge concluded that she did so because she was fearful of adverse consequences if she did not do so.

Counsel for the General Counsel also relies on the Board's decision *Dayton Typographical Service*, 273 NLRB 1205, 1206 (1984), enf. denied in relevant part 778 F.2d 1188 (6th Cir. 1985), in which an employer's attorney interrogated an employee without complying with the Board's guidelines in *Johnny's Poultry Co.,* 146 NLRB 770 (1964). In addition to the attorney's questioning of the employee, the attorney also asked for, and secured, a copy of the affidavit that the employee had given to the Board.

In *Hilton Credit Corp.,* 137 NLRB 56, 58 fn. 1 (1962), the Board found that an employer violated the Act when a supervisor told employees that they were required to give the employer any statements they had given to Board Agents investigating an unfair labor practices charge against the employer. Certainly, such demands would exert an inhibitory effect on employees' willingness to make such statements and to otherwise cooperate with Board Agents. As the Board pointed out in its decision, such demands therefore interfere with the Board's efforts to secure vindication of employees' statutory rights and thus interfere with the enjoyment of such rights in violation of Section 8(a)(1). The circumstances involved in *Henry I. Siegel Co.,* 143 NLRB 386, 387 fn. 1 (1963), were somewhat unique in that an investigating Board Agent came to the employer's facility to interview employees identified in advance by the employer's attorney. The attorney met with the employees in advance of their meeting with the Board Agent and instructed supervisory personnel to obtain copies of

the affidavits given by the employees to the Board Agent. Following their earlier rationale in *Hilton Credit Corp*., above, the Board found the employer's requests for the affidavits to violate Section 8(a)(1) of the Act.

In *Magic Chef, Inc*., 286 NLRB 380, 392 (1987), the Board affirmed the judge's dismissal of a complaint allegation involving an attorney's request for an employee's Board affidavit. The facts of the case reveal that the employer's attorney met with two employees prior to an unfair labor practice proceeding. After giving assurances that the employee had the right to terminate the conversation at any time and that the employee's participation was strictly voluntary, the attorney asked to see the employee's affidavit they had given to the Board. Both employees refused to furnish their affidavit. Citing the Board's decision in *Dayton Typographical Service*, and noting that the employees were given repeated assurances that their participation in the interview was voluntary and that there would be no reprisals if they chose not to cooperate, the judge found no violation.

As indicated by the cases discussed above, the Board has long held that an employer's request to employees for affidavits or statements given to the Board during a Board investigation or prior to an unfair labor practice trial may be sufficiently coercive to interfere with the safeguards and protections of the Board's process. It is important to note, however, that in those cases in which the Board found a violation the employers' requests were made to the employees in conjunction with unlawful or otherwise arguably intimidating interviews and more importantly the requests were made in the context of an employer/employee relationship. At the time that Respondent issued its first subpoena to Teare, there was not an employment relationship similar to the employees in the cases as described above. Although the record is not clear as to whether Teare ever received service of the amended subpoena, she was apprised of my order granting the petition to revoke and thus obviating her requirement to comply with the subpoena. Accordingly, I do not find sufficient Board authority that would compel a finding of a violation in this circumstance.

Counsel for the General Counsel did not cite any Board decisions that involved a subpoena request for affidavits or statements given to the Board. He did, however, cite an administrative law judge decision involving a subpoena for employee affidavits. Despite the fact that the case has no precedential value as an administrative law judge decision, the circumstances are significantly different from the case at hand. In a February 2010 decision involving *Santa Barbara News-Press,*[7] Judge Lana Parke found that an employer violated Section 8(a)(1)of the Act by issuing subpoenas to current and former employees requesting the production of affidavits the employees had submitted to the Board during an unfair labor practice investigation. Significant to her decision was the litigation history of both the employer and its representatives. Prior to the commencement of a trial before Judge William G. Kocol in August 2007, the employer's attorneys subpoenaed a number of employees requiring them to produce affidavits and statements that they had given to the Board during the investigation of the underlying unfair labor practice charges. Judge Kocol granted the General Counsel's petition to revoke the 2007 subpoenas in their entirety on the grounds that the employer was not entitled to witness statements given to the NLRB except and until the

[7] 31-CA-29253, JD(SF)-04-10.

subpoenaed employees had testified in a Board proceeding. In March 2009, the Region issued a subsequent consolidated complaint against the employer and a hearing was ultimately set for May 2009. Prior to the May trial, the employer's attorneys again subpoenaed employees requesting their production of affidavits given to the Board during the Board's investigation of the charges.

In her 2010 decision, Judge Parke found that the respondent's twice-repeated attempt to force current or former employees to disclose protected witness statements outside the parameters set by the Board's rules can reasonably be expected to have a chilling effect on employees' right to cooperate in Board investigations. In finding a violation, Judge Parke observed that the respondent must have intended such a chilling effect as the respondent provided no viable explanation or legal justification for twice seeking the employees' Board statements and after Judge Kocol had clearly put the respondent on notice that such subpoena requests were improper and would not be sustained. Judge Parke thus found that by issuing the 2009 subpoenas, the respondent was motivated, at least in part, by a desire to quell employee willingness to give evidence to, or for, the General Counsel.

As Judge Parke's decision reflects, there may be instances in which an employer's subpoena for Board affidavits may violate the Act because of the coercive nature of the circumstances surrounding the subpoena. In this instance, however, I do not find that the facts lend themselves to such a finding. Accordingly, I recommend dismissal of the allegation involving Respondent's initial subpoena to Teare.

Conclusions of Law

1. Respondent, Jones & Carter, Inc./Cotton Surveying Company, is an employer within the meaning of Section 2(6) and (7) of the Act.

2. By maintaining a rule that prohibits employees from discussing employees' salaries, Respondent violated Section 8(a)(1) of the Act.

3. By terminating Lynda Teare because she violated Respondent's rule prohibiting the discussion of salaries, Respondent violated Section 8(a)(1) of the Act.

4. By terminating Lynda A. Teare because she engaged in concerted activities with other employees for the purposes of mutual aid and protection by discussing their salaries, Respondent violated Section 8(a)(1) of the Act.

5. Respondent did not in any other manner violate the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Lynda Teare, must offer her reinstatement and make her whole for any loss of earnings and other benefits as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[8]

ORDER

The Respondent, Jones & Carter, Inc./Cotton Surveying Company, Houston, Texas, its officers, agents, and assigns, shall:

1. Cease and desist from:

(a) Maintaining a policy that prohibits employees from discussing their salaries.

(b) Discharging employees because they engage in protected concerted activity by discussing their salaries.

(c) Discharging employees for violating the Respondent's overly broad confidentiality rule that prohibits employees from discussing their salaries.

(d) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Lynda Teare full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Lynda Teare whole in the manner set forth in the remedy section of this decision and remove from its files any reference to the unlawful discharge.

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[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by he Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Rescind its policy that prohibits employees from discussing wages.

(e) Within 14 days after service by the Region, post at its Houston, Texas facilities copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by another material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has take to comply.

Dated, Washington, D.C. November 26, 2012

Margaret G. Brakebusch
Administrative Law Judge

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by the notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain an overly broad confidentiality rule that prohibits employees from discussing their salaries.

WE WILL NOT discharge employees for violating our rule that prohibits employees from discussing their salaries.

WE WIL NOT discharge employees for engaging in concerted activities with other employees for the purposes of mutual aid and protection by discussing employee salaries.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL rescind our policy that prohibits employees from discussing their salaries.

WE WILL reinstate Lynda Teare to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other right or privilege previously enjoyed, and make her whole for any loss of earnings and other benefits suffered s a result of the discrimination against her.

WE WILL remove from our files any reference to the unlawful discharge of Teare and notify her, in writing, that this has been done and that these actions will not be used against her in any way.

JONES & CARTER, INC./COTTON SURVEYING COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, Texas 76102-6178
(817) 978-2921 Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 209-4885.