JD(SF)–06–13
Oakland, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

AMERICAN BAPTIST HOMES OF THE
WEST d/b/a PIEDMONT GARDENS

and

Cases 32–CA–78124
32–CA–80340

SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE
WORKERS-WEST

Judith J. Chang Oakland, California,
for the General Counsel.

David S. Durham and *Christopher M. Foster*
(Arnold & Porter) Francisco, California,
for Respondent.

Manuel A. Boigues, (Weinberg, Roger
& Rosenfeld) Alameda, California for the Union.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge. This case was tried in Oakland, California on November 13, 2012. On April 4, 2012 Service Employees International Union, United Healthcare Workers West (the Union) filed the charge in case 32–CA–78124 against American Baptist Homes of the West d/b/a Piedmont Gardens (Respondent or the Employer). On May 4, 2012, the Union filed the charge in Case 32–CA–80340 against Respondent. On July 27, 2012 the Union filed amended charges in both cases. On August 20, 2012, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a consolidated complaint against Respondent. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying access to a representative of the Union, and unlawfully maintaining and enforcing a rule against off duty employees. The Respondent filed a timely answer in which it denied that it had violated the Act.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my

observation of the demeanor of the witnesses,[1] and having considered the briefs submitted by the parties, I make the following:

Findings of Fact and Conclusions

I. Jurisdiction

At all times material, Respondent has been a California nonprofit corporation, engaged in the operation of continuing care retirement communities, including a facility located in Oakland, California known as Piedmont Gardens, and a separate facility also located in Oakland, California known as Grand Lake Gardens. Respondent, in conducting its business operations described above, during 12 months prior to the issuance of the complaint, purchased and received goods at its facilities in California valued in excess of $5,000 directly from sources outside the State of California. Further, during the same time period, Respondent derived gross revenues in excess of $100,000 from its business operations. Accordingly, the parties stipulated and I find, Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

The parties stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

Since at least 2007, the Union has been the exclusive collective-bargaining representative of an appropriate unit of Respondent's employees at its Piedmont Gardens and Grand Lake Gardens facilities. The last agreement between the parties was a 2007–2010 collective-bargaining agreement. The bargaining unit covered by the agreement is:

> All employees performing work described in and covered by "Section 1, Union, 1.1, Recognition" of the March 1, 2007 through April 30, 2010 collective bargaining agreement between Piedmont Gardens and Grand Lake Gardens and the Union (the Agreement); excluding all other employees, guards, and supervisors as defined in the Act..

This case only involves the Piedmont Gardens facility. Negotiations for a successor agreement to the 2007 through 2010 agreement last occurred in August 2010 and the parties have not recommenced negotiations since that time.

Section 1.4 of the expired agreement provides the following with regards to union access:

> A duly authorized Field Representative of the Union shall be allowed to visit the Home at reasonable times for the purpose of ascertaining whether or not this Agreement is being observed and to check upon complaints of employees, provided:

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[1] The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and unworthy of belief.

> 3. The Union Field Representative confers with employees solely on the employee's free time and on a non-work area; provided. However, this sub-section shall not be construed so as to prevent a Union Field Representative from conferring with an employee and his supervisor or another representative of the Employer on the Employer's time in connection with a specific complaint or problem concerning the employee.

Respondent and the Union have also agreed to "ground rules" governing the access rights of Union Representative Donna Mapp as well as future union agents:

> 2. A duly authorized field representative of the Union will be allowed to visit the Communities at reasonable times for the purpose of ascertaining whether the contract is being observed and to check upon complaints of the members. The parties understand the field representative may need to access the Communities during late night or early morning hours to confer with NOIC shift employees.
>
> 6. . . . . And the field representative shall have access in employees' break rooms.

Union Representative Donna Mapp testified that she has held numerous meetings with employees in the break room. These meetings have varied in times from as many as every day to once a week depending on the issue involved and have involved different sized groups of employees, ranging from a low of 3–4 to a high of 15 employees. Typically during these meetings Mapp sat on a chair at a table in the break room. Employees who wished to speak with her would gather around the same table. Mapp used different methods of notifying unit employees of these meetings.

On April 2, 2012, Mapp posted a flyer on the union bulletin board in the break room at Respondent's facility announcing to employees that she planned on being in the break room on April 3, to meet with employees. The notice stated:

> Join Us For
> Union Meeting
>
> Some individuals are jeopardizing our future and we need to come together to discuss next steps and how we can put an end to the confusion.
> Please join us for an informational meeting and to learn how we can take back our union and our signature.

Mapp testified that she intended to discuss many issues at this meeting including the contract, benefits, treatment of workers as well as rumors about support of a rival union. On cross-examination, Mapp admitted that one of the purposes of the meeting was to discuss the issue of employees taking back authorization cards they had signed on behalf of a rival union.

On the morning of April 3, Mapp arrived at Respondent's facility at approximately 6:30 a.m. After checking in, she headed towards the break room. Mapp was met by Gayle Reynolds, Respondent's executive director. Reynolds asked why Mapp was having a meeting and pointed to the union flyer. Reynolds told Mapp that she could not have a union meeting. Mapp explained that she and the employees were allowed to meet in the break room. Reynolds stated that Mapp could not have this type of meeting. Reynolds then went to her office.

Reynolds then created a sign stating, "NO UNION MEETING HERE. The Union is not permitted to hold meetings in the break room." At about 9:30 a.m. Reynolds posted the sign on the bulletin board. However, Mapp remained in the break room and continued to talk to small groups of employees on their breaks.

Reynolds testified that she believed that the flyer indicated that two union representatives would be present and that the purpose of the meeting was not contract issues but rather a union meeting to discuss the rival union.

Respondent maintains a rule that states:

> Employees may not clock in for duty before their shift begins, nor are they to remain on the grounds after the end of their shift, unless previously authorized by their supervisor. Employees must have prior supervisor authorization before working/incurring overtime.

This rule was reaffirmed by a September 2011 memorandum from Rita Jennings, Respondent's administrative manager, which reads:

> No employees are allowed inside the building when not scheduled to work unless they have prior approval of their supervisor/manager, Human Resources, or the Executive Director.

However, Respondent has permitted off-duty employees to access the facility for meetings with Human Resources. Off duty employees are permitted to enter the employee entrance to pick up their paychecks at the security desk.

On April 3, Mapp emailed Lynn Morgenroth, Respondent's human resources director, and requested a meeting. A meeting was set for April 16 to discuss various issues. In an email of April 13, Mapp requested that off-duty employees be allowed to attend the meeting. On April 16, Morgenroth responded that "Employees that are not scheduled to work may not attend these meetings."

Mapp received Morgenworth's email about an hour before the scheduled meeting. Mapp telephoned Morgenworth and advised Morgenworth that she had two off-duty employees with her who would be coming to the meeting. Morgenworth stated that the off-duty employees would not be allowed to enter the premises. Mapp stated that the two employees were already with her and were on their way. Morgenworth told Mapp to get off the phone and notify the off-duty employees that they were not allowed in the building. Morgenworth stated that the two off-duty employees with Mapp would not be allowed to enter the building.

After the conversation with Morgenworth, Mapp along with off-duty employees Elizabeth Shoaga and Geneva Henry went to Piedmont Gardens. They announced their arrival at the security desk and signed in at approximately 10 a.m. Morgenworth arrived and told the two employees that they were not on duty and would not be allowed in the building. The employees then left.

Morgenworth asked to have the meeting but Mapp stated that she didn't want to meet without the employees.

Respondent's defense

Respondent argues that the Union had no statutory right to hold a union meeting in Respondent's break room. Respondent further argues that its off-duty access rule is valid under *Tri-County Medical Center* 222 NLRB 1089 (1976).

III. Conclusions

Reynolds Posting of the Sign on April 3

Board law is well-settled that a union's access to represent employees on an employer's premises is a mandatory subject of bargaining. *American Commercial Lines,* 291 NLRB 1066, 1072 (1988). In addition, a union access provision in a collective-bargaining agreement is a term and condition of employment that survives the agreement's expiration. *Turtle Bay Resorts,* 353 NLRB 1242 (2009).

Under the contract, Mapp had a right to be in the break room to meet with employees. Mapp had the right to meet with employees to monitor the agreement and to check upon complaints of employees. Reynolds never inquired from Mapp what her intentions for the meeting were. She wrote the sign prohibiting the union meeting based on the assumption that the meeting was to discuss the drive by the rival union. However, the purposes of the meeting included employee concerns about the status of the Union as well as the contract and employee benefits. By posting the sign, "No Union Meeting Here" , Respondent interfered with the Union's right to access in violation of Section 8(a)(1). See *Swardson Painting Co.,*340 NLRB 179 (2003).

Respondent's Off-Duty Access Rule

In *Tri-County Medical Center,* 222 NLRB 1089 (1976), the Board held that a rule denying off-duty employees access to an employer's premises is lawful if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.

In *Saint John's Health Center,* 357 NLRB No. 170 (2011), the Board invalidated an employer's access policy because it provided an ambiguous (and wholly undefined) exception for "health-center sponsored events." The Board interpreted this policy to mean "[i]n effect, the Respondent is telling its employees, you may not enter the premises after your shift except when we say you can."

Similarly in *Sodexo America,*358 NLRB No. 73 (2012), the Board invalidated an employer's "ambiguous" no access policy that provided an exception for "hospital related business" which the Board interpreted to mean that the employer had "free reign to set the terms of off-duty employee access."

Here the rule's exception is "prior approval of their supervisor/manager, Human Resources, or the Executive Director." This exception provides the employer with unlimited discretion and thus is invalid under *Tri-County Medical Center.*

On April 16, Respondent applied the invalid access rule to employees Shoaga and Henry and did not permit the employees to attend a meeting with management. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by posting a notice which prohibited a union meeting in its break room.

4. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an off-duty access rule which granted it unlimited discretion to permit access.

5. Respondent violated Section 8(a)(1) by denying access to two off-duty employees to its premises for a union-management meeting.

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.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended.[2]

ORDER

Respondent, American Baptist Homes of the West d/b/a Piedmont Gardens, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

a. Posting notices prohibiting union access to its break room to hold meetings with employees.

b. Maintaining and enforcing an off-duty access rule which limits off-duty employees' access to the facility for some purposes while permitting access for other purposes.

c. Enforcing its off-duty access rule to deny employees access to a union-employer meeting.

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

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

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[2] All motions inconsistent with this recommended order are hereby denied. In the event 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 the Board and all objections to them shall be deemed waived for all purposes.

a. Rescind the off-duty access policy to the extent that it permits off-duty employees access to the facility for some purposes while barring off-duty access for other purposes.

b. Within 14 days after service by the Region, post at its facility in Oakland, California, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other 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 April 2012.

c. 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 taken to comply.

Dated, January 29, 2013.

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Jay R. Pollack
Administrative Law Judge

[3] If this Order is enforced by a Judgment of the 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 AN 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

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated Section 8(a)(1)(3) and (5) of the National Labor Relations Act, as amended, and has ordered us to post and abide by this notice

The National Labor Relations Act gives all employees the following rights:

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT prohibit you from meeting with union representatives in our break room.

WE WILL NOT maintain and enforce our off-duty employee access rule which permits off-duty employee access to the facility for some purposes while barring off-duty access for other purposes.

We WILL NOT enforce our off-duty employee access rule to deny employees access to a scheduled meeting with the Union.

WE WILL rescind our off-duty employee access rule to the extent that it permits off-duty employee access to the facility for some purposes while barring access for other purposes.

American Baptist Homes of the West d/b/a Piedmont Gardens
_____
(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.

1301 Clay Street, Federal Building, Room 300N

Oakland, California 94612-5211

Hours: 8:30 a.m. to 5 p.m.

510-637-3300.

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, 510-637-3270.