

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

In the Matter of:

Case Nos. 32-CA-078124;
32-CA-080340

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

Employer,

and

SERVICE EMPLOYEES
INTERNATIONAL UNION, UNITED
HEALTHCARE WORKERS-WEST,

Union.

**RESPONDENT'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO
THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE
LAW JUDGE**

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I. PRELIMINARY STATEMENT.

On January 29, 2013, Administrative Law Judge Jay R. Pollack (“ALJ”) issued a Decision finding that American Baptist Homes of the West, d/b/a Piedmont Gardens (the “Respondent” or “Employer”) violated Section 8(a)(1) of the National Labor Relations Act (the “Act”), in the first instance by posting a notice which prohibited a union meeting in the Employer’s only break room, in the second instance by maintaining and enforcing a facially invalid off-duty access rule that granted the Employer “unlimited discretion,” and in the third instance by using this off-duty access rule to exclude two off-duty employees who were attempting to attend a meeting with Employer’s management which had already been cancelled.

Now, pursuant to The National Labor Relations Board’s Rules and Regulations, Section 102.46(e), the Respondent submits this brief in support of its limited cross-exceptions to the ALJ’s Decision and Recommended Order.¹ The ALJ’s Decision is erroneous both factually and legally and should not be adopted by the Board.²

Regarding the notice posting in the first instance, there is no violation of Section 8(a)(1) because, among other reasons as specified below, the employees had no statutory right to the meeting; the Respondent plainly and directly informed the Union that it was only prohibiting an unprecedented union-hall style meeting in the Respondent’s only break room that would violate the Parties’ access agreement; and the Union’s representative continued to meet with employees immediately after the notice in question was posted, affording ample opportunity to explain that its meeting would have violated the Parties’ access agreement.

¹ On February 8, 2013, the Service Employees International Union, United Healthcare Workers – West (“Charging Party” or “Union”) filed exceptions and a brief in support thereof.

² Respondent objects to the Board’s jurisdiction to consider the present matter and its ability to adopt and/or enforce the ALJ’s Decision and Order per *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. 2013).

Regarding the validity of the off-duty access rule in the second instance, there is no violation of Section 8(a)(1) because, among other reasons as explained below, the Respondent's off-duty access policy has narrow and reasonable exceptions per *Tri-County Medical Center*, 222 N.L.R.B. 1089 (1976). To the extent *Tri-County Medical Center* has been reinterpreted in Board decisions to stand for the proposition that an employer may not, as a practical matter, have any exceptions to off-duty access policy, these decisions are invalid and unlawful under the Act and should be overruled. If, *arguendo*, *Tri-County Medical Center* does stand for the proposition that an employer can have no lawful exceptions to off-duty access policy, it is invalid and unlawful under the Act and should be overruled.

Regarding the application of the off-duty access policy in the third instance, there is no violation of Section 8(a)(1) because, among other reasons as explained below, the policy was even-handedly applied to two employees who had arrived unannounced to a meeting with Respondent's managers, a meeting to which they were not entitled and which they had already been informed was cancelled. Additionally, the employees had no Section 7 right to force the Respondent's management team to meet with them, especially after the Respondent had already informed the Union's representative that the agreed upon terms of the meeting had not been satisfied.

For all of the above and following reasons, the Respondent respectfully requests that the Board not adopt the ALJ's Decision and that it dismiss the Complaint in its entirety.

II. FACTS.

A. Parties.

American Baptist Homes of the West operates retirement facilities throughout the western United States, including a community called Piedmont Gardens, located in Oakland, California.³ (ALJD at 2:8-16). The Respondent's continuing care retirement community provides the entire continuum of care from independent residential living to assisted living, skilled nursing, and memory support. (Tr. 104:7-9).

The Union is exclusive collective bargaining representative of those employees specified in the Parties' now-expired 2007-2010 collective bargaining agreement (the "Contract"). (ALJD at 2:23-36).

B. **The Employer Posted A Flyer On April 3, 2012 Notifying Employees That There would be "No Union Meeting", As Advertised By The Union, Wherein Employees Were Invited To Join Two Union Representatives In The Break Room At Piedmont Gardens For An All-Day "Informational Meeting" On "Taking Back Our Signature" From A Rival Union.**

On August 2, 2012, Union representative Ms. Donna Mapp ("Mapp") distributed flyers announcing a Union "Informational Meeting" to be held the following day in the only break room at Piedmont Gardens.⁴ (GC Exh. 4). On August 3, 2012, Mapp posted the same flyer,

³ References to the official transcript are referred to as "Tr. [page:line]." References to the Decision and Order of the ALJ are referred to as "ALJD at ____." General Counsel and Respondent's exhibits are referred to as "G.C. Exh. ____" and "Resp. Exh. ____," respectively. The General Counsel's Complaint is referred to as "Complaint ¶ ____" and the Respondent's answer as "Answer ¶ ____."

⁴ The break room is an approximately 300 square foot room with six tables, and is used by all employees, including those not represented by the Union. (Tr. 25:18; 107:20-108:2; 122:1-5; Resp. Exhs. 2-5). The break room is on the main floor, near the Assisted Living department and the beauty shop used by residents. (Tr. 75:11-15). Visitors and staff walk through the break room to get to the other side of the facility because it opens onto the facility's central courtyard. (Tr. 25:18-21; Resp. Exhs. 4, 5).

which stated under the word “Tomorrow” (surrounded by large images of confetti):⁵

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!

(GC Exh. 4) (font sizes decreased to 12 point here).

The flyer specified that the “Union Meeting” would take place on Tuesday, April 3, 2012 from 7:30 a.m. to 9:00 a.m., 10:00 a.m. to 1:00p.m., and 2:00 p.m. to 6:00 p.m., and that employees seeking more information should contact Union representatives Donna Mapp *or* Sanjanette Fowler-Brown.⁶ (GC Exh. 4).

After noticing Mapp’s flyer, Piedmont Gardens’ Executive Director Ms. Gayle Reynolds (Reynolds) was immediately concerned that the upcoming union meeting would not only be disruptive, but it would be a clear violation of the collective bargaining agreement and the supplemental agreement on union access referred to as the “Ground Rules.” (Tr. 112:2-24).

Reynolds understood that the flyer’s use of the phrase “[p]lease join us for an informational meeting and learn how we can take back our Union and our signature” in

⁵ Mapp did not normally put up flyers to announce meeting with employees. (Tr. 28:7-9). Reynolds had never seen the any Union meeting announcement flyers before. (Tr. 124:7-12).

⁶ Sanjanette Fowler-Brown was a former employee at Piedmont Gardens and was described by Mapp at hearing as “technically” a Union representative. (Tr. 49:20-24). The Employer requests that the ALJ take judicial notice of the NLRB, Region 32 Regional Director’s August 27, 2011 letter to the Union’s Counsel dismissing the Union’s charge that alleged the Employer unlawfully excluded Union representative Fowler-Brown. (Attachment A). The Regional Director’s letter states “The evidence presented that the past practice has been to allow only one Union representative at a time in the facility to meet with employee. This position is supported by the Employer’s reasonable interpretation of the collective bargaining agreement which provides access to a representative.”

conjunction with the names of two Union-representatives (*Mapp and Brown*) meant that Mapp was not planning on having only a single union representative in the break room, as the Union had agreed, but that she was planning on having at least two union representatives present. (Tr. 112:5-12; 118:9-11).

Also, the references to an “informational meeting” on the flyer made it clear to Reynolds that the event was not going to be limited to “conferences” with individual employees as Mapp had done in the past, and which was permitted by the contract and the Ground Rules, but instead was going to be an actual union hall style meeting on the Employer’s premises.⁷ (Tr. 117:21-118:12).

Moreover, Reynolds also reasonably understood that the Union’s representatives were planning on discussing plans to roust a rival union (National Union of Healthcare Workers, or “NUHW”) instead of the administration of the Parties’ contract because the flyer stated that it was time to “take back our Union and our Signature!” (Tr. 50:21-51:8; 112:2-5; 118:15-23; GC Exh. 4).

In order to address these concerns, Reynolds went into the break room on the morning of April 3, 2012 and spoke with Mapp. (Tr. 113:18-24). Reynolds told Mapp that she could not: “have these kind of meetings in the break room at Piedmont Gardens.” *Id.* (emphasis added). Mapp insisted that she could. (Tr. 113:22-23). Realizing that they were not going to resolve this issue then and there, Reynolds left. (Tr. 113:18-24).⁸

⁷ The Union had never been permitted to hold union meetings in the break room previously. (Tr. 112:22-24).

⁸ Interestingly, Mapp did not assure Reynolds that morning that she was not actually planning on holding a union meeting about the threat of NUHW or that she was merely “conferring” with employees about contract compliance or individual workplace concerns. (Tr. 122:24-123:17). Mapp merely insisted that she was acting within her rights in holding such a meeting. (Tr. 113:18-24).

Reynolds immediately went to her office and created a sign—which she then posted *in the break room*—to inform employees that there would be “No Union Meeting Here.” (Tr. 114:1-2; GC Exh. 5). Reynolds did not tell Mapp or Union members that they could not confer with Mapp or hold individual, small-scale meetings.⁹ (Tr. 114:18-115:8). In any case, Mapp remained in the break room and spoke with employees, giving her ample opportunity—which she in fact used— to discuss the situation with employees. (Tr. 34:22-23; 35:10-15).

C. The Employer Voluntarily Agreed With The Union To Hold Joint Meetings On April 16, 2012, Provided That The Meetings Be With On-Duty Employees In A One-On-One Format And Only If The Union First Gave The Names Of Those Attending.

On April 3, 2012, Mapp emailed Acting Labor Relations Manager Ms. Lynn Morgenroth (Morgenroth) to request a meeting with her and Reynolds regarding “several complaints and concerns” that employees in “various departments” had recently reported to her, including earlier in *the day after* Reynolds had posted the “no meeting” notice. (Tr. 34:22-35:15; 37:6-13; GC Exhs. 5, 6). In her email, Mapp mentioned that employees had raised a wide range of individual issues, from problems with time clocks and concerns about controlling employees’ personal information, to individual employees’ experiences with work load and taking leaves of absence. (GC Exh. 6). Mapp concluded her email by stating “[l]et me know how would you have the members attend this meeting, I have a suggestions, but will wait to here [sic] from you.” *Id.*

After conferring with Reynolds, Morgenroth emailed Mapp on April 3, 2012 to propose April 16, 2012 as the date to hold the meetings. *Id.* The e-mail set out the terms upon which she would agree to meet. She stated in that e-mail: “We think it would be best if we excuse one

⁹ Indeed there was no testimony that Reynolds had any conversation with an employee about the subject of Mapp’s flyer. Nor was there testimony at hearing that any employee saw Reynolds take down the sign, or that employees spoke to another about having seen her to do.

CNA at a time and meet with them individually.” Morgenroth also stated that Mapp would need to let her know the names of the employees attending the meetings so that she could coordinate with employees’ supervisors regarding the schedule to “make sure that there is coverage” and “resident care is not an issue.” (April 4, 2012 e-mail, GC Exh. 6, p. 3)

Mapp responded immediately, requesting an earlier meeting date. *Id.*

Morgenroth, in-turn, quickly responded that April 16th was the first available date, to which Mapp responded:

If that the best you can do, i will go ahead and lock that date in for the meeting. If there is changes I will let you know. I will also get back to you with the names of the workers who will be attending the meeting. (*Id.* (emphasis added))¹⁰

Mapp failed to live up to her promise that she would inform Morgenroth in advance of the Monday, April 16 meeting of the identities of those attending so that adequate coverage could be assured. Without providing any further communications for 10 days, on Friday, April 13, 2012 at 9:24 p.m., Mapp sent an email to Morgenroth stating that she had spoken with members and they suggested that the meetings take place in a group format, with half of the employees meeting at one time, and the second group afterwards.¹¹ *Id.* Mapp also informed Morgenroth *for the first time* that “[a]lso there are a few members who is off that will be coming to the meeting.” *Id.* (Tr. 38:18-20). She then provided three employees’ names, each in a

¹⁰ Mapp never objected to Morgenroth’s condition for agreeing to the meeting that employees be released one at a time, nor did she object to the requirement that the names be disclosed ahead of time to ensure adequate coverage. (GC Exh. 6).

¹¹ Mapp had been the assigned Union representative at Piedmont Gardens for almost three years, and knew that Morgenroth only worked at the facility on Mondays and Wednesdays, and thus would be not be at work on Friday, much less at 9:24 p.m. (Tr. 88:18-25). Indeed, while Mapp testified at the hearing, she never testified that she was unaware of Morgenroth’s schedule, nor did she give any explanation as to why she waited till the eve of the meeting to propose a drastic revision to the procedures which the Employer required as a condition to agreeing to the meeting in the first place. Her explanation for the late email, that she needed to contact night shift employees, may have justified the time of day she sent her email, but not the April 13th date.

different department.¹² (GC Exh. 6).

Arriving at work early on Monday, April 16th, Morgenroth immediately conferred with Reynolds, and then sent an email at 8:23 a.m. responding to Mapp's proposals to change the format of the meetings. (Tr. 89:12-23). Morgenroth reminded Mapp that she had not provided the list of names of employees (which Mapp had agreed to provide in her April 3rd email), and that as a result the Employer had not been able to schedule coverage to ensure residents continued to receive care during the meetings. (GC Exh. 6). Additionally, Morgenroth pointed out that the Parties had agreed to meet with employees on an individual basis, not in two big groups, since such a format would be an inefficient way to address the wide range of issues (many of which were individual-specific) that Mapp had identified in her April 3rd email. She also stated that the Employer was not willing to meet with off-duty NOC shift employees, and that as an accommodation, she could schedule another meeting so that they could participate on a time when they were on-duty.¹³ (GC Exh. 6).

Mapp called Morgenroth shortly thereafter. (Tr. 90:1-5). Morgenroth explained that Mapp's late night Friday e-mail had unilaterally and impermissibly changed the parameters of the meeting which the Employer had agreed to, and that she had never provided the list of names so that the Employer could arrange schedules as necessary. (Tr. 90:8-18). Morgenroth also told

¹² The named employees were "Monique Higgens" (Assisted Living), "Salvador Miranda" (Dietary), and "Mhret Weldeabzgh" (Skilled Nursing). (GC Exh. 6). Mapp testified that she did not provide Morgenroth with the names of employees because "they didn't want to give management their names" out of fears of Employer retaliation, but she gave no explanation as to why she provided these three names. (Tr. 57:7). And in any case, there was no direct evidence at hearing that any employees actually feared retaliation by the Employer, or that such a fear would have been objectively reasonable.

¹³ That the Union planned to bring off-duty employees to the meeting was first mentioned in the Friday night April 13th email. (Tr. 38:18-20; 90:8-11; GC Exh. 6). There was no discussion of that previously. That the parties assumed the employees would be on-duty is made clear by the previous e-mail trail in GC Exh. 6, where the parties discussed the need to reveal the names of the employees who would be attending so that coverage on the floor could be provided.

Mapp to call the off-duty employees whom she was planning to bring, and tell them there would be no meetings for them to attend. *Id.* Unbeknownst to Morgenroth, Mapp had been speaking to Morgenroth over speakerphone so that the two off-duty employees she was planning to bring (and whom she was meeting with over breakfast) could hear that there was no meeting for them to attend.¹⁴ (Tr. 39:10-41:13; 69:20-22).

Despite being told that the Employer would not accept her last-minute changes to the format of the meetings, Mapp nonetheless brought two NOC shift employees (Ms. Geneva Henry and Ms. Elizabeth Shoaga) to the facility's 41st Street entrance. (Tr. 40:24-41:12; 91:3-6; GC Exh. 7). The front desk notified Morgenroth, and she went to the front desk to personally explain that there was no meeting for them to attend. (Tr. 72:13-15; 91:8-14).¹⁵ However, Morgenroth also explained to them that Reynolds and she would be more than happy to meet with them individually that night during their shifts if they wanted, and that since they had no reason to be at the facility they would need to leave. (Tr. 72:14-21; 91:8-14). Henry and Shoaga left, and Mapp followed Morgenroth to Reynolds' office for a meeting. (Tr. 91:13-14).

At the meeting between Mapp, Morgenroth, and Reynolds, Mapp agreed to schedule an individual employee meeting with Monique Higgens to discuss her concerns with the three of them (as they had originally agreed to do) for the next Wednesday, April 18, 2012 during her shift. (Tr. 92:17-25). Morgenroth contacted Higgens' supervisor to arrange for coverage, and

¹⁴ At hearing, Mapp testified that she told Morgenroth over the phone that she had already invited off-duty employees to their meeting who were "on their way." (Tr. 40:23-24). However, at the time she said this, Mapp by her own account was still having breakfast with Henry and Shoaga. Indeed, Mapp testified that after her call with Morgenroth (during which she said was told "to get in touch with the workers and tell them don't bother to show up"), she then "head on over" to Piedmont Gardens with Henry and Shoaga. (Tr. 41:23-25).

¹⁵ Of course, they were already aware that the Employer would not be meeting with them as they were surreptitiously listening to Mapp's previous cell phone conversation with Morgenroth as Mapp (without informing Morgenroth) had placed the call on speakerphone.

the meeting was held as planned. *Id.*

III. PROCEDURAL HISTORY.

The Union filed two charges on April 4, 2012 and May 4, 201, respectively against the Employer alleging two separate violations of Section 8(a)(1), in the first instance by denying the union access to its representative, and in the second instance by maintaining an enforcing an invalid off-duty employee access rule. (ALJD D at 1).

The Regional Director for Region 32 issued a consolidated complaint on these charges on August 20, 2012. A hearing was held before ALJ Pollack in Oakland, California on November 13, 2012. (ALJD at 1). The ALJ issued his Decision on January 29, 2013.

The Union filed exceptions to the ALJ's Decision, and a brief in support thereof, on February 8, 2013.

IV. ARGUMENT.

A. **The ALJ's Conclusion That "Respondent Violated Section 8(a)(1) By Posting A Notice Which Prohibited A Union Meeting In Its Break Room" Is Not Supported By The Record Or Board Precedent.**

The ALJ found that the Employer "violated Section 8(a)(1) of the act denying access to two off-duty employees to its premises for a union-management meeting" (ALJD at 6:9-10). The ALJ erred in reaching this conclusion both legally and factually, in part by discounting or else ignoring without justification or any analysis the relevant and reliable testimony provided by the Employer's Executive Director, Ms. Gayle Reynolds, and the Employer's Acting Labor Relations Manager, Ms. Lynn Morgenroth.¹⁶

¹⁶ The ALJ's analysis of credibility was limited to a footnote which stated that "[t]he 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 Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction of the findings here, their testimony has been discredited, either as having been in conflict with the credited documentary or testimonial evidence, or because it was in and of

Footnote continued on next page

1. There Can Be No Section 8(a)(1) Violation As A Matter Of Law Because The Employees Have No Statutory Right To Have Access To Union Representatives On The Employer's Property.

The Employer's posting of a single "No Union Meeting Here" notice in the break room on April 3, 2012 does not constitute a violation of Section 8(a)(1). Assessment of the validity of the ALJ's conclusion otherwise necessarily begins with a review of the Union's access rights under applicable Board law. For, as is the case here, if a union has no statutory right of access, the employees necessarily have no corresponding Section 7 right to meet with union representatives on the employer's premises.

The Board and the courts have long recognized that notwithstanding a premises' status as a work place, employers nonetheless have property rights which must be respected. Of course, those rights are not absolute. Thus, in situations where access to the employer's premises is necessary to the union's fulfillment of its statutory obligations, an employer violates Section 8(a)(1) by refusing a union's *reasonable request* to enter onto the employer's premises at reasonable times and places to fulfill that statutory obligation. *See Holyoke Water Power Co.*, 273 N.L.R.B. 1369 (1985). In that case, the employer operated a power plant with a "forced draft fan room" which housed two large fans that were extremely noisy. The union made a request of the employer that an industrial hygienist selected by the union be allowed to enter the room to survey potential health and safety hazards. The employer provided certain information, but refused the union's request for access.

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itself incredible and unworthy of belief." Such a boilerplate footnote is an inadequate basis upon which to justify credibility determinations. *See St. Francis Med. Ctr.*, 347 NLRB 368, 370 n.9 (2006) (stating that a "boilerplate" credibility statement "adds nothing to permit meaningful review"); *see also K-Mart v. NLRB*, 62 F.3d 209, 213 (7th Cir. 1995) (Hearing Officer's "boilerplate comment concerning general credibility determinations" without further explanation was inadequate).

The Board rejected the decision of the ALJ which had analogized a request for access to a request for information, which must be granted whenever the information was “relevant to” the union’s statutory obligations. Instead, citing the U.S. Supreme Court in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Board reasoned that “an employer’s right to control its property is a factor that must be weighed in analyzing whether an outside union representative should be afforded access to an employer’s property.” *Holyoke Water Power Co.*, 273 N.L.R.B. at 1370. In performing this balance between the employer’s property rights and the employees’ right to “proper representation,” the Board applied the following analysis:

Where it is found that responsible representation of employees can be achieved only by the union’s having access to the employer’s premises, this employer’s property rights must yield to the extent necessary to achieve this end On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer’s premises, the employer’s property rights will predominate, and the union may properly be denied access. (*Id.*)

Applying this careful balancing test, the Board concluded in that case that the “employees’ right to responsible representation entails the union’s obtaining accurate noise level readings for the fan room to ascertain the extent of the hazard and to suggest means of ensuring that employees are properly protected.” *Id.* Since accurate noise levels could not be obtained except by an industrial hygienist being granted access to perform readings, the Board held that the employer’s property rights must yield that particular case. However, the Board cautioned that the right was not absolute. “However, access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer’s operations.” *Id.*

In the instant case, the ALJ made no conclusion, persuasive or otherwise, that the Union could only fulfill its representational duties by being allowed unannounced access to the

Employer's break room for three separate periods commencing at 7:30 a.m. and concluding at 6 p.m. for any purpose, much less the purpose of lobbying members to resist the siren song of a rival union. When one compares the Employer's legitimate property interests (as the case law says the Board must do), this is not a close call. Faced with a confetti-embellished flyer announcing an all-day union "informational meeting", the Employer was legitimately concerned that the Union's apparent domination of the *only break room in the community* would not only interfere with the use and the enjoyment of the room by other employees, but it threatened the peace and tranquil enjoyment of the adjoining courtyard which was regularly used by the elderly residents of the community.¹⁷ (Tr. 111:25-113:5).

In any event, even though the Board in *Holyoke Water Power Company* concluded that the employer's property interest must yield in that case, the violation occurred when the employer denied the union's *request* to schedule a hygienist at some future time. It did not hold that an employer must put up with a situation such as the instant, where the union did not even give the Employer advance notification, much less seek permission to enter the premises. Rather it acted like it "owned the place" by commandeering this small but important common area. Since it has not been established that the "responsible representation" of the employees could only be achieved through such an unannounced union meeting on the Employer's premises, the Employer's property rights prevail and no violation of Section 8(a) (1) was established.

2. The Employer's Reasonable Enforcement Of The Contractual Access System Did Not Violate Section 8(a)(1).

Even though there is no general statutory right of access to the Employer's private

¹⁷ Whether in hindsight the "informational meeting" turned out to be noisy and disruptive or not is irrelevant to whether the Employer had a legitimate concern over this announced meeting. At the time of the sole event alleged to constitute a violation in this case, which was in the morning of April 3, 2012, the Employer had no way of knowing for certain what would develop later in the day.

property, a union and an employer can always to agree to grant the union *contractual* rights in excess of access rights guaranteed by law.¹⁸ However, once agreed upon, the union is bound to follow applicable procedures upon which access was granted, and an employer does not violate Section 8(a)(1) when it denies access to a union that does not follow the appropriate procedures. *See Peck/Jones Constr. Corp.*, 338 N.L.R.B. 16 (2002). The ALJ erroneously failed to conclude that the terms of the Parties' valid access agreement controlled the Union's access rights.

In *Peck/Jones Construction*, the parties' collective bargaining agreement provided that "[t]he Business Agent of the Union shall be permitted on all jobs, but will in no way interfere with the men during working hours unless permission is granted by the individual employer." *Id.* The employer had established rules requiring all visitors to sign in at the employer's trailer and to have an escort with them at all times while on the job site. Two union representatives entered the job site, but did not sign in, nor were they escorted. The employer ejected them from the site. General Counsel alleged that in so doing, the employer violated 8(a)(1). The Board affirmed the ALJ's dismissal of the complaint, reasoning that since there was nothing in the access provision that exempted union agents from the employer's reasonable and non-discriminatory rules, the employer was within its rights in ejecting the agents and no violation of 8(a)(1) had been established.

In the instant case, the terms of the contractual access privilege are set out in Section 1.4 of the expired collective bargaining agreement (G.C. Exh. 2, pp. 3-4) as well as the Ground Rules (G.C. Exh. 3), which also expressly incorporate the access rights in Section 1.4. Through

¹⁸ Mapp testified that the Ground Rules was a "document that was created by both sides to – there was some issues that happened while I was being the representative there, and both sides came up with this document as a way of smoothing –." (Tr. 23:12-18). Mapp was unable to complete her sentence as Counsel for the General Counsel cut her off before she could finish her sentence.

these agreements, the Union has been granted certain limited contractual access rights, but only under specific conditions. The Union is granted the right to:

1. “Confer” with employees in the Break room.
2. During non-working times;
3. For the purpose of “ascertaining whether or not [the] Agreement is being observed” and to check on employee complaints;

However, the rights are subject to specific limitations and requirements;

1. The access as set out in the procedure may be granted only to a single union representative.
2. The access must take place between 9:00 a.m. and 6:00 p.m. unless prior arrangements are made with the Executive Director; and
3. The “privilege” must be “exercised reasonably.”

Here, the record is undisputed that the Union completely ignored not merely unilaterally imposed employer procedures (as was the situation in *Peck/Jones Construction*), but the *actual provisions of the access agreement itself*. Also, Mapp did not merely violate a single contractual requirement of the access agreement; she violated virtually *all of them*, and in any case, even one violation would have justified informing the Union that it could hold no such meeting. The Employer was well within its rights to attempt to limit Mapp’s access to the terms of the agreed-upon access procedures, and the ALJ’s conclusion otherwise is erroneous factually and legally.

a. The Union Violated The Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Not Limiting The Purpose Of The Planned Meeting To Ascertaining Whether The Contract Is Being Observed And Listening To Employee Complaints.

As discussed above, Section 1.4 of the Parties’ contract states that the Union representative is allowed access to “confer” with employees “for the purpose of ascertaining whether or not the agreement is being observed and to check upon complaints of

employees” (GC Exh. 2). Additionally, the Parties’ Ground Rules, which reiterates that Section 1.4 must be observed, repeats in almost identical terms, that the Union representative is granted access “for the purpose of ascertaining whether the contract is being observed and to check upon complaints and concerns of members.” (GC Exh. 3). Taken together, Section 1.4 and the Ground Rules could not be clearer in placing a condition on the Union representative’s access, namely that conferences with employees must be *for the purpose of* ensuring the contract is being observed and to check on employee complaints and concerns.

Here, the ALJ failed to conclude that the Union’s flyer promised a union meeting that was not being held for the purpose of listening to employee complaints or concerns. It was an “Informational Meeting” *for the purpose of* combating a rival Union’s efforts to organize its members. The Union was not holding a meeting to determine whether the contract was being observed or to listen to employee complaints, but rather to rally employees to “take back our Union and our Signature!” (GC Exh. 4). The flyer itself leaves no doubt that this was the meeting’s advertised *impermissible* purpose: “SOME INDIVIDUALS ARE JEOPARDIZING OUR FUTURE AND WE NEED TO COME TOGETHER AND DISCUSS NEXT STEPS AND HOW WE CAN PUT AN END TO THE CONFUSION.” Mapp herself bluntly confirmed at hearing that a primary purpose of the meeting was to discuss NUHW. (Tr. 32:14-15; 50:21-51:8). As Mapp candidly put it at hearing, the Flyer was announcing a union meeting “to get the members together and to talk about the Union, NUHW local stuff that was happening to them” (Tr. 32:14-17).

In any case, even if Mapp planned to discuss other subjects (not mentioned on the flyer) in addition to NUHW, as she claimed at hearing, the inclusion of *any* discussions about a rival Union would violate the meeting purpose restriction in Section 1.4 and the Ground Rules. As a

result, the Employer was perfectly within its rights to post the notice at issue.

Furthermore, because the Union's flyer announced a meeting that went far beyond the parameters of the union contract and the Ground Rules, the Employer would have been permitted (consistent with Section 8(a)(1)) to eject Mapp from the premises. *See Peck/Jones Construction, Supra*. If ejection was permissible, *a fortiori*, the posting of a notice narrowly tailored to the specific violation is likewise permissible and not violative of the Act.

b. The Union Violated The Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Announcing A Meeting To Be Conducted By More Than One Union Representative.

Section 1.4 of the contract and the Parties' Ground Rules could not be more clear in granting access to the Union on the condition that *only one* representative is permitted to meet with employees. (GC Exh. 2). Section 1.4 and the Ground Rules refer repeatedly to "a duly authorized Field representative," "[t]he Union Field Representative," "[t]he Field Representative," "[a] Union Field Representative" "[t]he field rep," in addition to exclusive use of singular personal pronouns to refer to this one representative. (GC Exhs. 2, 3). Here, the Union's flyer was subject to the reasonable interpretation by Reynolds that the Union was planning on having two representatives at its union meeting with employees. First, the flyer directs employees desiring "more information" to contact "Our Union Reps Donna Mapp . . . or Sanjanette Fowler Brown." (GC Exh. 4). Second, the flyer repeatedly invites employees to "Join Us," in an apparent reference to the fact that both "Our Union Reps" would be in attendance.¹⁹ Third, the total duration of the meeting from 7:30 a.m. to 6:00 p.m., and the seriousness of the subject to the Union, namely the encroachment by a rival union, reasonably

¹⁹ Although Mapp denied at hearing that Brown was going to be at the meeting, the use of the term "we" throughout her testimony and "Join Us" on the flyer she created indicates otherwise. (Tr. 50:10-13).

suggested that the union meeting would have two “Union Reps” As listed on the flyer, in express violation of the contract and Ground Rules.

c. The Union Violated the Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Scheduling Access Before 9:00 a.m. And After 5:00 p.m. Without Prior Management Approval.

The union meeting, as advertised on the flyer, expressly violated the terms of the Ground rules because the flyer specified that it would also run in three parts from 7:30 a.m. to 6:00 p.m., even though Parties had expressly agreed to Ground Rules that provided that Mapp would only be permitted on-site from 9:00 a.m. to 5:00 p.m. without prior approval from or notice to Piedmont Gardens’ Executive Director.²⁰ (GC Exhs. 3, 4). Here, there is no dispute that Mapp did not seek or otherwise receive such approval from Reynolds. (Tr. 30:13-15; 31:11-12; 111:23-113:5). As a result, Reynolds reasonably concluded that the meeting, as advertised, expressly violated the Union representative’s condition of access under the Ground Rules. *Id.*

3. The Employer Had No Knowledge That Union Representative Mapp Was Meeting With Larger Groups Employees, And The Employer Has Never Otherwise Given Permission To The Union To Hold *En Masse* Employee Meetings On Its Premises.

The ALJ found that Union Representative Mapp has held “numerous meetings” with employees in the break room, with between 3-15 employees, on a daily to weekly basis. (ALJD at 3:20-23). This factual finding was contradicted by the very witness—Mapp—on whom the ALJ relied, and in any case, no evidence was ever proffered (nor was a factual finding ever made) that the Employer was aware of such meetings. And in any case, if the Union had indeed

²⁰ Although the Ground Rules specify that “[t]he Parties understand that the field representative *may need* to access the Communities during late night or early morning hours to confer with NOC shift employees,” such permissive language is clearly subject to the final provision in the Ground Rules which states “[i]f the field rep believes that reasonable visits outside of these parameters are necessary, the field rep is encouraged to speak with the Executive Director or designee *to obtain permission* for such additional visits.” (GC Exh. 3) (Emphasis added).

been holding meetings with 13 members, the Union's advertised meeting for all of the approximately 130 member-employees at the facility was unprecedented. (Tr. 26:11-13).

Furthermore, Mapp testified at hearing that she had meetings on an individual meetings with employees, so the ALJ's specified range that only contemplates group meetings is contradicted by the only witness he apparently credited. (Tr. 46:24-25). Mapp testified that on "several occasions" she had meeting "one-on-one" with employees. *Id.*

Additionally, there is no record evidence that the Employer was aware of Mapp holding meeting with more than few on-duty employees, as was consistent with the terms of the Parties' agreement. The only record evidence on this point, unchallenged by General Counsel or Charging Party, was Reynolds' testimony that the Union has never held such a meeting before and instead had only met with smaller groups of employees. (Tr. 112:22-113:5). In fact, the General Counsel elicited testimony that Mapp did not inform the Employer about its meetings at the facility. (Tr. 29:3-7). As explained above, Reynolds had never seen any Union meeting announcement flyers before at the facility. (Tr. 124:7-12). The ALJ not only failed to so conclude factually, he failed to conclude legally, based thereon, that the Employer had therefore never knowingly permitted the Union to hold union hall style meeting in the Employer's only break room.

4. Mapp's Unexpressed Intent Regarding The Union Meeting Is Irrelevant Because The Flyer Posted By Mapp Invited All Employees To A Meeting In Apparent Violation Of The Parties' Access Agreement; Reynolds Was Under No Obligation To Inquire As To Mapp's Unexpressed Intentions.

The ALJ found that on April 2, 2012, "Mapp posted a flyer on the Union's bulletin board in the break room announcing to employees that she planned on being in the break room on April 3, 2012 to meet with employees." (ALJD at 3:28-30). The ALJ credited Mapp's hearing testimony 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”, and more particularly “taking back authorization cards [employees] had signed on behalf of a rival union.” (ALJD at 3:40-43, 5:19-23). The ALJ found that “Reynolds never inquired from Mapp what her intentions for the meeting were” beyond interpreting the sign, and that the purposes of the meeting extended beyond discussion of a rival union. (ALJD at 3:19-24).

Mapp’s unexpressed intent regarding her intentions for the meeting are entirely irrelevant. Instead, the only relevant fact is what was expressly included on the flyer posted by Mapp, which unambiguously provided that the meeting would violate the Parties’ access agreement. There is no dispute that the terms and conditions of the Parties’ access agreement, as detailed above, limited the purpose of Union-member meetings and the number of representatives. The ALJ misconstrued the record by stating that Mapp posted a flyer in the break room “announcing to employees that she planned on being in the break room on April 3, 2012 to meet with employees.” (ALJD at 3:28-30). Rather, the flyer itself is clear that it invited all employees to a meeting that expressly violated the terms of the Parties’ access agreement, as discussed above.

Thus, Reynolds had not duty to clarify Mapp’s unexpressed intentions for the meeting. In any case, there is uncontroverted testimony from Reynolds, affirmed by Mapp, that Reynolds told Mapp that she could not have “this type of meeting”, in express reference to the Union’s advertised meeting. (ALJD at 3:9-10) (emphasis added). Whereas, the General Counsel put forth no evidence at hearing that Mapp contended that the meeting did not violate the access agreement or that she took any efforts to relate her unexpressed intentions for the meeting.

5. There Was No Actual Interference With The Employees’ Ability To Confer With Union Representative Mapp.

Despite the fact that the Union’s planned meeting would violate the Parties’ contract,

access agreements, and past practice, and would also cause an undue disruption to residents' and other staff's enjoyment of the facility, Union members continued to meet with Mapp in the break room on April 3, 2012. (Tr. 34:22-32; 35:10-14). Thus, the ALJ's conclusion that the Employer denied employees access to a representative of the Union is completely without factual basis.

Contrary to the allegation in the Complaint that the Employer's notice was posted outside the break room, it is undisputed that Reynolds posted the "no meeting" sign *inside* the break room right next to Mapp, who continued to meet with employees. (Tr. 33:22-34:3; 114:1-14). It is undisputed that Mapp had handed out flyers inviting employees to the meeting the day before inviting employees to the break room. (Tr. 31:8). Thus, the employer's posting of a flyer in the break room could not have had (and did not have) any impact on denying employees access to their representative. Also, Employees could not see the sign until they were already in the break room. If employees came to the break room to meet with Mapp, they would have seen Mapp and been able to meet with her. And in fact, according to Mapp, employees did continue to meet with Mapp after Reynolds posted her flyer.²¹ (Tr. 34:22-23).

B. The ALJ's Conclusion That "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" Is Not Supported By The Record Or Board Precedent.

The ALJ concluded that "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." (ALJD at 6:12-13). The ALJ erred in reaching this conclusion both legally and factually. Again, as explained above, the ALJ discounted or else ignored without justification any analysis the

²¹ As a result of these conferences, Mapp received feedback from employees which she then used to request a meeting with the Employer, the same meeting that is the subject of the second alleged 8(a)(1) violation in the present case.

relevant and reliable testimony provided by Reynolds and Morgenroth.²²

1. The Employer Has An Unambiguous And Narrowly-Circumscribed Access Policy That Affords It No Discretion In Granting Off-Duty Employees Access.

The Employer has created and strictly applies a Chart of Infractions, which among other things, includes an access policy pertaining to off-duty employees. Chart of Infractions Rule 33 provides, in relevant part:

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. . . . (GC. Exh. 8).

As reasonable and necessary exceptions to the off-duty access policy, off-duty employees are able to access the facility if they satisfy one of three conditions.²³

First, off-duty employees are able to access the facility when they schedule an individual meeting with HR. (Tr. 84:13-17). For example, an employee may make an individual appointment to discuss benefits, or to discuss completing an interactive process while out on legally-protected disability to prepare for returning to work with potential accommodations. (Tr. 84:20-85:23).

Second, off-duty employees are granted access when they decide they wish to pick-up their paychecks on their day off. (Tr. 83:4-9). However, strict limitations apply. They are required to wait by the security desk immediately inside the 41st Street entrance while their paycheck is brought to them by a supervisor. (Tr. 83:7-25). They are not permitted to roam the

²² See *St. Francis Med. Ctr.*, 347 NLRB 368, 370 n.9 (2006) (stating that a “boilerplate” credibility statement “adds nothing to permit meaningful review”); see also *K-Mart v. NLRB*, 62 F.3d 209, 213 (7th Cir. 1995) (Hearing Officer’s “boilerplate comment concerning general credibility determinations” without further explanation was inadequate).

²³ The General Counsel did not present any evidence that the Employer has knowingly permitted off-duty employees access to the facility for any other reason. Indeed, employees attending in-services, receiving vaccinations, or attending mandatory trainings or other meetings are paid and considered on-duty. (Tr. 82:3-83:3).

facility and they must leave immediately after receiving their checks. *Id.*

Third, graveyard (“NOC”) shift employees who, because of limited bus schedules, must arrive prior to the commencement of their shift are not required to wait outside but are permitted to enter the vestibule just outside of the 41st Street entrance while they wait for their shift to begin. (Tr. 100:6-18; Resp. Exh. 1). Employees are permitted to wait in this confined area for up to an hour. *Id.* The Employer agreed to this exception in August 2011 after a meeting where the Union expressed the concerns of certain NOC employees who believed that waiting outside the facility before their shift began was unsafe and inconvenient for those commuting by public transportation. (Resp. Exh. 1). The Employer understood that this additional, narrowly-construed exception, requested by the Union, effectively balanced employees’ safety and comfort concerns with the Employer’s valid interest in “avoid[ing] uneven enforcement of the [access] rule.” *Id.*

To clarify the off-duty policy and its narrowly-tailored exceptions, on August 24, 2011, the Employer provided the Union’s representative with an explanatory email and accompanying memorandum, which stated, in relevant part: ²⁴

All employees must abide by the “No Access Rule” contained in Section 33 of the Chart of Infractions.

* * *

For safety and security purposes Employees who work the NOC shift may wait in the vestibule immediately outside the locked doors of the 41st Street entrance for as long as necessary, up to one hour before the beginning of their work shift. Employees are also welcome to wait outside the locked doors of the Linda Street entrance under the covered entrance area.

* * *

²⁴ The Union was asked whether it would like any further revisions to the access policy, but it provided no response, apparently agreeing to its terms and conditions. (Tr. 100:1-101:2).

Employees who are picking up their paycheck on their day off must enter Piedmont Gardens through the Linda Street entrance. Upon entering, the off-duty employee will be required to sign the "Employee Log" and advise the security person that they are at Piedmont Gardens to pick up their check. The off-duty employee must wait at the security desk while the security person contacts the supervisor to deliver the paycheck to the security desk. The off-duty employee is not authorized to leave the security desk area for any reason. Upon receipt of their paycheck the off-duty employee must immediately leave Piedmont Gardens property.²⁵ (Resp. Exh. 1)

In September 2011, the Employer circulated another memorandum to staff further clarifying the off-duty access policy:

- 1) All employees regardless of shift must enter Piedmont Gardens via the Linda Street entrance. **(See exception below for NOC shift employees (graveyard shift)).** All Employees must wear their badge upon entering the property, and sign the "Employee Log" located at the Security Desk.
- 2) 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.
- 3) Only NOC shift (graveyard shift) employees who arrive up to one hour early due to transportation issues and who elect to wait in the closed in area/vestibule at the 41st Street entrance have permission to enter the building through the 41st Street entrance. When it is time to punch in for their shift they may enter the lobby 10-15 minutes before their shift and go to the break room. Upon entering they must wear their badge and sign the "Employee Log" located at the Reception/Security Desk on the 41st Street entrance. Employees are also welcome to wait outside the locked doors of the Linda street entrance under the covered entrance area.
- 4) Employees who are picking up their paycheck on their day off may enter Piedmont Gardens through the Linda Street entrance. The off-duty employee will be required to sign the "Employee Log." The off-duty employee **must wait** at the security desk while the security person contacts the supervisor to deliver the paycheck

²⁵ As the email correspondence attached to the supplement shows, the Employer requested that the Union provide any feedback about the policy, but the Union never did so. (Tr. 100:23-101:13; Resp. Exh. 1).

to the security desk. Upon receipt of their paycheck the off-duty employee must leave Piedmont Gardens property. (GC. Exh. 9 (emphases in original))

2. The Employer’s Off-Duty Employee Access Policy Is Valid Under *Tri-County Medical Center* Because It Unambiguously (And Without Employer Discretion) Prohibits Access Unless Off-Duty Employees: (1) Decide To Wait In Reception While Their Checks Are Brought To Them, (2) Decide To Wait In An Enclosed Vestibule Outside Reception Before NOC Shift Begins, Or (3) Decide To Attend A Scheduled Meeting With HR.

The Board held in *Tri-County Medical Center*, 222 N.L.R.B. 1089, 1089 (1976), that an employer’s off-duty access policy is valid if it “(1) limits access solely with respect to the interior of the plant and other working area; (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.” (Emphasis added).

The ALJ concluded that the Employer’s off-duty employee access policy violates the third prong of *Tri-County Medical Center* in that it allows limited exceptions for picking-up paychecks, meeting with HR or waiting in the vestibule outside reception before NOC shift begins.²⁶ However, under applicable Board precedent, these narrow exceptions do not render Rule 33 unlawful.

In *Tri-County Medical Center*, the Board held that an employer’s off-duty access policy was invalid as it applied to an off-duty employee who was distributing union literature outside the facility.²⁷ 222 N.L.R.B. at 1090. Subsequent Board decisions interpreting *Tri-County*

²⁶ Piedmont Gardens’ HR Director for the past 13 years (Morgenroth) provided uncontroverted testimony that the three exceptions specified above are the only exceptions to the off-duty employees. (Tr. 81:17-85:23). The General Counsel provided *no evidence* indicating otherwise.

²⁷ The Board’s decision in *Tri-County* was based on the U.S. Supreme Court’s decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), which invalidated an employer’s blanket prohibition against solicitation. As the Board noted in *Saint John’s Health Center*, 357 N.L.R.B. No. 170 (2011), Board’s off-duty access jurisprudence focuses on protecting union activity at

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Medical Center have held that off-duty access rules are lawful so long as any exceptions were unambiguous and narrowly defined. For example, in *Southdown Care Center*, 308 N.L.R.B. 225, 231-32 (1992), the Board upheld an employer's off-duty access rule because it was limited to instances where an off-duty employee was visiting friends or families who were residents.

In its more recent decisions, the Board has focused on ensuring that access policies do not provide the employer with unchecked discretion to arbitrarily withhold access rights. In *Saint John's Health Center*, 357 N.L.R.B. 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 enter the premises after your shift except when we say you can."

Similarly, in *Sodexo America*, 358 N.L.R.B. No. 79 (2012), the Board invalidated an employer's "ambiguous" no-access policy that provided an exception for "hospital-related business," which the Board interpreted mean that the Employer had "free reign to set the terms of off-duty employee access." In invalidating this rule, however, the *Sodexo* Board noted that not all off-duty access policies with any exceptions were invalid, citing that case of *Southdown Care Center* as an example, but instead only those off-duty access policies that gave the employers "unfettered discretion." See also *Marriot Int'l*, 359 N.L.R.B. No. 8, fn. 2-3 (2012) (invalidating off-duty access policy because it afforded the employer with "broad, standard-less" discretion, but reiterating that an off-duty access policy that had "narrow" exceptions would be valid so long as it they were not "not subject to the complete discretion of the employer") (Emphasis added.)

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employer facilities (and preventing discrimination against such activity) and not simply protecting off-duty employees' access for its own sake.

Here, as in *Saint John's Health Center* and its progeny, the Employer's off-duty access policy is unambiguous, narrowly-tailored, and affords the Employer no "unfettered discretion" to grant or withhold access to off-duty employees on its whim. The Employer's policy strictly prohibits access to all off-duty employees unless *an employee decides* to invoke one of three exceptions to the access policy. First, off-duty employees can decide to wait in the 41st Street entrance lobby while their paycheck is brought to them by a manager. Second, off-duty employees can decide to wait in the vestibule outside the 41st Street entrance before their NOC shift begins. And third, off-duty employees can decide to schedule an appointment with HR, for example to discuss benefits or receiving reasonable accommodations due to disability. Each of the above exceptions to the off-duty access policy is reasonably necessary for the Employer's effective operation of its facility and to provide comfort and convenience to the employees while ensuring there is not "uneven enforcement of the [access] rule." (Resp. Exh. 1).

Unlike *Saint John's Health Center*, the Employer is not telling employees "you may not enter the premises after your shift except when we say you can," and unlike *Sodexo America*, the Employer's off-duty access policy does not afford it "unfettered discretion." Rather, like *Southdown Care Center*, where the Board approved of an off-duty policy that permitted employees to visit family and friends who were residents, the Employer's policy includes exceptions for the convenience and safety of its employees while protecting the Employer's right to ensure that its facility is secure, safe, and efficiently operated.

3. To The Extent That Board Decisions Interpret *Tri-County* To Stand For The Proposition That An Employer Can Have No Exceptions To An Off-Duty Access Policy, Such Board Decisions Are Inconsistent With The Act And Should Be Overturned; If *Tri-County* Legitimately Stands For Such A Proposition, It Is Inconsistent With The Act And Should Be Overturned.

To the extent that Board decisions, including *Sodexo* and *Marriot Int'l*, may stand for the proposition, as implicitly recognized by the ALJ in the Notice to Employees, that an employer cannot “permit[] off-duty employee access to the facility for some purposes while barring off-duty access for other purposes,” such an interpretation of *Tri-County* is invalid and unlawful under the Act and these cases should be overruled. (ALJD at Appendix). The Act does not require employers to choose between an unworkable, and indeed ridiculous, no-access rule or no rule at all. As former Member Hayes contended in his dissent in *Sodexo*, *Tri-County* does not stand for the proposition that any exception which affords an iota of discretion is *per se* invalid. As in *Sodexo*, here, permitting employees to pick up paychecks or else schedule meetings with HR are “innocuous activities,” not a sufficient basis for an 8(a)(1) violation. *Sodexo* (Hayes dissenting). Such an interpretation would be “unduly restrictive” and “undoubtedly not a scenario intended by the Board in *Tri-County*.” *Id.* Additionally, such an interpretation eviscerates, rendering meaningless, the third prong of the test in *Tri-County* which provides that an off-duty access rule is valid if it applies to all employees, “and not just to those employees engaging in union activity.” *Tri-County*.

Arguendo, to the extent that *Tri-County* indeed stands for the proposition that employer may have either a no-access rule or no rule at all, *Tri-County* itself is invalid and unlawful under the text and structure of the Act, and should be overruled. *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001) (holding that Board’s strained and rigid interpretation of “supervisor” violated the “text and structure” of the Act because it amounted to a categorical

exclusion). The Supreme Court and the Board have held in numerous cases that “all or nothing” approaches to interpretation undermine the practical workability which the Act was designed to foster and safeguard. *See e.g., NLRB v. Steelworkers (NuTone)*, 357 U.S. 357 (1958); *Flagstaff Med. Ctr.*, 357 NLRB No. 65, slip op. at 27 (2011).

4. In Any Event, Rule 33 Does Not Violate Section 8(a)(1) As The Union Agreed To Its Terms.

Even assuming *arguendo* that Rule 33 is invalid on its face, continued promulgation of the Rule is nonetheless permitted, as the evidence is undisputed that the Union was aware of the Rule, never objected to it and indeed actively participated in and acquiesced to modifications and exceptions to the rule in specific situations. The ALJ failed to so conclude, or even analyze this valid and determinative defense.

Uncontroverted record evidence showed that in August 2011, the Union itself actively engaged in fine-tuning the Access policy with the Employer so that NOC shift employees could wait in the vestibule outside the 41st Street entrance before their shift began for safety and convenience reasons. (Tr:100:6-15; Resp. Exh. 1.) This resulted in a draft “Supplement To Access Rule” which was sent via e-mail to Mapp on August 24, 2011 (Er. Exh. 1). Thus, whether the Rule is invalid on its face or not is not relevant, as the union has agreed to the terms and thus has waived any defects. *See Phillips Pipe Line Co.*, 302 N.L.R.B. 732, 737 (1991) (upholding union’s right to agree to settlement that waived employees’ rights to file a charge); *Energy Coop. Inc.*, 290 N.L.R.B. No. 78 (1988) (finding that strike settlement validly waived sick and disabled employees’ rights to receive benefits during strike); *Amcar Div. of ACF Indus., Inc.*, 247 N.L.R.B. 1056 (1980) (upholding union’s right to enter into “no-strike” agreement).

C. The Administrative Law Judge’s Conclusion That “Respondent Violated Section 8(a)(1) By Denying Access To Two Off-Duty Employees To Its Premises For A Union-Management Meeting” Is Not Supported By The Record Or Board Precedent.

The ALJ concluded that “Respondent violated Section 8(a)(1) by denying access to two off-duty employees to its premises for a union-management meeting.” (ALJD at 6:15-16). The ALJ erred in reaching this conclusion both legally and factually.²⁸ The Employer’s refusal on August 16, 2012 to meet with two off-duty employees, due to the Union’s refusal to satisfy the agreed-upon conditions for the meeting, shows an even-handed (not disparate) application of its unambiguous and narrowly-circumscribed access policy by prohibiting access to off-duty employees who did not meet any of the three exceptions to the off-duty access policy.

In order to prove the Complaint’s allegation of discriminatory enforcement of the Employer’s off-duty access rule, the General Counsel was required to show examples where the Employers refused access to off-duty employees conducting Union activities as opposed to off-duty employees conducting similar non-union related activities. *See Tri-County Med. Ctr.*, 222 N.L.R.B. at 1092 (holding that the General Counsel had failed “to establish by a preponderance of evidence its claim of disparate enforcement of the rule”). The General Counsel failed to provide any such an example here, and the ALJ failed to so conclude. Instead, the Employer provided uncontroverted evidence that it strictly applies its off-duty access policy. Additionally, in any case, the off-duty employees at issue here had no reason whatsoever to be at the Employer’s facility (nor did they assert any reason, let alone an interest in otherwise entering the facility) and they were justifiably refused access as a result.

²⁸ Again, as explained above, the ALJ discounted or else ignored without justification any analysis the relevant and reliable testimony provided by Reynolds and Morgenroth. *See St. Francis Med. Ctr.*, 347 NLRB 368, 370 n.9 (2006); *see also K-Mart v. NLRB*, 62 F.3d 209, 213 (7th Cir. 1995).

1. The Off-Duty Employees Had No Section 7 Right To Demand That The Respondent Make Its Management Available For A Meeting, Thus There Can Be No 8(a)(1) Violation.

There can be no violation of Section 8(a)(1) where the off-duty employees here at issue had no Section 7 right to meet with Employer's management team. The ALJ did not conclude, or otherwise cite any authority for the proposition that the employees at issue had any Section 7 right to meet with Reynolds or Morgenroth. Indeed, even if in general there is such a right, there would be no Section 7 right to attend a meeting when the terms of such a meeting had been expressly agreed to and then breached, causing such a meeting to be justifiably cancelled.

2. The Employer Even-Handedly Applied Its Off-Duty Access Policy.

The ALJ failed to conclude, or even analyze, the overwhelming evidence that the Employer strictly enforced its access rule. Morgenroth provided reliable and uncontroverted testimony that the Employer strictly applies its off-duty access policy when it is aware that off-duty employees are seeking access. (Tr. 81:21-85:23). Mapp's testimony to the contrary is unpersuasive.

First, Mapp's testimony that she met with "off-duty" employees occasionally is not reliable as it is apparent that she merely assumed without factual basis that they were off-duty. In fact, many of the employees she identified as "off-duty" were actually on-duty because she stated that they were at the facility to receive a "physical" or attend an "in service."²⁹ (Tr. 47:5-9). In both such cases, the employees would have been receiving pay and considered "on duty." (Tr. 82:3-83:3).

Second, Mapp's assertion that she has met with an unspecified number of off-duty

²⁹ Meeting with employees while on-duty was consistent with the Employer's practice of ensuring that employees are paid for time spent engaging in work-related obligations, such as mandatory meetings, in-services, and physicals. (Tr. 82:3-83:3).

employees in the past who were picking up checks or meeting with HR is irrelevant absent any evidence that the Employer knew of or at least should have known about the alleged incidents.³⁰

Indeed, there was no indication that her meetings with an unspecified number of off-duty employees lasted more than a few minutes or were otherwise open and notorious: “Several occasions, I’ve been in the break room having meeting or conversations with one-on-one, and somebody that was off would come in and say hi. They might talk about an issue. And they would be off and come to the building for a different reason.” (Tr. 46:24-47:3).

3. The Off-Duty Employees At Issue Here Were Not Granted Access Because They Had No Scheduled HR Meeting To Attend And Had No Other Reason (Nor Asserted One) Valid Or Otherwise To Be Inside Piedmont Gardens.

The only evidence of application of the Rule to exclude employees was the Employer’s refusal to meet with off-duty employees Geneva Henry and Elizabeth Shoaga on the morning of April 16, 2012. There is no dispute that the off-duty employees in question arrived at the Employer’s facility *after* Morgenroth had told their Union Representative (while they listened over Mapp’s cell phone’s speakerphone) that the Employer was unwilling to meet with them and accordingly there would be no meeting for them to attend; for this reason, their arrival at the Piedmont Gardens was done in complete bad faith. (Tr. 40:21-41:12; 90:15-24). The Employer had only agreed to meet with on-duty employees, *provided that* the Union first provide employee names so that coverage could be provided and provided that the meetings were in a one-on-one

³⁰ Henry’s testimony that she had met with Mapp an unspecified number of times for unspecified durations while off-duty is not credible, as her testimony was conclusory and completely lacking in specificity. In any event, Henry did not testify that the Employer was ever aware that she did so, nor is it likely that the Employer could have been aware given that she apparently met with Mapp at the end of her NOC shift. In *Tri-County Medical Center*, the Board held that the General Counsel failed to prove disparate enforcement of an off-duty no-solicitation rule where, as here, there was evidence that the employees at issue were not in fact off-duty, and that there was no evidence that management had been aware of the occasional violations of the rule, not resulting in discipline, which had been raised at hearing. 222 N.L.R.B. at 1092.

format so that the wide range of individual issues Mapp had identified in her April 3rd email could be addressed efficiently. There is no dispute that Mapp agreed to these terms, despite her late efforts to suggest a new format. (GC Exh. 6).

There is also no dispute that Mapp satisfied none of terms for the meeting that she had agreed to, and that as a result the Employer was under no duty to meet with off-duty employees and Mapp. *See Charleston Nursing Ctr.*, 257 N.L.R.B. 554, 555 (1981) (holding that an employer has no general obligation to meet with employees when there is no agreement providing otherwise, and that it is not illegal for an employer to refuse to deal with employees except on an individual basis). As a result, the Employer was justified in denying access to the off-duty employees who had no meeting to attend and who offered no valid reason (or even interest in) entering the facility.

D. In Any Event, The Administrative Law Judge’s Recommended Notice To Employees Is Incorrect To The Extent It Reference Section 8(a)(3) and 8(a)(5) Violations When No Such Violations Were Alleged In the Consolidated Complaint, Addressed At The Hearing Or Post-Hearing Briefing, Discussed In The ALJ’s Decision, Or Addressed In The ALJ’s Order.

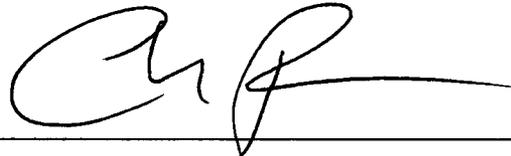
The ALJ’s Notice To Employees states that the Respondent “violated Section 8(a)(1)(3) and (5)” of the Act. (ALJD at Appendix.) The Consolidated Complaint alleges no violations of Sections 8(a)(3) or 8(a)(5), such violations were not addressed by any party at the Hearing or in any post-hearing briefing or in the ALJ’s own Decision, including in his conclusions of law, and the ALJ’s order fails to address, let alone even mention, such violations. As a result, it is unclear to what the ALJ was referring; and for that reason, there was obviously no opportunity for the Respondent to litigate whatever issues may have been raised. It is apparent that the inclusion of the 8(a)(3) and 8(a)(5) violations was completely erroneous.

V. CONCLUSION.

For each and every of the foregoing reasons, the Respondent respectfully requests that the ALJ's Decision not be adopted and that the Complaint be dismissed in its entirety.

DATED: March 12, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Durham', is written over a horizontal line.

David M. Durham
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AMERICAN BAPTIST HOMES OF THE
WEST d/b/a PIEDMONT GARDENS

33359066

PROOF OF ELECTRONIC SERVICE

I am a citizen of the United States and a resident of the State of California. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero, 10th Floor, San Francisco, CA 94111-4024. I am over the age of eighteen years and not a party to this action.

On March 12, 2013, I served the following documents:

Respondent's Cross-Exceptions to the Decision and Recommended Order of the Administrative Law Judge;

Respondent's Brief in Support of its Cross-Exceptions to the Decision and Recommended Order of the Administrative Law Judge; and

Respondent's Answering Brief to the Charging Party's Exceptions to the Decision and Recommended Order of the Administrative Law Judge.

I served the documents on the following persons:

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The documents were served by the following means:

By Electronic Service (E-mail). By electronically mailing a true and correct copy through Arnold & Porter's electronic mail system from Bridget.Smith-Eastman@aporter.com to the email addresses set forth above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 12, 2013

Signature: _____



Bridget Smith-Eastman