

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

**In the Matter of:**

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

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

**Employer,**

**and**

**SERVICE EMPLOYEES  
INTERNATIONAL UNION, UNITED  
HEALTHCARE WORKERS-WEST,**

**Union.**

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**RESPONDENT'S REPLY TO ACTING GENERAL COUNSEL'S BRIEF IN ANSWER  
TO RESPONDENT'S CROSS-EXCEPTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

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## I. INTRODUCTION.

Administrative Law Judge Jay Pollack's ("ALJ") January 29, 2013 decision ("ALJ Decision") fails to identify or sufficiently rely on any recognized Section 7 right in concluding that the Employer violated Section 8(a)(1) of the National Labor Relations Act (the "Act"). Section 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The Acting General Counsel ("GC") has made the same critical errors as the ALJ in its Answering Brief by not tethering the Complaint's allegations to Section 7 rights, and in failing to show any impermissible interference with such rights, assuming *arguendo* that they exist.<sup>1</sup>

The ALJ erred in concluding that the Employer's April 3, 2012 posting of a sign, which was directed at a particular *en masse* meeting, as advertised, constituted a violation of Section 8(a)(1) because the SEIU-UHW ("Union" or "Charging Party"), like the employees it represents, does not have a Section 7 right, let alone an unlimited one, to hold a meeting at American Baptist Homes of the West's, d/b/a Piedmont Gardens, ("Employer" or "Respondent"), facility. Similarly, the ALJ erred in concluding that the Employer's refusal to meet with two employees on April 16, 2012 was a violation of Section 8(a)(1) because the employees do not have a Section 7 right to demand that the Employer meet with them, let alone to meet how they want, when they want, and/or to discuss whatever they want, *especially* when the Union had already agreed to the Employer's reasonable conditions of holding such a voluntary meeting.

The Employer reaffirms all its cross-exceptions, and its brief in support thereof, and submits this Reply Brief pursuant to the Board's Rules and Regulations, Section 102.46(h), in

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<sup>1</sup> The GC acknowledges in its Answering Brief that the ALJ's inclusion of a reference to Section 8(a)(3) and 8(a)(5) violations in the proposed notice was erroneous because the "Complaint in this case did not allege any violations of these two sections of the Act. Rather, it only alleges violations of Section 8(a)(1)." (GC Answering Brief at 26).

response to the GC's April 9, 2013 Answering Brief to Respondent's Cross-Exceptions, jointly adopted by the Charging Party SEIU-UHW West.<sup>2</sup> For all the reasons herein, and those advanced in prior briefing, the Employer respectfully requests that the Complaint be dismissed.

**II. THE EMPLOYER DID NOT VIOLATE SECTION 8(a)(1) BY POSTING A SIGN PROHIBITING AN *EN MASSE*, ALL-DAY MEETING (*i.e.* "THIS KIND" OF MEETING), AS ADVERTISED BY THE UNION.**

**A. Neither The Union, Nor The Employees It Represents, Has A Section 7 Right To Hold A Meeting At The Employer's Facility.**

The ALJ and the GC have overlooked the missing linchpin that neither the Union, nor the employees it represents, has a Section 7 right under the Act to hold a meeting, let alone an *en masse* one, at the Employer's facility.<sup>3</sup> For this reason alone, the ALJ erred in finding a Section 8(a)(1) violation. Furthermore, the ALJ did not find, nor did the GC prove, that the Union's existing Access Agreement<sup>4</sup> with the Employer was an inadequate basis for the Union to fulfill its "representative duties" per *Holyoke Water Power Co.*, 273 N.L.R.B. 1369 (1985), *enforced*, 778 F.2d 49 (1st Cir. 1985). Indeed, the GC itself provided the evidence that the Union could effectively represent employees by meeting with them as it had apparently done in the past.<sup>5</sup> *Id.*;

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<sup>2</sup> Charging Party erroneously claimed in its April 9, 2013 Limited Joinder to Acting Counsel's Brief In Answer To Respondent's Cross Exceptions to be joining the GC's "request that the Board reject Respondent's cross exceptions in their entirety." In fact, as discussed below, the GC "agrees with Respondent that . . . references to Sections 8(a)(3) and 8(a)(5) [in the proposed notice] should be deleted in entirety." (GC Answering Brief at 26; Respondent's Cross-Exception No. 52).

<sup>3</sup> The ALJ and GC advance, and rely on, an erroneous theory of an 8(a)(1) violation which muddles together *unalleged* Section 8(a)(3) and 8(a)(5) violations: "The Judge relied on ample evidence in the factual record to conclude that, based upon the parties written agreements as well as their past practice, the Union had a right to hold meetings with employees in the break room." (GC Answering Brief at 6).

<sup>4</sup> The Employer and Union's (together, "Parties") Access Agreement is set forth in Section 1.4 of the Parties' expired collective bargaining agreement, as well as in the Parties' agreed-upon "Ground Rules" (GC Exh. 2, pp. 3-4; GC Exh. 3).

<sup>5</sup> As discussed above, it is important to note that the Complaint does not allege that the prohibition of the advertised meeting constituted a unilateral change in past practice or an unreasonable interpretation of a contract thereby violating the Act. Similarly, in *Success Village*

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*see also Nestle Purina Petcare Co.*, 347 N.L.R.B. 891 (2006); (GC Answering Brief at 7).

In *Holyoke*, a designated union agent sought access to the fan room of an employer's power plant facility to assess potential safety health and safety hazards. 273 N.L.R.B. 1369. The employer excluded the agent from the facility, and instead offered its own assessment of the hazards as an alternative. Confronted with the union's need to perform recognized representational activities, and the employer's established property rights, the Board sought to balance these competing interests, while still adhering to the Supreme Court's direction that "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." 273 N.L.R.B. at 1370 (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). Thus, the *Holyoke* Board articulated the following test:

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

Applying this test, the *Holyoke* Board ordered that the union agent be permitted access to the facility, provided that this access was *limited to a reasonable period*. *Holyoke*, 273 N.L.R.B. at 1370 (also reasoning that "[w]hile the presence of a union representative on the employer's premises may be relevant to the union's performance of its representative duties, we disagree that that alone, ipso facto, obligates an employer to open its doors.").

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*Apartments*, 347 N.L.R.B. 1065, 1077 (2006), the Board adopted the ALJ's dismissal of a complaint for an alleged Section 8(a)(1) violation where the union was given sufficient access and it was not alleged that there was any unilateral change in past practice.

Subsequent Board decisions have affirmed that a union's need to access an employer's facility "*must be limited to reasonable* periods so that the Union can fulfill its representation duties without unwarranted interruption of the employer's operations." *EIS Brake Parts*, 331 N.L.R.B. 1466, 1494 (2000) (ordering the employer and union to set *mutually acceptable* and *reasonable* times for the union to be granted access).

Unlike *Holyoke*, the Union here did not make a reasonable request—or any request for that matter—to use the Employer's facility to hold a large rally for all approximately 130 Union-represented employees. (Tr. 26:11-13; 31:8-12). Furthermore, the GC presented no evidence—nor did the ALJ make such a finding—that the Union needed unannounced and unfettered access to uphold its representational duties.

On the contrary, the ALJ implicitly found that a single Union representative had been able to satisfy the Union's representational duties, without holding *en masse* meetings, by meeting with employees on an individual or small-group basis under the Parties' Access Agreement. (ALJ Decision at 3). The GC's Answering Brief concludes that such meetings were an established past practice, yet simultaneously attempts to divert attention from the fact that the Union representative *continued* to meet with employees on April 3, 2012, consistent with this alleged past practice.<sup>6</sup> (GC Answering Brief at 7).

Furthermore, the ALJ's and GC's reliance on *Swardson Painting Co.*, 340 N.L.R.B. 179 (2003) to conclude that the "respondent interfered with the Union's right to access" is misplaced because in *Swardson* the Board affirmed an ALJ's finding that it was a Section 8(a)(1) violation to *actually exclude* a union representative seeking access for a reasonable purpose. Of course,

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<sup>6</sup> Again, as discussed above, the ALJ and GC's focus on analyzing past practice is erroneous since the Complaint only alleges a violation of Section 8(a)(1).

such exclusion did not occur here, as acknowledged by the ALJ and GC.<sup>7</sup> (ALJ Decision at 4; GC Answering Brief at 8). Failing to connect the dots in its own Answering Brief, the GC states that Union Representative Mapp “had a right to be in the break room to meet with employees to check upon complaints of the employees, and to monitor the contract,” *and* that “Mapp remained in the break room, and talked to employees on their breaks” after the Employer’s sign was posted. (Answering Brief at 8-9).

Additionally, to the extent that a handful of employees may have been confused as to the precise meaning of the Employer’s posted sign in the break room, the ALJ and GC do not rely on any Board Precedent for the novel notion that the Employer was required under the Act to clarify what Union Representative Mapp intended when she created her flyer. (ALJ Decision at 5; GC Brief at 9). However, in any case, Union Representative Mapp continued to hold meetings with small groups of employees and she explained to them that they were still permitted to meet with her.<sup>8</sup> (ALJ Decision at 4).

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<sup>7</sup> The ALJ’s conclusion that the Employer violated Section 8(a)(1) based on *Swardson* is also erroneous because in that case (unlike here), the Board relied on the fact that the contractor-employer did not have any property interest in the job site from which it was attempting to exclude the union agent, and because the employer “went too far” by “by insisting that union representatives stay off its jobsites entirely, and away from employees, even during break and lunch periods.” 340 N.L.R.B. at 179.

<sup>8</sup> As a testament to the lacking strength of the Complaint and the GC’s theory of case, the GC’s Answering Brief is riddled with gross misconstruals of the record. For example, the GC states that “many employees who came into the break room to talk to Mapp . . . expressed their worry and fear . . . and were very worried.” (GC Answering Brief at 14, citing Tr. 58:16-18 and 35:1-2). In the full sections of the transcript from Union Representative Mapp’s testimony, selectively cited by the GC, Mapp *did not* specify how many employees “definitely commented” on the posting, and especially did not use the term “many.” (Tr. 58). However, Mapp did state that she told employees that they could still meet with her after they saw the sign. *Id.* Notably, Mapp’s interpretation of the Employer’s sign, namely that it did not prohibit her continued meetings with employees, was erroneously not adopted by the ALJ.

Also, as an example of GC’s highly prejudicial and inaccurate representation of the record, the ALJ ordered this inadmissible evidence of employees’ alleged state of minds ignored and stricken from the record. (Tr. 34:22-35:6). The GC’s attempted use of such evidence should be disregarded and admonished.

**B. The Employer Reasonably Concluded That The Union’s Confetti-Clad Flyer Was Advertising A Meeting That Would Violate The Parties’ Contractual Access Agreement; The Unexpressed Intentions Of The Union Representative Who Made The Flyer Are Irrelevant.**

The Union was required to follow the Parties’ *contractual* access agreement, and the Employer was entitled to reasonably interpret and apply it. *See Peck/Jones Constr. Corp.*, 338 N.L.R.B. 16 (2002) (holding that the employer did not violate Section 8(a)(1) by ejecting two union representatives who had failed to comply with the Parties’ access agreement by signing-in). As recognized by the ALJ, the Employer interpreted the Union’s flyer to mean that the advertised meeting would violate the Parties’ Access Agreement and the Employer informed the Union that “*this* meeting,” would not be permitted. (ALJ Decision at 3-4; GC Answering Brief at 8) (emphasis added). Thus, the Employer could not have committed a Section 8(a)(1) violation since the heart of this matter is rooted in contractual interpretation not Section 7 rights.

Failing to analyze whether the Employer’s interpretation of the flyer itself was unreasonable, as he was required to do, the ALJ instead erroneously focused on the unexpressed intentions of Union Representative Mapp and concluded that the Employer somehow had the obligation to seek clarification from the Union as to what it meant by the flyer. *See Betteroads Asphalt Corp.*, 336 N.L.R.B. 972, 973 (2001) (analyzing whether the union’s contractual interpretation was reasonable); *see Vickers, Inc.*, 153 N.L.R.B. 561, 570 (1965) (“when an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.”). The ALJ cited no authority for such an obligation, and he can thus not base a Section 8(a)(1) violation on this alleged duty to seek clarification.

Implicitly recognizing that the GC was required to prove that the Employer's interpretation of the flyer was unreasonable, the GC makes the unsupported observation that "not even a scintilla of evidence" supports the Employer's limiting of the Union's access to the facility under the Parties' Access Agreement. (GC Answering Brief at 11). This conclusion is contradicted by the record.<sup>9</sup> Indeed, the Employer reasonably understood that the Union's meeting, as advertised, violated the Parties' Access Agreement for the following reasons:<sup>10</sup>

- The Union's flyer stated that the meeting would run in three parts from 7:30 a.m. to 6:00 p.m. (GC Exh. 4). The Access Agreement provided that a Union Representative would be granted access from 9:00 a.m. to 5:00 p.m. without prior approval. (GC Exhs. 2, 3).
- The Union's flyer stated that the meeting's purpose was to discuss the National Union of Healthcare Workers, a rival union, specifically to "take back our Union and our Signature." (GC Exh. 4). The Access Agreement states that the Union has access for the sole purpose of "ascertaining whether the contract is being observed and to check upon complaints and concerns..." (GC Exh. 3).
- The flyer suggested that two representatives would be arranging, and potentially leading, the meeting. (GC Exh. 4). The Access Agreement stated that only one representative would be provided access. (GC Exhs. 2, 3).

The ALJ failed to find that each and every one of these violations of the Access Agreement formed a reasonable basis for the Employer to prohibit "this kind" of meeting under the terms of the Parties' *contractual* access agreement. (ALJ Decision at 3). Additionally, regarding the ALJ's consideration of Union Representative Mapp's testimony that she was going to discuss issues beyond the rival union, these intentions were not expressed on the flyer or to Executive Director Reynolds on the morning of the meeting, and thus they are irrelevant for

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<sup>9</sup> As indicative that the GC's theory of case, as relied upon by the ALJ, is fatally flawed, the GC engages in substantial analysis of the Union's *contractual* access right, as opposed to any alleged Section 7 access rights right. (GC Answering Brief at 11.)

<sup>10</sup> As discussed above, it is not disputed that the Employer permitted the Union-representative to remain at the facility on the morning of April 3, 2012 when the sign at issue was posted. The ALJ found that the Union representative was not ejected from the break room, rather she continued to meet with employees, as she had apparently done in the past. (ALJ Decision at 4.)

purposes of evaluating the reasonableness of the Employer's interpretation of the flyer. (ALJ Decision at 5).

As another independent reason that the ALJ's Decision is erroneous, the Parties' Access Agreement provides that the Union's access privilege must be "exercised *reasonably*." (GC Exh. 3) (emphasis added). Thus, the Employer was reasonably privileged to apply its understanding of reasonableness, in the context of determining that an *en masse*, Union-hall style meeting would be unduly disruptive to residents, given that the meeting location was planned to be in the only facility's break room, near the elderly and disabled residents. (Tr. 75:11-18; 107:20-110:17; Resp. Exhs. 4, 5). Given the Employer's right to reasonably interpret the Parties' Access Agreement, there is no Section 7 right at issue here and the ALJ's conclusion of a Section 8(a)(1) violation is erroneous.

**III. THE EMPLOYER DID NOT VIOLATE SECTION 8(a)(1) BY DECIDING NOT TO MEET WITH TWO EMPLOYEES BECAUSE THEY DO NOT HAVE A SECTION 7 RIGHT TO REQUIRE THE EMPLOYER TO MEET WITH THEM IN THE FIRST PLACE.**

The ALJ did not conclude, nor has the GC ever contended, that the Union and the employees it represents have a Section 7 right to demand that the Employer hold informal meetings with them. Because no such Section 7 right exists under Board precedent, the ALJ erred as matter of law in concluding that the Employer thus violated Section 8(a)(1) by refusing to meet with the two employees at issue on April 16, 2012. (ALJ Decision at 6).

The ALJ and GC have struggled in vain to connect the Employer's off-duty access policy to the facts here because Employer's off-duty access policy is irrelevant to the Complaint's allegation that the Employer unlawfully excluded two employees.<sup>11</sup> Rather, as the key initial point of analysis, the Union-represented employees have no Section 7 right to demand that the

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<sup>11</sup> The Employer's off-duty access policy, as explained at hearing, is included as GC Exhs. 8, 9; Resp. Exh. 1. *See also* Tr. 83:4-25; 84:13-85:24; 100:1-101:14).

Employer meet with them at any time, while they are off-duty or on-duty. Thus, the Employer's refusal to meet with them on April 16, 2012 is not—and cannot be—a violation of Section 8(a)(1).

In *Charleston Nursing Center*, 257 N.L.R.B. 554, 555 (1981), the Board held that an employer has no general obligation to meet with employees when there is no agreement providing otherwise, and that furthermore, it was not a violation of the Act to require that a meeting be held on an individual basis. In dismissing the alleged violation of Section 8(a)(1), the *Charleston* Board also relied on the fact that the employer had suggested reasonable alternatives which had been rejected. *Id.* Similarly, here, the Employer had no obligation to meet with employees on an un-specified group basis, as initially proposed by the Union, and the Employer's reasonable alternative of meeting employees on an individual basis was initially accepted but then rejected.<sup>12</sup> (GC Exh. 6).

In any case, the Employer's conditions for the voluntary meetings were reasonable and the Union agreed to them. (GC Exh. 6). Given that it appeared that employees wanted to discuss a variety of personal issues, the Parties agreed that the meetings would be on a one-on-one basis with a Union-representative present. *Id.* Additionally, the Employer assumed that the employees who wanted to meet would be on-duty since the Union had agreed to provide the names of employees so that coverage could be arranged during their shifts, and the Union only raised the prospect of off-duty employees in its last minute email which impermissibly attempted to unilaterally imposed new conditions for the Employer's voluntary meetings.<sup>13</sup> (GC Exh. 6).

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<sup>12</sup> As strong evidence that the Employer's alternative was reasonable and acceptable to the Union, the Union did eventually re-agree to (arrange for, and then hold) a meeting between the Employer and an employee, with the Union representative present, on April 18, 2012. (Tr. 92:17-25).

<sup>13</sup> The GC asserts in its Answering Brief that the Employer was not entitled to require that the names of employees be specified in advance. First, the Employer has no obligation to meet with employees on an individual basis so it can impose such a condition. Second, the employer has a duty to ensure patient care during meetings with employees, so requiring names is necessary to ensure proper coverage. Third, the Union never asserted any privilege for withholding employee names. And fourth, the GC's assertion that employee names are protected is a completely new argument, never presented at hearing or briefed, and thus inappropriate to be raised now.

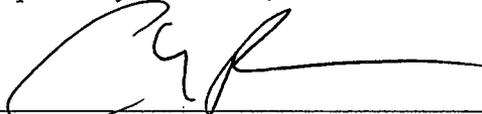
Additionally, it is determinative that the Employer could not have violated Section 8(a)(1) because it notified Union Representative Mapp via a via phone call—which the two employees overheard—that it would not be meeting with the employees since the conditions of the voluntary meeting had not been satisfied.<sup>14</sup> (Tr. 39:10-41:13; 69:20-22; 90:15-24). Thus, the Union and employees acted in bad faith in attempting to exercise any alleged right under the Act, and their conduct cannot form the basis of the specified Section 8(a)(1) violation.

#### IV. CONCLUSION.

For each and every of the above reasons, as well as all those advanced in its cross-exceptions and brief in support thereof, the Employer requests that the Complaint be dismissed.<sup>15</sup>

Dated: April 23, 2013

Respectfully submitted,



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AMERICAN BAPTIST HOMES OF THE WEST  
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<sup>14</sup> As another flagrant example of the GC's misconstrual of Board precedent and the record, the GC contends that the Respondent violated Section 7 rights by making a "unilaterally imposed demand" that the Union supply the names of employees who wanted to meet, and that the Union was thus entitled to withhold these names. (GC Answering Brief at 25). First, the GC cites no Board precedent for the proposition that the Employer violates Section 7 rights by conditioning a voluntary meeting on receipt of the names of employees it is planning to meet with so that coverage can be ensured for patient safety. Second, the GC's own evidence shows that the Union agreed to provide the names. (GC Exh. 6: April 3, 2012 email from Union Representative Mapp: "I will also get back to you with the names of the workers who will be attending the meeting.")

<sup>15</sup> The GC's request for a sentence to be added to the ALJ's proposed notice should be rejected because the GC never filed exceptions to the ALJ's Decision. Advancing exceptions in its Answering Brief violates the Board's Rules and Regulations, Section 102.46 and unduly prejudices the Employer. "[M]atters not included in exceptions are deemed waived and may not thereafter be urged before the Board, or in any further proceeding." *New Surfside Nursing Home*, 330 N.L.R.B. 1146, 1151 (2000).

**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 Center, 10th Floor, San Francisco, CA 94111-4024. I am over the age of eighteen years and not a party to this action.

On April 23, 2013, I served the following document:

Respondent's Reply To Acting General Counsel's Brief In Answer to  
Respondent's Cross-Exceptions To The Decision of the Administrative Law  
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The document was served by the following means:

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

Dated: April 23, 2013

Signature:

  
Bridget Smith-Eastman