UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 06-CA-081896

UPMC and its subsidiaries
UPMC Presbyterian Shadyside and
Magee-Womens Hospital of UPMC,
Single Employer, d/b/a Shadyside Hospital
and/or Presbyterian Hospital and/or
Montefiore Hospital and/or
Magee-Womens Hospital

and

SEIU Healthcare Pennsylvania,
CTW, CLC

RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

In the Matter of:	)
	)
UPMC AND ITS SUBSIDIARIES	)
UPMC PRESBYTERIAN SHADYSIDE	)
AND MAGEE-WOMENS HOSPITAL OF	)
UPMC, SINGLE EMPLOYER, D/B/A	)
SHADYSIDE HOSPITAL AND/OR	)
PRESBYTERIAN HOSPITAL AND/OR	)
MONTEFIORE HOSPITAL AND/OR	)
MAGEE-WOMENS HOSPITAL	)
	)
Respondent	)
	)
and	)
	)
SEIU HEALTHCARE PENNSYLVANIA,	)
CTW, CLC	)
	)
Charging Party	)

RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION

I. INTRODUCTION

Respondents, UPMC and its subsidiaries, UPMC Presbyterian Shadyside ("Presbyterian Shadyside") and Magee-Womens Hospital of UPMC ("Magee"), and pursuant to Rule 102.46 of the Board's rules, submit this brief in support of their contemporaneously-filed Exceptions to the decision of Administrative Law Judge David I. Goldman dated April 19, 2013 ("ALJ Decision").[1] The ALJ erred in finding that Respondents' Electronic Mail and Messaging Policy

[1] Citations to the Administrative Law Judge's decision will be referenced as "ALJD" followed by the appropriate page and line number(s). Citations to the hearing transcript will be referenced as "Tr." followed by the appropriate page number(s). Joint exhibits will be referenced as "J. Ex." followed by the exhibit number(s). General Counsel's exhibits and Respondents' exhibits will be referenced as "G.C. Ex." and "R. Ex.," respectively, followed by the exhibit number(s). The Second Amended Complaint will be referenced as "Compl." followed by the appropriate paragraph number(s).

("Email Policy") and Acceptable Use of Technology Resources Policy ("Technology Resources Policy") violate Section 8(a)(1) of the National Labor Relations Act (the "Act"). The ALJ's findings related to these policies are unsupported by the record, contrary to law, and should be reversed.[2]

II. STATEMENT OF THE CASE

On December 13, 2012, the Acting General Counsel of the National Labor Relations Board ("NLRB" or "Board") issued a complaint alleging violations of the Act by Respondents UPMC, Presbyterian Shadyside, and Magee related to a number of charges filed by SEIU Healthcare Pennsylvania ("SEIU" or the "Union"). An amended complaint was issued on January 8, 2013.[3] On February 7, 2013, the Regional Director for Region 6 approved a settlement agreement resolving most of the allegations in the amended complaint. An order severing the settled cases from the instant case issued February 8, 2013. A second amended complaint issued on February 11, 2013 alleging that Respondents' Solicitation, Email, and Technology Resources Policies violate Section 8(a)(1) of the Act.

A hearing in the case was conducted February 20, 2013, in Pittsburgh, Pennsylvania regarding the alleged violations of the Solicitation, Email and Technology Resources Policies.[4]

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[2] In his Decision, the ALJ correctly concluded that The Register-Guard, 351 N.L.R.B. 1110 (2007), enfd. in part sub nom. Guard Publ'g Co. v. NLRB, 571 F.3d 53 (D.C. Cir. 2009), is binding precedent that should not be overturned. To the extent that the remedy recommended by the ALJ could be interpreted to require Respondents to make open its electronic systems for solicitation activity, Respondents adamantly dispute the propriety of such an order for the reasons previously discussed in Respondents' Brief before the ALJ.

[3] UPMC filed a motion for summary judgment on January 4, 2013, which was denied by order of the Board on January 28, 2013.

[4] At the hearing, counsel for the General Counsel moved, without objection, to amend the complaint. That motion was granted. Respondents filed a motion for judgment on the pleadings on February 19, 2013. Counsel for the General Counsel, the SEIU, and the Respondents, filed briefs in support of their positions on March 27, 2013.

No witnesses were presented by any party. On April 19, 2013, the ALJ issued a decision ("ALJ's Decision") dismissing the AGC's claim that Respondents' Solicitation Policy was unlawful.[5] However, the ALJ incorrectly found that Respondents' Email and Technology Resources Policies violate Section 8(a)(1) of the Act. Indeed, the AGC failed to carry its burden of demonstrating that these policies are unlawful,[6] and the ALJ's decision should be overturned.

III. ISSUES PRESENTED

1. Did the ALJ err in applying Board precedent relating to general workplace rules to Respondents' policies relating to employee use of employer equipment? (See Exceptions 2, 4, 5, 7, 15, 16).

2. Did the ALJ err in failing to apply the Board's decision and analysis in The Register-Guard, 351 N.L.R.B. 1110, and other applicable Board precedent in finding Respondents' Email and Technology Resources Policies unlawful? (See Exceptions 2, 4, 5, 6, 7, 8, 9, 15, 16).

3. Did the ALJ err in relying upon dicta from Costco Wholesale Corp., 358 N.L.R.B. No. 106 (2012), as foundational authority for finding Respondents' Email and Technology Resources Policies unlawful? (See Exception 3).

---

[5] Respondents do not except to the ALJ's Decision to dismiss the allegation pertaining to Respondents' Solicitation Policy.

[6] Contrary to the ALJ's finding, the Acting General Counsel did not meet its burden of proving a violation in this case under any legal standard. Section 101.10(b) of the Board's Rules and Regulations states that "[t]he Board's attorney has the burden of proof of violations of [S]ection 8 of the National Labor Relations Act." See also Turtle Bay Resorts, 353 N.L.R.B. No. 127, slip op. at 56 (2009) ("the General Counsel has not satisfied his burden of proving that the cited rule would reasonably be read to include and infringe on employees' Section 7 rights"); Tradesmen Int'l, 338 N.L.R.B. 460, 463 (2002) ("the General Counsel has not met his burden to show that maintenance of this rule would reasonably chill employees in the exercise of their Section 7 rights").

4. Did the ALJ err in failing to find Respondents' policies lawful under the standards addressed in Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004), as followed in, among other cases, Costco, 358 N.L.R.B. No. 106? (See Exception 4, 5, 7, 8, 9, 15, 16).

5. Did the ALJ err in relying on Board decisions that are void under New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010), NLRB v. New Vista Nursing & Rehabilitation, Nos. 11-3440, 12-1027, 12-1936 (3d Cir. May 16, 2013) (precedential opinion and judgment), and Noel Canning v. NLRB, 705 F.3d 490 (2013)? (See Exception 2).

6. Did the ALJ err in considering matters that are not in record evidence in the case? (See Exception 12).

7. Did the ALJ err in failing to find that the hospital and healthcare environments present exceptional circumstances under which Respondents' Email and Technology Resources Policies are lawful? (See Exception 13).

8. Did the ALJ err in denying UPMC's Motion for Judgment on the Pleadings? (See Exception 14).

IV. STATEMENT OF FACTS

A. UPMC and Its Subsidiaries UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC

UPMC is a holding company that owns various subsidiaries. Those subsidiaries operate twenty (20) hospitals in Pennsylvania and 400 clinical locations in Western Pennsylvania.[7] (J. Ex. 2, paragraph 1). UPMC's various subsidiaries have over 55,000 employees. (J. Ex. 2, paragraph 2).

[7] The hospitals in the Pittsburgh area are: Children's Hospital, UPMC East, Eye & Ear Institute, Magee-Womens Hospital, Montefiore Hospital, Passavant Hospital, Presbyterian Hospital, Shadyside Hospital, St. Margaret's Hospital, McKeesport Hospital, Mercy Hospital and Western Psychiatric Institute and Clinic. (J. Ex. 2, paragraph 1).

Respondent Presbyterian Shadyside is a UPMC subsidiary that operates acute care hospitals, providing inpatient and outpatient medical care. (Compl., paragraph 2(a)). Presbyterian Shadyside employs more than 9,500 employees. (J. Ex. 2, paragraph 3). Respondent Magee, also a UPMC subsidiary, operates an acute care hospital providing inpatient and outpatient medical care. (Compl., paragraph 2(b)). Magee employs more than 2,500 employees. (J. Ex. 2, paragraph 4).

B. Respondents' Policies to Advance and Protect Patient Care, Privacy and Confidential Business Data

Presbyterian Shadyside and Magee maintain the Email and Technology Resources Policies at issue here. (J. Ex. 2, paragraph 6). Employees have access to these policies through the "UPMC Infonet," which is a password-protected website not accessible to the general public and used exclusively for Respondents' communications with employees. All employees are given passwords with which to access the Infonet. Respondents maintain business computers in certain departments and work areas of Respondents' facilities, from which employees may access these policies. (J. Ex. 2, paragraphs 7-9). Some employees are also assigned specific electronic communications equipment owned and provided by Respondents. (G.C. Exs. 7-9).

Electronic Mail and Messaging Policy

Respondents' Email Policy establishes guidelines for using Respondents' email and other electronic messaging systems. (See G.C. Exs. 4-6).[8] The policy guidelines explain that Respondents' electronic messaging systems are "provided to facilitate [Respondents'] business, education & research and/or patient care." (Id.) The guidelines also set forth numerous rules and prohibitions to restrict use, protect patient privacy, minimize distractions to patient care,

[8] G.C. Ex. 4 is the policy dated December 30, 2011 (Tr. 18); G.C. Ex. 5 is the policy dated October 26, 2012 (Tr. 19); and G.C. Ex. 6 is the policy dated December 7, 2012 (Tr. 19).

manage legal exposures, protect confidentiality of business and trade secret data, and manage productivity and costs. (Id.).

While the policy incorporates by reference other policies (which should be reviewed in construing the policy terms), the guidelines illustrate the intended uses of UPMC's electronic mail and messaging systems and state, in part, that:

> 9. UPMC Electronic Messaging Systems are provided to facilitate UPMC business, education & research and/or patient care.
>
> 10. UPMC electronic messaging systems may not be used:
>
> - To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or
> - To sponsor or promote a political party or candidate or to campaign against a political party or candidate; or
> - To solicit employees to support any group or organization, unless sanctioned by UPMC executive management; or
> - In a manner inconsistent with UPMC policies and directives, including, but not limited to policies concerning commercial communication, solicitation, sexual harassment, job performance and appropriate Internet use.
>
> 11. UPMC electronic messages are the property of UPMC. Electronic messages are presumed to be UPMC business related and give rise to no reasonable expectation of privacy. UPMC reserves the right to access and disclose messages sent over its electronic messaging systems.
>
> ***

(See G.C. Exs. 4-6).

Acceptable Use of Technology Resources Policy

From about October 10, 2011, Presbyterian Shadyside and Magee also have maintained an Acceptable Use of Information Technology Resources policy. (See G.C. Exs. 7-9).[9] The policy states that "[t]he UPMC information technology resources (computers, servers, Internet,

[9] G.C. Ex. 7 is the policy issued on October 10, 2011; G.C. Ex. 8 is the policy dated July 27, 2012; and G.C. Ex. 9 is the policy dated December 7, 2012. (Tr. 24).

email, etc.) shall only be used for supporting the business, clinical, research and educational activities of UPMC workforce members." (Id., page 1). All computer users are responsible for information security, ensuring patient confidentiality, and following the policy guidelines. (Id.)

The purpose of the policy is to establish guidelines for "[t]he acceptable use of ***UPMC information technology resources***," "[e]nsuring that appropriate security controls are implemented on ***UPMC information technology resources***," and "[e]nsuring that all software is appropriately licensed and used in a manner consistent with the software's license terms and conditions." (Id.) (emphasis added).

The requirements of the policy are numerous. Most relevant to this case are the following:

> 1. UPMC workforce members shall only use UPMC information technology resources for authorized activities. Authorized activities are related to assigned job responsibilities and approved by the appropriate UPMC management. To the extent that a UPMC information technology resource is assigned to an employee, the employee is permitted de minimis personal use of the UPMC information technology resource.
>
> "De minimis personal use" is defined as use of the information technology resource only to the extent that such use does not affect the employee's job performance nor prevents other employees from performing their job duties.
>
> In the personal use of UPMC information technology resources, the UPMC workforce member should have no expectation of privacy. Any information stored on the UPMC information technology resource is considered the property of UPMC, regardless of whether the information is stored as a file, in a log or cache, or otherwise recoverable using forensic techniques. Additionally, UPMC reserves the right to monitor the use of information technology resources (including logging information that was created, accessed or transmitted using the UPMC information technology resource).
>
> ***
>
> 15. UPMC's Internet access shall not be used:
>
> - for any inappropriate or illegal activities

- for file sharing services through peer-to-peer networks that enable downloading music and other copyright protected materials
- in a manner that is inconsistent with UPMC policies, standards or procedures

***

20. Without UPMC's prior written consent, a UPMC workforce member shall not independently establish (or otherwise participate in) websites, social networks (such as a face book, MySpace, peer-to-peer networks, twitter, etc.), electronic bulletin boards or other web-based application or tools that:

- Describe any affiliation with UPMC;
- Make references to UPMC patients;
- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;
- Make promises or commitments by UPMC; or
- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titled "Use of UPMC Name, Logo, and Tagline").

A UPMC workforce member who wants to establish a website, social network, electronic bulletin board or other web-based application or tools as described above, should contact the UPMC Strategic Research & Communications Division (See also UPMC Policy HS-PR1104 titled "Public Internet Communications").

Further, UPMC workforce members shall not independently establish local area networks or internet connections that directly connect to UPMC's corporate network.

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23. Sensitive, confidential, and highly confidential information transferred over the Internet shall use appropriate security controls and have the written approval of UPMC's Chief Information Officer or Privacy Officer.

***

(G.C. Exs. 7-9).

C. Respondents' Employees Have Locations and Opportunities to Engage in Section 7 Discussions and Solicitation

Although Respondents' policies restrict the use of company-owned email systems and equipment, employees of Presbyterian Shadyside and Magee have numerous opportunities and areas to engage in Section 7 discussions at work without violating any of the foregoing policies. Importantly, Respondents' policies do not prohibit all employee personal or Section 7 discussions during working time. Furthermore, Presbyterian Shadyside and Magee both provide employee-only break facilities and other non-work areas within and outside their facilities where employees who are not on working time are free to engage in Section 7 discussions and to solicit and distribute information. There are at least thirteen (13) break rooms at Magee and at least 95 locker rooms and/or staff lounges at Presbyterian Shadyside. (R. Exs. 1-2).

V. ARGUMENT

A. The ALJ's Decision Applies the Wrong Standard to Respondents' Policies

The Board's decision in Register-Guard provides the controlling standard for determining the lawfulness of policies that restrict employees' use of employer-owned email and technology resources. The ALJ erred in not applying this controlling precedent to find Respondents' policies lawful.[10]

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[10] Respondents except to the ALJ's rejection of Respondents' argument that the disputed rules must be examined by taking into consideration the special circumstances that exist in the hospital and healthcare environment. (AJLD p. 20-21 fn. 11). Board precedent applying the balancing of employer-employee rights in the hospital setting clearly recognizes the distinct property interests of such employers. As the Supreme Court said in NLRB v. Baptist Hospital, Inc., 442 U.S. 773 (1979):

> The Board bears a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique

1. The ALJ's Decision Improperly Analyzes Respondents' Policies as if They Were Rules of General Application

Although the ALJ's Decision initially acknowledges that policies that regulate the use of company equipment are unique and subject to a different standard,[11] the ALJ relies heavily on cases examining company policies that regulate employee conduct generally and that have nothing to do with the use of company equipment. The distinction between these standards is critical. When considering policies that regulate employee use of company equipment, the Board has acknowledged that employee Section 7 rights must give way to employer property rights, so long as the employer does not discriminatorily proscribe employee conduct along Section 7 lines. See Register-Guard, 351 N.L.R.B. at 1116 (finding that it is a "settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications.").

Despite this crucial distinction, the ALJ applied the standard from Lutheran Heritage, 343 N.L.R.B. 646, as followed in, among other cases, Costco 358 N.L.R.B. No. 106.[12] (ALJD p. 9

> considerations that do not apply in the industrial settings with which the Board is more familiar.

Id. at 790. The Court in Baptist Hospital (citing NLRB v. Beth Israel Hospital, 437 U.S. 483 (1978)), stated that "the Board must frame its rules and administer them with careful attention to the wide variety of activities within the modern hospital." Id. at fn. 16. The ALJ should have recognized the uniqueness of the setting involved in this matter.

[11] See ALJD at p. 10 (explaining that employer has greater discretion to prohibit protected activity when it involves the use of company equipment).

[12] The D.C. Circuit Court of Appeals has held the Costco decision invalid. Respondents have also asserted the Board's lack of quorum, as decided in Canning, as an affirmative defense in this case and for purposes of any future appeal. See, 705 F.3d 490. The Third Circuit Court of Appeals, within which this case arises, has also held that the Board lacks a proper quorum. NLRB v. New Vista Nursing and Rehabilitation, Appeal Nos. 11-3440, 12-1027, and 12-1936.

Further, the Costco decision is weak precedent, and the ALJ should not have relied on it for numerous reasons. First, the decision is an aberration, which may explain why the Acting

lines 28, 31, 35; p. 12 fn. 5; p. 14 lines 15-20). In Lutheran Heritage, the Board examined policies regarding general standards of employee conduct within and even away from the workplace, relating to, e.g., confidential information, solicitation, loitering, unlawful work stoppages, and harassment. What the Board did ***not*** consider in Lutheran Heritage is any policy that regulated the use of company equipment. In fact, this is true of the majority of cases upon which the ALJ's Decision relied.[13] These cases cited by the ALJ did not involve policies

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General Counsel asked for guidance on how to harmonize the decision with Register-Guard in this case. Second, the parties in Costco did not raise Register-Guard as the relevant standard for review, and there were no exceptions taken to the ALJ's application of a different standard. Costco, 358 N.L.R.B. at fn. 6 ("[N]o party argues [the] applicability" of Register-Guard). Accordingly, the part of the Costco decision on which the ALJ most heavily relies, footnote 6, was dictum. See Central Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (there is no requirement "to follow … dicta in a prior case in which the point [currently] at issue was not fully debated.").

[13] See, e.g., Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164 (2012) (ALJD p. 12 fn. 5; p. 18 fn. 8) (examining general rule instructing employees to treat others with "courtesy"); Claremont Resort and Spa, 344 N.L.R.B. 832, 832 (2005) (ALJD p. 12 fn. 5) (considering policy generally banning "negative conversations about [other employees] or managers"); Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998) (ALJD p. 9 lines 25, 45) (reviewing policies generally barring "conduct that does not support the [hotel's] goals and objectives" and "making false…statements," among other generally applicable policies); Farah Mfg. Co., 187 N.L.R.B. 601 (1970) (ALJD p. 9 line 50) (considering generally applicable solicitation and distribution rules); Univ. Med. Ctr., 335 N.L.R.B. 1318, 1320-22 (2001) (ALJD p. 12 fn. 5) (examining rule prohibiting "insubordination," among other generally applicable rules); American Cast Iron Pipe Co., 600 F.2d 132 (8th Cir. 1979) (ALJD p. 13 line 4; p. 18 line 29) (reviewing policies banning distribution without prior approval and generally prohibiting "false, vicious, or malicious" statements); Hyundai America Shipping Agency, 357 N.L.R.B. No. 80, slip op at 1 (2011) (ALJD p. 9 line 23; p. 13 line 6; p. 18 line 32) (examining generally applicable policies regarding disclosure of confidential information and barring "activities other than Company work during working hours"); Flex Frac Logistics, LLC, 358 N.L.R.B. No. 127, slip op. at 1 (2012) (ALJD p. 13 line 20) (considering rule generally barring dissemination of "confidential information"); S. Md. Hosp. Ctr., 293 N.L.R.B. 1209, 1222 (1989) (enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990)) (ALJD p. 18 fn. 8) (reviewing policy banning "malicious gossip or derogatory attacks on…Hospital representatives," among other generally applicable rules); Beverly Health and Rehab. Servs., 332 N.L.R.B. 347, 348, 356-57 (2000) (enfd. 297 F.3d 468 (6th Cir. 2002)) (ALJD p. 18 fn. 8) (considering policies generally banning false or misleading statements and refusal to cooperate with company investigations); Cincinnati Suburban Press, 289 N.L.R.B. 966, fn. 4, 975 (1988) (ALJD p. 18 fn. 8) (reviewing policies generally barring "false, vicious or malicious statements" and "unlawful, improper or unseeming conduct on or off [the job]");

regulating employee use of company equipment and, thus, they do not supply the legal standard applicable to the instant case. The ALJ's reliance on this law was in error.

2. Respondents' Email and Technology Resources Policies Must be Analyzed and Found Lawful Under Register-Guard

Respondents' policies should have been analyzed and found lawful under Register-Guard and other applicable Board precedent dealing with employees' use of company property for Section 7 activities. In Register-Guard, the Board, following a long line of Board and Supreme Court precedent, declared that:

> employees have no statutory right to use the Respondent's e-mail system for Section 7 purposes

Register-Guard, 351 N.L.R.B. at 1110. The Board noted further that it is a "settled principle that, absent discrimination, employees ***have no statutory right to use an employer's equipment or media for Section 7 communications***." Id. at 1116 (emphasis added). The Board succinctly stated that an employer's restrictions on the use of its equipment are lawful so long as the employer's policies do not "***[draw] a line*** between permitted and prohibited activities ***on Section 7 grounds***." Id. at 1118. The Board also clarified that "nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis." Id. Most importantly, the Board noted that:

> [T]he fact that [Section 7 activity] would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines.

Id.

In the recent Board decision DirecTV U.S. DirecTV Holdings, LLC, 359 N.L.R.B. No. 54 at fn. 2 (Jan. 25, 2013), the Board confirmed that Register-Guard permits an employer to

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Flamingo Hilton-Laughlin, 330 N.L.R.B. 287, 288 fn. 3, 291-92 (1999) (ALJD p. 19 fn. 9) (considering rule generally prohibiting dissemination of confidential information); Albertson's, Inc., 351 N.L.R.B. 254 (2007) (ALJD p. 19 fn. 9) (examining application of generally applicable confidentiality policy).

maintain an electronic communications policy allowing some personal use, but containing content-based restrictions on such use. Specifically, the Board, applying Register-Guard, held the following policy lawful:

> 2.4 Use of Company Systems, Equipment and Resources
>
> Occasional and reasonable personal use of company property is permitted. Examples of reasonable use include use that is moderate and appropriate in duration and frequency, ***use that does not involve obscene or questionable subject matter***, use that does not conflict with the company's Anti-discrimination/Harassment and/or conflict of interest policies, ***and use that is not in support of any religious, political, or outside organization activity***.

Id. at 29 (emphasis added). As DirecTV shows, an electronic communications policy is lawful under Register-Guard even if it does not prohibit all non-job use and restricts the content and nature of personal use of the employer's systems. Further, as DirecTV illustrates, vague and ambiguous terms are not the focus for review under Register-Guard, as the prohibition of "questionable subject matter" presented no problem in the Board's decision in DirecTV.

These principles are on point and dispositive here. The policies at issue are rules specifically governing employee use of employer-owned equipment, and the ALJ should have analyzed them as such rather than under the rubric for policies of general application. It has been clearly established – both in Register-Guard and in decades of other cases – that employees have ***no*** right to engage in any Section 7 activities using employer-owned equipment. Mid-Mountain Foods, Inc., 332 N.L.R.B. 229, 230 (2000) (no statutory right to use the television in the respondent's breakroom to show a prounion campaign video), enfd. 269 F.3d 1075 (D.C. Cir. 2001); Eaton Tech., 322 N.L.R.B. 848, 853 (1997) ("It is well established that there is no statutory right of employees or a union to use an employer's bulletin board."); Champion Int'l Corp., 303 N.L.R.B. 102, 109 (1991) (stating that an employer has "a basic right to regulate and restrict employee use of company property" such as a copy machine); Churchill's Supermarkets,

285 N.L.R.B. 138, 155 (1987) ("[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations . . ."), enfd. 857 F.2d 1474 (6th Cir. 1988), cert. denied 490 U.S. 1046 (1989); cf. Heath Co., 196 N.L.R.B. 134 (1972) (employer did not engage in objectionable conduct by refusing to allow prounion employees to use public address system to respond to antiunion broadcasts).

Further, while the ALJ took issue with Respondents' allowance of *de minimis* personal use, Board law is clear that a policy can be lawful even if it does permit some non-business or personal use of employer-owned equipment. The Board in Register-Guard noted that rules restricting employee use of the employer's equipment are lawful so long as the restrictions are not drawn "along Section 7 lines." For example, the "no-solicitation" rule that the Board upheld in Register-Guard could be read broadly to prohibit both protected and non-protected solicitations, however it was neutrally drafted and therefore lawful. Similarly, here, the parameters of permissible use set forth in Respondents' Email and Technology Resources Policies are neutrally drawn. In the Email Policy, Respondents have laid out a rule that prohibits employees from using employer-owned equipment in a way that may be "disruptive," "offensive," or "harmful to morale." Section 7 activity is not coterminous with activities that are disruptive, offensive, or harmful to morale. Accordingly, the Email Policy does not draw distinctions on Section 7 lines. Even assuming that these restrictions could be read broadly to proscribe Section 7 activity, which Respondents deny,[14] "the fact that [Section 7 activity] would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines." Register-Guard, 351 N.L.R.B. at 1118. Likewise, Respondents' Technology Resources Policy prohibits employees from using Respondents' equipment to "describe any affiliation with

[14] Respondents deny, for example, that a basic prohibition on "offensive" conduct could be understood to prohibit protected activity.

UPMC" or "disparage or misrepresent UPMC" or "make false or misleading statements regarding UPMC." Just because Section 7 activity conceivably could fall somewhere within the sphere of prohibited activities, the policy prohibitions are not drawn on Section 7 lines and thus are lawful.

In short, under Register-Guard, which supplies the appropriate standard, Respondents' policies are lawful. Therefore, the ALJ's Decision is incorrect and must be vacated.

B. Even Under the Lutheran Heritage/Costco Standard, the ALJ Should Have Found Respondents' Policies Lawful

Even if the analytical framework addressed in Lutheran Heritage and Costco was appropriate to apply, which Respondents dispute for the reasons explained above, Respondents' policies still should not have been found unlawfully ambiguous and/or overbroad. The ALJ's errors in purporting to apply the Lutheran Heritage/Costco framework are addressed separately for each policy below.

1. Respondents' Email Policy Should Have Been Found Lawful Under the Lutheran Heritage/Costco Standard

In pertinent part, the Email Policy provides:

> 1. UPMC Electronic Messaging Systems are provided to facilitate UPMC business, education & research and/or patient care.
>
> 2. UPMC electronic messaging systems may not be used:
>
> - To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or
> - To sponsor or promote a political party or candidate or to campaign against a political party or candidate; or
> - To solicit employees to support any group or organization, unless sanctioned by UPMC executive management; or
> - In a manner inconsistent with UPMC policies and directives, including, but not limited to policies concerning commercial communication, solicitation, sexual harassment, job performance and appropriate Internet use.

(See G.C. Exs. 4-6).

The ALJ takes issue with two aspects of the Respondents' Email Policy: (1) the policy's prohibition on use of Respondents' email and electronic messaging system in a manner that "may be disruptive", "offensive" to others, or "harmful to morale;" and (2) the policy's prohibition on use to solicit employees to "support any group or organization, unless sanctioned by UPMC executive management." (ALJD p. 12 lines 9-22; p. 15 lines 1-3). The ALJ's analysis and conclusions on these portions of the policy are erroneous.

First, contrary to the ALJ's Decision, the Email Policy's proscription of use of UPMC's electronic messaging systems in a manner that "may be disruptive, offensive to others, or harmful to morale" is lawful under Board law. Similar prohibitions of disruptive conduct, questionable subject matter, offensive conduct, or conduct that would harm employee morale have been upheld by the Board. See Fiesta Hotel Corp., 344 N.L.R.B. 1363 (2005) (upholding a policy prohibiting "conduct which is or has the effect of being injurious, ***offensive***, threatening, intimidating, coercing or interfering with [other employees]."); Tradesmen Int'l, 338 N.L.R.B. 460 (2002) (upholding a prohibition on "any conduct which is disloyal, ***disruptive***, competitive, or damaging to the company"); Albertson's, Inc., 351 N.L.R.B. at fn. 8 (upholding rule prohibiting "[o]ff the job conduct which has a negative effect on the Company's reputation or operation or ***employee morale*** or productivity"); DirecTV, 359 N.L.R.B. No. 54 at 29. The ALJ improperly ignored this relevant precedent in reaching his Decision.

Second, the ALJ's Decision also found the Email Policy unlawful because "solicitation is barred only if it seeks to have employees 'support any group or organization,' and even that is permitted if it is 'sanctioned by UPMC executive management.'" (ALJD p. 12 lines 11-12). However, the Board has long recognized the right of an employer to allow charitable organizations to solicit employees. Hammary Mfg. Corp., 265 N.L.R.B. 57 fn. 4 (1982) (allowance of "isolated 'beneficent acts'" or isolated instances of charitable solicitation lawful);

see also Zurn/N.E.P.C.O., 345 N.L.R.B. 12 (2005); Woodland Clinic, 331 N.L.R.B. 735 (2000). The same precedent should be applied here.

2. Respondents' Technology Resources Policy Should Have Been Found Lawful Under the Lutheran Heritage/Costco Standard

Respondents' Technology Resources Policy contains a number of restrictions that, when read in proper context, should reasonably have been construed as regulating business-related use of company technology. However, the ALJ read several provisions of Respondents' Technology Resources Policy in isolation and, as a result, found them unlawful. More specifically, the ALJ found unlawful the third, fourth, and sixth bullet points of a provision that precludes employees from "independently establish[ing] (or otherwise participat[ing] in) websites, social networks (such as face book [sic], MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

- Describe any affiliation with UPMC;
- Make references to UPMC patients;
- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;
- Make promises or commitments by UPMC; or
- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titled "Use of UPMC Name, Logo, and Tagline").

(G.C. Exs. 7-9).

Even under the Lutheran Heritage/Costco analytical framework, the ALJ should have read these provisions in the context of the entire rule, should not have read them in isolation, and should not have presumed that the rules were unlawful. See Comty. Hospitals of Central Cal., 335 F.3d 1079, 1088 (2003) (stating that allegedly unlawful language in a rule must be read in context); see also S.T.A.R., Inc., 347 N.L.R.B. 82, 83 fn. 3 (2006) ("When determining a rule's reasonable construction, the Board must refrain from reading particular phrases in isolation and must not presume improper interference with employee rights); Lutheran Heritage, 343 N.L.R.B.

at 646 ("In determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights"). If the ALJ had applied these rules of construction, he would have found that the provisions are lawful.

Here, the bullets appear in a list of content that UPMC warns employees not to "***independently*** establish (or otherwise participate in)." (G.C. Exs. 7-9). Following the provisions quoted above, the policy provides that "[a] UPMC workforce member who wants to establish a website, social network, electronic bulletin board or other web-based application or tools as described above, should contact the UPMC Strategic Research & Communications Division . . . ." (Id.) Therefore, the policy contemplates that some of the conduct discussed therein could be permissible, so long as it was sanctioned by the Respondents' *Strategic Research and Communications Division*. Under the "Scope" section, the rule specifically states that the policy "applies to all domestic UPMC entities, facilities, employees and individuals ***acting for or on behalf of UMPC***." (Id.) (emphasis added). These contextual clarifications make it apparent that the policy is intended to solely control communications that could reasonably be construed as being made on its behalf. An employer can lawfully regulate who speaks on behalf of the employer via social media or otherwise. See Crowne Plaza Hotel, 353 N.L.R.B. 382 (2008); see also N.L.R.B. Mem. OM 12-59 at 17 (May 30, 2012) (finding lawful a prohibition on employees representing "any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer]" and pages 19-23 (finding lawful a policy advising employees: "If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]"). Accordingly, the ALJ should have

read the Technology Resources Policy's restrictions in proper context and found them lawful in their entirety.

Also, while the ALJ analogized Respondents' policy to the electronic communications policy at issue in Costco, which prohibited all "statements posted electronically … that *damage* the Company …" Costco, 358 N.L.R.B., slip op. at 2, Respondents' policy is distinguishable. It focuses not on any statement that might "damage" the Company, but on statements that "[d]isparage or [m]isrepresent UPMC," as well as "false or misleading statements regarding UPMC." This language is both less vague and less restrictive than the broad language contained in Costco.

Further, Respondents' prohibition on non-business use of its logos or other copyrighted or trademarked materials is lawful under binding Board precedent. In Flamingo Hilton-Laughlin, 330 N.L.R.B. 287, the Board upheld an analogous work rule prohibiting employees from wearing company uniforms off company premises when not engaged in company business. The Board distinguished Pepsi-Cola Bottling Co., 301 N.L.R.B. 1008, 1019-1020 (1991) (which the ALJ relied on for this portion of the Decision) on the ground that the rule in Pepsi-Cola was promulgated in response to a union organizing drive and specifically stated that employees could not engage in union activities while wearing company uniforms. Here, however, Respondents' rule was not promulgated in response to a union organizing drive and, consistent with Flamingo Hilton-Laughlin, seeks only to prohibit use of Respondents' logos and other copyrighted or trademarked materials for non-business purposes in a manner that implies that the use is on behalf of Respondents. Therefore, the rule is lawful and the ALJ's reliance on Pepsi-Cola is misplaced. See General Motors, LLC, 07-CA-53570, 2012 WL 1951391 (NLRB Div. of Judges May 30, 2012) (upholding a work rule stating that employees should not "incorporate GM log[o]s, trademarks, or other assets in [their social media] posts.").

Additionally, the ALJ's Decision found the Technology Resources Policy to be unlawful on the ground that it allegedly "require[s] that employees request and receive permission in order to find out if Section 7 activity will be permitted" and because it purportedly "makes clear that all of the above limitations – on disparaging, misrepresenting, making false or misleading statements or using UPMC logos – can be engaged in by employees if they receive prior written permission from UPMC to do so." (ALJD p. 19 lines 30-34). This overly literal reading of the policy borders on absurd. It defies common sense to suggest that UPMC would give prior written permission to "misrepresent[]" or "mak[e] false or misleading statements" about Respondents, whether Section 7 related or not. As such, this additional aspect of the ALJ's Decision is incorrect.

Finally, the ALJ also opined that the Technology Resources Policy is unlawful because it states: "***Sensitive, confidential, and highly confidential*** information" transferred over the Internet shall use appropriate security controls and have "the written approval of UPMC's Chief Information Officer or Privacy Officer." (ALJD p. 19 lines 41-44) (emphasis added). In interpreting this policy, the ALJ refers to other policies while ignoring contextual language contained within the same policy. The policy makes clear that the restriction is strictly for information "classified" by Respondents as "sensitive, confidential, or highly confidential" such that the information may be subject to certain protective measures including encryption, authentication, and placing secure servers on a secure network. (G.C. Exs. 7-9). There is nothing contained in this policy to suggest that those terms are intended to encompass wages or working conditions or that employees would read this policy as prohibiting them from engaging in any protected activity.

In short, even if the ALJ was correct in applying the Lutheran Heritage/Costco analytical framework, the ALJ's Decision failed to properly analyze Respondents' Policies. Accordingly, his Decision should be overturned.

C. The ALJ's Decision Improperly Relies on Precedent Voided by the Courts

In addition to the above errors, the ALJ's Decision repeatedly relies upon cases issued by the Board during periods in which the Board did not have a statutorily-required quorum.[15] Reliance on these decisions is, of course, misplaced and Respondents except to the reference to and reliance on them in the ALJ's Decision. Indeed, in Canning, 705 F.3d 490 at 498-515, the United States Court of Appeals for the District of Columbia Circuit held: (1) the Recess Appointments Clause of the United States Constitution applies only to intersession recesses, not to recesses within a session; (2) the Clause authorizes the President to only fill vacancies that arise during such a recess and not vacancies that arise prior to the recess; and (3) the President's power to appoint an officer to fill such a vacancy expires at the end of the recess in which the vacancy arose. The Court of Appeals for the Third Circuit, the Circuit within which this case arose, agreed with the Canning decision in a recent precedential opinion, concluding that the Board lacked a statutorily-required quorum. New Vista Nursing, Nos. 11-3440, 12-1027, 12-1936. The Courts of Appeals vacated Board orders and determined that the Board lacked the quorum necessary to issue such orders. Further, the Courts of Appeals concluded that the Board

[15] See J.W. Marriot Los Angeles at L.A.-Live, 359 N.L.R.B. No. 8 (2012) (ALJD p. 8 line 32; p. 15 lines 25, 32; p. 16 lines 14, 16; p. 20 line 10); Hyundai, 357 N.L.R.B. No. 80 (2011) (ALJD p. 9 line 23; p. 13 line 6; p. 18 line 32); DirecTV, 359 N.L.R.B. No. 54 (2013) (ALJD p. 9 line 44; p. 13 line 7; p. 14 fn. 6; p. 18 line 33); Costco, 358 N.L.R.B. No. 106 (2012) (ALJD p. 11 line 8; p. 13 line 35; p. 14 lines 13, 15, fn. 6; p. 15 line 18; p. 18 line 23; p. 19 lines 11, 28; p. 20, line 7); Karl Knauz Motors, 358 N.L.R.B. No. 164 (2012) (ALJD p. 12 fn. 5; p. 18 fn. 8); Flex Frac Logistics, LLC, 358 N.L.R.B. No. 127 (2012) (ALJD p. 13 line 20); Center for Social Change, Inc., 358 N.L.R.B. No. 24 (2012) (ALJD p. 21 fn. 11); Orni 8, LLC and Opuna, LLC, 359 N.L.R.B. No. 87 (2013) (ALJD p. 21 fn. 11).

lacked a quorum since March 2010 (Member Becker was invalidly appointed to the Board during the March 2010 intrasession break) and in all decisions on or after January 4, 2012 (Members Flynn, Griffin and Block were invalidly appointed to the Board on January 4, 2012).

It follows, therefore, that the decisions relied upon in the ALJ's Decision and listed above, all decided after January 4, 2012, were made by a Board with no authority to issue such decisions. See New Vista Nursing, Nos. 11-3440, 12-1027, 12-1936; Canning, 705 F.3d 490 at 498-515; see also New Process Steel, 130 S. Ct. 2635. Accordingly, Respondents except to the ALJ's Decision to the extent it relies on these decisions.

D. The ALJ's Decision Improperly Relies Upon Evidence Not of Record

The ALJ's Decision concludes that Respondents' Technology Resources Policy would "reasonably chill protected employee discussion such as on wages, personnel matters, benefits and other terms and conditions of employment." (ALJD p. 19 lines 41-45). However, there is an insufficient factual basis for this finding. Beginning on page 20, the ALJ's Decision considers purported language from Respondents' "Confidential Information Policy" in the legal analysis of the policies at issue here. The decision notes that "as record evidence *suggests*" that confidential information is defined "in other employment rules" to include "Compensation Data," "Staff Member (Co-Worker) Data," and "Policies and Procedures." (ALJD p. 20 line 1-3) (emphasis added). No "Confidential Information Policy" is at issue in this case and, aside from a fact gleaned from Joint Exhibit 4 indicating that "Confidential Information" policies were part of a settlement between the Region and Respondents, no record evidence was offered or taken during the hearing regarding any "Confidential Information Policy."[16] (J. Ex. 4). Any reliance upon

[16] In footnote 10, the ALJ's Decision reveals that "[t]he December 13, 2012 consolidated complaint" is the apparent source of the "evidence on the record" relied upon to draw factual conclusions about a "Confidential Information Policy." (ALJD p. 20 fn. 10). The ALJ undertook a strained analysis of how the Respondents' alleged failure to "neither admi[t] or

bare and unproven allegations (which are no longer at issue) from an earlier version of the complaint[17] as a foundation for an adverse finding against Respondents is clear error.[18]

A. The ALJ Improperly Denied UPMC's Motion for Judgment on the Pleadings

UPMC filed a Motion for Judgment on the Pleadings on February 19, 2013. In its motion, UPMC argued that the second amended complaint contained no substantive allegations regarding UPMC. In his decision, the ALJ finds that there are no allegations in the Second Amended Complaint that UPMC engaged in any unfair labor practices. (ALJD p. 22 lines 13-14). Without an allegation of wrongdoing against UPMC, there is no basis to force UPMC to remain as a respondent in this case. It follows, then, that the ALJ's denial of this motion should be reversed.

VI. CONCLUSION

For all of the foregoing reasons, the decision and recommended Order of the Administrative Law Judge should not be upheld by the Board to the extent outlined by Respondents' Exceptions and this Supporting Brief, and the complaint against Respondents should be dismissed in its entirety.

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den[y]" an allegation in a complaint from another case somehow deems the allegation admitted for purposes of this case. (ALJD p. 20 fn. 10). In fact, no credible evidence on a "Confidential Information Policy" exists in this case.

[17] See Baptist Hospital of East Tennessee, 351 N.L.R.B. 71, 72 (2007) ("It is not the Board's role to attempt to piece together theories from ambiguous complaint references and random statements during the hearing.").

[18] Additionally, the ALJ erred in reconsidering and overturning an evidentiary ruling that was made during the February 20, 2013 hearing in this matter. (ALJD p. 16 fn. 7). The ALJ correctly ruled during the hearing that extraneous documents purportedly maintained by Respondents on a website accessible to employees had no bearing on the facial validity of the policies at issue and therefore were irrelevant and inadmissible. (Tr. 34-38). The Board should reject the ALJ's reversal of this ruling.

Respectfully submitted,

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Dated: May 17, 2013

CERTIFICATE OF SERVICE

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