

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

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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

Case 06-CA-081896

Administrative Law Judge  
DAVID I. GOLDMAN

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**BRIEF IN SUPPORT OF CHARGING PARTY'S LIMITED EXCEPTIONS**

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## **I. INTRODUCTION**

This brief is submitted in support of the Limited Exceptions of the Charging Party, SEIU Healthcare Pennsylvania (“Union”) to the decision of Administrative Law Judge (ALJ) David Goldman issued on April 19, 2013.<sup>1</sup> Charging Party also joins in the Argument in Support of the Exceptions filed by the Acting General Counsel on May 16, 2013.

The issue presented by the Union’s limited exceptions is whether Respondents UPMC and its subsidiaries, UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC (collectively, “UPMC” or “Hospital”) violated §8(a)(1) of the Act in maintaining those provisions of its Solicitation, Electronic Mail and Messaging and Acceptable Use of Information Technology Resources Policies barring the use of the Hospital’s email and electronic messaging systems for all non-work solicitation, while permitting other non-work use of the systems. Also at issue is whether a rule requiring the reporting of such “unauthorized use” of the email system is unlawful.

To the extent this case is governed by the Board’s prior decision in *The Guard Publishing Co. (Register Guard)*, 351 NLRB 1110 (2007), the Union contends that case was wrongly decided and should be overruled.

## **II. SUMMARY OF ARGUMENT**

Where the Employer’s Solicitation Policy prohibits *any* non-business solicitation via the UPMC email system, but allows other non-business, non-solicitation emails, such a comprehensive restriction on personal communications among employees in the workplace presumptively violates §8(a) (1) of the National Labor Relations Act. To the extent that Respondents’ other policies, including Electronic Mail and Messaging and Acceptable Use of

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<sup>1</sup> The Board should sustain the remainder of ALJ Goldman’s Decision for all the reasons argued by the Acting General Counsel and the Union below.

Information Technology Resources Policies, similarly restrict employees' use of the electronic messaging systems, those policies likewise violate the Act on the same basis.<sup>2</sup> This is because §7 of the Act gives employees the right to form unions and engage in concerted activity for their mutual self-interest. Employee-to-employee communications in the workplace are essential to realization of these rights. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798 (1945). Decades of Supreme Court precedent have established that employee rights under §7 ordinarily trump an employer's general management interest in preventing non-business related communication in the workplace. See generally, *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491-492 (1978). The Board's decision in *The Guard Publishing Co. (Register Guard)*, 351 NLRB 1110 (2007), was wrongly decided and should be overruled.

### **III. STATEMENT OF FACTS**

The Respondent's Solicitation Policy states in pertinent part:

No staff member may distribute any form of literature that is not related to UPMC business or staff duties at any time in any work, patient care, or treatment areas. Additionally, **staff members may not use UPMC electronic messaging systems to engage in solicitation** (see also Policy HS-IS0147 Electronic Mail and Messaging).

[Second Amended Complaint ¶¶8, 9; General Counsel (GC) Exhibits 2, 3 (emphasis added)].

Similarly, the Electronic Mail and Messaging Policy states that, "UPMC electronic messaging systems may not be used ... *to solicit employees to support any group or organization, unless sanctioned by UPMC executive management...*" [Second Amended Complaint at ¶10,(emphasis added)]. The Acceptable Use of Information Technology Resources

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<sup>2</sup> ALJ Goldman found the Electronic Mail and Messaging and Acceptable Use of Information Technology Resources Policies to be unlawful and violative of Section 8(a)(1) on other grounds. See, ALJD at 12-16; 17-20. We support this portion of the ALJD and do **not** except to it. We contend, however, that the ALJ erred in failing to find these policies unlawful on the additional basis that employees should have a statutory right to use their employer's email systems for §7 purposes.

Policy states that UPMC information technology resources “shall only be used for supporting the business, clinical, research and educational activities of UPMC workforce members” and “for authorized activities” but permits *de minimis* personal use. [*Id.* at ¶11].

The Solicitation Policy gives examples of “solicitation” as including “solicitation for raffles, charity drives, sale of goods, proposing or procuring membership in any organization, [and] canvassing...” [GC Exhibits 2, 3]. The Policy further requires employees to report violations of the Policy to a supervisor and the Human Resources Department:

All situations of unauthorized solicitation or distribution must be immediately reported to a supervisor or department director and the Human Resources Department and may subject the staff member to corrective action up to and including discharge.

[Second Amended Complaint, ¶¶8, 9].

#### **IV. STATEMENT OF THE CASE**

ALJ Goldman found the UPMC Solicitation Policy to be lawful because it “bars all non-work solicitation. Other non-work use of the email system is not barred, but the line is drawn based on solicitation/non-solicitation generally, not Section 7 lines. Under *Register Guard*,<sup>3</sup> the solicitation policy is lawful. It bars no Section 7 activity that the Board has found takes precedence over an employer’s assertion of a property right to bar generally non-work solicitation.” [ALJD 11, Lines 10-14]. In reaching this conclusion, ALJ Goldman noted that he was constrained to follow Board precedent in *Register Guard*. [ALJD at 11, fn. 4].

The ALJ similarly rejected the Union’s and Acting General Counsel’s arguments below that the Electronic Mail and Messaging and Acceptable Use of Information Technology Policies

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<sup>3</sup> *Register Guard*, 351 NLRB 1110, 1116-17 (2007), *enfd. denied in part*, 571 F.3d 53 (D.C. Cir. 2009), *rem. and supp.*, 357 NLRB No. 27 (2011), held that that across-the-board prohibitions on non-business use of the employer’s e-mail system are lawful because employees do not have a statutory right to use their employer’s e-mail system for §7 purposes and the employer has a legitimate property interest to protect.

were unlawful because employees have a statutory right to use their employers' email systems for §7 purposes, ruling that he was "bound to accept the *Register Guard* precedent." [ALJD at 20, fn. 11].

However, ALJ Goldman also correctly recognized that,

[T]he right of employees to self-organize and bargain collectively established by § 7 of the [Act] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). As the Supreme Court has recognized, the workplace "is a particularly appropriate place for the distribution of § 7 material, because it 'is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'" *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978), quoting *Gale Products*, 142 NLRB 1246 (1963).

[ALJD at 8].

ALJ Goldman further recognized that, "in considering the propriety of employer rules limiting or governing employee communication in the workplace, the Board balances the Section 7 rights of employees and the rights and interests of employers. *Republic Aviation*, *supra* at 797-798." [*Id.* at 8]. However, he was critical of the manner in which *Register Guard* changed the analysis of Section 7 rights:

When a workplace rule involves the employees' right to use a particular item of employer equipment in Section 7 communications, and with regard to email and electronic messaging systems in particular, the *Republic Aviation* balancing that governs face-to-face communication has been redrawn – indeed discarded—in favor of employer property rights and at the expense of employee rights under the Act.

[ALJD at 10].

ALJ Goldman also analyzed the reporting requirement of the UPMC Solicitation Policy. He found that it was "reasonably tailored to a requirement that substantive violations of the

solicitation policy be reported” because “this is a lawful policy under Register Guard...and it is not unlawful to require employees to report violations.” [ALJD at 11, Lines 33-35].

## **ARGUMENT**

### **I. EXCEPTIONS 1-3, and 7-11 – RESPONDENTS’ RULES BARRING NON-WORK USE OF THE EMAIL AND ELECTRONIC MESSAGING SYSTEMS FOR SOLICITATION**

The Charging Party excepts to the ALJ’s failure to find that UPMC’s maintenance of the provision of the Solicitation Policy barring employees’ use of the electronic mail and messaging systems for non-work solicitation was unlawful, in light of the Acting General Counsel’s position that *Register Guard* should be overruled. The Employer’s other policies restricting use of its email systems for non-work solicitation (Electronic Mail and Messaging; Acceptable Use of Information Technology Resources) are equally unlawful because employees have a statutory right to use these messaging systems for §7 purposes.<sup>4</sup> The Policies’ blanket prohibition unduly restricts union and protected concerted activities and must, therefore, be found unlawful and ordered rescinded.

The Union joins with the Acting General Counsel’s position that if an employer bans use of its electronic mail and messaging systems to support *all* outside organizations, the employer violates Section 8(a)(1) of the act because that rule reasonably tends to interfere with employees’ right to engage in Section 7 activity.<sup>5</sup> Under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n. 10 (1945), employees presumptively have a statutory right to use their

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<sup>4</sup> The ALJ did find the Electronic Mail and Messaging and Acceptable Use of Information Technology Resources Policies to be unlawful on other grounds, and the Union supports, and does not except to that finding. Our exceptions seeking overruling of *Register Guard* do encompass any failure by the ALJ to conclude that any aspects of other rules that would operate (alone or in conjunction with other rules) to ban employees from using employer email/messaging systems for solicitation (self-organizing and/or union) are unlawful for the same reasons and to the same extent that we argue the Solicitation Rule itself must be found unlawful under *Republic Aviation*.

<sup>5</sup> See Acting General Counsel’s Post-Hearing Brief, filed March 27, 2013 at pp. 9-2; Acting General Counsel’s Argument in Support of Limited Exceptions at pp.2-10.

employer's communications systems, subject to their employer's need to maintain production and discipline. Therefore, a rule that bans employees' personal use of such company messaging systems without a showing of special circumstances interferes with employees' Section 7 communication at work and is unlawful.

The rules at issue here prohibit employee use of workplace electronic communications systems to engage in all types of solicitation, including "procuring membership in any organization." Employees would most reasonably view the ban as including unions, and, therefore, that prohibition clearly interferes with employees' rights to organize. Because no exception is made or can be inferred from the language of the rule, Respondent's maintenance of these rules violates §8(a)(1) of the Act, and the ALJ's finding to the contrary is erroneous. Charging Party joins in the Exception of the Acting General Counsel on this point.<sup>6</sup>

**A. *Register Guard* Was Wrongly Decided and the *Republic Aviation* Standard Should Be Applied to Email Use**

The Employer's policies restrict the use of e-mail for solicitation without a showing of special circumstances, thereby interfering with employees' §7 communications at work, and are therefore facially unlawful. *Register Guard* was wrongly decided and should be overturned. The *Republic Aviation* standard should be applied instead to the circumstances presented here.

**1. *No Restriction May be Placed on Employees' Right to Discuss Self-Organization Among Themselves, Unless the Employer Can Demonstrate that a Restriction is Necessary to Maintain Production or Discipline.***

Employees' §7 right to communicate with each other in the workplace about the terms and conditions of their employment is governed by a long line of Supreme Court cases. In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Supreme Court articulated the over-

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<sup>6</sup> The Union further joins in and adopts the Acting General Counsel's position that in overruling *Register Guard*, the Board should overturn that decision's legally erroneous definition of discrimination. See Acting General Counsel's Argument in Support of Limited Exceptions at pp. 10-14.

arching legal principle, determining that employees presumptively have a statutory right to use their employer's communication systems, subject to the employer's need to maintain production and discipline. The Court found that the Board's presumption prohibiting an employer's ban on union solicitation during non-work time at the plant, absent special circumstances, was rationally based on the Board's appraisal of the normal employee and employer interests at stake in industrial establishments. [*Id.* at 803-05]. In balancing these rights, the Court rejected a "rigid scheme of remedies," instead favoring flexibility within appropriate statutory limits to accomplish the "dominant purpose of the legislation ... the right of employees to organize for mutual aid without employer interference." [*Id.* at 798].

That principle was further developed in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), where the Court reasoned that "accommodation between [employee-organization rights and employer-property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." [*Id.* at 112]. The Court concluded that:

No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline."

[*Id.* at 113].

More specifically, as the Court recognized in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 573 (1978), since "employees are already rightfully on the employer's property, . . . it is the employer's management interests rather than its property interests that primarily are implicated" by employee workplace communications. Therefore, to justify suppression of employees' workplace communications, an employer must "show that its management interests would be prejudiced" to a sufficient degree to justify the suppression. [*Id.*]

In *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 495, 501-502 (1978), the Supreme Court approved a qualified extension of the rule in *Republic Aviation* to hospitals. The *Beth Israel* Court emphasized the importance of balancing legitimate §7 interests with management interests, concluding that the Board's presumption permitting solicitation in areas other than immediate patient-care areas was appropriate where the cafeteria was the "natural gathering place" for employees and the risk of disruption to patient care was relatively low. *Id.* at 490, 495, 504-05.

**2. *Employees Have a Cognizable § 7 Interest in Engaging in E-mail Communication.***

In the last decade, the emergence and widespread use of e-mail has transformed the manner in which many employees interact in the workplace. See *Register Guard*, 351 NLRB 1110, 1121 (2007) (Dissent of members Liebman and Walsh, addressing how "email has revolutionized communication both within and outside the workplace"). In many workplaces technology has replaced face-to-face communication in a break room, cafeteria, or other traditional gathering place as the preferred method of communication. As employees increasingly use email communication to work, email has likewise become the "new water cooler" for non-work-related communication.

Because employees have a §7 right to communicate at work, employees who have access to and utilize electronic communication in their workplaces – such as the UPMC employees here – have a §7 right to communicate through email. The right of employees to self-organize and collectively bargain "necessarily encompasses the right to effectively communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital*, 437 U.S. at 491-92. See also, *Republic Aviation Corp.*, 324 U.S. at 797-98. This is because §7 rights are only effective to the extent that employees are able to learn about the advantages and disadvantages of

organization from others. *Beth Israel*, 437 U.S. at 492 fn. 9, citing *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972).

**3. UPMC's Management Interests (and Not Property Interests) Are Implicated in the Choice of Non-Business Matters About Which Employees May Communicate Via Email.**

UPMC's Solicitation (and Electronic Mail and Messaging and Acceptable Use of Information Technology Resources) Policies permit employees to use the company email system for some non-business purposes. [ALJD at 11, Line 10-11; page 12 at Lines 3-16; page 17, Lines 3-10]. An employer does not have the right to ban e-mail solicitation simply because the computer system or computer from which employees send or receive e-mail may be owned by the employer; ownership is not relevant where the organizational activity of employees already rightfully on the employer's property is involved. *Republic Aviation*, 324 U.S. at 803 fn. 8 ("[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining"). Where an employer allows employees to use the company's email system to communicate with each other on non-business matters generally, the "employees are already rightfully on the employer's property" in the sense of having been allowed access to the email system. *Eastex*, 437 U.S. at 573. Further, "[e]ven if the mere distribution by employees of [email messages] protected by § 7 can be said to intrude on [the employer's] property rights in any meaningful sense, the degree of intrusion does not vary with the content of the [e-mail]." *Id.* Therefore, "it is the employer's management interests rather than its property interests that primarily are implicated" in the choice of non-business matters about which employees may communicate via e-mail. *Id.*

**4. UPMC's Email Restrictions Against Soliciting Violate §8(a)(1) in the Absence of Special Circumstances.**

Employer rules that categorically prohibits employees from using the workplace email system to communicate with each other about union or other concerted, protected matters is unquestionably a “restriction . . . on the employee’s right to discuss self-organization among themselves.” *Babcock & Wilcox*, 351 U.S. at 113. Such a rule violates § 8(a)(1)’s prohibition on employer “interfere[nce] with . . . the exercise of the rights guaranteed in § 7,” 29 U.S.C. § 158(a)(1), “unless the employer can demonstrate that a restriction is necessary to maintain production or discipline,” *Babcock & Wilcox*, 351 U.S. at 113 (emphasis added).<sup>7</sup> At the same time, because “time outside working hours . . . is an employee’s time to use as he wishes without unreasonable restraint, . . . a rule prohibiting union solicitation by an employee outside of working hours, although on company property . . . must be presumed to be an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.” *Republic Aviation*, 324 U.S. at 803-804 n. 10, quoting *Peyton Packing Co.*, 49 NLRB 828, 843-844 (1943).

Under the Supreme Court’s governing principles, UPMC cannot justify suppressing such workplace email communications simply by demonstrating that the controlling rule is non-discriminatory. Union-related matters enjoy a privileged status under the NLRA, and the employees have an affirmative right to discuss such matters, even if they are barred from discussing analogous topics that are not subject to § 7 protection. *Beth Israel*, 437 U.S. at 491-492.

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<sup>7</sup> On the other hand, a general nondiscriminatory rule that limits employees’ non-business communications to non-work time is valid on its face, and such a rule may be applied to email communications as to other communications. This follows from the recognized principle that “[w]orking time is for work,” so that “a rule prohibiting union solicitation during working hours . . . must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose.” *Republic Aviation*, 324 U.S. at 803 n.10, quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943). Here, there is no such across-the-board prohibition.

To justify restrictions on employee e-mail communications concerning union or other concerted, protected matters during non-work time, the Employer must show “special circumstances” that “make the rule necessary.” Here, UPMC presented no evidence whatsoever to justify a finding of special circumstances supporting the ban on using electronic communications for solicitation. Notably, it did not put on any evidence showing that its management interests were burdened or adversely affected by employee usage of email to communicate about self-organization. While UPMC’s counsel argued that the “unique circumstances of the healthcare setting” justified its rules, there was no evidentiary explication of those “unique circumstances.” [See Hrg. Tr. at 14-16; ALJD at pp. 20-21, fn. 11].

No witnesses were presented by UPMC to attest to the “risks of spam,” or of potential harm to patients. No evidence was adduced concerning a special burden to the Hospital’s email system or servers. Nor was any evidence presented showing that “email clutter” presented a dangerous “distraction”. Indeed, such evidence would have been hard to come by, since employees are currently and unquestionably permitted personal use of the email system, so long as it does not affect their work performance. The dangers, if any, of “spam,” “distraction” and “email clutter” are already present in this workplace, and are addressed by the reasonable limitation already in place.

The ALJ correctly rejected this “unique circumstances” argument, noting that, “under *Register Guard*, Respondents are under no requirement to permit any non-work employee use of email. But when they do, their discretion to bar Section 7 activity, or only Section 7 activity, is not unfettered. Respondents make no case why non-work non-Section 7 activity is less distracting in a hospital setting than Section 7-related use of electronic communications.” [ALJD at 201-21, fn. 11].

## **II. EXCEPTIONS 4, 5, AND 6 – RESPONDENT’S RULE REQUIRING REPORTING OF UNAUTHORIZED SOLICITATION**

The ALJ erred in finding that the provision of UPMC’s Solicitation Policy requiring the reporting of “unauthorized solicitation or distribution” is lawful because the underlying policy barring email solicitation was lawful under *Register Guard*. [ALJD at p. 11, Lines 34-37].

Such a reporting requirement encouraging employees to report to management the possible union solicitational activities of other employees violates §8(a)(1) because it has the potential to chill employees from engaging in protected activities. *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998). Accordingly, in overruling *Register Guard* and reversing the ALJ’s findings and conclusions predicated on *Register Guard*, the Board should explicitly reverse the ALJ’s determinations with respect to the required reporting of prohibited solicitations and hold that this provision of the Solicitation Policy, too, is unlawful to the extent that the underlying provisions of the Solicitation Policy are unlawful.

### **CONCLUSION**

Based on the foregoing argument and authorities, the Charging Party’s Limited Exceptions should be granted. Otherwise, the Decision should be affirmed, and the Board should issue a recommended order requiring Respondents to cease and desist from its unlawful conduct and affirmatively directing them to remedy all their unfair labor practices found in this case.

Dated: May 17, 2013

Respectfully submitted,

/s/ Betty Grdina

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Brief in Support of Charging Party's Limited Exceptions in the above captioned case has been served by email on the following persons on this 17<sup>th</sup> day of May 2013:

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