

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION**

and

CASE 08-CA-090132

**THE UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 75**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE MARK CARISSIMI'S DECISION AND BRIEF IN
SUPPORT OF EXCEPTIONS**

EXCEPTIONS

Counsel for the Acting General Counsel Gina Fraternali excepts to the following findings of facts and conclusions of law by Administrative Law Judge Mark Carissimi in his Decision and Order which issued on June 4, 2013 (JD-38-13).¹

First, the ALJ erred by failing to reach a Conclusion of Law that Respondent violated Section 8(a)(1) of the Act and to issue an appropriate remedial order with respect Respondent's promulgation and maintenance of Conflict of Interest and Unsatisfactory Conduct work rules and policies. (ALJD, pp. 15-20)

Second, the ALJ also erred by failing to draw appropriate conclusions of law and to recommend the appropriate remedy for the maintenance of its rules prohibiting employees from using the name and emblem of the American Red Cross as set forth in Complaint paragraph 8(A)(i)[a.] and Paragraph (a) of General Counsel's Exhibit 18, which was amended to the

¹ Judge Carissimi will be referred to as "ALJ". ALJD p. __: __ will indicate the page and line numbers in the ALJ's Decision, JD-38-13.

complaint at trial. These rules prohibiting the use of Respondent's name and emblem are independent Section 8(a)(1) violations that are fully established by the record facts and evidence.

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

I. **EXCEPTION 1: RESPONDENT'S CONFLICT OF INTEREST AND UNSATISFACTORY CONDUCT WORK RULES AND POLICIES VIOLATE SECTION 8(A)(1) OF THE ACT**

The ALJ erred in his conclusion that Respondent's rules prohibiting conduct contrary to the Respondent's best interests, prohibiting employees from "conflicts of interests" and prohibiting "unsatisfactory conduct" do not violate Section 8(a)(1) as overly broad and unlawful rules. (ALJD, p. 17:2-8; p. 19:46-48, p. 20:1-2) In making his erroneous finding, the ALJ found that when these unlawful rules are read in the context of Respondent's compliance and ethics handbook, the rules are not overbroad. The ALJ also found that the history Respondent's "goodwill" to organized labor and the satisfactory relationship between the Respondent and the Union had some probative value in finding these rules to be lawful.

The ALJ's findings with regard to these rules must be overruled. The record evidence does not support the ALJ's finding that these rules are read by employees in the context of this independent compliance and ethics handbook. Furthermore, the suggested "goodwill" and benevolent relationship between the Respondent and the Union, which the record shows is not the reality, has little probative value in finding these rules to be lawful.

The ALJ found that the "illustrative examples contained in the Respondent's compliance and ethics handbook establish that the Respondent is directing its employees to avoid conflicts of interest involving possible personal or financial gain. It also cautions employees against acting in competition with the interests of the Respondent." (ALJD, p. 18:8-11)

It is uncontroverted that Respondent, in its normal course of business, fails to notify employees of its compliance and ethics handbook. (R. 7) The compliance and ethics handbook is not referenced in any of Respondent's other policies or handbooks which are issued to employees. The employee handbook (GC 8), American Red Cross Code of Business Ethics and Conduct (GC 18) and new hire checklist (R. 9) are bereft of any reference to it. Notably, Respondent's employee handbook states that it contains the information for employees about essential policies and makes reference to other handbooks and policies, including EEOC and Diversity, Affirmative Action, Sexual Harassment, Telework Program, Outside Employment, and Military Leave. (GC 8, at p. 5, 8) Furthermore, none of Respondent's new employee training programs and new employee orientation sessions provides any instruction, guidance or even mention of this compliance and ethics handbook. (R. 9)

The record clearly shows that Respondent requires that employees are aware of and informed about some of its policies. It requires that employees sign a document to confirm that they have read specific policies. (R. 9 at 1, 18) Those policies include Respondent's Employee Handbook, employment eligibility verification, Code of Conduct, Confidential and Intellectual Property agreement, employee emergency contact information, voluntary medical form, union contract and membership form, tax forms, and signature forms. (R. 9 at 1) However, the Respondent does not require employees to confirm that they have read its compliance and ethics handbook. (R. 7)

The new hire checklist includes a signature block for employees to certify that they were provided with an overview of the following policies: dress code, harassment-free work environment, drug and alcohol policy, violence free work environment, workplace safety and security, performance management payroll, recognition, HR Direct, clock in procedures, absence

notification, benefits, human resource, payroll and employment verification information. (R. 9 at 1)

There is no record evidence to show that employees are aware of the compliance and ethics handbook. In this connection, when Respondent discharged two employees for allegedly violating Respondent's ethics, code of conduct and confidentiality policies, their termination letters did not mention the compliance and ethics handbook. (GC. 20, 21)

Thus, the record does not support the ALJ's finding that "employees would not reasonably construe the challenged language to refer to union or protected concerted activity" because employees would read the language in the context of the compliance and ethics handbook. (ALJD, 18: 7-8) Respondent failed to meet its burden to show that its rules are lawful.

The ALJ also found that given Respondent's "long history of collective bargaining with the Union and its cooperative efforts with the labor community in the Toledo area, it is very unlikely that employees would perceive the challenged provisions as interfering with their Section 7 rights." (ALJD, p. 18:17-20) The relationship between the Union and the Respondent in collective bargaining and in the community has no probative value in analyzing whether Respondent's work rules restrict Section 7 rights. Indeed, improper motive is not a necessary element of an 8(a)(1) violation. See, Tenneco Automotive, Inc., 357 NLRB No. 84 slip op. at 7 (2011); Windsor Convalescent Center of North Long Beach, 351 NLRB 957, 987 (2007).

The ALJ gives undue weight to Respondent's Vice President of Human Resources and Labor Relations Keith Sherman testimony that Respondent and the Union have had a 40-year history of collective bargaining and that 25% of the American Red Cross' rank-and-file

employees are unionized. (Tr. 150-152; ALJD, p.18:13-15) The ALJ stated, “[r]espondent has a labor liaison representative who coordinates the Respondent’s activities with that of the labor community to engage in blood drives.” (Tr. 151; ALJD, p. 18:15-18) It is unclear how this shows that “a reasonable employee reading the challenged provisions would conclude that [Respondent] prohibited his or right to engage in union or protected activity.” (ALJD, p. 19:6-11)

It should be noted that while the ALJ credited Sherman’s testimony pertaining to the relationship between the Union and the Respondent, he failed to take notice from the record that Respondent and the Union had been without a contract since January 2010. (Tr. 130) The employees went on strike on March 27, 2012. (Tr. 83) This belies the notion that the Respondent and labor organizations have “cooperative ventures”. (ALJD, p. 19:7) With regard to the blood drives, Respondent is in a competitive market and it profits from its blood drives. It is not surprising that it would reach out to labor organizations and its members to participate in blood drives. Significantly, there is nothing in the record to show that Respondent’s employees have any knowledge about the 40 year bargaining history between Respondent and the Union or about Respondent’s relationships with other labor organizations across the nation. There is no evidence to show that employees know that Respondent has a labor liaison or that the liaison reaches out to labor organizations to arrange blood drives and disaster relief. For the ALJ to consider these factors to sustain his finding that, in context, the Respondent’s rules do not infringe on employees’ Section 7 rights is unsupported by Board law.

Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) instructs that in determining whether a challenged rule is unlawful it must give the rule a reasonable reading in the proper context. However, the ALJ’s reliance on the Respondent’s compliance and ethics handbook to

give context to the rules contained in the employee handbook and Respondent's code of conduct is misplaced and his consideration of the employer-union relationship and outreach efforts for blood drives is wholly unsupported by Board precedent. (ALJD, pp. 16-20:2) These rules are unlawful and violate Section 8(a)(1).

Respondent maintains in its employee handbook the rules prohibiting employees from: operating or acting "in any manner that is contrary to the best interest of the American Red Cross", "willfully allowing a 'conflict of interest,' such as financial, personal or otherwise" and engaging in "unsatisfactory conduct." (G.C. 8) The Board found in Costco Wholesale Corp., 358 NLRB No. 106 (2012) that a rule prohibiting employees from making statements that "damage the company, defame any individual or damage any person's reputation" was unlawful because there was nothing in the rule that "even arguably suggests that protected communications are excluded from the broad parameters of the rule." Id. at *4-5. The ALJ incorrectly found Costco to be distinguishable because of his finding that Respondent met its burden by showing that its ethics and compliance handbook, its labor relations history and its outreach efforts for blood drives put the challenged rules in sufficient context. (ALJD, p. 18:45-47, p.19:4-11)

Respondent's conduct rules are overly broad and violate the Act. In Claremont Resort & Spa, 344 NLRB 832 (2005), the Board found that a rule prohibiting "negative conversations about associates and/or managers" violated the employer's standard of conduct was overbroad because a reasonable employee could interpret it to be a prohibition on voicing complaints. The rules here are far more vague than the rule in Claremont Resort. While the ALJ compares Respondent's rules to Lutheran Heritage Village's "abuse or profane language" and "harassment" rules that the Board found to be lawful, Respondent's conduct rules have no specificity about the type of conduct they are prohibiting. In Costco, Claremont and Lutheran

Heritage Village , the rules at the very least prohibited employees from defaming the company, talking about managers, abusive language and harassment. Here, Respondent's rules when given a reasonable reading do not define what is prohibited. Respondent bears the burden to show that the rule is unambiguous and that burden has not been met here. Norris/O'Bannon, Dover Resources Co., 307 NLRB 1236, 1245 (1992).

The ALJ also found Respondent's unsatisfactory conduct rules lawful, on grounds that there "is no evidence in this case to indicate that Respondent has disciplined employees for 'unsatisfactory conduct' in order to restrain Section 7 rights of employees." The ALJ also reasoned that the "just cause" article in collective bargaining agreement protects employees from discipline and a reasonable employee would not read a rule threatening discipline for unsatisfactory conduct to infringe on employees' Section 7 rights. (ALJD, p. 19:41-47, p. 20:1-2) It is well-established Board law that promulgation and/or maintenance of an unlawful rule violates Section 8(a)(1). There is no requirement that employees must be disciplined for violating a bad rule for the rule to violate the statute. See, Lafayette Park Hotel, 326 NLRB 824 (1998), *citing Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945) in which the Board held that the mere maintenance of an unlawful work rule, even in the absence of enforcement, violates Section 8(a)(1).

II. EXCEPTION 2: RESPONDENT'S PROHIBITIONS ON THE USE OF ITS NAME AND EMBLEM VIOLATE SECTION 8(A)(1) OF THE ACT

In Paragraph 8(A)(i)[a.] of the Second Amended Complaint (GC 1((l) and Paragraph (a) of Acting General Counsel's Exhibit 18, which was amended to the complaint at trial, Counsel for the Acting General Counsel alleged that Respondent violated Section 8(a)(1) by maintaining

the following prohibitive policy in its Employee Handbook (GC 8) and the American Red Cross Code of Business and Ethics and Conduct (GG 18):

Personal Use. Authorize the use of or use for the benefit of advantage of any person, the name, emblem, endorsement, services or property of the American Red Cross, except in conformance with the American Red Cross policy.

The ALJ erred in failing to draw appropriate conclusions of law that this policy, as maintained in the employee handbook and the code of business and ethics and conduct, violates Section 8(a)(1). It should be noted that this allegation is separate and distinct from the allegation concerning the American Red Cross Trademark pamphlet, GC 16, which the ALJ concluded was lawful.² However, the ALJ failed to make a finding with regard to the rule prohibiting employees from using Respondent's name and emblem. (ALJD, pp. 20-23)

It is undisputed that the rules prohibiting employees from using Respondent's name and emblem are distributed to employees. Indeed, employees are required to verify that they have read both the Employee Handbook and Code of Business and Ethics and Conduct. The Trademark pamphlet, similar to the Compliance and Ethics Handbook, is a separate document and is not referenced in any of Respondent's policies. (GC 8, at p. 5, 8; R. 9) Again, similar to the Compliance and Ethics Handbook, the Trademark pamphlet is not distributed to employees nor explained to employees during the normal course of their employment. (R.9 at 1) The Trademark pamphlet is separate and distinct from the rules pertaining to use of Respondent's name and emblem contained in the employee handbook and the code of business and ethics and conduct. The ALJ erred when he failed to make a finding with regard to these rules.

² Acting General Counsel does not take exception to this finding.

In Pepsi-Cola Bottling Co., the Board found the employer's policy prohibiting employees from wearing or using the company's logo while engaging in protected concerted activity was unlawful. The Board found that the company had not provided a business reason outweighing the Section 7 rights of employees. While the ALJ finds this case to be distinguishable because the rule in Pepsi-Cola was promulgated in response to protected activity, the ALJ erred by not considering the other factors set forth in Lutheran Heritage Village-Livonia in making his determination. Those factors include whether employees would reasonably construe the rule to prohibit Section 7 activity and whether the rule has been applied to restrict the exercise of Section 7 rights. A reasonable reading of the rules prohibiting employees from using Respondent's name and emblem would limit employees from using the Respondent's name and logo in concerted protected communications, including leaflets, picket signs, banners, etc. While the ALJ distinguishes the Acting General Counsel's reliance on Meat & Allied Food Workers Local 248, 230 NLRB 189 (1977) because that case involved allegations of unlawful picketing in violation of Section 8(b)(4)(ii)(B), the Board's finding, in dicta, that employees have a Section 7 right to use an employer's name or logo in conjunction with protected concerted activity should not be so summarily discounted. Additionally, there is no record evidence of any business or safety concerns Respondent might have regarding the use of its name and emblem. These prohibitions restrict employees and chill their Section 7 activities and should be found to violate Section 8(a)(1).

CONCLUSION

Accordingly, it is respectfully requested that the Board reverse the ALJ and find that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining its conflict of interest and unsatisfactory conduct Work Rules and Policies. Additionally, it is respectfully

requested that the Board find that Respondent violated Section 8(a)(1) of the Act by promulgating and maintain work rules that prohibit employees from using Respondent's name and emblem.

It is further requested that the Board order the Respondent to cease and desist from engaging in such conduct. The Acting General Counsel requests that the Board Revise the ALJ's recommended Order and Notice to conform to the exceptions above.

Dated at Cleveland, Ohio this 2nd day of August, 2013.

Respectfully submitted,

/s/ Gina Fraternali

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically and served by electronic mail on the following parties, this 2nd day of August 2013

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