

*National Labor Relations Board*  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

**DATE:** March 10, 2000

**TO:** James J. McDermott, Regional Director, Region 31

**FROM:** Barry J. Kearney, Associate General Counsel, Division of Advice

**SUBJECT:** Mercy Hospital/Mercy Hospital Southwest, Case 31-CA-24189

512-5012-0133-4800, 512-5024-2500

This case was submitted for advice as to whether one unlawful provision in the Employer's otherwise valid no-solicitation/no-distribution policy renders the entire policy unlawful under Section 8(a)(1).

FACTS

The Employer has maintained, since 1992, a facially lawful rule<sup>(1)</sup> which limits solicitation at the Employer's hospital to nonworking time and to areas other than immediate patient care areas and other specified areas where solicitation would cause disruption of health care operations or would disturb patients. The rule also prohibits distribution during working time and in working areas. The policy defines working time, and directs employees to the Employer's human resources department if they have any questions as to the meaning of "working time" or "working areas." The policy concludes with the following sentence in a separate paragraph:

Any solicitation should be reported to administration.

The Employer is unable to trace the origin of that last paragraph of the policy, and states that it is intended to apply only to solicitations that violate the other provisions of the solicitation policy. The Region has concluded that the last paragraph facially violates Section 8(a)(1), as it includes solicitations which would be protected by Section 7 of the Act.

The Union began organizing certain employees of the Employer in late summer 1999. During that time, several employees received either written or oral warnings concerning violations of the facially valid provisions of the no-solicitation/no-distribution rule. The Region has concluded that that discipline would not be violative of Section 8(a)(1) unless the last paragraph of the Employer's rule invalidates the facially valid provisions of the rule. The Region states that there is no evidence that the last paragraph has been enforced, i.e., no employees have been disciplined for a failure to report solicitation.

There is also no direct evidence that employees have reported pursuant to that last paragraph, any Union solicitation.<sup>(2)</sup>

ACTION

We agree with the Region that, in the circumstances of this case, the facially valid provisions of the Employer's valid no-solicitation/no-distribution policy are not rendered unlawful by the separate unlawful last paragraph stating that employees should report solicitation to the Employer.

While the last paragraph of the policy is violative of Section 8(a)(1) in that it arguably encourages employees to report even protected Union solicitations,<sup>(3)</sup> that paragraph does not specifically allude to Union solicitations and is easily separable from the otherwise lawful provisions. There is no evidence that employees thought there was a requirement to report solicitation that would have been allowable under the Employer's policy, including protected Union solicitation. Further, there is no evidence that the last paragraph has ever been enforced or otherwise been an issue.

The Board has found that an employer's unlawful orally promulgated rule prohibiting all distribution of union literature did not

render unlawful an existing valid handbook rule prohibiting distribution in working areas. NTA Graphics, 303 NLRB 801 (1991), enf'd. in rel. part 983 F.2d 1067, 1993 WL 7518 (6th Cir. 1993)(unpublished). The Board stated that while the oral rule may have confused employees about the scope of the written rule, requiring the employer to post a notice that it would not forbid all solicitation or distribution would make clear that employees were not precluded from engaging in all union solicitation and distribution.<sup>(4)</sup> We conclude that under NTA Graphics, the last paragraph of the Employer's policy did not invalidate the lawful provisions of the policy. Requiring the Employer to post a notice that it does not seek to have employees report solicitation which would be allowed under the otherwise lawful provisions of the policy would make clear to employees that they are not expected, encouraged, or required to report protected Union solicitation.

B.J.K.

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<sup>1</sup> The Region has concluded that the policy, with the exception of the last sentence quoted below, is valid under Hale Nani Rehabilitation and Nursing Center, 326 NLRB No. 37, slip op. at 1-2 (1998).

<sup>2</sup> While the Employer made reference, while warning one employee for solicitation, to having "been made aware" of the employee's activity, the solicitation was apparently open and could have been observed by supervisors as well as by employees.

<sup>3</sup> See generally Greenfield Die and Manufacturing Corp., 327 NLRB No. 52, slip op. at 2, and cases cited at n. 6 (1998).

<sup>4</sup> 303 NLRB at 801. While the Board found the second written paragraph of the employer's policy, prohibiting off-duty employees access to any of the facility, to be unlawful, the Board did not use that finding to invalidate the first paragraph which restricted distribution to nonworking areas further supporting the idea of severability between lawful and unlawful separate provisions of a no-solicitation/no-distribution policy. 303 NLRB at 801, 809.