

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES**

MUSE SCHOOL CA

and

Case 31–CA–108671

TRUDY PERRY, an Individual

Katherine Mankin, Esq., for the General Counsel.
Travis Gemoets and Patricia Desantis, Esqs.
(Jeffer, Mangels, Butler & Mitchell LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

LISA D. THOMPSON, Administrative Law Judge. This matter is before me on a stipulated record. On July 5, 2013, Trudy Perry (Charging Party or Perry) filed a charge in Case 31–CA–108671 against MUSE School CA (Respondent or MUSE). The Regional Director for Region 31 issued the complaint and notice of hearing on November 27, 2013. On December 10, 2013, Respondent filed its answer, denying all material allegations and setting forth its affirmative defenses to the complaint.

The complaint alleges that, since on or before June 28, 2013, Respondent violated Section 8(a)(1) of the National Labor Relations Act (the NLRA or the Act) when it maintained and threatened enforcement of its written confidentiality rule that prohibits employee disclosure of confidential information.¹

On February 6, 2014, the parties filed their Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts with Associate Chief Administrative Law Judge Gerald Etchingham. On February 6, 2014, Judge Etchingham reassigned this case to my docket. Also on February 6, 2014, I granted the aforementioned motion and directed the parties to submit posthearing briefs by March 14, 2014, which they timely filed.

Upon the stipulated record, and in full consideration of the briefs submitted, I make the following.

¹ Abbreviations used in this decision are as follows: “Jt. Stip.” for the parties’ Stipulation of Facts; “Jt. Exh.” for Joint Exhibit; “GC Br.” for the General Counsel’s brief; “R Br.” for Respondent’s brief; and “R. Answer” for Respondent’s Answer to the Complaint and Notice of Hearing.

FINDINGS OF FACT

I. JURISDICTION

5 The parties stipulated to the following facts regarding the nature of Respondent’s business and jurisdiction:

10 1. At all material times, Respondent has been a non-profit public benefit corporation with an office and place of business in Calabasas, California. Respondent is and has been in the business of operating a private elementary school.²

15 2. During the 12-month period ending October 31, 2013, Respondent derived gross revenues in excess of \$1,000,000. At its Calabasas location, Respondent purchased and received products, goods, and materials valued in excess of \$5,000 directly from points outside the State of California.³

3. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.⁴

20 4. At all material times, Travis Gemoets, the attorney representing Respondent, has been an agent of Respondent within the meaning of Section 2(13) of the Act.⁵

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Background Facts

25 1. Since on or before June 28 through about September 17, 2013, it is undisputed that Respondent maintained the MUSE Elementary Confidentiality and Non-Disclosure Agreement (the Original Confidentiality Agreement) that prohibits employees from disclosing confidential information about Respondent. Specifically, the confidentiality agreement provides that:

30 ¶3. . . ‘Confidential Information’ includes, without limitation, any material or information about MUSE, MUSE employees, MUSE students, the families of MUSE students, including but not limited to the Cameron Family, and the Cameron Entities that is not generally known to the general public or business competitors. Such Confidential Information includes, but is not limited to, information, however acquired, relating to: MUSE’s financial and business affairs, budgets, compensation paid to MUSE owners and employees...and physical items relating in any way to the Cameron Family including, by way of example and not limitation: photographs, films, videos, tapes and other records or recordings of or relating to any member of the Cameron Family, the voice or likeness of members of the Cameron Family, and the assets or activities of members of the Cameron Family...

40 ¶4. In the course of providing services to MUSE, I, the undersigned, have had and may continue to have access to Confidential Information. I understand that MUSE would not engage, or continue to use, my servie, if I were not willing to maintain the

² Jt. Stip. ¶8a.

³ Id. at ¶8b-c.

⁴ Jt. Stip ¶9, Complaint ¶3, R. Answer ¶3.

⁵ Jt. Stip. ¶10.

confidentiality of such Confidential Information. In consideration of MUSE using, or continuing to use, my services, I agree to abide by all of the terms and provisions set forth in this Agreement.

5 ¶5. I agree that at all times, both during and after the time that I am providing services to MUSE, [sic] will maintain the confidentiality of all Confidential Information (emphasis in original). By way of example but not limitation, I shall not do any of the following without the prior written consent of James or Suzy Cameron in each instance:
 10 (a) release, disclose or publish any photograph, tape, film or other record or recording of (i) the voice, likeness or any activity of any member of the Cameron Family or any friend or associate of any member of the Cameron Family, or (ii) any aspect of any activity occurring at, in or about any home, office or other property owned, occupied or used by the Cameron Family...

15 ¶6. I further agree that I will not make any disparaging remarks about MUSE, any current or former MUSE owner, employee, or student, or any member of the Cameron Family, nor will I do anything that may harm the reputation of any current or former MUSE owner, employee, or student, or any Cameron Entity or any member of the Cameron Family.⁶

20 2. Trudy Perry was an employee of Respondent.⁷

25 3. During Ms. Perry’s employment with Respondent, she received and executed a copy of the original Confidentiality Agreement described in paragraph 1.⁸

4. On or about June 28, 2013, after Ms. Perry resigned from Respondent’s employ, Respondent, by its attorney, Travis Gemoets, sent Perry a letter threatening to take legal action against her for allegedly violating the original confidentiality agreement. The letter states:

30 This law firm is legal counsel to MUSE Elementary ("MUSE").

We have been informed by MUSE that you recently separated from MUSE.

35 It is our understanding that you are currently in violation of the MUSE Elementary Confidentiality and Non-Disclosure Agreement by making false, slanderous, and negative statements about MUSE to the parents of current MUSE students. I am attaching a copy of the MUSE Elementary Confidentiality and Non-Disclosure Agreement (the "Confidentiality Agreement") that you signed on February 15, 2011.

40 In Paragraph 5 of the Confidentiality Agreement, you agree not to use any confidential information relating to MUSE.

45 In Paragraph 6 of the Confidentiality Agreement, you agree as follows:

I further agree that I will not make any disparaging remarks about MUSE, any current or former MUSE owner, employee, or student, or

⁶ Jt. Stip. ¶13; see also, Jt. Exh. 2.

⁷ Jt. Exh. 3

⁸ Jt. Exh. 2.

any member of the Cameron Family, nor will I do anything that is likely to harm the reputation of any current or former MUSE owner, employee, or student, or any Cameron Entity or any member of the Cameron Family.

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We have received credible information which demonstrates that you have violated the covenants and conditions set forth in the Confidentiality Agreement. In fact, individuals who have heard you violate these obligations have approached MUSE to report your misconduct. The purpose of this letter is to remind you, in no uncertain terms, of your obligations and to seek your *immediate* cooperation and full compliance with the terms of the Confidentiality Agreement. Please confirm by signing below that you have received the enclosed copy of the Confidentiality Agreement and that you will not violate the Confidentiality Agreement now or at any point in the future.

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In Paragraph 8 of the Confidentiality Agreement, you "agree that if [you] breach or threaten to breach any obligation hereunder, MUSE and/or the Cameron Family shall also be entitled to temporary and permanent injunctive relief without the necessity of proving actual damages." Further, in Paragraph 11, you agree to "indemnify and hold MUSE and the Cameron Family harmless from and against any and all claims, losses, damages and expenses incurred as a result of any breach by [you] of any of the covenants, representations or warranties contained in this Agreement."

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We will continue to monitor your activities and market conduct to ensure your compliance; if we believe further violations occur after the date of this letter, or if MUSE or the Cameron Family is damaged in any way, we will proceed with our legal remedies. Any questions or comments should be addressed to me directly. We continue to reserve all rights.

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Very truly yours,

Travis M. Gemoets for
 Jeffer Mangels Butler & Mitchell LLP⁹

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5. Ms. Perry filed the instant unfair labor practice (ULP) charge on July 5, 2013.

6. On or about September 17, 2013, it is undisputed that Respondent promulgated and has since maintained a revised version of the MUSE confidentiality agreement (Revised Version). The Revised Version contains the following highlighted changes:

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¶3. For purposes of this Agreement, 'Confidential Information' includes, without limitation, any material or information about MUSE, MUSE employees, MUSE students, the families of MUSE students, including but not limited to the Cameron Family, and the Cameron Entities that is not generally known to the general public or business competitors. Such Confidential Information includes, but is not limited to, information, however acquired, relating to: MUSE's financial and business affairs, budgets...and physical items relating in any way to the Cameron Family including, by way of example and not limitation: photographs, films, videos, tapes and other records or recordings of or relating to any member of the Cameron Family, the voice or likeness of members of the Cameron Family, and the assets or activities of members of the Cameron Family. . .

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⁹ Jt. Exh. 3.

Confidential information also includes compensation and benefits paid to MUSE owners and employees, unless that information is or has been disclosed by the individual owner and/or employee who earned the compensation or benefits being disclosed . . .

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¶4. In the course of providing services to MUSE, I, the undersigned, have had and may continue to have access to Confidential Information. I understand that MUSE would not engage, or continue to use, my service, if I were not willing to maintain the confidentiality of such Confidential Information. In consideration of MUSE using, or continuing to use, my services, I agree to abide by all of the terms and provisions set forth in this Agreement. **I understand that this Agreement will not be interpreted to interfere with my ability to engage in activity protected under the National Labor Relations Act ("NLRA") on behalf of myself and other employees regarding terms and conditions of employment with MUSE which is undertaken for mutual aid or protection.**

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¶5. I agree that at all times, both during and after the time that I am providing services to MUSE, [sic] will maintain the confidentiality of all Confidential Information (emphasis in original). **Unless I have received prior written consent from Rebecca Amis (regarding Confidential Information which pertains to MUSE's employees, students, the families of MUSE students, MUSE's financial and business affairs, budgets, and compensation paid to MUSE owners and employees)...in each instance, I will not use, summarize or copy any Confidential Information, and I will not disclose or otherwise communicate any Confidential Information to any person or entity, whether directly or indirectly, including without limitation my spouse and/or significant other, children, parents, and all other members of my immediate family.** By way of example but not limitation, I shall not do any of the following without the prior written consent of James or Suzy Cameron in each instance: (a) release, disclose or publish any photograph, tape, film or other record or recording of (i) the voice, likeness or any activity of any member of the Cameron Family or any friend or associate of any member of the Cameron Family, or (ii) any aspect of any activity occurring at, in or about any home, office or other property owned, occupied or used by the Cameron Family...

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¶6. I further agree that I will not make any disparaging remarks about MUSE, any current or former MUSE owner, employee, or student, or any member of the Cameron Family, nor will I do anything **that is likely to harm** the reputation of any current or former MUSE owner, employee, or student, or any Cameron Entity or any member of the Cameron Family.¹⁰

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¹⁰ Jt. Exh. 4. It is undisputed that, because Perry was no longer employed by Respondent, she was not given and did not execute a copy of the Revised Version.

III. ANALYSIS AND CONCLUSIONS

A. *The Parties' Positions*

5 The issue in this case is whether Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing its confidentiality agreements.

10 Citing the Board's decision in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), counsel for the General Counsel (CGC) asserts that Respondent's Original Confidentiality Agreement and the Revised Version violate Section 8(a)(1) of the Act because both agreements explicitly prohibit and could reasonably be interpreted as prohibiting employees in exercising their Section 7 rights. Respondent maintains that: (1) the original confidentiality provisions in no way precludes employees from conferring about matters regarding their terms and conditions of employment; 15 (2) the original confidentiality rules cannot reasonably be interpreted to prohibit employees from discussing their terms or working conditions; (3) there was no violation because Respondent never enforced the original confidentiality agreement; (4) the legality of the original agreement is moot since Respondent promulgated and maintained the Revised Version; and (5) the Revised Version serves clear legitimate business purposes. Furthermore, Respondent avers that the Revised Version does not violate 20 the Act since it explicitly states that the provisions therein do not prohibit the exercise of employees' Section 7 rights.

B. *Prevailing Legal Authority*

25 In *International Business Machines Corp.*, 265 NLRB 638 (1982), the Board explained that the discussion of wages is an important part of organizational activity. The suppression of employees' ability to discuss wages adversely affects their Section 7 rights and will be held violative of the Act.¹¹ As the Board later pointed out in *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 fn. 14 (2004), the ability to discuss terms and conditions of employment with fellow employees is the most basic of Section 7 30 rights.¹² Thus, it is well settled that employees have a protected right to discuss and to distribute information regarding wages, hours, and other terms and conditions of employment. *Mobile Exploration & Producing U.S., Inc.*, 323 NLRB 1064, 1068 (1997), enfd. 156 F.3d 182 (5th Cir. 1998). Because of these inherent protections, the Board scrutinizes employer confidentiality agreements or rules that restrict employees' Section 7 rights.

35 The Board set out a framework for evaluating whether an employer's work rule, such as Respondent's Confidentiality Agreement, violates the Act. First, the rule must be examined to determine whether it explicitly restricts Section 7 activity. If it does, the rule is unlawful.¹³ If the rule does not explicitly restrict Section 7 activity, the rule must be evaluated to determine whether: (1) employees 40 would reasonably construe the language in the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. If any of these circumstances apply, the rule infringes on employees' rights under the Act.¹⁴ Thus, an employer's confidentiality rule that infringes upon an employee's Section 7 rights is

¹¹ *Id.*

¹² *Parxel International*, 356 NLRB No. 82, slip op. at 3 (2011) (Board reiterated that "wage discussions among employees are considered to be at the core of Section 7 rights.")

¹³ *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

¹⁴ *Lutheran Heritage*, *supra*.

unlawful unless the employer establishes a legitimate and substantial business justification for the rule that outweighs the infringement on employee rights.¹⁵

C. Analysis

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1. The Original Confidentiality Agreement and Revised Version Violate the Act.

In this case, the CGC asserts that paragraphs 3, 5, and 6 of both the original confidentiality agreement and the Revised Version violate the Act.

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a. Paragraph 3

Paragraph 3 in the original agreement and Revised Version define confidential information as “. . . any material or information about MUSE, MUSE employees, MUSE students, the families of MUSE. . . students, including but not limited to the Cameron Family, and the Cameron Entities that is not generally known to the general public or business competitors . . .” Paragraph 3 goes on to state that confidential information includes “. . . information, however acquired, relating to: MUSE’s financial and business affairs, budgets, compensation paid to MUSE owners and employees . . .” The CGC argues that this provision, especially when read in conjunction with other portions of paragraph 3, could reasonably be interpreted as precluding employees’ discussion of wages. I agree.

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In its 2001 decision in *IRIS U.S.A.*, 336 NLRB 1013 (2001), the Board dealt with confidentiality language similar to that found in this case. Specifically, in *IRIS*, the employer prohibited disclosure of confidential information to include financial information, leases, licenses, agreements, sales figures, business plans, and proprietary information. The employer argued that it included this language to prevent disclosure of information that might give an unfair advantage to competitors or adversely affect its ability to compete in its industry. However, the employer went on to include “personnel records” as confidential and limited their disclosure only to the named employee and senior management. In determining whether the employer’s confidentiality rule was lawful, the judge noted that “personnel records” contain various kinds of information about employees, including their wages. As such, the Board adopted the judge’s findings and found that the employer violated Section 8(a)(1) by maintaining the confidentiality provision.¹⁶

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Like the employer in *IRIS*, Respondent argues that it had a clear legitimate business purpose for the language in paragraph 3. Specifically, Respondent asserts that this provision was intended to protect the confidentiality of MUSE founders James and Suzy Amis Cameron, who are distinguished celebrities in their own right, as well as other notable celebrity “individuals and families who are part of the MUSE community. . . or whose children attend the school” who, because of their high profile status, depend upon strict confidentiality. However, Respondent does not cite any case law or Board precedent showing how the confidentiality of its founders and celebrity clients trumps its employees’ right to discuss their wages, hours or other terms and conditions of employment.

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Moreover, while Respondent sought to prevent disclosure of information concerning its high profile founders, clients and their children as well as their proprietary information, because Respondent’s ambiguous rule prohibits the discussion of *any* information concerning *any* nonpublic information, the rule, as written, also encompasses “various kinds of information about employees, including their

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¹⁵ *Desert Palace Inc.*, 336 NLRB 271 (2001); *Phoenix Transit System*, 337 NLRB 510 (2002).

¹⁶ *IRIS U.S.A.*, 336 NLRB 1013, 1014 fn. 1 (2001).

wages.”¹⁷ Because paragraph 3 also fails to clarify what communication is permissible, I find that Respondent’s rule reasonably tends to chill protected activity.

Respondent next focuses on its right to protect MUSE’s “financial and business affairs, budgets, the Cameron Family’s or the Cameron Entities’ financial and business affairs and the Cameron Family’s personal affairs . . .” citing a *Walmart Advice Memorandum* 11-CA-067171 (May 30, 2012). However, there are several problems with Respondent’s reliance on this memorandum. First, the memorandum has no binding authority on the Board, and by extension, on administrative law judges. Second, the memorandum is inapposite. In the *Walmart Advice Memorandum*, Walmart sought guidance from the Board’s Office of the General Counsel (OGC) regarding its social media policy. The OGC concluded that Walmart’s social media policy, which prohibited employees from disparaging it by using “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct” was lawful.¹⁸ In analyzing Board precedent, the OGC determined that Walmart’s social media policy was lawful because it gave clear and unambiguous examples of the “prohibited conduct” such that employees could not reasonably construe the proscribed conduct as protected activity.¹⁹

Here, however, Respondent fails to clearly define the “prohibited conduct” it seeks to restrict; rather Respondent precludes, without limitation, *any* discussion about *any* nonpublic information regarding its founders, clients, and employees. Such a broad prohibition, without clarification, could reasonably be construed to include a prohibition on discussing employee wages. In fact, Paragraph 3 defines confidential information to include compensation and wages. Accordingly, I find Respondent’s confidentiality rule identical to the confidentiality provisions in *Cintas Corp.*, 344 NLRB 943 (2005), where the Board found that respondents’ unqualified prohibition on discussing any information concerning its employees unlawful, because it was overbroad, ambiguous and could be reasonably construed to encompass discussions of wages and other terms and conditions of employment.²⁰

Paragraph 3 also defines confidential information as “information, however acquired, relating to: MUSE’s financial and business affairs, budgets, compensation paid to MUSE owners and employees...” I find that this section *expressly* prohibits employees from discussing their wages.²¹ Moreover, the prohibition from disclosing “MUSE’s financial and business affairs and budgets” could reasonably be construed to prohibit discussion and disclosure of information related to employees’ wages.²² While the Revised Version is more artfully worded to allow employees to disclose details regarding their own wages and compensation, this phraseology still violates the Act because it enjoins employees’ discussion of other employees’ wages when they are acting in concert for their mutual aid and protection.²³

¹⁷ *Id.*

¹⁸ *Walmart Advice Memorandum*, 11–CA–067171 (May 30, 2012).

¹⁹ *Id.*, *Compare University Medical Center*, 335 NLRB 1318, 1320–1322 (2001), *enfd.* denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003)(work rule that prohibited “disrespectful conduct towards [others]” unlawful because it included “no limiting language [that] removes [the rule’s] ambiguity and limits its broad scope.”) with *Tradesmen International.*, 338 NLRB 460, 460–462 (2002) (prohibition against “disloyal, disruptive, competitive or damaging conduct” would not be reasonably construed to cover protected activity, given the rule’s focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

²⁰ See *Cintas Corp.*, 344 NLRB 943 (2005) (Board found employer’s rule prohibiting the release of “any information” regarding its employees “could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the union.”)

²¹ See *Automatic Screw Products Co.*, 306 NLRB 1072 (1992)(respondent violated Sec. by promulgating and maintaining rule prohibiting employees from discussing their salaries and by disciplining them for violating the rule); *Leather Center, Inc.*, 312 NLRB 521, 527 (1993)(rule barring employees from any discussion of wages unlawful).

²² See *Lutheran Heritage Village-Livonia*, *supra*.

²³ *Labinal, Inc.*, 340 NLRB 203, 210 (2003) (respondent’s confidentiality rule which limited discussion of wages except

Continued

As such, paragraph 3 of the original agreement and the Revised Version directly interferes with employees’ right to discuss their wages amongst themselves or as part of concerted activity, and accordingly, are unlawful.

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b. Paragraph 5

Paragraph 5 of Respondent’s original agreement requires employees to:

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. . .agree that at all times, both during and after the time that I am providing services to MUSE, [sic] will maintain the confidentiality of all Confidential Information (emphasis in original). By way of example but not limitation, I shall not do any of the following without the prior written consent of James or Suzy Cameron in each instance: (a) release, disclose or publish any photograph, tape, film or other record or recording of (i) the voice, likeness or any activity of any member of the Cameron Family or any friend or associate of any member of the Cameron Family, or (ii) any aspect of any activity occurring at, in or about any home, office or other property owned, occupied or used by the Cameron Family . . .”

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The CGC argues that this section violates the Act because employees could reasonably construe this language to prohibit them from engaging in concerted activity such as tape recording unlawful activity at a jobsite or videotaping employees’ strike efforts. Again, I agree. Although Respondent claims that its intent was to protect its celebrity owners, clients and their children who rely on anonymity and privacy, those privacy interest do not rise to the level of those found by the Board to be protected.²⁴ Rather, I find that, in agreement with the arguments and cases cited by the CGC, paragraph 5 is so overbroad that employees could reasonably construe this paragraph to prohibit them from engaging in various types of concerted activity protected by the Act.

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Similarly, the language included in paragraph 5 of the Revised Version violates the Act. Specifically, the Revised Version prohibits employees from disclosing confidential information “unless [they] receive prior written consent from Rebecca Amis (regarding Confidential Information which pertains to MUSE’s employees, students, the families of MUSE students, MUSE’s financial and business affairs, budgets, and compensation paid to MUSE owners and employees)...” Moreover, employees can neither “use, summarize or copy any Confidential Information... [nor] disclose or otherwise communicate any Confidential Information to any person or entity, whether directly or indirectly, including without limitation my spouse and/or significant other, children, parents, and all other members of my immediate family. . . .”

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However, like paragraph 5 in Respondent’s original agreement, I find the broad prohibition in the Revised Version expressly precludes discussion of employees’ wages and is not narrowly tailored to protect any particular business interest. In fact, it explicitly limits discussing of wages, MUSE’s financial and budgetary affairs and compensation unless approved by a designated official who may or may not permit such communication. Again, the Board dealt with a similar confidentiality rule in *Rochester*

where employee previously disclosed their wages to another violated the Act because “to prohibit one employee from discussing another employee’s pay without the knowledge and permission of the other employee muzzles employees who seek to engage in concerted activity for mutual aid and protection”).

²⁴ See *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991), enfd. 976 F.2d 743 (11th Cir. 1992) (employee tape recordings at job site that provided evidence in a Department of Labor investigation considered protected). But compare with *Flagstaff Medical Center*, 357 NLRB No. 65, slip op at 4–5 (2011)(Board found lawful a rule prohibiting employees from taking photographs of hospital patients or property in light of “weighty” privacy interests of hospital patients and “significant” employer interest in preventing wrongful disclosure of individually identifiable health information.)

Regional Joint Board UNITE HERE v. Crown Plaza Hotel, where the Board found that an employer’s confidentiality rule that prohibits employee communications absent consent from a supervisory official unlawfully prohibits employees’ exercise of their Section 7 rights.²⁵ Thus, I find that, rather than expanding employees’ right to discuss their wages, paragraph 5 further restricts employees from engaging in concerted activity. In sum, paragraph 5 of both agreements violates the Act.

c. Paragraph 6

Finally, paragraph 6 in both agreements require that employees “...not make any disparaging remarks about MUSE, any current or former MUSE owner, employee, or student, or any member of the Cameron Family,” or “do anything that may harm the reputation of any current or former MUSE owner, employee, or student, or any Cameron Entity or any member of the Cameron Family . . .” Relying on the Board’s decision in *Costco Wholesale Corp.*, the CGC argues that this section is overbroad and unlawful because employees could reasonably construe this language to prohibit them from engaging in concerted communications for their mutual benefit and aid.²⁶ Again, I agree.

In *Beverly Health & Rehabilitation Services, Inc.*, the Board reviewed a confidentiality rule similar to that of Respondent’s in this case. In *Beverly Health*, the Board found the employer’s broad prohibition against “making false or misleading work-related statements concerning the company, the facility or fellow associates” unlawful, because it clearly encompassed concerted communications, thus would be reasonably construed by employees to prevent them from objecting to their working conditions and/or making statements to their coworkers, supervisors or others to gain support to improve their working conditions.²⁷

Like the Board in *Beverly Health*, I also find the language in Paragraph 6 overly board and fails to even suggest that protected communications are excluded from the broad parameters of Respondent’s confidentiality rule. Moreover, Paragraph 6 fails to specifically delineate which types of communications are lawful or unlawful, thus employees could reasonably construe that *all* communications about MUSE, including those made while engaging in protected concerted activity, are prohibited. Such a broadly worded, ambiguous rule violates the Act.

Nevertheless, Respondent maintains the validity of its original confidentiality agreement on grounds that it never enforced it. However, whether Respondent enforced the agreement misses the point. The fact remains that Respondent maintained the original agreement, and because the broad language in the agreement could reasonably be construed to restrict and deter concerted activity, the maintenance of such an agreement is unlawful²⁸. Alternatively, Respondent asserts that the legality of the original agreement is moot since it promulgated and maintained the Revised Version. However, I have found (as set forth above) that the relevant provisions in the Revised Version violate Section 8(a)(1) of the Act. Moreover, I conclude that Respondent does not escape liability by including a savings clause in its confidentiality agreement as discussed in further detail below.

²⁵ *Crown Plaza Hotel*, 352 N.L.R.B. 382 (2008)(employer’s rule stating General Manager responsible for handling all media inquiries and prohibits employees from any contact with the media and/or speaking about hotel business found unlawful).

²⁶ *Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at 3 (2012). Although the *Costco* decision was issued by a three-member panel that was recently declared invalid, see *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), I nevertheless find the Board’s decision in *Costco* persuasive particularly because the Board relied and based its analysis on its decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) which was decided by a validly appointed Board.

²⁷ *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000), enf. 297 F.3d 468 (6th Cir. 2002).

²⁸ See e.g., *Ingram Book Co.*, 315 NLRB 515, 516 (1994); *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983) (“Indeed, the mere maintenance of an ambiguous or overly broad rule tends to inhibit or threaten employees who desire to engage in legally protected activity but refrain from doing so rather than risk discipline); *NLRB v. Beverage-Air Co.*, 402 F.2d 411, 419 (4th Cir. 1968) (“mere existence” of an overbroad but unenforced no-solicitation rule is unlawful because it “may chill the exercise of the employees’ [Section] 7 rights.”)

2. The Savings Clause in the Revised Version Fails to Elevate Violations of the Act.

5 Paragraph 4 of the Revised Version includes a savings clause stating that the agreement “will not be interpreted to interfere with [the employee’s] ability to engage in activities protected under the National Labor Relations Act (“NLRA”). . . regarding terms and conditions of employment with MUSE which is undertaken for mutual aid or protection.”²⁹ Respondent argues this language shields it from liability under the Act. I find it does not.

10 In order for an employer to relieve itself of liability for its unlawful conduct, the Board has held that the employer must: (1) timely and unambiguously repudiate the conduct; (2) be specific as to the coercive conduct being repudiated; (3) be free from other proscribed illegal conduct; (4) adequately publicize the repudication to employees and 5) give assurances to employees that the employer will not interfere with the exercise of employees’ Section 7 rights.³⁰

15 Here, I find Respondent has failed to satisfy its burden to repudiate its unlawful conduct and shield itself from the unlawfulness of the revised version. First, Respondent’s savings clause is untimely because it was promulgated more than three and a half years after Charging Party Perry signed the original agreement, approximately three months after enforcing the original agreement against Ms. Perry, and a month before the complaint issued in this case.³¹ In fact, I find the timing of the savings clause telling since it appears Respondent may have included it as a defense to the charge in this case.

20 Even if the timing of the savings clause was simply coincidental, I find the language in the savings clause vague as to the conduct being repudiated. In fact, the Revised Version fails to include any specifics as to the activities or communications protected by the Act, the provisions of the Agreement being rescinded, or the conduct subject to confidentiality. Additionally, Respondent presented no evidence as to how (or whether) it circulated the Revised Version to employees or explained its meaning, and I find no evidence, from the plain reading of the savings clause or elsewhere, that employees were given assurances that Respondent would not interfere with their Section 7 rights. Accordingly, the savings provision of the Revised Version does not remedy the violations of the Act.

3. Threat to Enforce Confidentiality Agreement Against Charging Party Violates the Act.

35 Finally, I find that Respondent’s June 28, 2013 letter to Charging Party Perry, which sought to enforce paragraph 6 of the original confidentiality agreement, also violates Section 8(a)(1) of the Act.

40 Ms. Perry was accused of violating Respondent’s original confidentiality agreement by allegedly “making false, slanderous and negative statements about MUSE to the parents of current MUSE students.”³² Curiously, Respondent failed to describe the “alleged false, slanderous and negative statements” attributed to Perry. Nevertheless, after learning of these alleged statements, Respondent sought to enforce paragraph 6 of its original agreement by informing Ms. Perry to refrain from making
45 “. . . any disparaging remarks about MUSE, any current or former MUSE owner, employee, or student, or any member of the Cameron Family,” or “do anything that may harm the reputation of any current or former MUSE owner, employee, or student, or any Cameron Entity or any member of the Cameron

²⁹ Jt. Exh. 4, ¶ 4.

³⁰ *Passavant Memorial Area Hospital*, 237 NLRB 138, 139 (1978).

³¹ Jt. Exhs. 1(d) and 3.

³² Jt. Exh. 3.

Family. . .³³ Respondent further threatened legal action against Perry if she failed to refrain from making statements about MUSE to others.³⁴

5 Since I have previously found that promulgating and maintaining paragraph 6 of the original confidentiality agreement violated Section 8(a)(1) of the Act, enforcement of this unlawful provision against Ms. Perry is also unlawful, particularly since Respondent failed to include the precise statements attributed to Perry which it found breached the agreement. Moreover, although Respondent did not pursue any legal recourse against Perry, the fact that Respondent threatened to do so evinced its intent to enforce an unlawful provision of the agreement.³⁵ That action, standing alone, violates the Act.

10 CONCLUSIONS OF LAW

15 1. Respondent MUSE School CA is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. By the following acts and conduct, Respondent violated Section 8(a)(1) of the Act.

20 (a) By promulgating and maintaining the overly broad original confidentiality agreement that employees could reasonably understand to prohibit them from discussing their wages, hours and other terms and conditions of employment.

25 (b) By promulgating and maintaining the overly broad “revised version” that employees could reasonably understand to prohibit them from discussion their wages, hours and other terms and conditions of employment.

(c) By enforcing the overly broad original confidential agreement against Trudy Perry and threatening legal action against her if she failed to comply with the agreement.

30 REMEDY

35 Having found that Respondent has engaged in certain unfair labor practices, I find that the Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁶

³³ Jt. Stip. ¶13; see also, Jt. Exh. 2.

³⁴ Id.

³⁵ See *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992); *Waco, Inc.*, 273 NLRB 746 (1984) (it is axiomatic that a rule may be unlawful even if it is not enforced).

³⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

5 The Respondent, MUSE School CA of Calabassas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

10 (a) Promulgating, maintaining and/or enforcing overly broad and ambiguous provisions in its confidentiality agreement that prohibit or may reasonably be read to prohibit employees from discussing wages, hours, or other terms and conditions of employment with other current or former employees.

15 (b) Threatening to enforce overly broad and ambiguous provisions in its confidentiality agreement that prohibit or may reasonably be read to prohibit employees from discussing wages or other terms and conditions of employment with other current or former employees or threatening legal action against current or former employees in seeking to enforce its overly broad and ambiguous confidentiality rules.

20 (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

25 (a) Rescind or revise paragraphs 3, 4, 5 and 6 in its Revised Version to remove any language that prohibits or may be read to prohibit employees from discussing wages, hours and other terms and conditions of employment

30 (b) Furnish, publish and/or distribute to all current employees a new confidentiality agreement that: (1) does not contain the unlawful provisions noted in paragraph (a) above, or (2) advises that the unlawful provisions above have been rescinded, or (3) provides the language of lawful provisions that describes, with specificity, which types of conduct or communication is proscribed by the Agreement and the conduct/communication that is protected by the Act;

35 (c) Notify all current and former employees in writing, including but not limited to, Trudy Perry, that paragraphs 3, 4, 5 and 6 in the Original Confidentiality Agreement that was promulgated and maintained since on or before June 28 through about September 17, 2013, has been rescinded and is void and that Respondent will not prohibit employees from discussing their wages, hours or other terms and conditions of employment.

40 (d) Notify Trudy Perry in writing that Respondent will not enforce or threaten to enforce paragraphs 3, 4, 5 and/or 6 in either the Original Confidentiality Agreement or its Revised Version and that she will not be subject to legal action at any time as a result of discussing her wages or other terms and conditions of her employment with current or former employees of Respondent.

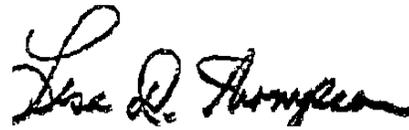
45 (e) Within 14 days after service by the Region, post at all facilities where both confidentiality agreements applied, copies of the attached notice marked “Appendix”³⁷ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the

³⁷ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and former employees by such means. Respondent also shall duplicate and mail, at its own expense, a copy of the notice to all former employees who were required to sign the mandatory and binding arbitration policy during their employment with Respondent. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, D.C. September 8, 2014



Lisa D. Thompson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain an overly broad confidentiality agreement prohibiting you from discussing your wages, hours or other terms and conditions of employment.

WE WILL NOT threaten to enforce or otherwise discipline you for discussing wages, hours or other terms and conditions of employment with former or fellow employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify you in writing that the overly broad Confidentiality Agreement that was implemented since before June 2013 is void and rescinded and the overly broad provisions of the Confidentiality Agreement that was implemented on or about September 18, 2013 are rescinded and/or modified and will not be enforced to prohibit you from discussing wages, hours or other terms and conditions of employment with other current or former employees in a manner protected by the Act.

MUSE SCHOOL CA

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/31-CA-108671 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.