

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

SECURITY WALLS, LLC

and

Case 28-CA-22483

ORLANDO FRANCO, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF

**TO: Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary**

Respectfully submitted,

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Counsel for the General Counsel (CGC) files with the National Labor Relations Board (the Board) the following Answering Brief to Respondent's Cross-Exceptions to the Decision (ALJD) of Administrative Law Judge Margaret G. Brakebusch (ALJ), which issued on November 25, 2009. Respondent excepts to the ALJ's findings and conclusions that Respondent's maintenance of overly-broad confidentiality rules violate Section 8(a)(1) of the Act. In support of its cross-exceptions, Respondent urges the Board to overturn well-established precedent relied upon by the ALJ in finding Respondent's maintenance of such rules to be unlawful. As discussed below, the ALJ applied the Board's establish test regarding overly-broad rules restricting employees' discussions of wages, hours, and working conditions. It is respectfully submitted that Respondent's cross-exceptions are without merit and should be rejected in their entirety.

I. BACKGROUND AND SUMMARY OF FACTS

The Complaint in this matter alleges that in or about February 2009, Respondent discharged its employee Orlando Franco (Franco) and issued unwarranted warnings to employees Jeff Ortega (Ortega) and Royal Jacobs (Jacobs) in retaliation for their having engaged in protected concerted activities, including their concerted refusal to work overtime, in violation of Section 8(a)(1) of the Act. At hearing, the ALJ granted CGC's motion to

amend the Complaint to allege that since October 24, 2008, Respondent has maintained overly-broad confidentiality rules in its Employee Handbook and Restrictive Covenant in violation of Section 8(a)(1) of the Act.¹

The ALJ failed to find that Respondent violated the Act by discharging Franco or issuing discipline to Ortega and Jacobs;² however, the ALJ found that Respondent violated Section 8(a)(1) of the Act by maintaining two confidentiality rules (ALJD 18:45 - 19:42; 19:44 -20:32).³

A. Respondent’s Confidentiality Rules

The Complaint alleges, and the ALJ found, that Respondent violated the Act by maintaining two confidentiality rules. More specifically, the ALJ found the following rule, as set forth at page 8 of the Respondent’s Employee Handbook (Respondent’s Handbook Rule), to be violative of Section 8(a)(1) of the Act (see ALJD 16:46 - 17:6):

Confidentiality

In cases involving a report of harassment or discrimination, all reasonable efforts will be made to protect the privacy of the individuals involved. In many cases, however, Security Walls’ duty to investigate and remedy harassment makes absolute confidentiality impossible. Security Walls will try to limit the sharing of confidential information with employees on a “need to know” basis. Employees who assist in an investigation are required to maintain the confidentiality of all information learned or provided. Violation of confidentiality will result in disciplinary action.

¹ Respondent does not take exception to the ALJ’s granting of CGC’s motion to amend the Complaint.

² On December 23, 2009, CGC filed with the Board exceptions to the ALJ’s failure to find that such discharge and discipline violated the Act and a brief in support of said exceptions.

³ The ALJ did not find that a third rule of Respondent, set forth at page 11 of its employee handbook, violated the Act (ALJD 17:8 - 21; 20:34 - 50). Rather, the ALJ found that that rule was limited to the confidentiality of certain business records and not a prohibition of employees’ exercise of Section 7 rights, noting that it is not apparent that employees would construe the rule as precluding their ability to discuss matters related to terms and conditions of employment (ALJD 20:44 -50). CGC did not except to the ALJ’s failure to find the page 11 rule violative.

The ALJ also found that Respondent's maintenance of the rules set forth at page 2 of its Restrictive Covenant (Respondent's Restrictive Covenant Rules), which prohibit the disclosure by an employee or former employee of the following (ALJD 17:23 - 34), are violative of Section 8(a)(1) of the Act

- (1) Insurance and benefits cost formulas and payment premiums
- (2) Personal and/or sensitive information regarding any Security Walls, LLC employee with particular emphasis on salary/hourly wage rate, benefits, promotions demotions, disciplinary actions, bonuses, or other actions which are clearly the authority of the Human Resource Department.

Respondent excepts to the ALJ's findings and conclusions that the Handbook Rule and the Restrictive Covenant Rule violate Section 8(a)(1) of the Act. In support of its cross-exceptions, Respondent argues that the record fails to establish that Respondent's employees actually construed or interpreted such language as prohibiting employees from exercising Section 7 rights. Contrary to Respondent's assertions, the record shows that the ALJ properly applied Board law in finding such rules to be violative of the Act.

II. LAW AND ANALYSIS

A. The ALJ Applied the Correct Standard in Finding the Rules Unlawful

In finding that Respondent's rules violated the Act, the ALJ fully considered and applied the Board's rationale set forth in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999), that a rule be given a "reasonable reading" and that particular phrases in a rule should not be read in isolation or presumed to improperly interfere with Section 7 rights. *Guardsmark, LLC*, 344 NLRB 809 (2005).

The ALJ, in determining that Respondent's maintenance of the above rules is violative of the Act, applied, *inter alia*, the Board's analysis set forth in *Lafayette Park* and its progeny (ALJD 17:37 -18:28). More specifically, in addition to *Lafayette Park*, the ALJ was guided,

generally and in her treatment of Respondent's Restrictive Covenants Rule specifically, by the Board's decision in *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004), a case involving a rule advising employees that it was essential that confidential information, including salary grades, pay increases, and disciplinary information, not leave a department, by document or verbally, other than as required by a job function, or be discussed with members of an employee's own group. The Board, in finding a violation, found that such a rule left nothing for the employees to "construe" because it specifically defined confidential information as including information concerning salaries, disciplinary information, etc., thus falling clearly within the realm of wages and working conditions (ALJD 18:30 - 43).

In *Double Eagle* and, later in 2004, *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board set forth in clear terms the mechanics of its *Lafayette Park* analysis. First, in *Double Eagle*, in the course of applying both *Lafayette Park* and cases involving rules in the gaming industry, the Board explained that its analysis starts with an examination of the rule, on its face, and that consideration of how employees may construe the rule comes, if at all, only if the rule does not explicitly restrict Section 7 activity:

The instant rule is even more clearly unlawful [than the rules at issue in *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999), and other cases]. The Respondent's confidentiality rule leaves employees with nothing to construe -- it specifically defines confidential information to include wages and working conditions such as 'disciplinary information, grievance/complaint information, performance evaluations, salary information, salary grade, types of pay increases and termination date of employees,' and then explicitly warns employees that '[a]ny breach or violation of this policy will lead to disciplinary action up to and including termination.' We conclude, therefore, that this rule, which on its face and on threat of discipline, expressly prohibits the discussion of wages and other terms plainly infringes upon Section 7 rights and violates Section 8(a)(1).

In November of the same year, in *Lutheran Heritage Village-Livonia*, supra, the Board set forth a clear, two-step analysis regarding confidentiality rules, as reiterated in *The NLS*

Group, 352 NLRB 744, 745 (2008). More specifically, under such a framework, the Board first determines whether the rule explicitly restricts Section 7 activity. If it does, it will be found to be unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if: (1) employees would reasonably construe the language of 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. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

1. The ALJ's Analysis Regarding Respondent's Restrictive Covenants Rule

As to Respondent's Restrictive Covenants Rule specifically, the ALJ fully considered the fact that Respondent is in the business of providing security services to governmental and private entities and, due to the nature of its business, is charged with maintaining the confidentiality of its clients' trade secrets (ALJD 18:45 - 19:3). In finding the maintenance of the Restrictive Covenants Rule to be unlawful, the ALJ correctly honed in on the fact that the rule imposes restrictions on current employees and specifies the information considered confidential, to wit:

Personal and/or sensitive information regarding any employee with particular emphasis on salary/hourly wage rate, benefits, promotions, demotions, disciplinary actions, bonuses, or other actions which are clearly the authority of the Human Resource Department.

(ALJD 19:7 - 13). Such a rule, on its face, explicitly restricts Section 7 activity and, as such, is unlawful. The ALJ correctly observed that such language contains "nothing that gives employees any assurance that the broad restrictions identified in the policy carve out or exclude discussions that would otherwise be protected by Section 7" (ALJD 19:13 -18), citing

Biggs Food, 347 NLRB 425, 426 (2006) (the Board, relying on *Cintas Corporation*, 344 NLRB 943 (2005), found that where there is an unqualified prohibition in a rule, such a rule may be reasonably construed by employees to restrict their discussion with other employees of wages and other terms and conditions of employment) (ALJD 19:18 - 30). As a result, there being no ambiguity on the face of the rule, there is no need to examine whether the rule was imposed in response to protected activity or how the rule has been applied. It is simply unlawful on its face. *Lutheran Heritage Village-Livonia*, supra.

2. The ALJ's Analysis Regarding Respondent's Handbook Rule

The ALJ also found that Respondent's Handbook Rule, on its face, prohibits employees from discussing with each other acts of discrimination and harassment in the workplace (ALJD 20:24 - 32). While noting that Respondent's Project Manager, Richard De Los Santos (De Los Santos), testified that Respondent maintained the rule to protect both the alleged victim and the accused in a sexual-harassment complaint and that the rule did not preclude such employees from discussing the matter (ALJD 20:5 - 9), the ALJ correctly points out that, contrary to such testimony, the rule, on its face, "specifically states that employees who assist in an investigation are required to maintain the confidentiality of all information learned or provided and a violation of [such] confidentiality will result in disciplinary action" (ALJD 20:8 - 11). As a result, based upon the plain meaning of the rule and the absence of any caveat providing for the exercise of employees' Section 7 rights, the ALJ found that such a rule unlawfully precludes employees from discussing among themselves concerns and issues regarding sexual harassment, citing *Phoenix Transit System*, 337 NLRB 510 (2002). Based on the explicit directives in the rule, there is no need to

examine extrinsic evidence, such as why the rule was implemented or how it has been applied.

B. Respondent's Contention that the Record Must Establish that Employees Actually Construed the Rules as Prohibiting the Exercise of Section 7 Rights in Order for the Board to Find a Violation is Without Merit

By its cross-exceptions, Respondent argues that the ALJ erred in finding its rules violative because, Respondent argues, the record purportedly shows that “employees did not construe either of [the two rules] to prohibit their discussion of the terms and conditions of employment and they were free to, and did, regularly exercise these rights without fear of reprisal.” Respondent’s Brief in Support at p. 5.⁴

Respondent fails to recognize that an examination as to why a particular rule was implemented or how it has been applied, or even how employees would reasonably construe or interpret the rules, occurs only where the rule in question does not explicitly, on its face, restrict Section 7 activity. *Lutheran Heritage Village-Livonia*, supra. In the instant case, the ALJ correctly found that the rules, on their face, restrict such conduct.

Even assuming, *arguendo*, that subjective evidence regarding the impact of the maintenance of Respondent’s rules was relevant, the record shows that Respondent failed to create such a record before the ALJ. Try as it might to contort the evidence of alleged discriminatees’ protected conduct into evidence showing how employees actually and subjectively interpreted Respondent’s rules, there can be no dispute that Respondent failed to

⁴ Even if the Board was obliged to reach the stage of its analysis requiring an examination of how employees would reasonably construe the language at issue, Respondent fails to cite to any record evidence to support its argument that employees did not construe these rules as prohibiting Section 7 discussions or that they regularly exercised Section 7 rights “without fear of reprisal.” Respondent offers nothing to support such assertions, other than to point to the ALJ’s findings that the alleged discriminatees engaged in protected concerted conduct regarding the pay rates of security officers and that there is nothing in the record to show that Respondent discouraged such meetings. Respondent fails to point to any record evidence showing that employees construed Respondent’s rules as not restricting Section 7 activities.

offer any evidence at hearing that would show how employees actually interpreted such rules or whether they engaged in Section 7 conduct “without fear of reprisal.”

Moreover, the ALJ made clear that she found the violations to be as a result of the “maintenance” of the two overly-broad rules (ALJD 19:36 -42; 20:27 - 32; 21:24 - 28; 23:19 - 32). Stated differently, in the absence of appropriate caveats or evidence of extenuating circumstances providing an overriding business justification for such rules, the rules were unlawful on their face. Respondent’s arguments are better suited to situations involving a respondent’s allegedly unlawful application or enforcement of confidentiality rules. Respondent simply ignores the fact that this is a case regarding the unlawful maintenance of rules which, on their face, would reasonably tend to interfere with and restrain employees in the exercise of their Section 7 rights.

More telling is the fact that Respondent admits, at page 9 of its Brief in Support, that its “*confidentiality* language *could* have been interpreted as restrictive of Section 7 rights” (emphasis in the original). Respondent follows this admission with the baseless and unsubstantiated assertion that the language “clearly was not so interpreted in that way by any of the Respondent’s employees.” Respondent’s Brief in Support at p. 9. Not surprisingly, because there is none, Respondent cites to no record evidence in support of its assertions regarding employees’ actual interpretation of the rules.

As a result, it appears that Respondent’s defense of its unlawful rules amounts to nothing more than a plea to the Board to jettison its developed jurisprudence regarding overly-broad confidentiality rules and instead require that General Counsel establish that employees subjectively interpret or “construe” a particular rule as restricting Section 7



activities before such rules may be found violative of the Act. The Board should reject such an invitation.

1. The Sole Case Cited by Respondent in Support of Its Cross-Exceptions is Readily Distinguishable

In support of its cross-exceptions, and in particular its contention that dismissal is warranted based on the absence of evidence showing an unlawful application of the rules or that employees actually construed the rules as restricting Section 7 rights, Respondent cites one case, the D.C. Circuit's opinion in *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F. 3d 209 (D.C. Cir. 1996). Respondent's Brief in Support at p. 7. Respondent argues that the *Aroostook County* case is "instructive" inasmuch as the court concluded that "in the absence of any evidence that [the respondent] is imposing an unreasonably broad interpretation of the rule upon employees, the Board's determination to the contrary is unjustified." *Aroostook County*, 81 F.3d at 213. See Respondent's Brief in Support at p. 7, 8. Respondent misapprehends not only the Board's *Lafayette Place and Lutheran Heritage Village-Livonia* analysis, as discussed above, but also the court's analysis and conclusions regarding the examination of a rule's "context" in *Aroostook County*. The application of the *Aroostook County* decision is limited to the facts in that case and, moreover, shows that the ALJ's application of well-established Board law in this case was correct.

More specifically, the rules at issue in *Aroostook County*, set forth in the office-policy manual of the respondent -- a small, rural medical practice -- are as follows:

No office business is a matter for discussion with spouses, families or friends.

All grievances are to be discussed in private with the office manager or physicians. It is totally unacceptable for an employee to discuss any grievances within earshot of patients.

The Board had found such rules to be violative of the Act, but the D.C. Circuit refused to enforce the Board's order, noting that the "no office business" rule was contained in a policy manual that defined "office business" as "confidential patient medical information." *Aroostook County*, supra, 81 F. 3d at 213. As to the rule regarding in-house grievances,⁵ the court, relying specifically on cases in which hospitals were permitted to restrict employees' Section 7 conduct in patient-care areas, did not agree with the Board that the rule's specific prohibition of discussing grievances "within the earshot of patients" was unlawful, citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 505 (1978), and *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 784-86 (1979) (an employer may prohibit union solicitation in the corridors and sitting rooms of a large hospital because such activity would disturb patients). Thus, in *Aroostook County*, the court relied on the specific language of the rules, as informed by other content of the rules, and the fact that at the small rural facility at issue, unlike the hospital in *Beth Israel*, the distinction between non-patient and patient areas was not easily discerned. Supra, at 213, fn. 4.

As a result, Respondent's effort to apply *Aroostook County* to the facts of the instant case, in particular by way of cherry-picking one sentence out of the court's decision ("In the absence of any evidence that [the respondent] is imposing an unreasonably broad interpretation of the rule upon employees, the Board's determination to the contrary is unjustified") (Respondent's Brief in Support at p. 8), simply does not work. More to the point, any suggestion that the *Aroostook County* decision rejected or altered the Board's established analysis, as applied by the ALJ in this case, is entirely without merit. See *Stanford Hospital and Clinics v. NLRB*, 325 F.3d 334 (D.C. Circuit 2003), where the court

⁵ *Aroostook County* involved a non-union facility.

observed that its holding in the *Aroostook County* case was limited by the particular facts presented in that matter:

Moreover, in upholding the [rule] at issue in [the *Aroostook County* case], we relied on the existence of two considerations not present here: that the employer ‘does not operate large facilities where the distinction between patient and non-patient areas can easily be discerned,’ and that, ‘[i]n a small medical practice[,] the employer has unique concerns about employees acting in a way that might disturb patients.’

Stanford Hospital, supra, 325 F.3d at 345-46. Similarly, in a subsequent case before the D.C. Circuit, an employer (another hospital) sought -- unsuccessfully -- to defend the following rule based upon the court’s decision in *Aroostook County*:

Information concerning patients, [employees], or hospital operations should not be discussed either inside or outside the hospital, except strictly in connection with hospital business.

Brockton Hospital v. NLRB, 294 F.3d 100, 106 (D.C. Cir. 2002), enf’g *Brocton Hospital*, 333 NLRB 1367 (2001). The employer in *Brocton Hospital* argued that its policy “merely protects the confidentiality of patient information,” and that the Board’s underlying decision was contrary to the D.C. Circuit’s decision in *Aroostook County* as well as to *Lafayette Park*, supra. The D.C. Circuit rejected the respondent’s argument, noting:

The policy on its face prohibits nurses from discussing with each other, let alone Union officials, ‘information concerning [themselves],’ which the Board argues the nurses could reasonably read to include their wages, hours, and working conditions -- the very stuff of collective bargaining. The employer in *Aroostook*, by contrast, prohibited discussion only of ‘office business,’ which the court expressly understood not to cover the wages, hours, and working conditions of employees. 81 F.3d at 212-13. Considering the terms of the confidentiality policy in this case, the Board reasonably applied the standard set forth in *Lafayette Park*, namely, whether a rule ‘would reasonably tend to chill employees in the exercise of their Section 7 rights.’

Thus, the court in *Brocton Hospital* correctly applies -- and thereby reaffirms -- the Board’s standard, based on *Lafayette Park* and as stated in *Lutheran Heritage Village-Livonia*. In fact,

in *Stanford Hospital*, discussed above, the court stated categorically that its *Aroostook County* decision does not support a claim that an employer “may prohibit its employees from discussing their own terms and conditions of employment with nonemployees.” *Supra*, 325 F.3d at 345.⁶

As a result, Respondent’s reliance on the D.C. Circuit’s opinion in *Aroostook County* is misplaced and should be disregarded by the Board. Moreover, as discussed above, the Board should reject Respondent’s suggestion that the ALJ’s findings and conclusions concerning the two rules at issue are contrary to Board law or are otherwise not supported by the record. To the contrary, the ALJ’s findings and conclusions that Respondent’s maintenance of the two rules is violative of the Act, in keeping with well-established Board precedent, and fully supported by the record.

III. CONCLUSION

Based on the foregoing and the record as whole, it is respectfully submitted that the Board should adopt the ALJ’s findings and conclusions that Respondent violated Section 8(a)(1) of the Act by maintaining its Restrictive Covenant and its Handbook Rules, reject Respondent’s cross-exceptions in their entirety, and issue an appropriate Order requiring Respondent to post and distribute to its employees a Notice to Employees and whatever other relief deemed appropriate by the Board, in addition to the relief sought by CGC’s Exceptions

⁶ See also *SKD Jonesville*, 340 NLRB 101 (2003), where the Board itself distinguished the D.C. Circuit’s decision in *Aroostook County* as a decision which is of limited application due to the unusual facts presented. The Board noted that the court in *Aroostook County* held that the rule against discussing grievances in the presence of patients was consistent with the Supreme Court decisions in *Beth Israel Hospital* and *Baptist Hospital*, *supra*, and that the rule requiring employees to discuss their grievances in private with management was designed merely to provide a fair and reasonable employment dispute resolution mechanism. *Id.*, at 213-214. Neither rule suggested to the court that employees were forbidden to discuss work-related grievances with each other under any circumstances.

dated December 23, 2009, and CGC's Reply Brief in Support of said exceptions, filed with the Board under separate cover this date.

Dated at Phoenix, Arizona, this 20th day of January 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S ANSWERING BRIEF** in **SECURITY WALLS, LLC**, Case 28-CA-22483, was served via E-Gov, E-Filing, e-mail, and overnight delivery via Federal Express, on this 20th day of January 2010, on the following parties:

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