

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

T-MOBILE USA, INC.

and

**Cases 14-CA-155249
14-CA-158446
14-CA-162644
14-CA-166164**

**COMMUNICATION WORKERS OF
AMERICA, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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I. Overview

This case is before the National Labor Relations Board (Board) based on a Consolidated Complaint alleging that T-Mobile USA, Inc. (Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (Act). By Decision dated June 28, 2016, Administrative Law Judge Sharon Levinson Steckler concluded that Respondent violated the Act, as alleged in certain paragraphs of General Counsel's Consolidated Complaint that issued on January 27, 2016.¹ Following Judge Steckler's decision, on August 12, 2016, Respondent filed timely exceptions wherein it argues that Judge Steckler made numerous errors in reaching her conclusions. In accordance with Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel (General Counsel) respectfully files this answering brief, and for the following reasons, submits that Respondent's exceptions are without merit.

II. Respondent's Exceptions

Respondent's Exceptions to the Decision of the Administrative Law Judge and its Brief in Support of its Exceptions raise the following areas of inquiry: Whether Judge Steckler erred in finding that Respondent (1) disparately applied existing policies to restrict Section 7 activity; (2) promulgated overbroad rules in response to Section 7 activity; (3) unlawfully told employees it was creating a seating chart to isolate employees because of their Union sympathies and created and maintained such a seating chart; (4) was liable for unlawful actions committed by its security guard; (5) prohibited employees from engaging in Section 7 activity; and (6) engaged in unlawful surveillance and interrogation of its employees.² For the reasons

¹ The General Counsel did not file exceptions to the Complaint paragraphs dismissed by Judge Steckler.

² Respondent filed 88 exceptions to Judge Steckler's decision. However, Respondent did not address each of those exceptions in its supporting brief. The GC's Answering Brief addresses Respondent's arguments set forth in Respondent's Brief in Support of its Exceptions. Respondent's exceptions that are unsupported by its brief should be dismissed due to Respondent's failure to provide any reasons to reverse the ALJ's conclusions.

addressed below, Respondent's exceptions are without merit.

A. Respondent Disparately Applied Existing Policies to Restrict Section 7 Activity

Respondent argues that Judge Steckler erred in finding that Respondent applied its Acceptable Use Policy, Enterprise User Standard, and Solicitation Policy to Chelsea Befort's May 29 email in a discriminatory fashion. For the reasons detailed below, Respondent's exceptions are without merit.

1. Facts

Chelsea Befort worked at Respondent's Wichita call center as a customer service representative from October 7, 2013 to July 21, 2015. (Tr. 40).³ During her employment with Respondent, Befort was a Union supporter. She expressed her support in a number of ways including the distribution of Union literature and by organizing get-togethers with her coworkers outside of the call center in order to discuss employees' rights. (Tr. 44). Befort communicated with her fellow employees through word-of-mouth, social media, flyers, texting and telephone. (Tr. 45). On one occasion, Befort used Respondent's e-mail system in order to communicate with her coworkers. As a customer service representative, Befort had access to Respondent's email system. (Tr. 45). Respondent's employees are permitted to use Respondent's email system for non-work purposes. (Tr. 312; GC 11, p. 1-2). Through use of this system, Befort received emails from managers, supervisors, and her fellow customer service representatives. (Tr. 45). Befort would send emails to the same categories of individuals employed by Respondent. (Tr. 45). The one occasion Befort used Respondent's

³ References to the trial transcript will be denoted by "Tr" followed by the page number. References to the General Counsel's exhibits will be denoted by "GC" followed by the exhibit number. References to Respondent's exhibits will be denoted by "R" followed by the exhibit number. References to Respondent's Brief in Support of its Exceptions will be denoted by "R Brief" followed by the applicable page number. References to the Judge's Decision will be denoted by "ALJD" followed by the applicable page and line numbers.

email system for the purpose of discussing the Union was on May 29, 2015. (Tr. 45-46). Befort's goal was to send a singular email in order to quickly and efficiently reach as many employees as possible to inform them of their rights to organize. (Tr. 46). Befort's work schedule on May 29, 2015, was 12 p.m. to 9 p.m. and she normally took a one-hour unpaid lunch break around 3:30 to 4:30 p.m. (Tr. 48). On May 29, 2015, Befort clocked out for lunch and then attempted to send an email to all customer service representatives at the call center. Befort opened her email and after clicking the "To" button, she typed, "customer service representative Wichita." (Tr. 49). This search brought up all of the customer service representatives at the Wichita call center. Befort selected each name and entered those into the "To" field. (Tr. 49). Befort typed the following text into the body of the email and she hit send:

"Dear T-Mobile Wichita Employees,

For far too long now, our voices have been silenced. We are told we do not have the right to discuss work conditions in an organized manner. Enough is enough. It is time to make a change! Join the movement!

Feel free to contact me with any questions, but please do so outside of working hours.

Some of us that are currently involved will be meeting at North Rock Lanes tomorrow night. Please join us to meet our team and have some fun!

Sincerely,
Chelsea Befort
T-Mobile CSR 1
Wichita, KS
(316)519-7201" (GC 6)

After sending the email, Befort left her desk to continue her lunch break. Upon her return to her desk, she opened her email account to find an automated message reply letting her know that her message had not been delivered because she could only send an email to 100 recipients at a time. (Tr. 50; R 2). Next, Befort followed the same search function as she had previously

and going alphabetically, she did her best at selecting 100 names. (Tr. 50). Befort repeated this process several times before she clocked back into work. (Tr. 50; GC 6; R 9-13). After Befort clocked out at the end of the day, she repeated this process and sent several more emails to additional groups of customer service representatives. (Tr. 50-51; GC 6, p.7-9; R 16-18). Each email Befort sent out was sent from her work cubicle during non-work time. (Tr. 48-50).

In response to her emails, Befort heard back from some of her coworkers. One employee told Befort that they would rather not receive that type of email while another contacted Befort to express excitement about the Union and indicated a desire to learn more. (Tr. 51). The response to Befort's emails was not limited to her fellow rank and file coworkers. On June 2, 2015, Befort was called into a meeting with Respondent's management to discuss the matter. (Tr. 51-52). As Befort returned from her lunch break, her immediate supervisor, Coach Angel Meeks, asked Befort to put her phone into "team meeting" status and to follow her. (Tr. 52). After Befort followed these instructions, Meeks led Befort to a small conference room. (Tr. 52). In this room, Befort was introduced to Lillian Maron. (Tr. 52). This was Befort's first time meeting Maron, but she soon learned that Maron was her new team manager. (Tr. 52). Maron started the meeting by telling Befort that representatives cannot send out mass emails and that anything Union-related cannot be sent while on the clock. (Tr. 53). Befort responded to Maron by stating that she made sure that she was clocked out when she sent her May 29 emails. (Tr. 53). Maron acknowledged that it was great that Befort did so while clocked out, but the problem was that other representatives had opened or read the email while they were on the clock. (Tr. 53). Maron also stated that what Befort had done was a form of solicitation and Respondent does not allow that. (Tr. 53). Maron went on to tell Befort that anything "Union-related" could not be done by using Respondent's email system. (Tr. 53). She further noted

that anything Union-related could not be discussed within employees' working areas. (Tr. 53). Maron advised that anything Befort wanted to talk about regarding the Union needed to be done outside of working areas and off the clock. (Tr. 53). Befort testified that Maron did not have any documents in her hand while she was speaking. The only document she might have had was sitting on the table but at no time did Maron reference the document while speaking to Befort. (Tr. 54).

After the 10 to 15 minute meeting with Maron, Befort returned to her desk. (Tr. 53-54). Upon her return, there was an email that had been sent out to the entire call center by Call Center Jeff Elliott. The email was directly in response to Befort's May 29 emails a few days prior. (Tr. 54; GC 7). Elliott's email read:

“Team,

It has been reported to us that on Friday an employee sent hundreds of you emails about the union. Many of you told us it was disruptive and unwanted communication. We apologize for any disruption or inconvenience this may have caused. I'd like to take this opportunity to remind you that it is not appropriate for employees to send emails to large numbers of employees. We don't allow mass communication for any non - business purpose since this disrupts the workplace and distracts employees from their work. Also, it is not appropriate to solicit other employees for any purpose when employees are working. We certainly recognize employees' rights to support the union, but we ask that they do so without violating these policies.

Since this email addressed union issues, I'd like to take this opportunity to respond. It is not the case that anyone's voices have been silenced. And no one is telling employees they don't have a right to discuss work issues -you know employees around here aren't shy about discussing anything. Employees have countless opportunities to communicate with others when they are not working -about the union or anything else. They can talk with others in break areas, before work, or after work. They can talk from home, or text while eating out. They can use social networks – off the job of course. But it is not appropriate to solicit or discuss other issues when you are supposed to be working.

Employees have a right to support the union, and an equal right not to. And employees have a right to discuss the union - as long as they are not working - and a right to refuse to discuss the union. Employees have a right to sign authorization cards, and employees have a right to refuse to sign authorization cards. But before you sign, make sure you understand what it means to sign a card.

And if you have any questions about the union, its claims, or authorization cards, feel free to ask your Coach, your Manager or me. We'd be happy to answer any questions you may have.

Jeff" (GC 7)

2. Argument

a. Respondent's Application of Existing Policies

Respondent argues that Befort's email violated its Acceptable Use Policy, Enterprise User Standard, and Solicitation Policy. In her decision, Judge Steckler accurately applied *Lafayette Park Hotel*⁴, *Lutheran Heritage Village-Livonia*⁵, and *Purple Communications*⁶ in finding that Respondent discriminatorily applied its existing policies to Befort's email. (ALJD 20-23). In *Lafayette Park Hotel*, the Board held that the maintenance of a rule violates Section 8(a)(1) of the Act if it would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park* at 825. In *Lutheran Heritage Village-Livonia*, the Board refined this standard by setting forth a two-step inquiry for determining whether a rule violates the Act. *Lutheran Heritage* at 646-647. First, it will be unlawful if the rule explicitly restricts Section 7 activities. If the rule does not, it might still be unlawful if (1) employees would reasonably construe the language 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.

Furthermore, in *Purple Communications, supra*, the Board overturned *Register-Guard*, 351 NLRB 1110 (2007), by adopting the presumption that employees who have been given access to their employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment

⁴ 326 NLRB 824 (1998)

⁵ 343 NLRB 646 (2004)

⁶ 361 NLRB No. 126 (December 11, 2014)

while on nonworking time. Any rule maintained by an employer that limits or chills an employee's protected e-mail communication on non-work time is presumptively unlawful. *Purple Communications* at slip op. 1, 14. The Board noted that employers may apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline. *Id.* at slip op. 13. However, the mere assertion of an interest that could theoretically support a restriction will be insufficient. *Id.*

i. Acceptable Use Policy

Respondent argues that Befort's email violated Section 3.5 of its Acceptable Use Policy for Information and Communication Resources ("AUP"). (Tr. 316, 382; GC 11). Under "Legitimate Business Purposes," Section 3 identifies rules that "apply when using T-Mobile information and communication resources." (GC 11, p. 1). Section 3.5 also lists prohibited uses of Respondent's information and communication resources. (GC 11, p.2). One of the prohibitions listed includes, "To distribute or store junk mail and chain letters." (GC 11, p. 2). While the General Counsel concedes that the AUP does not explicitly restrict Section 7 activity, the record is clear that Respondent applied its AUP unlawfully to restrict the exercise of Section 7 rights. The application of this rule in such a manner was a first for Respondent. At the hearing, Respondent provided no examples to establish a past practice and Respondent's counsel confirmed that Respondent had no documents in its possession showing instances for the time period of January 1, 2013 to the present where Respondent had applied its AUP to employees sending and/or receiving mass e-mails. (Tr. 323-324). Instead, the evidence established that Respondent waited until an employee engaged in unwanted Section 7 activity before it made the decision to apply its prohibition against junk mail and chain letters to such activity. In his testimony, Jeff Elliott confirmed the discriminatory application of this rule.

When asked directly on the stand how Befort's email constituted junk mail or a chain letter, he testified that the email was "not business related." (Tr. 397). Yet, Respondent concedes that employees are otherwise permitted to use Respondent's email system for personal use. (Tr. 312). Elliott's testimony is simply further evidence that Respondent applied its AUP in a discriminatory manner based solely on the content of Befort's May 29, 2015 email. Judge Steckler further acknowledged that employees' "reply all" e-mail capabilities have been used in response to other topics, such as baby showers and death notices. (ALJD 21:9-10). Respondent chose to take issue with the content of Befort's email, which reflected union activities and sympathies.

With respect to Respondent's argument that Befort's email was prohibited because it constituted "junk mail" under the AUP, Judge Steckler correctly pointed out that Respondent failed to provide evidence to establish that the email met reasonable definitions of junk mail or spam. (ALJD 21:35-36).

Additionally, Respondent's application of its prohibition against junk mail and chain letters violates the Act under the principles identified by the Board in *Purple Communications*, supra. *Purple Communications* overturned *Register-Guard*, 351 NLRB 1110 (2007), by adopting the presumption that employees who have been given access to their employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time. Any rule maintained by an employer that limits or chills an employee's protected e-mail communication on non-work time is presumptively unlawful. *Purple Communications* at slip op. 1, 14. The Board noted that employers may apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain

production and discipline. *Id.* at slip op. 13. However, the mere assertion of an interest that could theoretically support a restriction will be insufficient. *Id.* Respondent cannot meet its *Purple Communications* burden. The only evidence in the record of Respondent's interpretation and application of its AUP provision prohibiting junk mail and chain letters is Chelsea Befort's Section 7 activity. There is no evidence to support a finding that such use of Respondent's AUP is necessary to maintain production and discipline.

ii. Enterprise User Standard

In addition to its Acceptable Use Policy, Respondent further argues that Judge Steckler erred in finding that it disparately applied two additional policies to Befort's email: Enterprise User Standard (EUS), and Solicitation Policy. With respect to the EUS, Larissa Wray Tolbert testified that Respondent uses this policy to help "secure and protect T-Mobile information." (Tr. 317). Respondent argues that in sending her May 29, 2015 email, Befort violated Section 3.4 Access Management. (GC 18, p.2). Section 3.4 reads:

1. Users must follow the appropriate authorization process for requesting an account granting specified access and permission levels. Most authorization processes start with a Remedy ticket and specific approvals from T-Mobile Management. Contact your manager or the Help Desk for more information.
2. All access that is not explicitly authorized is forbidden.
3. Users are responsible for all acts associated with their UserID.

Respondent argues that Section 3.4, parts 1 and 2, apply to Befort's email because Befort was not authorized to send emails to certain distribution lists and therefore was prohibited from sending a "mass communication." (Tr. 317-320, 378). In conjunction with its application of its junk mail and chain letter prohibition, Respondent attempts to use this generic language selectively and disparately by applying it against emails pertaining to union organizing and other protected, concerted activities. Such use of this policy in response to Befort's emails was

blatantly discriminatory, particularly where Respondent provided no evidence to show that it has applied its EUS in such a fashion in the past. Judge Steckler reached this same conclusion. (ALJD 22:18-20). As she noted in her decision,

“The issue is “whether the employer applied uniform and consistently enforced control over its email system to the extent such controls are necessary to maintain production and discipline.” *Purple Communications*, 361 NLRB No. 126, slip op. at 1. The standard for establishment of uniform and consistently enforced restrictions are those that an employer can prove would interfere with the email system’s efficient functioning. *Id.*, slip op. at 15. Examples are large attachments or audio/video segments. *Id.* Respondent did not prove that its enforced restrictions were necessary for production and discipline, nor did it prove the email interfered with its email system’s efficient functioning.”

(ALJD 22:9-18).

Contrary to Respondent’s arguments, the Judge correctly applied the analysis set forth in *Purple Communications* to the evidence in this case. The ALJ also addressed Respondent’s arguments that Befort engaged in conduct that exceeded her “restricted access.” The evidence set forth at hearing established that employees have the ability to email large groups of employees and have done so without Respondent responding like it did to Befort’s emails. As the Judge noted in her analysis of Respondent’s new “mass communications” prohibition, “...employees can email a large group to recover lost electronics, but not about the Union.” (ALJD 24:15-16). Similarly, the Judge agreed with the General Counsel in finding disparate treatment in the evidence presented at hearing concerning facility-wide emails such as those “about salsa and lip sync contests” where Respondent identified those as “business-related interests in fostering employee morale; in contrast Befort’s email is not business-related purpose because it was intended to create support for the Union.” (ALJD 22:32-34). Respondent’s response to Befort’s email in comparison to its past practice was a clear departure and the Judge correctly reached the conclusion that the disparity was due to her protected

content.

iii. Solicitation Policy

In Jeff Elliott's June 2, 2015 email, in the same breath that he bans mass communications, Elliott also attacks Befort's email as a form of solicitation in violation of Respondent's no solicitation policy. Respondent's Employee Handbook includes the following prohibited activity:

“Solicitation of any kind by employees on Company premises during working time (of either the employee engaged in soliciting or the employee being solicited). (GC 12, p. 28; GC 13, p. 28)

Respondent's use of its no solicitation policy in this scenario is clearly selective and discriminatory against Section 7 activity. Befort's testimony confirmed that when she sent her emails on May 29, 2015, she was clocked out and on her own personal time. However, Respondent made several indications during the hearing that it was problematic that although Befort was off duty at the time, many of her recipients would have been working. As Judge Steckler found, Respondent's position is contrary to *Purple Communications*, supra. (ALJD 23:14-17). The Board in *Purple Communications* wrote:

“[w]e do not find it appropriate to treat email communication as either solicitation or distribution per se. Rather, an email system is a forum for communication, and the individual messages sent and received via email may, depending on their content and context, constitute solicitation, literature (i.e., information) distribution, or--as we expect would most often be true--merely communications that are neither solicitation nor distribution, but that nevertheless constitute protected activity.” 361 NLRB No. 126 at slip op. 10.

Judge Steckler astutely noted,

“Using an email system is not treated as just solicitation due to its unique features. It may defy classification as a work or non-work area. *Purple Communications*, supra, slip op. at 14. Further, reading of personal email on working or nonworking time has become blurred due to the structure of the technology workplace in which the CSRs operate. *Purple Communications*, 361 NLRB No. 126, slip op. at 15 fn. 72. Respondent does not demonstrate that it has significantly limited email usage during working time when

anyone else sends a personal email. In this respect, Respondent's reliance upon the solicitation policy is misplaced. Because this interpretation was put forth against Union activity but not before, it is discriminatory."

(ALJD 23:19-26).

Furthermore, the Board has been clear with respect to its definition of solicitation. As detailed by the Board in *Conagra Foods, Inc.*, 361 NLRB No. 113 (November 21, 2014) at slip op 2:

"...the Board has consistently held that "[s]olicitation' for a union usually means asking someone to join the union by signing his name to an authorization card" at that time. *W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), enf. 582 F.2d 1118 (7th Cir. 1978); *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970) (the presentation of an authorization card is an "integral and important part of the solicitation process"); see also *Wal-Mart Stores*, 340 NLRB 637, 638-639 (2003) (employee did not engage in solicitation by stating she would like coworkers to consider signing authorization card where no card was tendered at the time), enf. denied in relevant part 400 F.3d 1093 (8th Cir. 2005); *Opryland Hotel*, 323 NLRB 723, 731 (1997) (asking employee to attend union meeting not solicitation); *Lamar Industrial Plastics*, 281 NLRB 511, 513 (1986) (asking employee if she had an authorization card not solicitation). As the Board has explained, drawing the "solicitation" line at the presentation of a card for signature makes sense because it is that act which "prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the employees are supposed to be working." *Wal-Mart*, above, 340 NLRB at 639."

The Judge is correct in that Befort's May 29, 2015 email simply does not meet the definition of solicitation, whether oral or otherwise. Furthermore, even if it did, Respondent has no legitimate business justification to restrict employees from electronically soliciting employees who are at work. Unlike solicitations in person, solicitations made via email do not impinge on Respondent's interests in maintaining discipline as an email message may be read later at the recipient's convenience or be deleted. Therefore, what time an employee receives an email in their inbox has no impact on production or discipline. Respondent simply attempts to apply its no solicitation policy against Section 7 activity without a legitimate business

justification and its failure to do so runs afoul of the requirements identified by the Board in *Purple Communications*.

Chelsea Befort had the right to use the Employer's e-mail system to send her protected emails and when Respondent applied its Acceptable Use Policy, in conjunction with its Enterprise User Policy and Solicitation Policy in a manner that restricts Section 7 activity, it violated 8(a)(1) of the Act. The record supports Judge Steckler's conclusion and Respondent's exceptions fail to warrant a reversal of her findings.

B. Respondent Promulgated Overbroad Work Rules in Response to Section 7 Activity

1. Facts

Respondent promulgated new overbroad rules in direct response to Chelsea Befort's Section 7 activity. The new rules promulgated by Respondent were rules (1) prohibiting employees from sending mass communications; (2) prohibiting employees from discussing Union in non-work areas during non-work time; and (3) prohibiting social media use. Respondent argues in its exceptions that in his June 2, 2015 email, Jeff Elliott did not promulgate new company rules; he simply reiterated existing ones. Additionally, Respondent argues that even if the rules identified below were new, they do not constitute violations of the Act. For the following reasons, Respondent's exceptions are without merit.

2. Argument

a. Rule Prohibiting Mass Communications

Respondent promulgated a new rule prohibiting employees from sending mass emails. Similar to application of its prohibition against junk mail and chain letters, Respondent's new rule prohibiting mass emails also violates the Act under the standards set forth in *Lutheran Heritage Village-Livonia*, supra. Respondent's newly created rule prohibiting mass emails

checks all three of the Board's boxes in that case. In response to Union activity, Respondent promulgated a rule prohibiting employees from sending mass emails; Respondent applied its rule in an effort to restrict Section 7 rights; and as a result, employees would have no choice but reasonably construe the language to prohibit such activity.

Contrary to Respondent's arguments in its exceptions, there is no evidence in the record to support an argument that Respondent's mass email prohibition is an existing rule or prohibition. Jeff Elliott confirmed in his testimony that there is no specific provision or policy in writing that prohibits mass emails in any manner. (Tr. 396). Elliott testified that Befort's email constituted "junk" because "it was a large e-mail that didn't have [a] purpose behind it." (Tr. 382). Yet, when asked on the stand if Elliott deemed the mass communication prohibition to be a new one, he testified that it was not and in justifying this response, Elliott only referenced Respondent's "junk mail" prohibition. (Tr. 383). In banning mass emails, Respondent simply extended its prohibition against the "Distribut[ion] or stor[ing] junk mail and chain letters" into a new rule. (Tr. 316, 382; GC 11, p. 2). Respondent confirmed that it had no evidence from the past three years of applying its Acceptable Use Policy against employees for sending or receiving mass emails. (Tr. 323-324). This was a first for Respondent. Respondent also went to great lengths at hearing to establish that customer service representatives do not have access to certain distribution lists that allow for emails to be sent side wide or to various groups of recipients. Access to distribution lists does not equate to an established rule prohibiting employees sending emails to multiple recipients. As Befort easily showed with her efforts on May 29, 2015, Respondent's system does not prohibit employees from manually selecting multiple recipients to send an email at one time. In fact, had Befort followed the same process and sent an email inviting 50 of her closest customer service

representative friends to grab a drink at her local Sonic after work, Respondent would have no problem with this. The only barrier that existed on May 29, 2015, was one that was automated in nature, being that Respondent's email system has a built in maximum number of recipients (100). Furthermore, multiple employees testified to frequently receiving emails not directly related to employees' job duties that went to multiple recipients, including side wide recipients. General Counsel Exhibit 8 contains several examples of these types of emails including emails concerning hockey tickets, fresh popcorn being available, free nachos, salsa contests, signing a birthday card, and a missing cell phone charger. It is clear that Respondent did not start to take issue with "mass emails" until it involved Section 7 activity.

Respondent's position is also contrary to *Purple Communications*. As previously detailed, in *Purple Communications*, the Board adopted the presumption that employees who have been given access to their employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time. Any rule maintained by an employer that limits or chills an employee's protected e-mail communication on non-work time is presumptively unlawful. *Purple Communications* at slip op. 1, 14. Although employers may apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline, the mere assertion of an interest that could theoretically support a restriction will be insufficient. *Id.* For example, if the employer can demonstrate that large attachments or audio/video segments will interfere with the email system, an employer is permitted to establish uniform and consistently enforced restrictions regarding such emails. *Id.* at slip op. 14. As the majority in *Purple Communications* found,

"We emphasize, however, that an employer contending that special circumstances justify a particular restriction must demonstrate the connection between the interest it asserts and

the restriction. The mere assertion of an interest that could theoretically support a restriction will not suffice. And, ordinarily, an employer's interests will establish special circumstances only to the extent that those interests are not similarly affected by employee email use that the employer has authorized." *Id.*

With respect to prohibiting mass emails, Elliott's June 2, 2015 email simply notes that "this disrupts the work place and distracts employees from their work." (GC 7). Elliott confirmed this in his testimony when he stated that Befort's email was a disruption and that multiple employees complained about it. (Tr. 377). Respondent can point to no evidence to support an argument that a "no mass emails" restriction is necessary to maintain production and control. As the Board noted in *Purple Communications*, Respondent is required to justify a particular restriction and must demonstrate the interest it asserts. "Disruption" fails to do so. Employees are permitted the use Respondent's email system for non-work purpose and "disruption" can be used by an employer for any singular email disputed by any of its employees.

Additionally, with respect whether recipients of Befort's email read or could have read the email during non-work time, in *Purple Communications*, the Board noted,

"We also find it unnecessary to characterize email systems as work areas or nonwork areas. In the vast majority of cases, an employer's email system will amount to a mixed-use area, in which the work-area restrictions permitted on literature distribution generally will not apply." *Purple Communications* at slip op. 13, citing, e.g., *United Parcel Service*, 327 NLRB 317, 317 (1998).

Respondent has no legitimate business justification for restricting employees from electronically sending "mass emails" to employees who are at work. E-mails may be read later at the recipient employee's convenience. Therefore, what time employees receive an email in their inbox has no impact on production of discipline. The Board addressed this issue, in part, in its decision:

"We are unpersuaded by our dissenting colleagues' dire predictions that an unstoppable

flood of Sec. 7-related email messages will have a “debilitating impact on productivity” and deprive employees of their right to refrain from Sec. 7 activity. First, as we have made clear, the presumption we establish is limited to nonworking time, for which there is, by definition, no expectation of employee productivity. In addition, employees can, and do, promptly hit the “delete” button when they receive messages that are not relevant to their work or otherwise of interest. And, as explained, employers can monitor for misuse and reduced productivity. To state the obvious, many employers already permit personal use of work email, and the sky has not fallen.” *Purple Communications* at slip op. 14.

Respondent created a new rule banning mass emails as an extension of its pre-existing rule prohibiting junk mail or chain letters under its Acceptable Use Policy. Respondent has failed to support an argument that it is permitted to apply this rule to Section 7 activity because it is “necessary to maintain production and discipline” such that the rule trumps the protected nature of Befort’s emails. The only argument offered by the Respondent is that Befort’s emails were disruptive and there was proof through employees’ complaints. The Board made it clear that emails are hardly disruptive to employees, noting, “[E]mployees can and do, promptly hit the “delete” button when they receive messages that are not relevant to their work or otherwise of interest.” *Id.* at 28. For these reasons, Judge Steckler’s conclusion that Respondent’s new rule prohibiting employees from sending mass emails restricts employees’ Section 7 rights violated Section 8(a)(1) of the Act is supported by the record and Respondent’s exceptions are without merit.

b. Rule Prohibiting Union Talk During Work Time

Further in his email, Jeff Elliott identified employees’ rights to discuss issues related to their work, including Union issues. (GC 7). However, in doing so, Elliott unlawfully restricted employees from discussing the Union during work time. In relevant part, Elliot wrote,

“And no one is telling employees they don’t have a right to discuss work issues – you know employees around here aren’t shy about discussing anything. Employees have countless opportunities to communicate with others when they are not working – about the union or anything else. They can talk with others in break areas, before work, or after

work. They can talk from home, or text while eating out.” (GC 7).

Respondent argues in its exceptions that the Board allows employers to restrict employees from engaging in concerted activities during working time or work time. (R brief at 31). What Respondent fails to address is exactly what Judge Steckler spoke to in her decision - the substantial evidence in the record establishing that Respondent permits employees to discuss other matters unrelated to work during work time. (ALJD 24:37-44). Within his email, Elliott dictated a new rule to employees that had never previously been communicated to them. Similar to the rule prohibiting mass emails, four employees consistently testified that the common practice at Respondent’s facility was and is that employees talk about a wide-range of non-work topics during work time. (Tr. 57-59, 117- 118, 141-142, 179-180). Employees engage in these discussions in the presence of supervision and frequently they do so with supervision. (Tr. 57-59, 117-118, 141-142, 179-180). Although employers are permitted to prohibit discussion of non-work topics during working time, they are not allowed to limit such prohibitions to unions or other protected topics. See *Williamette Industries*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986); *Altorfer Machinery Co.*, 332 NLRB 130, 133 (2000). Elliott clearly promulgated Respondent’s rule that employees are prohibited from discussing the Union during work time in direct response to Befort’s protected activity and such a rule on its face is an overbroad restriction on employees’ exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, supra. As such, Elliott’s promulgation of this rule violated Section 8(a)(1) of the Act and Respondent’s exceptions to this finding are without support.

c. Rule Prohibiting Use of Social Media at Work

Contrary to Respondent’s arguments, Judge Steckler correctly found that Respondent

promulgated a new overbroad rule restricting employees' social media use in response to Section 7 activity. (ALJD 25:6-38). While Jeff Elliott identified the number of ways, and when, employees can discuss Union issues, he reminded employees of their ability to use social networks. (GC 7). After informing employees that they have "countless opportunities to communicate with others when they are not working," including break areas, before work, after work, from home or while eating out, Elliott continued,

"They can use social networks – off the job of course. But it is not appropriate to solicit or discuss other issues when you are supposed to be working." (GC 7).

The testimony provided by employees on this subject follows the same pattern as their testimony regarding employees' non-work discussions during work time. Four employees provided uncontested testimony regarding employees' common use of social media while at the work place. (Tr. 59-60, 118-119, 143-144, 180-181). Uncontroverted testimony confirmed that it was common for employees to use social media such as Facebook and Twitter during work time in between calls or when things were slow. Furthermore, at the time, Respondent maintained a written social media policy that was consistent with the employees' testimony. (GC 12, 13, 19). Respondent's Employee Handbook contains a specific section referring to social media. (GC 12, 13). The Social Media provision within the Employee Handbook reads as follows:

TMUS respects the rights of employees to engage in social media and does not want to discourage employees from self-publishing and self-expression except where the company determines that such conduct is inappropriate or unlawful. Employees are expected to follow the guidelines in the Social Media Policy.

A link to the Social Media Policy sends employees to a separate document identified as General Counsel Exhibit 19. The T-Mobile Social Media Policy not only identifies various do's and do not's to keep in mind, but it also contains information related to whether employees can

use Respondent's resources for the purpose of utilizing social media. In relevant part, the policy reads:

"T-Mobile resources like computers, Internet access, and email are to be used for business purposes. For most positions, engaging in Social Media during work hours is not a legitimate business purpose. However, occasional, personal Social Media use on your work computer or during work hours may be acceptable as long as it doesn't interfere with your job responsibilities and is consistent with this Policy and other applicable documents and policies listed below." (GC 19)

Not only is Elliott's new rule contrary to the past practice detailed by the testimony of Respondent's employees, but it is also contrary to Respondent's written Social Media Policy. As such, similar to Elliott's rules preventing employees from sending mass emails and discussing the Union during work time, Respondent clearly promulgated its new rule regarding social media use in direct response to protected Section 7 activity in an attempt to limit that activity. *Lutheran Heritage Village-Livonia*, supra.

Furthermore, as noted in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), the maintenance of a rule violates Section 8(a)(1) of the Act if it would reasonably tend to chill employees in the exercise of their Section 7 rights. Under *Lutheran Heritage Village-Livonia*, supra, a rule is deemed unlawful if employees would reasonably construe the language to prohibit Section 7 activity. The record establishes that employees have historically used social media at the call center during work time and non-work time. However, even if the record established that employees have historically been limited to using social media during non-work time, Elliott's directive could be construed by Respondent's employees as limiting social media while they are present at the call center. "Off the job" does not distinguish between work and non-work time. The Board has specifically distinguished between the use of "working time" and "working hours." See *Essex International*, 211 NLRB 749, 751 (1974). "On the job" is no

more descriptive than “working hours.” “Working hours has been deemed to mean “the period of time from the beginning to the end of a workshift.” Id. Therefore, use of such a term would mean that employees are prohibited from using social media at any point from the beginning of their workday to the end of it.” Id. As the Judge found, “a solicitation rule is presumptively invalid when solicitation is prohibited during the employee’s own time. *Our Way*, 268 NLRB 394, 394 (1983).” (ALJD 25:29-31). This includes a ban that extends to working areas during nonworking time. *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295, 1296 (2011). The Board has equally found similar terminology of “company time” to be equally ambiguous. See *General Motors Corp.*, 240 NLRB 168 (1979). As a result of Elliott’s phrasing in his email, employees are left to interpret his meaning. Any ambiguity that exists within Respondent’s restrictions is resolved against Respondent. See *Norris/O’Bannon*, 307 NLRB 1236, 1245 (1992), quoting *Paceco*, 237 NLRB 399 fn. 8 (1978) (“Where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it.”).

C. Respondent Created a Seating Chart for Unlawful Reasons

Respondent argues that Judge Steckler erred in finding that Respondent violated Section 8(a)(1) of the Act by telling employees it planned to create a seating chart to isolate Union supporters and by creating and maintaining a seating chart to isolate employees for the same reason. (R brief at 32; ALJD at 32-33, 36). For the following reasons, Respondent’s exceptions are without merit.

1. Facts

After serving in a temporary capacity for several months, around the end of June or early July 2015, Coach Belinda Spencer was permanently assigned to Senior Customer Service

Representative Jerrica Croxson's team. (Tr. 205). Around this same time, employees were preparing for a realignment at Respondent's facility. A realignment occurs approximately every six months when employees bid on team placement. The next one was scheduled to take place the last week of July 2015. (Tr. 209-210). At Respondent's call center, teams of approximately 12-15 customer service representatives work in pods where the employees' work areas form a square around the desks of their assigned senior customer service representatives and coach. (Tr. 42; GC 5). In advance of the July 2015 realignment, Spencer had discussions with Croxson concerning the fact that Union supporters Chelsea Befort, Alyssa Jones and Holly Robinson had all bid to be a part of Spencer and Croxson's team. (Tr. 212). Spencer told Croxson that she did not want those individuals sitting by Croxson because she wanted to make sure that they did not think that Croxson would display any favoritism towards them or vice versa because of their similar Union support. (Tr. 212-213). It was also discussed by Spencer that Jones and Robinson should sit opposite from each other because of that same support. (Tr. 212). In advance of the late July 2015 realignment, Spencer discussed the use of a seating chart due to the newly acquired employees. (Tr. 212-214). When Spencer first expressed a desire to do so, she told Croxson that the reason for the seating chart was because Jones and Robinson were union supporters and they should not sit near each other. (Tr. 213). Spencer identified those two employees by name. (Tr. 214). Befort was no longer in the conversation because she was no longer employed by Respondent. (Tr. 213). It was not until the week of the realignment or shortly thereafter that Spencer gave Croxson another reason for separating Jones and Robinson – they were in a relationship with each other. (Tr. 212-213). When the realignment took place, Spencer initiated a seating chart. (Tr. 214-215; GC 17). In the seating chart that Spencer emailed to her team on July 23, 2015, Robinson and Jones were seated across from each other,

meaning that as they sat in their cubicles, they faced opposite directions. (Tr. 215). This seating chart was the first seating chart that Spencer had implemented while Croxson worked on her team. (Tr. 215-216). Although the idea had been discussed previously, Spencer had never followed through and implemented a seating chart until the July 2015 realignment. (Tr. 216).

2. Argument

Respondent takes the position that Spencer's statements to Croxson are not "unduly coercive" and "do not constitute an actionable, coercive threat of reprisal." (R brief at 33). Respondent argues that Spencer communicating an unlawful reason for separating employees for their union support is somehow lawful because it did not affect Croxson's job conditions. Respondent's argument is not supported by the law. When an employer tells an employee that it has taken an action against an employee or employees because they engaged in union or protected concerted activity, it violates Section 8(a)(1). *Bowling Transportation, Inc.*, 336 NLRB 393, 393 (2001)(employer violated Section 8(a)(1) when it told employees they were removed from the employer's property because they engaged in union and/or protected concerted activity); *Yale-New Haven Hospital*, 309 NLRB 363, 367-368 (1992); *Atlas Transit Mix Corp.*, 323 NLRB 1144, 1150 (1997). Respondent seeks to narrow the intent of previous Board decisions on this subject by arguing that there must have been a specific threat to Croxson's terms and conditions of employment. What is relevant is that Spencer made a clear statement in the presence of an employee that she sought to punish employees because of their protected Section 7 activity. Judge Steckler correctly found such a statement to be unlawful consistent with Board precedent.

Respondent also argues that the record did not establish evidence to support Judge Steckler's related finding that Spencer's subsequent implementation of a seating chart was

violative of Sections 8(a)(1) and (3) of the Act. Respondent argues that the small pod design and the fact that Croxson walks around the pod to perform her job somehow negates any type of unlawful motive on Spencer's part because it was impossible to "isolate" the Union supporters. (R brief 33-34). As the ALJ found, the seating chart clearly shows that Spencer followed through with her goals when she assigned Union supporters Holly Robinson and Alyssa Jones to seats on opposite sides of their work area and facing opposite directions. (GC 17). Additionally, as the Judge noted in her decision, each of the four known Union supporters in the group were seated separately from each other and facing in opposite directions. (GC 17; ALJD 32:45-46). Even though Croxson credibly testified that she had previously discussed a seating chart with Spencer, one was never implemented until July 2015, and Spencer never provided an explanation to support a need for one other than the unlawful one credited by Judge Steckler. As such, Respondent's exceptions are without merit.

D. Respondent is Liable for its Security Guard's Unlawful Actions

In its exceptions, Respondent argues that Judge Steckler erred in finding that one of its security guards was an agent for the company when the guard prohibited an employee from distributing union literature in a non-work area during non-work time. Respondent also argues that the Judge failed to find that it adequately cured the guard's misconduct under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). (R brief 37-44). The record supports Judge Steckler's conclusions that security guard J. Weigand was an agent of Respondent because he possessed apparent authority and Respondent failed to properly cure Weigand's unlawful conduct under *Passavant*.

1. Facts

From late March to early December 2015, Abigail Parrish worked for Respondent as a

customer service representative at its Wichita call center. (Tr. 162). On August 20, 2015, Parrish was not scheduled to work. On this date, Parrish joined several Union staff members and supporters along the public easement next to two driveways that access Respondent's facility. (Tr. 163-164; GC 5). Parrish joined Organizer Tammera Chaffee to distribute literature at one driveway while Union supporters Rebecca Harris and Ellen Braken distributed at the other driveway. (Tr. 165; GC 5). After several minutes, Parrish realized that as Respondent's employee, she had the right to be present on Respondent's property. (Tr. 165-166). Her understanding at the time was that she could distribute non-work literature on company property if she did so in non-working areas. (Tr. 166). Upon this realization, Parrish took a stack of flyers and walked to the front (east) entrance of the facility. (Tr. 166; GC 5). While Parrish was distributing flyers in that non-work area, she was approached by a security guard who told Parrish that she was on private property and she could not distribute flyers. (Tr. 166). Parrish advised that she was an employee and offered to show the guard her I.D. badge. (Tr. 166). After hearing this response, the guard stated, "Oh, okay," and went inside while Parrish continued to distribute literature. (Tr. 166-167). After approximately ten or fifteen minutes, Parrish ran out of flyers and returned to the east entrance public easement to obtain more. (Tr. 167). Once she restocked her supply, Parrish walked around the perimeter of the call center's premises to the west entrance where an outdoor break area is located. (Tr. 167-168; GC 5). Parrish entered a structure designated for employees to smoke ("smoke shack") and handed a flyer to the two individuals who were present. She asked those employees to read the literature but not to do so during company time. (Tr. 168). When Parrish left the smoke shack, she noticed two individuals departing the call center's west entrance. (Tr. 168). One was a supervisor and the other was a security guard. (Tr. 168). Parrish recognized the security guard based on his clothing he was

wearing – white button up shirt, black slacks and a name tag that read “J. Weigand.” (Tr. 168-169). Weigand approached Parrish and as he neared, in a loud voice, stated, “Abby, you can’t be passing out flyers. It’s solicitation.” Weigand also told Parrish that it was company policy that she could not pass out flyers. (Tr. 169). Parrish responded that she was pretty sure what she was doing did not amount to solicitation. (Tr. 169). Weigand reiterated his previous position, “No, this is solicitation and it’s company policy.” Weigand told Parrish she needed to stop. (Tr. 169). Parrish told Weigand, “Okay,” and that she would talk to her “people.” (Tr. 170). Parrish then returned to the public easement to discuss the matter with Tammera Chaffee. (Tr. 170).

Parrish was not scheduled to work again until August 22, 2015. (Tr. 171). Upon her arrival to work, she found an email that had been sent to her by Senior Manager HR Business Partner Larissa Wray Tolbert. (Tr. 170-171; GC 10). Wray Tolbert sent the email to Parrish at 3:58 p.m. on August 20, 2015. (GC 10). In her email, Wray Tolbert wrote that she understood that a security guard approached Parrish in the smoking area and told her that she was not allowed to hand out leaflets in that area. Wray Tolbert went on to write that the guard was in error and that there is no prohibition against Parrish distributing union literature in a non-working area during non-working time. (GC 10). This email was the only communication Respondent had with Parrish about the August 20, 2015 incident with security guard J. Weigand. (Tr. 171-172).

2. Argument

a. Weigand Possessed Apparent Authority

Respondent argues in its brief that the ALJ erred in finding Weigand to be an agent possessing apparent authority in this matter. Respondent argues that apparent authority to control access of a property does not translate into apparent authority to enforce a company

policy such as Respondent's distribution policy. (R brief at 38). In doing so, Respondent seeks to improperly narrow the agency question in a manner that is contrary to Board law. As detailed below, Respondent's exceptions are without merit and Judge Steckler reached the appropriate conclusion on this subject.

Respondent's security guards are not directly employed by Respondent. Respondent previously contracted with Guardsmark for the purpose of supplying guards at Respondent's Wichita call center, and recently Guardsmark was acquired by Universal. (Tr. 340). The Board has frequently found security guards to constitute agents of an employer notwithstanding the fact that they were not directly employed by the entity based on the scope of their authority and job duties. See, e.g., *Station Casinos, LLC*, 358 NLRB 1556 (2012)(guard acted as an agent when instructing an employee to stop campaigning in a non-work area during non-work time). In determining the agency status of an individual not employed by the respondent employer or union, the Board has long used common law agency principles. See, e.g., *Cooper Industries*, 328 NLRB 145 (1999); *Southern Bag Corp.*, 315 NLRB 725 (1994). Common-law agency principles are used to determine 2(13) agency status when considering the making of particular statements or taking particular actions. *Cooper Industries*, supra; *Southern Bag Corp.*, supra; *Great American Products*, 312 NLRB 962, 963 (1993). One agency principle is apparent authority, which occurs when, as it relates to these facts, Respondent's conduct creates a reasonable basis for employees to believe that Respondent authorized security guard J. Weigand's conduct. The test used for agency status is whether, under all the circumstances, "the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426 (1987). In determining agency status, the Board will consider whether the statements or actions of the

asserted agent were consistent with statements or actions of the employer. *Pan-Osten Co.*, 336 NLRB 305, 306 (2001). The Board has found that security guards can act with apparent authority in stopping the distribution of Union materials in an employer's parking lot even if, in informing the employees that they were violating the employer's rules, they conveyed incorrect information. *NLRB v. Southwire Co.*, 801 F.2d 1252, 1254 (11th Cir. 1986), citing to *Harrison Steel Castings Co.*, 262 NLRB 450, 455 fn. 6 (1982) (noting that "the authority placed in [the security guard], the location and means by which she exercised her authority with respect to the protection of plant property against trespass would naturally be taken as possessed of the imprimatur of Respondent."). In *Harrison Steel Castings Co.*, the Board upheld an ALJ's finding that a security guard was an agent of respondent acting with apparent authority because the security guard's warning about distributing union material was within the scope of her authority as a guard charged with responsibility of maintaining the integrity of Respondent's property. 262 NLRB at 455.

In this matter, Respondent's security guards are agents of Respondent. Four employees provided testimony concerning their time employed by Respondent at its Wichita call center. Within their testimony, each employee testified to their respective recollections as it related to observations, interactions, communications, directives, and information derived from and about security guards at the call center. (Tr. 67-70, 119-122, 147-153, 173-176). A totality of the testimony provided by Respondent's employees supports the Judge's finding that Respondent's security guards have apparent authority to act as agents on Respondent's behalf for the purpose of monitoring and controlling access to Respondent's property, as well as individuals' behavior on the property. As a result, when security guard Weigand approached Parrish on August 20, 2015, as Respondent's employee, Parrish would have no choice but have the reasonable

understanding that Weigand was reflecting Respondent's company policy and speaking on behalf of the Respondent.

At Respondent's Wichita call center, security guards maintain a constant presence within the vision of Respondent's employees. Guards are permanently stationed at two entrances. Guards are stationed at the front, primary entrance utilized by employees and the public and they are also stationed at a secondary entrance in the rear of the building used primarily by Respondent's employees. (Tr. 67, 119, 148, 172-173, 340-341). Guards are also consistently observed by employees as they monitor Respondent's property by performing patrols of the interior of the call center, including checking utility closets and doors with roof access. Employees also observe guards patrolling the exterior of the building, patrolling the call center's outer premises and parking lot. (Tr. 67, 119, 148, 172, 341).

The evidence set forth at hearing established that employees have frequent observations and interactions with guards as they performed their task of monitoring and securing Respondent's call center and surrounding premises. Employees were instructed during their initial training and orientation that they were required to contact security if they lose their employee identification badge, which allows access to the call center, or their parking permit, which allows access to Respondent's parking lots. (Tr. 69-70, 119-120, 150-152, 174-175). Employees were also required to register their vehicles with security when they started their employment with Respondent. (Tr. 122-123, 151). During initial training and orientation, both the Respondent and security instructed employees to notify security if they see someone on the property who they did not believe should be there, anything suspicious, or any other incidents that should be brought to someone's attention. (Tr. 120, 152-153, 174). This included anything that seemed dangerous or suspicious on or outside the property. (Tr. 174).

The employees' collective testimony revealed that security communicated with employees on a frequent basis, not only through face to face verbal discussions, but also through use of Respondent's internal e-mail and instant messaging systems. (Tr. 68-69, 121-122, 152, 175-176). Respondent's guards utilize the same e-mail and instant messaging system that is available to Respondent's management and supervision and the instant messaging system is only available to Respondent's employees on an internal network. Security guards frequently correspond directly with employees, both site-wide and on an individual basis. Employees testified to security guards sending site wide e-mails regarding notifications of incoming inclement weather, issues in the parking lot such as flat tires, windows being left down or broken, and employees parking in designated parking spots reserved for expectant mothers. (Tr. 68-69, 121, 125, 152, 175-176). Employees also testified to receiving individual emails and instant messages from security guards for issues related directly to them, such as leaving their car lights on, the arrival of food delivery, a member of the public being at the front entrance requesting to see the employee, mail being left for them, etc. (Tr. 68-69, 122, 152, 173-174, 176).

Guards at Respondent's Wichita location do not wear special uniforms or display identification that indicates that they are employed by a separate entity or somehow communicates to employees that they have nothing to do with Respondent's operations. Guards simply wear white button-up shirts, black slacks and a nametag. (Tr. 168).

As detailed above, employees understand that if there is something questionable that arises or an incident occurs that needs to be brought to someone's attention, employees should contact security immediately. An example of this is found in Taylor Lowery's testimony. (Tr. 148-150). During Lowery's initial training and orientation, Lowery had a medical situation as a

result of low blood sugar. (Tr. 148). The first step that was taken was contacting security for assistance. (Tr. 148). Security then assisted Lowery by giving her a glucose gel, taking a sample of her blood, and obtaining information regarding her identification. (Tr. 149-150). This action mirrored the instructions provided to Lowery and her fellow new hires during training that if an emergency occurred, they should contact security first. (Tr. 148-149).

The evidence at hearing established that in the eyes of the employees, Respondent's security guards have a wide spectrum of job duties at the Wichita call center. Guards are not limited to the simple function of sitting at entrances, checking badges and walking around. The duties and responsibilities guards have displayed in the presence of employees extend well beyond that. Respondent cannot argue that in the scenario that Abigail Parrish experienced, Parrish should have understood that Weigand did not have the authority to tell her that she was prohibited from distributing literature at that time. No reasonable employee could have made that determination, yet that's exactly what Respondent asserts. What Respondent asks is that its employees analyze every instruction provided to them by security and make a determination of whether or not security has the authority to speak on behalf of Respondent. Not only is that an impossible task, it is also a very dangerous one.

The record established that on a daily basis, employees observe Respondent's security guards engaging in conduct with the goal of securing, monitoring and maintaining the integrity of Respondent's call center and surrounding premises. In fact, Senior HR Business Partner Larissa Wray Tolbert confirmed that securing and monitoring Respondent's facility is part of security's job responsibilities. (Tr. 340-341). Respondent argues that Weigand acted out of the scope of his authority and the Judge erred because Weigand was not authorized "to enforce the Company's employment policies or promulgate similar rules of his own." (R brief at 38).

Respondent argues that the relevant inquiry in this case is not whether Weigand had the authority to control access or monitoring or reporting of Union activities. Respondent's arguments are without merit. As the Judge found, the test used for agency status is whether under all the circumstances, "employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426 (1987); *CNP Mechanical, Inc.*, 347 NLRB 160, 169 (2006). As detailed above, the Board has consistently found security guards to have acted with apparent authority in stopping the distribution of Union materials on an employer's property, even if, in informing the employees that they were violating the employer's rules, they conveyed incorrect information. *NLRB v. Southwire Co.*, 801 F.2d 1252, 1254 (11th Cir. 1986), citing to *Harrison Steel Castings Co.*, 262 NLRB 450, 455 fn. 6 (1982).

Therefore, the Judge correctly found that on August 20, 2015, when security guard J. Weigand instructed Abigail Parrish that she must stop distributing literature on Respondent's property because she was violating company policy, in the eyes of a reasonable employee, Weigand was acting within his apparent scope of the authority granted to him by Respondent.

b. Respondent Failed to Cure Under *Passavant*

The ALJ correctly found that Respondent failed to meet the high burden set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In *Passavant*, the Board articulated factors that must be met for any repudiation of unlawful conduct to be effective. Any "cure" must be (1) timely, (2) unambiguous, (3) specific to the unlawful conduct, and (4) free from other proscribed conduct. There must also be adequate publication to the employees involved and the employer must explicitly assure employees that it will not interfere with the exercise of their Section 7 rights in the future. *Id.* at 138; *Pope Maintenance Corporation*, 228 NLRB 326,

340 (1977). There also can be no unlawful conduct post-publication because such conduct effectively nullifies the employer's repudiation. *Austin Power Company*, 141 NLRB 183, 191-192 (1963).

Respondent had the burden to establish that it effectively cured Weigand's conduct. The only evidence concerning any potential cure by Respondent is found in the August 20, 2015 email from Larissa Wray-Tolbert to Abigail Parrish. (GC 10). With respect to any attempted cure by Respondent concerning Weigand's unlawful conduct, the Judge correctly found that Respondent cannot meet the *Passavant* standard because it failed to assure Parrish that such conduct would not occur again and because Respondent's attempted cure occurred within the context of other proscribed conduct. (ALJD 31:36-38). The record is filled with numerous unremedied violations of the Act dating from June 2 to December 21, 2015. Between those dates, Respondent engaged in a flurry of violations including unlawful surveillance, interrogations, prohibitions against Section 7 activity, and threats of reprisal. To date, each of these violations remains uncured. See *Comcast Cablevision of Philadelphia*, 313 NLRB 220-221, 224, 253 (1993)(Board and ALJ found the employer did not properly cure instructions for employees not to wear union buttons because "the context in which the violation occurred is hardly free from other unlawful conduct."). Additionally, as the Judge noted, Weigand's unlawful conduct occurred within the Notice posting period following the settlement of a previous Board case involving the Wichita facility (14-CA-147990).

In its brief, Respondent disputes Judge Steckler's assertion and case citation related to the fact that the company failed to assure Parrish that it "would not repeat its actions" or in other words, not interfere with her Section 7 rights. (ALJD 31: 16-18; R brief at 44-45). The Board's requirement in this area is long standing and clear that an employer should give assurances to

employees that in the future it will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965). Wray-Tolbert simply failed to give this assurance in her email to Parrish.

Therefore, for the reasons set forth above, Judge Steckler properly found that (1) Respondent was liable for the misconduct of J. Weigand, its agent, when he prohibited an employee's distribution of Union literature during non-work time in a non-work area; and (2) Respondent has failed to establish that it has adequately remedied J. Weigand's unlawful prohibition of an employee's distribution of Union literature during non-work time in a non-work area.

E. Respondent's Manager Lillian Maron Prohibited Employees from Engaging in Section 7 Activity

1. Facts

On June 2, 2015, Chelsea Befort's immediate supervisor, Coach Angel Meeks, led Befort to a small conference room where Befort was introduced to Lillian Maron. (Tr. 51-52). This was Befort's first time meeting Maron, but she soon learned that Maron was her new team manager. (Tr. 52). Maron started the meeting by telling Befort that representatives cannot send out mass emails and that anything Union-related cannot be sent while on the clock. (Tr. 53). Befort responded to Maron by stating that she made sure that she was clocked out when she sent her May 29 emails. (Tr. 53). Maron acknowledged that it was great that Befort did so while clocked out, but the problem was that other representatives had opened or read the email while they were on the clock. (Tr. 53). Maron also stated that what Befort had done was a form of solicitation and Respondent does not allow that. (Tr. 53). Maron went on to tell Befort that anything "Union-related" could not be done by using Respondent's email system. (Tr. 53). She further noted that anything Union-related could not be discussed within employees' working

areas. (Tr. 53). Maron advised that anything Befort wanted to talk about regarding the Union needed to be done outside of working areas and off the clock. (Tr. 53). Befort testified that Maron did not have any documents in her hand while she was speaking. The only document she might have had was sitting on the table but at no time did Maron reference the document while speaking to Befort. (Tr. 54).

Two days later, on June 4, 2015, Team Manager Lillian Maron conducted a meeting with Chelsea Befort's team inside their work area (pod). (Tr. 60-61, 108-111, 137-140). Maron discussed a Union flyer that Befort had previously created and distributed to her coworkers. (Tr. 61, 110, 139). Befort's flyer highlighted benefits of a union, including employees having some control over metrics, insurance and wages. (Tr. 61). In response to this information, Maron told Befort's team that a union could not change those terms and conditions of employment. Maron noted that employees can bring those issues to management's attention but ultimately it is management that determines if a change happens, not the Union. (Tr. 61). Maron brought up an organized group of engineers who work for Respondent in Connecticut and are working on getting rid of their union because their wages had been capped. (Tr. 61-62, 110-111, 139). Maron reiterated her previous instructions to Befort during her one-on-one meeting two days prior when she told the team that they were not allowed to discuss the Union or distribute flyers or anything pertaining to the Union within working areas and all of that had to be done in the lunch room, break areas or outside of work. (Tr. 62, 110, 139). Although Maron had a document in her hands, she did not read verbatim directly from it. At most she occasionally glanced at the document. (Tr. 63, 109-110, 138).

2. Argument

In her decision, Judge Steckler found that Maron committed multiple violations of the Act during her meetings on June 2 and June 4. With respect to Maron's June 2 meeting with Chelsea Befort, the Judge found Maron's prohibition against employees sending "mass emails" was "violative for the same reasons that Jeff Elliott's email also promulgated an overly broad rule and was discriminatory. An employee would reasonably believe she could not send an email to a group of employees." (ALJD 26: 36-39). The Judge also found that Maron told Befort that she could not discuss the Union except in non-working areas. (ALJD 26:41-46). As the Judge noted, employees consistently testified that they are permitted to discuss any topics during work time as long as they attended to calls first. (ALJD 26:41-44). Judge Steckler also found that Maron told Befort that employees are prohibited from sending Union-related emails to employees' work email addresses and for the reasons she addressed earlier in her decision based on *Purple Communications*, she found Maron's statement to be violative because an employee would believe she did not have a right to use Respondent's email system to communicate about Union or other protected activities. (ALJD 27:1-7). With respect to Maron's June 4 meeting with Befort's team, the Judge relied upon Befort's version of the meeting and credited the employees who testified that Maron did not read verbatim from any document as she "gave her own interpretations of what she had on the talking points." (ALJD 27:13-15). Similar to her finding related to the June 2 meeting, the Judge found that Maron told employees they could not talk about the Union during work time in non-work areas in violation of Section 8(a)(1) of the Act. (ALJD 27:15-18).

Respondent disputes the fact that the Judge credited Chelsea Befort over Maron and insists on arguing that Maron's talking points do not speak to the unlawful findings reached by

the ALJ. Judge Steckler made it clear that she felt Befort testified with a forthright demeanor and Maron tended to shade her testimony, for example, insisting she read from talking points verbatim while later admitting to variations and interruptions from Befort. (ALJD 26:1-14). It is well settled that the Board attaches great weight to an administrative law judge's credibility findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951).

With respect to Respondent's argument that Befort gave contradictory testimony by testifying on direct that she distributed Union flyers and then denied doing so on cross examination, Respondent fails to acknowledge an important detail. On cross examination, Respondent's counsel asked Befort about her distribution of flyers "in the pod" or work area. At no point in her direct testimony did Befort say that she had distributed non-work materials *in her work area*. Respondent ignored this very important distinction.

With respect to Respondent's argument that the Judge erred in finding that Maron gave employees instructions that they are prohibited from talking about the Union during working time while permitting employees to talk about other non-work subjects, again the record supports the ALJ's conclusion. Respondent, again, argues that Maron's Talking Points do not contain such a prohibition. However, the Judge credited the testimony of the multiple employees who testified that Maron did not read verbatim from the document and that she "gave her own interpretations of what she had on the talking points." (ALJD 27:11-15). Furthermore, Respondent had the ability to call Angel Meeks to the stand to corroborate Maron's version of the events from June 2 and June 4. It chose not to do so. As a result, Judge Steckler accurately used her judicial discretion to draw an adverse inference that had Meeks testified, she would have given testimony that was not favorable to Respondent. See *Government Employees*

(*IBPO*), 327 NLRB 676, 699 (1999); *Ready Mixed Concrete*, 317 NLRB 1140, 1143 fn. 16 (1995).

F. Respondent Engaged in Unlawful Surveillance and Interrogation

1. Facts

Following Lillian Maron's meeting with Chelsea Befort's team on June 4, 2016, the employees had around ten minutes to kill. (Tr. 63-64). For the ten minutes or so that remained, several individuals from the team went outside to an outdoor break area used, primarily, for smoking. (GC 5). Several employees testified to the events that occurred during this time period. (Tr. 63-67, 111-115, 144-147). What was atypical about this particular break is that the team's immediate supervisor, Coach Angel Meeks, joined the group for their break. Employees consistently testified that prior to this date, Meeks had never joined the team for a break, nor did she join the team again on any subsequent date. (Tr. 65, 66-67, 112, 115, 147). When Meeks informed the group that she would join them on break, customer service representative Alyssa Jones asked Meeks why she was doing so, considering she never came outside with the team. (Tr. 112). Meeks responded, "I just want to come with you guys." (Tr. 112). Once the group gathered for the remainder of their break at the outdoor smoking area, employees attempted to communicate about the Union and more specifically, the details of what was just discussed by Lillian Maron during the meeting. (Tr. 64, 112-113). Chelsea Befort typed notes on her cell phone and attempted to show those notes to coworker Alyssa Jones, but she was unable to safely do so because of the close proximity of Meeks. (Tr. 65). As the employees attempted to discuss the meeting, Meeks continued to hover and went as far as asking the employees what they were talking about; what they were looking at on each other's phones and why they were being so secretive. (Tr. 113). Meeks told the group, "You don't have to whisper, you can talk to

me.” (Tr. 113). Befort sent a text to Jones regarding meeting with the Union and discussing Maron’s meeting. (Tr. 114). After Jones received and read the text, she handed her phone to coworker Holly Robinson. After Robinson was done, Jones moved on to coworker Taylor Lowery. Jones and Lowery were sitting next to each other at a picnic table. (Tr. 114). Jones handed Lowery her phone. Lowery is prone to moving her mouth when she reads and this was noticed by Angel Meeks. (Tr. 114, 145-146). Meeks asked what the employees were looking at. (Tr. 114, 146). Jones responded and told Meeks that they were looking at a picture. (Tr. 114, 146). Meeks asked to see the photo. (Tr. 146). Jones declined because the picture was not appropriate for work. (Tr. 146). This response did not suffice for Meeks because she reminded Jones that she shows Meeks things that are not work appropriate all the time. (Tr. 146). Meeks further contested Jones’ assertion by stating, “It’s not a picture because Taylor’s moving her mouth.” (Tr. 114). Jones quickly countered that it was a picture with words on it. (Tr. 114-115). Meeks made her way around the table where Jones and Lowery were sitting. Meeks asked Lowery for the phone and reached for it. (Tr. 146-147). Jones then obtained her phone from Lowery, at which time Meeks reached for the phone again. (Tr. 147). Jones then quickly pulled up a recent picture she had saved with words on it. Jones showed that picture to Meeks and the employees left the area. (Tr. 115, 147).

2. Argument

In its brief, Respondent argues that the “Charging Parties failed to carry their burden of proof and establish that Meeks engaged in unlawful surveillance and interrogation of employees, and the ALJ erred in concluding otherwise.” (R brief at 48). Respondent first argues that unlawful surveillance requires employees to have engaged in *open* union activities. Respondent argues that the record does not contain evidence of open union activity and even if it did, Meeks

did not engage in any coercive activity because the employees gathered in a public, nonworking area frequented by management. (R brief at 48-49). Judge Steckler appropriately addressed this argument in her decision. With respect to Respondent's open union activity argument, Judge Steckler accurately noted,

“Such conduct constitutes only one form of surveillance. Surveillance is supervisors watching ‘employees engaged in Section 7 activity by observing them in a way that is out of the ordinary and thereby coercive.’ *Aladdin Gaming, LLC*, 345 NLRB 585-585-586 (2005), rev. denied sub nom. *Local Joint Executive Bd. Of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). It depends upon the nature and duration of the supervisors’ observation. *Id.* Factors showing the observation was coercive include the duration of observation, the employer’s distance while making the observation and whether the employer engaged in other unlawful activity. *Id.* at 586.” (ALJD 27:31-38)

Respondent argues that there was no way for Meeks to know what the employees were discussing or attempting to discuss. However, Judge Steckler acknowledged that Meeks clearly knew what was going on and the timing of her actions was a strong indicator of that. Furthermore, Meeks engaged in conduct she had never engaged in before, or ever again, by joining employees who were known Union sympathizers in the break area immediately following a meeting about Union leaflets “and obviously wanted to hear if employees had any response.” (ALJD 27:40-47; 28: 5-10). The Judge made a valid comparison to the supervisor who more frequently visited a non-work area where employees gathered to smoke in *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 502-503 (1995). As in *Fieldcrest*, Respondent provided no explanation for Meeks’ suddenly making the decision to join her team on a break for the first and last time. (ALJD 28: 14-22). Consistent with Board law, the Judge found Meeks’ conduct to be unlawful surveillance. See *The Sheraton Advantage*, 363 NLRB No. 6, slip op. 10-11 (September 15, 2015)(increased number of supervisors in cafeteria while union reps met with employees deemed surveillance as it was not ordinary activity); *Liberty House Nursing Homes*, 245 NLRB

1194, 1200 (1979)(supervisors departed from usual practice of eating separately and purposely mingled with employees on break engaged in surveillance); *Intermedics, Inc.*, 262 NLRB 1407, 1410, 1415 (1982)(supervisors engaged in atypical behavior when they remained in the lunch room and were clearly trying to overhear employee conversations).

Respondent also argues that the ALJ erred in finding that Meeks unlawfully interrogated employees, while closely watching them in a manner that was out of the ordinary, because the general types of questions she asked did not rise to the level of unlawful conduct. In determining whether an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 186 (1992), citing *Rossmore House*, 269 NLRB 1176 (1984) and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In its analysis, the Board will look at factors including whether the employer has a history of hostility of discrimination concerning employee rights; the nature of the information sought; the identity and organizational level of the questioner; the place and method of the interrogation; and the truthfulness of the reply. *Grand Canyon Education, Inc.*, 359 NLRB No. 164, slip op. at 2-3 (2013), citing *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The Judge astutely concluded that Meeks, as the employees' immediate supervisor, questioned her team in a non-work area where they should have been free to discuss the Union and other protected activities during their non-work time. Meeks questioned what the employees were discussing, particularly where they were clearly keeping their conversations private by whispering, and sought to insert herself into their discussions. (ALJD 1-16). Meeks' actions caused employees to go out of their way to disguise the true content of their discussions by changing phone screens and lying about the true substance of their communications (ALJD 1-

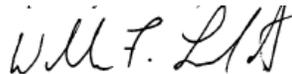
16). The Judge accurately found that under the totality of the evidence in this case, the record demonstrated that Meeks' questioning was coercive and therefore violative of the Act. Contrary to Respondent's footnote in its brief, the ALJ appropriately used her judicial discretion to credit the employees' version of what occurred that day and to make an adverse inference because Respondent failed to call Meeks to testify to refute these allegations. See *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999); *Ready Mixed Concrete*, 317 NLRB 1140, 1143 fn. 16 (1995). (ALJD 27:22-25).

III. Conclusion

The General Counsel respectfully submits that for all of the reasons set forth above, Respondent's exceptions are without merit and that Judge Steckler's conclusions that Respondent violated Sections 8(a)(1) and (3) of the Act, as alleged, are supported by the record. The General Counsel requests that the Board affirm Judge Steckler's recommended order.

Dated: September 2, 2016

Respectfully Submitted,



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