

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

**NATIONAL INDEMNITY COMPANY**

**Case 14-CA-182175**

**and**

**BRUCE RICHARD FRIEDMAN**

**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. STATEMENT OF THE CASE**

This case is before the National Labor Relations Board (Board) based on a Complaint that issued on November 30, 2016, alleging that National Indemnity Company (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining confidentiality rules in three documents that interfere with, restrain, and coerce employees in the exercise of rights protected by Section 7 of the Act. The three documents are (1) the Code of Business Conduct and Ethics; (2) a Confidentiality Agreement; and (3) a Memorandum that was distributed with the Confidentiality Agreement. By Decision (ALJD) dated November 20, 2017, Administrative Law Judge Elizabeth M. Tafe concluded that, as alleged, Respondent's maintenance of all three rules violated Section 8(a)(1) of the Act. Following Judge Tafe's decision, Respondent filed Exceptions and a Brief in Support of its Exceptions on January 8, 2018, wherein it argues that Judge Tafe's finding regarding the confidentiality provision contained in Paragraph 5 of the Code of Business Conduct and Ethics, which relied on the recently-overruled Board decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), is contrary to the governing legal standard and that the Remedy and Order which addresses all three rules is overly-broad and unnecessary.<sup>1</sup>

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. Even under the Board's recent decision in *Boeing Company and Society of Professional Engineering Employees in Aerospace*,

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<sup>1</sup> Respondent has not taken exception to the ALJ's conclusion that the Confidentiality Agreement and the memo distributed with the Confidentiality Agreement are unlawful. We nevertheless discuss those provisions below because they are relevant in determining whether employees would reasonably interpret Paragraph 5 of the Code of Business Conduct and Ethics to prohibit discussion of wages and other terms and conditions of employment.

*IFPTE Local 2001*, 365 NLRB No. 154 (Dec. 14, 2017) (*Boeing*), the confidentiality provision found in the Code of Business Conduct and Ethics violates Section 8(a)(1) of the Act. Moreover, the Remedy and Order set forth in the ALJD is necessary to remedy the violations of the Act that resulted from the Employer's maintenance of these three rules. Accordingly, the General Counsel urges the Board to adopt the ALJD's conclusions and order.

## **II. STATEMENT OF FACTS**

Respondent is a corporation with operations and a place of business in Omaha, Nebraska, that is engaged in the business of property and casualty insurance. GC Ex. 1-M, O; Jt. Ex. 1; ALJD 2:8-10, 18-20.<sup>2</sup> In paragraphs 5-8 of the Complaint,<sup>3</sup> the General Counsel alleges that since at least February 15, 2016, Respondent has unlawfully maintained three work rules regarding confidentiality: (1) Paragraph 5 Confidentiality in Respondent's Code of Business Conduct and Ethics; (2) a Confidentiality Agreement that it required employees to sign; and (3) a Memorandum dated July 21, 2009, which was distributed along with the Confidentiality Agreement. GC Ex. 1-M.

### ***A. Text of Relevant Rules***

Respondent's Code of Business Conduct and Ethics, Section C Ethical Standards, Paragraph 5 Confidentiality ("Paragraph 5") states:

Covered parties must maintain the confidentiality of confidential information entrusted to them, except when disclosure is authorized by an appropriate legal officer of the Company or required by laws or regulations. Confidential information includes all non-public information that might be of use to competitors or harmful to the Company or its customers if disclosed. It also

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<sup>2</sup> References to the trial transcript will be denoted by "Tr. [page number]." References to the General Counsel's exhibits will be denoted by "GC Ex. [page number]." References to the Joint Exhibits will be denoted by "Jt. Ex. [page number]." References to Respondent's Exceptions to the Decision of the Administrative Law Judge will be denoted as "R. Exceptions [page number]." References to Respondent's Brief in Support of its Exceptions will be denoted as "R. Exceptions Brief [page number]." References to the Judge's Decision will be denoted as "ALJD [page number: line number]."

<sup>3</sup> On March 27, 2017, Judge Tafe granted General Counsel's Motion to Withdraw paragraphs 4(a) and (b) and Amend the Complaint accordingly.

includes information that suppliers and customers have entrusted to the Company. The obligation to preserve confidential information continues even after employment ends.

Jt. Ex. 2 at 2. Covered Parties is defined as directors, officers, and employees of Respondent.

*Id.* at 1.

Relevant to the analysis of Paragraph 5 is Paragraph 6 of the Code of Business Conduct and Ethics which addresses the use of Company Assets. Paragraph 6 provides that “All Covered Parties should endeavor to protect the Company’s assets and ensure their efficient use.” *Id.* at 2. Paragraph 6 defines Company Assets to include proprietary information and proprietary information is defined to include “salary information.” *Id.* at 3. Covered Parties are instructed in Paragraph 6 that “Unauthorized use or distribution of this information would violate Company policy.” *Id.*

The challenged Confidentiality Agreement prohibited the disclosure of a non-exhaustive list of items that included “personnel information.” Jt. Ex. 3. By signing the Confidentiality Agreement, an employee agreed to use the Confidential Information “only to advance the interests of the Company.” *Id.* The employee also agreed not to “knowingly disclose Confidential Information . . . where [she] know[s] that such disclosure is contrary to the interests of the Company” or “use any Confidential Information for [] personal benefit or the benefit of any person or entity except the Company.” *Id.*

Distributed with the Confidentiality Agreement was a Memorandum (“Memo”) dated July 21, 2009, from Donald Wurster to Employees regarding the Confidentiality Agreement. Jt. Ex. 1. The Memo lists various types of information that should not be disclosed including employee “evaluations, applications, and insurance information” maintained by Human Resources. Jt. Ex. 5. The Memo states that employees are required to sign the Confidentiality

Agreement. *Id.* The Memo also states, "This [Confidentiality] Agreement will help you understand your confidentiality obligations and protect our company against violation of a contract or disclosure of our own confidential information or our customers' or employees' proprietary or private information. *Id.*

***B. Parties' Stipulations Regarding Respondent's Maintenance of Rules***

Prior to the hearing, the parties stipulated to a series of facts regarding the maintenance and distribution of these three work rules. Those factual stipulations were entered into evidence as Joint Exhibit 1. Other than the text of the rules, these factual stipulations comprise the only record evidence regarding the rules at issue in this case. *See* ALJD 2: fn. 3. The parties stipulated and Judge Tafe found that during the relevant 10(b) period, Respondent maintained the three rules at issue and distributed them to employees. *Jt. Ex. 1; ALJD 3:5-6; 7:41-42; and 4:25-27.*

After the Region issued Complaint in this matter, Respondent distributed to its employees via email a revised Confidentiality Agreement on December 20, 2016. *ALJD 4:12-13; Jt. Ex. 1, 4.* On that same day, Respondent stopped distributing the Memo to its employees. *ALJD 4:27-28.* At all times during the time period and continuing to present, the relevant text of the Code of Business Conduct and Ethics has remained the same as that alleged in the Complaint.<sup>4</sup> *ALJD 3:5-7.*

**III. ARGUMENT AND ANALYSIS**

***A. Respondent's Exceptions***

Respondent's Exceptions to the Administrative Law Judge's Decision and its Supporting Brief raised the following areas of inquiry: (1) Whether Judge Tafe erred in finding that the

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<sup>4</sup> Respondent contends that the Code of Conduct was last amended in April 2017 but that the substantive language remains the same. *R. Exceptions Brief at 7, n. 4.*

Confidentiality Provision found in Paragraph 5 of the Code of Business Conduct and Ethics violations Section 8(a)(1) of the Act; (2) Whether Judge Tafe erred in ordering a Remedy that required Respondent to revise or rescind each of three confidentiality rules and to comply with the reprinting and Notice Requirements for each rule. For the reasons addressed below, Respondent's Exceptions are without merit.

***B. Maintenance of Paragraph 5 of the Code of Business Conduct and Ethics Violates Section 8(a)(1) Under the Legal Standard Set Forth in Boeing***

In determining whether Respondent's maintenance of Paragraph 5 interfered with, restrained, and coerced employees in the exercise of rights protected by Section 7 of the Act, Judge Tafe correctly applied the then-governing standard which had been set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (Lutheran Heritage). When finding that Paragraph 5 violated the Act, consistent with the standard for evaluating policies that do not explicitly restrict Section 7 activity, Judge Tafe concluded that the Paragraph 5 was "vague and overly broad" and that in accordance with Board law the ambiguity must be construed against Respondent. ALJD 7:6-9, 19-22. In addition, Judge Tafe correctly reasoned that when read in context with Paragraph 6 of the Code of Conduct, the Confidentiality Agreement, and the Memo, Respondent's interchangeable use of the terms "private," "confidential," and "proprietary" supported her finding. ALJD 7:33-37. As thoroughly briefed by Respondent, the standard relied upon by Judge Tafe was recently overruled by the Board's decision in *Boeing*, supra. As explained below, even under the heightened standard set forth in *Boeing*, supra, the Board should adopt Judge Tafe's conclusion of law that Respondent's maintenance of Paragraph 5 violates Section 8(a)(1) of the Act.

**1. The New Legal Standard Set Forth In *Boeing***

After Judge Tafe issued her decision in this matter, the Board overruled the standard set forth in *Lutheran Heritage*, supra, for determining the lawfulness of rules that do not explicitly restrict Section 7 activity, or in other words, are facially neutral. *Boeing*, 365 NLRB at \*2. When determining the lawfulness of a facially neutral rule, the Board must initially determine whether the rule at issue “when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights.” *Id.* at \*17. This is an objective standard that requires the interpretation of the rule be “conducted from the perspective of a reasonable employee.” *Id.* at \*4, n.16.

If the facially neutral rule when reasonably interpreted by a reasonable employee would potentially interfere with the exercise of Section 7 rights, the Board must evaluate the “(i) the nature and extent of the [rule’s] potential impact on NLRA rights” and the “(ii) legitimate justifications associated with the requirement(s)” and determine whether the legitimate justification outweighs the potential impact on NLRA rights. *Id.* at \*14, 17. When making this evaluation the Board “may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral).” *Id.* at \*15. Likewise, the Board “may distinguish between substantial justifications – those that have direct, immediate relevance to employees or businesses – and others that might be regarded as having more peripheral importance.” *Id.*

Based on the application of the Board’s test to the challenged rule, the rule will be placed into one of three categories. Category 1 includes “rules that either the Board designates as *lawful* to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rules.” *Id.* Once a type of rule has

been placed in Category 1, no further balancing is necessary and that type of rule will be found lawful. To date, rules that have been categorized as Category 1 rules include the no-camera rule at issue in *Boeing* (Category 1, subpart ii) and rules requiring “harmonious interactions and relationships” and “other rules requiring employees to abide by basic standards of civility” (Category 1, subpart i or ii). *Id.* at \*4 and n. 15, \*15, n. 76.

Category 2 includes “rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.” *Id.*

Category 3 includes “rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.” *Id.* The Board identified as an example rules that prohibit employees from discussing wages or benefits. *Id.* Like Category 1 rules, Category 3 rules do not require individualized scrutiny of the Section 7 interests at stake or of the employer’s particular business justifications; rather, once a rule is placed in this Category, the Board has already struck the balance and concluded that the harm to Section 7 rights is greater than the employer’s legitimate business need for such a rule.

**2. When Reasonably Interpreted, Paragraph 5 Is an Unlawful Category 3 Rule under *Boeing***

Record evidence supports finding that Paragraph 5, when reasonably interpreted by an employee, would interfere with Section 7 rights in a manner that the Board has determined outweighs the Respondent’s business justifications. The conclusion is supported whether, as would be expected, the employee reads the rule in context, or, as suggested by Respondent, the rule is read in isolation.

There is no indication that the Board's decision in *Boeing* was intended to mark a departure from the legal precedent that a rule must be read in context. In fact the very motivation behind the new standard appears to be an effort to expand the context in which the rule is read to include the business justification that motivated the rule. In this instance, a reasonable employee would consider Paragraph 5 in context with the entire document and as one of nine "basic standards of ethical and legal behavior" set forth in Section C, Ethical Standards.

As noted by Judge Tafe, Paragraph 6 addresses the obligation of employees to protect Respondent's assets, which are defined to include its proprietary information. ALJD 7: 24-25; Jt. Ex. 2 at 2- 3. Proprietary information is further defined to include "salary information." *Id.* at 3. Paragraph 6 states that "unauthorized use or distribution of this information would violate Company policy." *Id.* Contrary to Respondent's suggestion, the language of Paragraph 6 is relevant to the analysis of whether Respondent's maintenance of Paragraph 5 is unlawful. *See R. Exceptions Brief 11.* A reasonable employee would conclude that proprietary information is non-public information because disclosure and use require authorization. Although Respondent contends that Judge Tafe "conflated" the restriction on confidential information with proprietary information, a reasonable employee reading these two provisions would draw the same conclusion that proprietary information is confidential. *R. Exceptions Brief at 11.* In light of the fact that proprietary information explicitly includes salary information, there is sufficient evidence to conclude that when reasonably interpreted Paragraph 5 would potentially interfere with the exercise of rights protected by Section 7 of the Act, specifically the right to discuss wages.

A reasonable employee would also read Paragraph 5 in the context of other confidentiality rules maintained by Respondent. Prior to issuance of the Complaint, the Code of

Business Conduct and Ethics, with its confidentiality provision, did not exist in a vacuum; it existed alongside a Confidentiality Agreement and Memo that Judge Tafe found to be unlawful. *See* ALJD 7-8. The Confidentiality Agreement unlawfully prohibited employees from disclosing personnel information, and the Memo prohibited the disclosure of confidential information, including employees' proprietary information. Jt. Ex. 3, 5. Following issuance of Complaint, employees were provided a revised copy of the Confidentiality Agreement and Respondent stopped issuing the Memo, Jt. Ex. 1, but there is no record evidence of what exactly employees were told when the Revised Confidentiality Agreement was issued. ALJD 9:27-29, 31-32. Similarly, there is no evidence in the record that the Memo was rescinded. *See* Jt. Ex. 1; ALJD 9:31-32. Respondent merely stopped distributing the Memo which is not the same as notifying employees that the Memo has been rescinded. ALJD 9:3-4, 31-32. Consequently, the language in those documents is still relevant to the consideration of whether a reasonable employee would reasonably interpret Paragraph 5 as having the potential to interfere with Section 7 rights. When reasonably interpreted in context with these documents that prohibit the disclosure of personnel information and employee's proprietary information, Paragraph 5 would potentially interfere with Section 7 activity.

Even when read in isolation, Paragraph 5 would potentially interfere with Section 7 rights. Paragraph 5 prohibits the unauthorized disclosure of confidential information that is defined as "all non-public information." When reasonably interpreted, this definition of confidential information is expansive enough to include information about wages, benefits, and other non-public working conditions. A prohibition against discussing wages, benefits and other working conditions would interfere with Section 7 rights.

Whether Paragraph 5 is read in the context of the entire Code of Business Conduct and Ethics, in context with the Confidentiality Agreement and Memo, or in isolation, a reasonable employee engaged in a reasonable interpretation would conclude that Paragraph 5 would prohibit the exercise of certain Section 7 rights.

Respondent's argument that Paragraph 5 cannot be read to interfere with Section 7 rights because Paragraph 5 does not mention "personnel, wage, or similar information" is misplaced. R. Exceptions Brief 11. *Boeing* makes clear that, in determining whether a rule would be interpreted in such a way as to interfere with the free exercise of Section 7 rights, the Board will examine the rule from the employees' perspective, and employees reasonably would read "all non-public information" to include employee wages and benefits, particularly where the other documents that employees were provided (e.g., the Confidentiality Agreement) specifically mention personnel information as a type of information that should not be shared. Employees also would reasonably read the prohibition on sharing non-public information where it "might be ... harmful to the Company" as precluding protected efforts to share such information as part of a campaign to improve wages and benefits.<sup>5</sup>

For all these reasons, the Board should conclude that paragraph 5 of the Code of Business Conduct and Ethics is an unlawful Category 3 rule, and that there is no need to engage in a balancing of the harm to employee rights and Respondent's business justifications because the Board has already struck the balance in favor of finding this type of rule unlawful.

### **3. Paragraph 5's Impact on Section 7 Rights Outweighs Legitimate Justifications Associated with the Rule**

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<sup>5</sup> Indeed, the Respondent's argument is essentially that, in order to be unlawful under *Boeing*, a rule has to *explicitly* prohibit the discussion of wages and benefits. But a rule that explicitly prohibits Section 7 activity should not be subject to a *Boeing* analysis at all; *Boeing* was designed to address only "facially neutral" rules that would reasonably be interpreted to prohibit Section 7 activity. *See Boeing*, 365 NLRB at \*3.

If this is not a Category 3 rule, it is a Category 2 rule and the impact on Section 7 rights outweighs the Respondent's business justifications. As discussed above, Paragraph 5 interferes with a right that is at the very core of the Act, an employee's right to discuss wages and other personnel information. *See William Beaumont Hospital*, 363 NLRB No. 162, slip op. at \*19, n.57 (Apr. 13, 2016) (Member Miscimarra noting in his dissent that "concerted activity regarding wages is central to the Act's protection"); *International Business Machines Corporation*, 265 NLRB 638, 638 (1982).

With regard to Respondent's business justifications for maintaining Paragraph 5, Respondent had an opportunity at hearing to make a factual showing regarding any legitimate interest it had in maintaining the confidentiality of all non-public information and it made no such showing. Instead, Respondent made an argument with no factual support that the Code of Conduct and by extension Paragraph 5 are required by the Sarbanes-Oxley Act (SOX). When rejecting this argument, Judge Tafe correctly reasoned that there was nothing in the record to show that the protections afforded by the NLRA and Respondent's obligations under SOX were mutually exclusive. *See* ALJD 3: n.3. Respondent has raised this argument again in its Brief in Support of its Exceptions without offering any evidence that would provide a basis on which to reverse Judge Tafe's finding on this issue. *See* R. Exceptions Brief 6-8.

In the absence of any record evidence, Respondent attempts to establish its legitimate interest in maintaining Paragraph 5 by comparing the rule with (1) the no-camera rule at issue in *Boeing* and (2) rules previously analyzed by the Board. Neither of these comparisons establishes that Respondent has a legitimate interest in maintaining the confidentiality of all non-public information or that any such interest would be significant enough to warrant the potential impact

on the right of its employees to discuss their salaries and other personnel information, a right that is at the very core of the Act.

The Board should reject Respondent's efforts to establish a legitimate interest by analogizing its Code of Conduct with the rule in *Boeing* for two reasons. First, the decision in *Boeing* indicates there was a substantial amount of testimonial evidence on the employer's undisputed justification for the no-camera rule. 365 NLRB at \*\*5-7. Significantly, the Board's decision shows that the federal mandate explained the need to maintain the confidentiality of information and that the rule was intended to achieve that goal. *Id.* at \*6. In this case, no such record evidence exists. In its Brief in Support of its Exceptions, Respondent notes that the Sarbanes-Oxley Act outlines a code of ethics for senior financial officers of publicly-traded companies. R. Exceptions Brief 6-7. Yet, Respondent has failed to show how Sarbanes-Oxley justifies and/or requires a confidentiality rule that restricts employees from discussing salaries and personnel information. Second, Respondent's attempt to analogize the purpose of the two rules fails. Paragraph 5 has been drafted to prevent disclosure of more than supplier and customer information entrusted to Respondent; it prevents disclosure of all non-public information. Although the rule in *Boeing* also seeks to prevent the disclosure of the employer's proprietary information that is also defined as "any nonpublic information," the rule does not then go on to define proprietary information to include salary information. For those reasons, Respondent's attempt to establish a legitimate interest though *Boeing* fails.

Respondent's attempt to establish a legitimate interest in maintaining this confidentiality rule by looking at cases previously considered by the Board should also be rejected. The cited cases, which fall in one of three categories, neither establish that Respondent has a legitimate

interest in keeping employees' salary and other personnel information confidential or that any such interest would outweigh the potential impact on core Section 7 rights.

First, Respondent repeatedly notes that Board law supports that employers have a legitimate interest in maintaining the confidentiality of customer information. R. Exceptions Brief 16. This argument, however, is unpersuasive because Respondent's definition of confidential information far exceeds a mere limitation on the disclosure of customer information. Respondent's definition includes *all* non-public information which a reasonable employee would interpret, based on Paragraph 6, the unrescinded Memo, and the unremedied Confidentiality Agreement, as including salary and personnel information. In fact as noted by Respondent in its Brief in Support of its Exceptions on page 16, the Board has acknowledged that rules prohibiting the disclosure of customer information are distinguishable from situations where the employer seeks to keep confidential *employee* information. As such, these cases fail to establish a legitimate interest in maintaining Paragraph 5.

Respondent also contends that the legitimate interest in maintaining Paragraph 5 can be established based on similar rules that the Board has found to be lawful. This argument suffers from the same flaw because to support its argument, Respondent relies on cases that are distinguishable. R. Exceptions Brief 14-15 (citing *G4S Secure Solutions (USA), Inc.*, 364 NLRB No. 92 (2016); *Super K-Mart*, 330 NLRB 263 (1999); *Lafayette Park Hotel*, 326 NLRB 824 (1998)). The cited cases share a common theme, that nothing in the lawful rules suggests that the employer considered employee information to be confidential. *See, e.g., G4 Secure Solutions*, 364 NLRB No. 92 (2016). While Paragraph 5 may not explicitly reference employee information, there is language in other provisions of the Code of Conduct and in other documents maintained by the Employer that would lead a reasonable employee to conclude they are

prohibited from discussing wages and personnel information. As a result, Respondent's reliance on these cases is misplaced.

Finally, Respondent seems to be relying on cases where the Board has analyzed terminations or disciplines that were issued pursuant to confidentiality rules, and extrapolating from those cases that Respondent has a legitimate interest in maintaining Paragraph 5. *See* R. Exceptions Brief 13-14. But those cases are distinguishable in that the Board was considering the circumstances that led to the discipline or termination, and if anything they support the finding of a violation here. For example, in *Flex Frac Logistics, LLC*, 360 NLRB 1004 (2014), the Board affirmed the ALJ's decision that the termination was lawful because the employee was terminated pursuant to the lawful portion of the rule that prohibited disclosing customer information and not pursuant to the unlawful portion of the rule that prohibited disclosure of personnel information. In *International Business Machines Corp.*, 265 NLRB 638 (1982), the Board affirmed the termination of an employee who disclosed salary guidelines that were compiled by the Employer and marked as confidential, but in finding that the termination was lawful, the Board expressly noted that the employer's prohibition against disclosing its confidential document including salary guidelines did not prohibit employees from making their own compilation of salary information and sharing it with other employees. The cases in *Roadway Express*, 271 NLRB 1238 (1984) and *Bullocks*, 251 NLRB 425 (1980) involve employees who were terminated or disciplined for disclosing information that they wrongfully obtained. In summary, these cases establish that an employer can lawfully discipline an employee for disclosing customer information, employer-created documents designated as confidential, and information wrongfully obtained. Respondent has not explained the applicability or relevancy of these cases to the facts in this case, and has not explained how

these cases establish that an employer's interest in maintaining the confidentiality of customer information or employer-created documents warrants infringing on an employee's right to disclose or discuss salary or other personnel information.

***C. ALJ's Remedy and Order Is Necessary to Effectuate Remedial Purpose of the Act***

Judge Tafe correctly concluded that remedying the effects of the unfair labor practices created by maintenance of these rules requires the Employer to explicitly rescind or revise the offending rules, notify employees of the rescission or revision, and distribute the Notice to Employees. In regard to Paragraph 5, Respondent asserts that the Remedy and Order is unnecessary because Paragraph 5 does not violate the Act, as alleged. As it pertains to the Confidentiality Agreement and Memo, Respondent argues that the Remedy and Order is overly broad and unnecessary because the Confidentiality Agreement has already been revised and that the Memo is no longer being distributed and, as a result, the ordered Remedy would only confuse employees. As explained below, Respondent's exceptions to the Remedy and Order are without merit.

**1. ALJ Tafe Appropriately Found That Respondent Failed to Cure Violations Created By Maintenance of All Three Rules**

In determining whether Respondent effectively remedied the violations created by maintenance of these three rules, Judge Tafe correctly applied the standard set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) and its progeny. The Board has long-held that for a respondent to show that its repudiation of the unlawful conduct has been effective, respondent's action must be (1) timely, (2) unambiguous, (3) specific to unlawful conduct, and (4) taken in an environment free from other unlawful proscribed conduct. *Id.* The Board in *Passant* also held that respondents must provide sufficient publication of the repudiation to employees and assurances to employees that respondent will not continue to

interfere with rights protected by Section 7 of the Act. *Id.* Finally, the Board has also held that there can be no effective repudiation if the respondent has not admitted wronging *or* explained to employees the importance of the changes that it made. *See DirecTV U.S. DirecTV Holdings LLC*, 362 NLRB No. 48 (2015); *Fresh & Easy Neighborhood Market*, 361 NLRB 72, 75 (2014).

Judge Tafe correctly applied this Board precedent to the facts in this case when she found Respondent has yet to effectively remedy violations of the Act resulting from maintenance of the three rules at issue. There is no dispute that Respondent has made no attempt to revise or rescind Paragraph 5 which Judge Tafe found unlawful. As to the Confidentiality Agreement and the Memo, Judge Tafe found, consistent with Board law, that the actions taken by Respondent after the filing of the Complaint were untimely. ALJD 9: 22-27. Moreover, the record supports Judge Tafe's finding that Respondent's revision of the Confidentiality Agreement, without more, did not sufficiently identify the changes between the two versions or explain the importance of those changes. *See* ALJD 9:27-31. As noted by Judge Tafe, there is nothing in the revised Confidentiality Agreement to indicate that it supersedes or replaces the challenged Confidentiality Agreement. *Id.* 8:23-25. The record also supports Judge Tafe's finding that Respondent failed to admit that its maintenance of the Confidentiality Agreement and Memo were unlawful. *Id.* 9:27-28. Finally, Judge Tafe's finding that Respondent failed to publicize its repudiation of the Confidentiality Agreement and Memo is supported by the evidence. *See* ALJD 9:31-32, Jt. Ex. 1. For example, there is no evidence that Respondent ever notified employees that the Memo was rescinded. Respondent merely distributed the Memo, an action that falls short of *Passavant's* requirement that it publicize the repudiation. Despite Respondent's contention that that its actions were sufficient to cure the violations that resulted

from the maintenance of the Confidentiality Agreement and the Memo, Judge Tafe's findings on this issue are supported by record evidence and consistent with Board law.

Respondent's argument that the facts of this case warrant a less strict application of *Passavant* is also without merit. Respondent's argument is neither supported by the factual record nor by the case law that it cites on page 20 of its Brief in Support of its Exceptions. In support of this argument, Respondent again has relied on cases that are factually distinguishable from the facts of the instant case. Respondent's reliance on Member Johnson's dissent in *Boch Imports, Inc.*, 362 NLRB No. 83 (Apr. 30, 2015) is misplaced. In concluding that the requirements enunciated in *Passavant* should not be strictly applied, Member Johnson cited to facts that are not present in this case. *Id.* at \*6 (dissent). Member Johnson noted that both during the investigation and after issuance of Complaint, the employer communicated to the Region its willingness to work with the Region to remedy the violations and revise the employee handbook. *Id.* In the instant case, Respondent did not revise the Confidentiality Agreement until 20 days after issuance of Complaint and 5 months after the filing of the Charge. Unlike in *Boch*, there is no evidence in the record that Respondent attempted to work or worked with the Region to revise the challenged rules earlier in the process or to ensure that any actions it was taking would effectively repudiate the unlawful conduct.

Similarly, Respondent's reliance on the Board's decision in *River's Bend Health and Rehabilitation Service*, 350 NLRB 184 (2007) is equally misplaced. In *River's Bend*, the Board affirmed the Administrative Law Judge's finding that the memos posted by the employer, although untimely and somewhat ambiguous, sufficiently cured the 8(a)(5) allegation, where the employer also rescinded the alleged unilateral change. *Id.* at 184. The memos relied upon by the Judge in reaching his decision specifically stated that the increase in meal prices, which was the

basis for the allegation, was unlawful and that the employer would cancel the increase and reimburse employees. *Id.* at 193. The restoration of the status quo and a make-whole remedy for employees affected by the unilateral change are remedies regularly ordered when an employer is found to have made a unilateral change. Unlike in *River's Bend*, there is no evidence that Respondent has admitted wrong doing, sufficiently notified employees that the Memo has been repudiated, or effectively rescinded or replaced the Confidentiality Agreement. As such, *River's Bend* is distinguishable and provides no basis for the less strict application of *Passavant* in this case.

Finally, Respondent's reference to the Board's decision in *Broyhill Company*, 260 NLRB 1366 (1982) also provides no support for its argument that Judge Tafe erred in strictly applying *Passavant*. In affirming the Administrative Law Judge's finding that the employer had effectively disavowed the unlawful statements of its supervisor and no further remedial action was necessary, the Board majority noted that the employer posted a notice one day after learning of the unlawful conduct, used statutory language normally found in Board ordered notices, including language affirming employees' rights and stating that the employer would not interfere with those rights "in any other matter." *Id.* at 1366. Again, there is no evidence in the instant case that Respondent went to these lengths to repudiate the violation created by maintenance of these rules and, again, Respondent's attempted cure came twenty days after Complaint issued and five months after the filing of the Charge.

Respondent has failed to point to any evidence or applicable Board law to support its position that these violations have been sufficiently cured under the standards set forth in *Passavant* or that a less strict application of *Passavant* is warranted in this case. For these reasons, Respondent's exception should be denied.

**2. Remedy Ordered By Judge Tafe Is Necessary to Effectuate the Purpose of the Act**

As explained above, Respondent's actions have failed to remedy the violations created by the maintenance of these three rules. Consistent with Board law, when a respondent has "overstep[ped] the prohibitions of the Act, it seems . . . that the purposes of the law would best be served by issuing an order remedying those violations." *Electric Workers, IBEW (AFL-CIO) Local 38 (Bob Cutler Signs)*, 155 NLRB 1147, 1151 (1965). Judge Tafe's Order that Respondent remedy the violations by rescinding or revising the rules and by notifying employees that such actions have been taken is consistent with Board remedies in these types of cases. *See Guardsmark, LLC*, 344 NLRB 809, 812 (2004), *enf'd* in relevant part 475 F.3d 369 (D.C. Cir. 2007). As described below, the Remedy and Order is also supported by the record. Respondent's exception to Judge Tafe's Remedy and Order should be rejected.

As an initial matter, Respondent's maintenance of Paragraph 5, which Judge Tafe correctly concluded was unlawful, must be remedied through rescission or revision as well as notice to employees.

As for the other two rules, Respondent filed no exceptions to Judge Tafe's finding that the maintenance of the Confidentiality Agreement and Memo violated Section 8(a)(1) of the Act. For the reasons detailed by Judge Tafe and described above, the violation created by maintenance of the Confidentiality Agreement remains un-remedied despite Respondent's issuance of a new version that deleted the offending language. Likewise, the violation that resulted from Respondent's maintenance of the Memo could not have been remedied when there is no evidence that the Memo was ever rescinded. No longer distributing a rule is not the same as

affirmatively rescinding the document. As such, the Remedy to rescind or revise is necessary to effectuate the purposes of the Act.

Record evidence also supports Judge Tafe's Order to notify employees about the rescission or revision. Respondent has pointed to no facts or case law to refute Judge Tafe's finding that the revised Confidentiality Agreement did not sufficiently rescind the challenged version or that there was insufficient publication to employees that the challenged version had been revised. Again, the record contains no evidence that employees were notified that the Memo was rescinded or that Respondent had stopped its distribution. Contrary to Respondent's exceptions, the facts demonstrate that the Remedy, as ordered by Judge Tafe, is necessary and consistent in scope to Board remedies issued in similar cases where employers have maintained rules in violation of the Act.

Respondent's other exceptions to the Remedy and Order are also without merit. First, Respondent's contention that notifying employees would cause confusion should be rejected for several reasons. Respondent has pointed to no controlling law that absolves a respondent of the need to remedy a violation based on the length of time between the violation and the Order to Remedy. To the extent that any confusion is created, this is confusion of Respondent's own making by failing and/or refusing to comply with the requirements of *Passavant*. Finally, nothing prevents Respondent from clarifying points of confusion or directing employees to contact the Regional office with their questions. But in no way does the risk of confusion warrant simply foregoing remedies that are consistent with the purpose of the Act and Board law and necessary under the facts of this case.

Second, Respondent's argument that the Remedy, as ordered, would disincentivize employers from changing work rules without Board involvement is also without merit. As

outlined above, the record clearly supports Judge Tafe's conclusions of law that violations occurred. Moreover, Respondent filed no exceptions to Judge Tafe's conclusion that the maintenance of the Confidentiality Agreement and Memo violated the Act, as alleged. General Counsel does not dispute that there is record evidence that Respondent took some steps in December 2016 in regard to the Confidentiality Agreement and Memo. The record and Board law, however, support Judge Tafe's conclusions that these steps fell short of remedying the violation. Respondent cites no Board law to suggest that incentivizing employers to make proactive changes to work rules outweighs the Board's obligation to ensure that un-remedied violations of the Act are remedied.

Finally, Respondent's argument that the ordered Remedy is punitive should also be rejected. Ordering Respondent to remedy violations that remain un-remedied is not punitive; rather, such an Order is consistent with the purpose of the Act. Moreover, Respondent's reliance on *Landry's, Inc. and its Wholly Owned Subsidiary Bubba Gump Shrimp Co. Restaurants, Inc.*, 362 NLRB No. 69 (Apr. 16, 2015) is misplaced. Contrary to Respondent's assertion, the Board explicitly stated there that it was "**not** rely[ing] on the judge's comment that, were the Board to order a remedy here, such a remedy 'could be characterized as punitive rather than remedial.'" *See id.* at \*3 n.3 (emphasis added). Moreover, the facts of the instant case are distinguishable from those in *Landry's*, where the challenged rule was superseded by a lawful rule two months *prior* to the filing of the charge.

As described above, the Remedy, as ordered by Judge Tafe, is necessary to ensure that the offending rules have been rescinded or revised and that employees have been notified of steps taken by Respondent to remedy unlawful conduct, to inform employees about their rights under the Act, and to assure employees that Respondent will not interfere with their exercise of

rights protected under Section 7 by maintaining these rules. For those reasons, Respondent's exceptions should be rejected and Judge Tafe's Remedy and Order should be affirmed.

#### **IV. CONCLUSION**

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

Dated: February 2, 2018

Respectfully submitted,

*/s/ Julie M. Covell*

Julie M. Covell  
Counsel for the General Counsel

**STATEMENT OF SERVICE**

I hereby certify that I have this date served copies of the foregoing Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Office of the Executive Secretary with service by electronic mail on the parties unless otherwise indicated.

Dated: February 2, 2018

*/s/ Julie M. Covell*

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