

I. INTRODUCTION

At issue in this case is the following language in Respondent National Indemnity Company's ("National Indemnity" or "Company") Code of Business Conduct and Ethics (the "Code"), "Confidentiality," at Paragraph 5:

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

The Administrative Law Judge's ("ALJ") finding that Paragraph 5 of National Indemnity's Code violates Section 8(a)(1) of the Act is erroneous because the Code's definition of Confidential Information does not include "personnel" information or restrict employees from exercising their Section 7 rights under the Act in any way. On its face and under the Board's holding in *Boeing Company and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001*, 365 NLRB No. 154 (2017) ("*Boeing*"), Paragraph 5 of the Code does not violate the Act.

Because the Code is not unlawful, the ALJ's Remedy and Order ("Remedy") with respect to the Code of Conduct is in error. Further, the Remedy with respect to National Indemnity's revoked Confidentiality Agreement ("Agreement") and discontinued Memorandum (which previously accompanied the Agreement) is unnecessary and overbroad because those rules were already revised or rescinded. The Remedy is also contrary to the Act's remedial purposes and dissuades employers from making proactive changes to work rules without the Board's involvement or intervention. The Board should reject the ALJ's punitive approach and sustain Respondent's Exceptions.

II. ARGUMENT(S)

A. Paragraph 5 of the Code of Conduct is Lawful.

1. The *Boeing* standard applies here.

The General Counsel concedes he must meet a "heightened standard" under *Boeing* to show that Paragraph 5 of the Code is unlawful. (See General Counsel's Brief, p. 5). Because the ALJ did not apply that "heightened standard," the ALJ's decision should not be given any deference. See, e.g., *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003) (overruling the ALJ's application of the wrong legal standard).

Under *Boeing's* "heightened standard," Paragraph 5 of the Code, as drafted, is clearly permissible under the Act. When reasonably interpreted, Paragraph 5 neither prohibits nor interferes with the exercise of Section 7 rights. It does not refer to personnel, wage, or similar information. It merely defines confidential information as "non-public information that might be of use to competitors or harmful to the Company or its customers, if disclosed." (Jt. Ex. 2).

The General Counsel claims, without support, that the Code prohibits employees from discussing wages and other personnel information. Not only is there no language to support this contention, but the General Counsel's position is contrary to its own Advice Memorandum. Recently, the General Counsel opined that employees would *not* construe a prohibition on disclosing "non-public information" to encompass information concerning employees, wages, or other terms and conditions of employment. See Advice Memorandum, Office of the General Counsel, Case No. 02-CA-191078, p. 6 (October 31, 2017) ("Advice Memorandum"). There is no plausible explanation why employees reading Paragraph 5 would conclude they were being restricted from discussing their salary or engaging in any other Section 7 protected activity. Because

Paragraph 5 of the Code does *not* prohibit or interfere with the exercise of Section 7 rights, the rule is lawful. *Boeing*, 365 NLRB No. 154 at p. 16.

Even if the Board were to conclude that, in some circumstances, Paragraph 5 of the Code may potentially affect the exercise of Section 7 rights, the adverse impact on Section 7 rights is "comparatively slight" because Paragraph 5 does not prohibit discussions about terms and conditions of employment. Further, any adverse impact on NLRA rights is outweighed by the Company's "substantial and legitimate interest in maintaining the confidentiality of private information, including [customer] information, trade secrets, contracts with suppliers, and a range of proprietary information." *See Lafayette Park Hotel*, 326 NLRB 824, 826 (1998). The Code is permissible under *Boeing*, and the General Counsel cannot meet the "heightened standard" to show that Paragraph 5 of the Code is unlawful and no further analysis is necessary or appropriate.

2. The General Counsel illogically attempts to infer language from other documents into Paragraph 5 of the Code of Conduct.

Because Paragraph 5 of the Code does not expressly restrict Section 7 activity, the General Counsel attempts to infer language from outside documents into Paragraph 5 of the Code to argue Paragraph 5 is unlawful. The General Counsel repeatedly appeals to language regarding "personnel" information from a separate Agreement and language regarding employees' proprietary information from a separate Memorandum to argue that Paragraph 5 of the Code is unlawful. (General Counsel's Brief, p. 9). Under the General Counsel's reasoning, if *any* work rule is impermissible, the language from the unlawful rule alone may invalidate any *other* work rule maintained by that employer, even if the other rule contains no unlawful language. (*See id.*). Neither common sense nor Board precedent supports this reasoning.

For instance, in *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92 (2016), the ALJ found a confidentiality rule which prohibited employees from discussing "wages and salary information" unlawful. The Board held that a different confidentiality rule maintained by G4S Solutions instructing employees not to "use, reveal, copy, disclose or destroy" the employer's or client information was lawful. The Board reasoned that nothing in the lawful provision suggested the provision applied to employee information. This was so despite the fact that the employer separately maintained a different rule prohibiting employees from discussing "wages and salary information." Significantly, and contrary to the General Counsel's invitation here, the Board did *not* read the rule prohibiting discussion of "wages and salary information" into the rule instructing employees not to "use, reveal, copy, disclose or destroy" the employer's or client information. The rule prohibiting discussion of "wages and salary information" did not taint all other confidentiality rules, as the General Counsel suggests.

Here, too, nothing in Paragraph 5 of the Code suggests that it applies to wages or personnel information. Under *G4S Secure Solutions*, references to salary or employee information found in other documents formerly maintained by the Company cannot be read into Paragraph 5. Because there is **no language** in Paragraph 5 of the Code to suggest that "confidential" information refers to "personnel" information or limits an employee's right to discuss salary or compensation in any way, National Indemnity's Exceptions to the ALJ's Decision should be sustained.

3. The General Counsel repeatedly misstates the language of Paragraph 5 of the Code of Conduct.

Throughout his Brief, the General Counsel also *repeatedly* misstates Paragraph 5's definition of confidential information, which misleads the Board and appeals to

otherwise inapplicable case law. The General Counsel repeatedly claims, erroneously, that the Code defines confidential information as "all non-public information." (*See, e.g.*, General Counsel's Brief at p. 9 ("Paragraph 5 prohibits the unauthorized disclosure of confidential information that is defined as 'all non-public information.'"); p. 10-11 ("Neither of these comparisons establishes that Respondent has a legitimate interest in maintaining the confidentiality of all non-public information."); p. 12-13 (claiming, incorrectly, that "Respondent's definition includes *all* non-public information") (emphasis supplied by General Counsel)). In doing so, the General Counsel both egregiously misstates the language of the Code and appeals to case law which has no application to these facts.

Here, the Code defines confidential information as including "all non-public information *that might be of use to competitors or harmful to the Company or its customers if disclosed ... includ[ing] information that suppliers and customers have entrusted to the Company.*" (Jt. Ex. 2). Non-public information is, thus, defined in reference to competitors and customers, which is perfectly permissible. The General Counsel repeatedly omits the emphasized language, which is essential to the definition of confidential information.

Because the General Counsel misconstrues the true definition of confidential information contained in Paragraph 5, the General Counsel's arguments are flawed and unreliable. For instance, in an about-face from its recent Advice Memorandum, the General Counsel claims that "employees would reasonably read 'all non-public information' to include employee wages and benefits." (General Counsel's Brief, p. 9). A few short months ago, the General Counsel stated exactly the opposite: that "**employees would not reasonably construe [a] 'non-public information' prohibition to encompass**

Section 7-related information concerning employees, wages, or other terms and conditions of employment." Advice Memorandum at p. 6 (emphasis added).

The General Counsel also argues that a "reasonable employee" would "conclude that proprietary information" discussed in Paragraph 6 of the Code (which is *not* alleged to be unlawful) includes "non-public information," and, therefore, constitutes confidential information under Paragraph 5 of the Code. (General Counsel's Brief, p. 8). The General Counsel's leap between proprietary information (discussed Paragraph 6 of the Code, which is not alleged to be unlawful) and confidential information (discussed in Paragraph 5 of the Code) is unsupported by a reasonable reading of the Code. Significantly, the Code does not define "confidential information" merely as "non-public information." For this reason alone, the General Counsel's conflation of proprietary information and confidential information - which are discussed in different provisions of the Code - is unsupported by the text of the Code.

Moreover, it is neither reasonable nor permissible for the General Counsel, or any employee, to simply ignore language which qualifies the meaning of confidential information. The General Counsel's approach - which ignores the majority of the definition of confidential information - would permit any employee to pull limited words from a policy out of context and construe those words in an overbroad manner. Under this approach, *no* confidentiality policy could ever withstand Board scrutiny. Board precedent requires analysis of the actual language of the policy at issue and does not support such an approach.

The General Counsel's appeal to *William Beaumont Hospital*, 363 NLRB No. 162 (2016) and *International Business Machines Corporation*, 265 NLRB 638 (1982) to suggest that this case involves an employee's right to discuss wages and other

personnel information is also misplaced. In *William Beaumont Hospital*, then-Member Miscimarra merely noted that, under the test ultimately adopted in *Boeing*, the Board "might reasonably invalidate a confidentiality requirement prohibiting disclosure of employee wages." The Code, however, contains no prohibition on disclosure of employee wages, so the holding of *William Beaumont Hospital* is inapplicable. In *International Business Machines Corporation*, the Board found it was not unlawful to discharge an employee who disseminated confidential wage information because the employer's business interests outweighed the employees' interests in learning and discussing each other's wages. Here, no employee has been disciplined for disclosing or discussing wage information and Paragraph 5 of the Code does not prohibit it. As such, *International Business Machines Corporation*, similarly, does not control.

4. National Indemnity has a legitimate interest in maintaining the confidentiality of private information.

Employers have a substantial and legitimate interest in maintaining "the confidentiality of private information, including [customer] information, trade secrets, contracts with suppliers, and a range of proprietary information." *Lafayette Park Hotel*, 320 NLRB 824, 826 (1998); *Macy's Inc.*, 365 NLRB No. 116 (2017). The General Counsel incorrectly claims that the Board cannot find an employer has a legitimate interest in protecting the confidentiality of private business information without "a substantial amount of testimony." (General Counsel's Brief, p. 12). *Boeing* expressly rejects this notion. There, the Board recognized that the "justifications associated with particular rules **may be apparent from the rule itself or the Board's experience with particular types of workplace issues.**" 365 NLRB No. 154 at p. 15 (emphasis added). As such, the Board confirmed that evidence or testimony is not required for the Board to

recognize the justifications associated with a work rule. *See id.*

The General Counsel also claims that case law does not "establish that Respondent has a legitimate interest in keeping employees' salary and other personnel information confidential." (General Counsel's Brief, pp. 12-13). But Paragraph 5 of the Code does not require that employees keep salary and personnel information confidential. The General Counsel's interpretation of Paragraph 5's confidentiality rule should be rejected.

The General Counsel also unsuccessfully attempts to distinguish the plethora of case law in which the Board has recognized an employer's legitimate interest in maintaining the confidentiality of private business information. The General Counsel claims those cases are distinguishable because "nothing in the lawful rules suggest that the employer considered employee information to be confidential." (General Counsel's Brief, p. 13).¹ Here, too, **nothing in Paragraph 5 suggests that employee information is considered confidential under the rule.**

National Indemnity's Exceptions to the ALJ's decision should be sustained because the Company's "substantial" interest in maintaining the confidentiality of its private business information outweighs any marginal impact on employees' Section 7 rights and the General Counsel has not cited any case law suggesting otherwise.

B. The ALJ's Remedy and Order Are Overly Broad and Unnecessary.

Because the Code of Conduct does not violate the Act, the Company's Exception

¹ Interestingly, the General Counsel cites *G4S Security* for the proposition that "nothing" in G4S Security's rule suggests that the employer considered employee information to be confidential. (General Counsel's Brief, p. 13). However, G4S Security separately maintained a rule prohibiting employees from discussing "wages and salary information." The General Counsel's argument that "nothing" in G4S Security's lawful confidentiality rule suggests employee information was considered to be confidential contradicts the General Counsel's earlier argument that language from *other* policies formerly maintained by National Indemnity should be interpreted to suggest the Company considered employee information confidential.

to the Remedy with respect to the Code of Conduct should be sustained. There is no need to remedy a rule that is lawful. Moreover, the ALJ's Remedy with respect to National Indemnity's revised Agreement and discontinued Memorandum is also unnecessary and overly broad. Prior to the ALJ's decision, the Company revised the Agreement in December 2016 and this revision was communicated to employees, and the Company rescinded the Memorandum in December 2016, and it is no longer in use. (ALJ Dec. 4:6-15, 4:25-28). As such, the Remedy to rescind or revise the rules is unnecessary. *See UPS Supply Chain Solutions, Inc.*, 364 NLRB No. 8 (2016) (Member Miscimarra, concurring in part and dissenting in part) (noting the Board's remedial authority is "strictly limited to measures that are remedial, not punitive."). Further, if the Board were to implement the Remedy now, this would only serve to dis-incentivize employers from proactively changing rules without Board involvement. *See Boch Honda*, 362 NLRB No. 83 (2015) (Member Johnson, dissenting).

The General Counsel argues in favor of a strict reading of *Passavant* that is refuted by Board precedent. In fact, in *Claremont Resort & Spa*, 344 NLRB 832 (2005), two of the three Board members stated they "**do not necessarily endorse all the elements of *Passavant*.**" (emphasis added). "[W]hile not passing on all of the aspects of *Passavant*," the majority in *Claremont* found that the employer's notice was inadequate under the facts of that case because it failed to assure employees that all discussions protected by Section 7 were permitted.

Here, the General Counsel ignores that National Indemnity *did* inform employees that they are permitted to engage in all discussions protected by Section 7, including discussions about wages and other terms and conditions of employment. The Company issued a new handbook before the ALJ's decision, which stated:

Nothing contained in this Handbook prohibits or is intended to prohibit employees from discussing their wages or other terms and conditions of employment.

(ALJ Decision 5:27-35) (emphasis in the original). In addition, the revised Confidentiality Agreement also specifically provides that "nothing in this Confidentiality Agreement prohibits or is designed to interfere with, restrain, or prevent employee communications regarding wages, benefits, hours, or other terms and conditions of employment." Thus, the General Counsel's argument that employees were not adequately informed of the changes or their rights under the law is without merit.

The *Claremont* case casts serious doubt on the validity of *Passavant*. In fact, the Board has found that the *Passavant* criteria should not be applied in the "highly technical and mechanical manner" requested by the General Counsel. *In re Broyhill Co.*, 260 NLRB 1366 (1982). Rather, by its terms, the *Passavant* decision indicates that "what an employer must do to cure a violation may depend on the nature of the violation." *Extendicare Health Services, Inc.*, 350 NLRB 184 (2007). A violation may be sufficiently cured "despite the fact that the repudiation does not completely accord with the *Passavant* criteria." *Id.* This is precisely what occurred here.

III. CONCLUSION

For the reasons stated herein and for the reasons stated in National Indemnity's opening Brief in Support of Exceptions, the Board should sustain Respondent's Exceptions to the Administrative Law Judge's Decision.

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Respectfully submitted,

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