

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 6**

**UPMC AND ITS SUBSIDIARY, UPMC  
PRESBYTERIAN SHADYSIDE, SINGLE  
EMPLOYER, D/B/A UPMC PRESBYTERIAN  
HOSPITAL AND D/B/A UPMC SHADYSIDE  
HOSPITAL**

**Case 06-CA-171117**

**and**

**SEIU HEALTHCARE PENNSYLVANIA,  
CTW, CLC**

**UPMC AND ITS SUBSIDIARY UPMC  
CHILDREN'S HOSPITAL, A SINGLE  
EMPLOYER**

**Case No. 06-CA-171126**

**and**

**SEIU HEALTHCARE PENNSYLVANIA,  
CTW, CLC**

**UPMC AND UPMC MERCY HOSPITAL, A  
SINGLE EMPLOYER D/B/A/ MERCY HOSPITAL**

**Case No. 06-CA-171621**

**and**

**SEIU HEALTHCARE PENNSYLVANIA,  
CTW, CLC**

**UPMC MERCY HOSPITAL, UPMC PRESBYTERIAN SHADYSIDE,  
AND CHILDREN'S HOSPITAL OF PITTSBURGH OF UPMC'S  
BRIEF IN REPLY TO THE ANSWERING BRIEF OF THE GENERAL COUNSEL**

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Not surprisingly, the General Counsel disagrees with each and every Exception raised by the Respondents and argues that the Administrative Law Judge (“ALJ”) got it all right. The General Counsel’s Answering Brief merely tags up to each finding and conclusion in the ALJ’s Decision (the “Decision”) in order to justify the desired outcome. Respondents trust that the National Labor Relations Board (the “Board”) will conduct a *de novo* review of the parties’ briefs and the citations to the record and make its own determinations regarding the issues raised in Respondents’ exceptions and brief in support thereof.<sup>1</sup> Notwithstanding, Respondent wishes to reinforce a couple of key points in this Reply Brief:

First, as detailed in Respondent’s Exceptions Brief, the ALJ failed to distinguish Board law related to access by “off-duty” employees and employees on-duty but on “non-working” time. This is a distinction with a significant difference.

Second, the ALJ misapplied the Board’s recent holding in *The Boeing Co.*, 365 NLRB No. 154 (2017) and failed to weigh UPMC Mercy Hospital’s (“Mercy Hospital”) business justifications for its Solicitation and Distribution Policy (“S&D Policy”) for off-duty employees.

Third, the ALJ placed the burden on Mercy Hospital to disprove elements that the General Counsel had the affirmative burden to prove.

Fourth, the ALJ mischaracterized UPMC Presbyterian Shadyside’s (“Presbyterian Shadyside”) Posting Policy as a prohibition on distribution rather than what it is – a housekeeping policy.

Fifth, the ALJ credited a General Counsel witness’s testimony in the matter regarding Children’s Hospital of Pittsburgh of UPMC (“Children’s Hospital”) without resolving manifest contradictions in the General Counsel witness’s testimony.

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<sup>1</sup> References to the General Counsel’s Answering Brief will be cited as (Ans. Br. at X). References to the ALJ’s Decision will be cited as (D. X, L. X). References to the transcript will be cited as (Tr. X:X-X).

**I. The ALJ and General Counsel fail to distinguish Board law relating to off-duty access and employees on-duty but on “non-working time” present in Mercy Hospital’s Solicitation and Distribution Policy.**

When read as a whole, Mercy Hospital’s S&D Policy comports with applicable Board precedent and contains no broad ban on solicitation and distribution during non-working time and in non-working areas, as argued by the General Counsel. *See* GX. 3. The definitions in the policy delineate between “working time” and “non-working” time, and draw a demarcating line between “on-duty” and “off-duty” employees. *Id.* These definitions, and the distinctions contained therein, are not novel concepts to the Board, but rather are established differentiations which can determine the scope of an employee’s rights under the Act. *See, e.g., Tri-County Med. Ctr.* 222 NLRB 1089 (1976) (discussing “off-duty” designation). Similarly, Sections IV(A), (B), and (C) of the S&D Policy contain the general regulations on solicitation and distribution, which prohibit (1) solicitation during working time, or of employees during working time, (2) solicitation in patient care areas and (3) distribution in work, patient care, or treatment areas. (GX. 3.) These restrictions are in line with Board precedent regarding allowable restrictions on solicitation and distribution, and do not constitute a ban on solicitation and distribution during non-working time and in non-working areas. *See Valmont Indus., Inc. v. NLRB*, 244 F.3d 454 (5th Cir. 2001); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Peyton Packing Co.*, 49 NLRB 828, 843 (1943); *see also Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978); *NLRB v. Baptist Hosp. Inc.*, 442 U.S. 773 (1979).

The ALJ’s Decision ignores these distinctions. Instead of reading Section IV(D) as a restriction on “off-duty” employee access in context with the solicitation and distribution rules and definitions contained elsewhere in the S&D Policy, the ALJ – and General Counsel – read out any distinction between off-duty employees and non-working employees. (Ans. Br. at 16-17; D. 12, n. 12.)

A correct application of the law and the policy would have also required the ALJ to take note of Joshua Malloy’s testimony regarding his status at the time the events took place. Mr. Malloy, who the ALJ found to be credible, testified that he was off duty at the time the incident occurred. (Tr. 124:17-20.) Failing to take note of this undisputed fact leads the ALJ to a wrong conclusion, as he did not apply the holding of *Sodexo Am., LLC*, 361 NLRB No. 97 (2014), which upheld an analogous off-duty access rule. The ALJ’s Decision recognizes none of the exceptions to the *Tri-County Medical Center* test that *Sodexo* allowed, and claims instead that because the S&D Policy contains an “exception, indefinite in scope,” it is invalid. (D. 21 n. 12.) The “exception” which the ALJ cites in the S&D Policy is Section II, which in no way is related to the off-duty access rule contained in Section IV(D). Section II concerns the scope of the application of the solicitation and distribution rules, and does not alter or provide any exceptions applicable to the off-duty access rule. (*See* GX. 3.)

When Section IV(D) of the S&D Policy is properly considered as an off-duty access rule, analogous to that presented in *Sodexo*, Mercy Hospital’s limits on off-duty employee access and limits on activities permitted while on the premises, which are consistent with limitations placed on activities of the general public, Mercy Hospital’s S&D Policy complies with Board law.<sup>2</sup>

**II. The ALJ misapplied the standard from *The Boeing Co.*, and did not properly consider UPMC Mercy Hospital’s business justifications for the S&D Policy’s off-duty access provisions.**

The ALJ’s Decision focuses solely on whether a hospital may prohibit solicitation or distribution while on *non-working* time, rather than whether an employee may reenter a facility when *off-duty*. This is underscored by the ALJ’s discussion of *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), which quotes portions of the decision concerning employees who are *on-duty* or *scheduled to work* but not performing work tasks. (D. 16, L. 35-45.) Nothing in the

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<sup>2</sup> *See* Resp. Exceptions Brief, pp. 5-9, and Resp. Post Hr. Br. pp. 5-15, for further discussion.

ALJ's analysis acknowledges the different status of employees who are *not* scheduled to work and seek access to an employer's property. (*Id.*)

By failing to recognize this distinction, the ALJ does not consider the business justifications associated with the off-duty access rule contained in Section IV(D) of the S&D Policy that were presented by UPMC Mercy Hospital. This is not a case where the incident at issue involved on-duty employees who were soliciting or distributing, but rather an employee who came into the hospital when he was not scheduled for work for the sole purpose of soliciting or distributing. As was noted above, the S&D Policy restricts access by off-duty employees and members of the general public for such purposes, and does so with the aim of preventing unnecessary disturbances to services at the hospital for patients and their families.<sup>3</sup> The justifications presented by UPMC Mercy Hospital should have been considered *in the proper context* by the ALJ under *The Boeing Co.* framework.<sup>4</sup> As UPMC Mercy Hospital argued, the impact on Section 7 rights of the off-duty access rule is minimal, as employees have ample opportunities to solicit and distribute during their non-working time and in non-working areas while on duty. This is not, as the ALJ characterized it, a rule which “prevent[s] and prohibit[s] employees...not on working time from engaging in solicitation and distribution regarding the union...in non-working areas” that “strike[s] at the heart of employees’ rights under Section 7 of the Act.” (D. 16, L. 9-13.) Rather, it is a valid off-duty access rule and the rule itself, and justifications for the rule, should be evaluated under applicable jurisprudence.

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<sup>3</sup> See, e.g. *NLRB v. S. Md. Hosp. Ctr.*, 916 F.2d 932 (4th Cir. 1990) (allowing hospitals to bar access to members of public who engage in solicitation or distribution activities, even in publicly open cafeterias)

<sup>4</sup> See Resp. Exceptions Brief, pp. 10-12, for further discussion.

**III. The ALJ placed the burden on Respondent Mercy Hospital to prove elements that the General Counsel had the burden to prove.**

As discussed in Respondents' Exceptions Brief, the ALJ improperly shifted the burden of proof regarding whether the public had access to the UPMC Mercy Hospital cafeteria. The General Counsel fails to address this exception in its Answering Brief, except to say that "the ALJ's logic was sound and he correctly placed the burden on Respondent to demonstrate that the cafeteria is used for patient care." (Ans. Br. 12.) There was no authority cited by the ALJ to support such a reallocation of the burden of proof and the General Counsel likewise cites to none.

This improper shift of the burden of proof provides cover for the insufficient and speculative testimony that the General Counsel's witnesses offered to describe the individuals in the UPMC Mercy Hospital cafeteria. The General Counsel quotes from the ALJ's conclusion that the "general public" was allowed into the UPMC Mercy Hospital cafeteria. (Ans. Br. 15.) However, the testimony given by Mr. Malloy and Amber Stenman was, at best, speculative in nature and without any real foundational knowledge which would allow them to determine who the people present in the cafeteria were on the day in question. (Tr. 125:4-8; 125:13-15; 133:2-8.) This is insufficient evidence for the General Counsel to establish that the general public had access to the cafeteria.

**IV. The ALJ mischaracterizes UPMC Presbyterian Shadyside's Posting Policy as a prohibition on distribution rather properly considering it as a housekeeping policy.**

The General Counsel, once again, does nothing more than parrot back the ALJ's findings and conclusions with regard to UPMC Presbyterian Shadyside's posting policy. Like the ALJ, the General Counsel claims Respondent "mischaracterizes" the Posting Policy as a housekeeping policy because the *allegations* in the Amended Complaint claim that the Posting Policy was a distribution policy. (Ans. Br. at 21.) The concept that the allegations control the scope of

inquiry or the interpretation of evidence runs contrary to the very point of having hearings—the record and evidence presented, not mere allegations, should control the analysis.

The General Counsel also attempts to distinguish *Page Avjet, Inc.*, 278 NLRB 444, 450 (1986), on the same basis as the ALJ did, namely that “[UPMC Presbyterian Shadyside] informed employees they could not distribute material in the break room by leaving it on tables or posting it, while the employer in *Page Avjet* maintained a distribution procedure that allowed employees to place literature on the tables for employees to take and read if they desired....[.]” (D. 27, L. 21-27; Ans. Br. 22.) Upon examination of the record, however, there is little to support this alleged “distinction.” The Posting Policy prohibits only *leaving behind* or posting materials—i.e., abandoning them. GX. 15.) Lorraine Fabrizzi, a General Counsel witness whom the ALJ credited, testified that there was no interference with employees being able to view materials or distribute them during their breaks. (Tr. 74:14-22.) The only thing the Posting Policy prohibited was *abandoning* such materials. Jamie Scalise’s (“Ms. Scalise”) directives to employees, as she testified, were regarding the fact that any materials that were abandoned would be cleaned up and thrown out. (Tr. 347:13-19.) This was a common and standing practice for Ms. Scalise. (Tr. 342:22-23; 343:1-7.)

In the end, neither the ALJ nor the General Counsel address the actual substantive discussion in *Page Avjet* which delineates the difference between materials abandoned and left behind and those being actively read by employees. The Board, in *Page Avjet*, affirmed the administrative law judge’s reasoning that no Section 7 rights attached to “abandoned literature” and the employer committed no act of interference by “cleaning up” a break area “at the conclusion of an employee break.” *Page Avjet*, 278 NLRB at 450. The situation presented here is analogous to that of *Page Avjet*—the Posting Policy was simply a reminder to employees not

to post or leave materials behind, regardless of the subject matter. If such materials were left behind, they would be cleaned up or disposed of as noncompliant with the policy. Any such abandoned materials do not have Section 7 rights attached to them, and thus, may be disposed of without repercussion.<sup>5</sup>

While the ALJ and General Counsel attempt to conflate the Posting Policy with a distribution policy, the Board has made clear that it views posting or housekeeping rules as a distinct.<sup>6</sup> *See St. Francis Med. Ctr.*, 347 NLRB 368, 370 (2006) (stating that “comparison between solicitation/distribution and posting is a comparison of “apples to oranges”). The Posting Policy is a valid housekeeping rule that was not discriminatorily enforced, and cannot be a basis for a finding of interference in this matter.

**V. The ALJ credited the General Counsel’s witness in the matter regarding Children’s Hospital of Pittsburgh of UPMC without resolving manifest contradictions in the witness’ testimony.**

Under applicable precedent, the ALJ is bound by certain standards in rendering judgment on witness credibility. *See, e.g., NLRB v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 765 (2d Cir. 1996) (must consider whole record in making determinations). Such a determination must not ignore evidence which is contrary to the conclusions reached by the ALJ. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

As detailed in Children’s Hospital’s Exceptions Brief, Pamela Banks’ (“Ms. Banks”) testimony on her interactions with Linda Terry (“Ms. Terry”) were full of contradictions, omissions, and inconsistencies which called into question the credibility of her testimony. (Resp. Ex. Br. at 26-29.) Rather than resolve these conflicts or otherwise comment on the issues

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<sup>5</sup> *See* Resp. Exceptions Brief, pp. 17-20, and Resp. Post Hr. Br. pp. 17-23 for further discussion.

<sup>6</sup> Also, it is illogical that UPMC Presbyterian Shadyside would have two distribution policies—one contained in the S&D Policy, and the other contained in the Posting Policy. The existence of an explicit S&D Policy should indicate, at the very least, that the Posting Policy was intended to cover different ground.

presented by Ms. Banks' account of the incidents involved in the allegations, the ALJ simply credited all of Ms. Banks' testimony, declaring her testimony "very credible...consistent, convincing, and plausible." (D. 30 L. 31-33.) Unsurprisingly, the General Counsel does not attempt to bolster Ms. Banks' credibility or resolve the issues in her testimony in his Answering Brief.

Instead, the General Counsel adopts again the ALJ's strategy, and reiterates the ALJ's critical analysis of Ms. Terry's testimony. In order to undermine Ms. Terry's testimony, the ALJ and General Counsel attribute anti-union animus to Ms. Terry, and allow assumptions, such as the fact she received training about union campaigns, to color their analysis of her testimony. (D. 32. L. 23-31; Ans. Br. at 28-29.) Furthermore, the ALJ held any perceived inconsistency against Ms. Terry, while not even investigating any of the inconsistencies in Ms. Banks testimony or requiring similar "explanations" for any perceived inconsistencies. (D. 32, L. 32) (discrediting Ms. Terry's testimony because she "failed to offer an explanation as to why one of her staff would contact her" to report Ms. Banks passing out flyers at the bus stop). This one-sided review of the record is inconsistent with a proper weighing of the testimony of Ms. Banks and Ms. Terry.

## **VI. Conclusion**

For the reasons stated herein and in Respondents' Brief in Support of their Exceptions, the portions of the ALJ's decision excepted to by Respondents should be reversed.

Respectfully submitted,

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Dated: March 29, 2018

**CERTIFICATE OF SERVICE**

It is certified that a copy of UPMC Mercy Hospital, UPMC Presbyterian Shadyside, and Children's Hospital of Pittsburgh of UPMC's Brief in Reply to the Answering Brief of the General Counsel in the above-captioned case has been served by email on the following persons on this 29th day of March, 2018:

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