

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ENTERGY NUCLEAR OPERATIONS, INC.,

and

UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 25

Cases 01-CA-153956
01-CA-158947
01-CA-165432

Emily Goldman, Esq.,
for the General Counsel.
Terence P. McCourt, Esq., Justin F. Keith, Esq.,
(*Greenburg Traurig, LLP*)
Boston Massachusetts, and
Ian H. Hlawati, Esq.,
White Plains, New York,
for the Respondent.
Alan J. McDonald, Esq., Kristen Barnes, Esq.,
(*McDonald Lamond Canzoneri*)
Southborough, Massachusetts, and
Robert B. Kapitan, Esq.,
Wareham, Massachusetts,
for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. On May 12, 2017, I issued a decision in which I found, inter alia, that the General Counsel had established that some of the work rules challenged in this case violated Section 8(a)(1) of the National Labor Relations Act (Act or NLRA), but had failed to establish that other challenged work rules violated the Act. Entergy Nuclear Operations, Inc., (the Respondent) and the General Counsel both filed exceptions to my decision. While those exceptions were pending before the National Labor Relations Board (Board or NLRB), the Board issued its decision in *The Boeing Company*, 365 NLRB No. 154 (2017), reconsideration denied 366 NLRB No. 128 (2018). In that decision, the Board modified the standards for determining whether an employer's work rules interfere with employees' rights under the Act in violation of Section 8(a)(1). On January 15, 2019, the Board issued an Order severing and remanding to me the allegations regarding the Respondent's work rules. The Order stated that those allegations were being remanded "for the purpose of reopening the record, if necessary, and preparing a supplemental decision addressing the complaint allegations affected by" the decision in *The Boeing Company*. The work rule allegations that are before me on remand are those set forth in the Second Amended

Consolidated Complaint (Complaint) at paragraph 8(d), paragraph 11 (Sections 3.1 and 5.2), paragraph 12 and paragraph 13.¹ Although in my original decision I found that several of the Respondent's challenged work rules were not shown to be unlawful, the rules that remain at issue on remand are all among those that I previously found unlawful.

5

I offered the parties the opportunity to participate in a supplemental hearing for the purpose of presenting any additional evidence they believed was relevant to consideration of the work rules under the standards announced in *Boeing Company*. The General Counsel, the Respondent, and the Charging Party all stated that the presentation of additional evidence was not necessary. I did not find a basis on the record to reject the parties' consensus that the presentation of additional evidence was not necessary. The General Counsel and the Respondent have submitted supplemental briefs addressing the impact of *The Boeing Company* decision on the remanded allegations. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

10

15

FACTS

The Respondent operates a nuclear power plant, referred to as the Pilgrim Nuclear Power Station, in Plymouth, Massachusetts (the Plymouth facility). Since 2007, the Union has represented the nuclear security officers employed by the Respondent at the Plymouth facility. The security force is a paramilitary organization and has a presence at the facility 24 hours a day. The policies before me on remand are set forth in the Respondent's "Code of Entegrity" and in separate policy statements regarding protection of information, issue resolution, and government investigations.

20

25

A. PROVISIONS REFERENCING CONFIDENTIALITY

Since at least July 22, 2015, the Respondent has maintained a policy on "Protection of Information" (Information Policy). Section 3.1. of the Information Policy defines "employee information" as "confidential information" that "must be protected from disclosure"² and Section 5.2

30

¹ A number of allegations that appear in the Consolidated Complaint (the Complaint) are not before me. On November 6, 2018, in proceedings before the Board, the General Counsel withdrew the allegations set forth in Complaint paragraphs 8(a), 9, 15(b), and 17. Subsequently, on April 3, 2019, I granted the General Counsel's unopposed motion to withdraw Complaint paragraphs 8(b),8(c), 8(e), 10, and sections 3.7, 3.14, 5.1, 5.6, and 5.7 of Complaint paragraph 11. The Board, in its remand order, expressly retained jurisdiction regarding "the allegation that the Respondent unlawfully disciplined employee Jamie Amaral," and on May 21, 2019, the Board affirmed my determination that the Respondent had not been shown to have unlawfully disciplined Amaral. 367 NLRB No. 135 (2019).

² Section 3.1 of the Information Policy states in its entirety:

3.1 Confidential Information – Those Information Assets that must be protected from disclosure, either accidental or intentional, due to their sensitive or proprietary nature. Confidential Information includes but is not limited to: Sensitive Information; Personal Information; customer information; passwords; vendor pricing information; information submitted by vendors with their bids; employee information; information provided in connection with employment applications (unless a waiver is secured from such applicant for specific disclosures); information provided by outside parties under a confidentiality agreement or under circumstances that indicate its confidential nature; marketing strategies and business plans; non-public financial, accounting and budgeting records; non-public research and development records; knowledge, data, or know-how of a technical, financial, commercial, creative, or artistic nature in

provides that employees are prohibited from disclosing confidential information, either accidentally or intentionally, to “parties both inside and outside the Company, who do not have a legitimate business ‘need to know’ for purpose of the Company’s operations or management.”³ The General Counsel alleges that these sections unlawfully restrict employees’ exercise of their NLRA rights.

5

The Information Policy contains another provision, Section 5.6, which is devoted to the protection of employee *records*. The General Counsel does not allege that the confidentiality restrictions on employee records that are set forth in Section 5.6 are unlawful. The Respondent nevertheless cites Section 5.6 for its inclusion of “savings clause” language that the Respondent contends bears on the legality of the restrictions on employee *information* that it imposes in Section 3.1 and Section 5.2 of the policy. The savings clause that the Respondent points to states:

10

5.6 Employee Records . . .

15

* * *

5.6.3 Nothing in this Policy is intended to restrict an employee’s rights under any federal state or local labor or employment law, or regulation, except to the extent such rights are clearly waived by the express terms of a current collective bargaining agreement. These employee rights include, but are not limited to, the right to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment, such as the right to discuss his or her wages, benefits and employment conditions with others.

20

25

I note, that the Information Policy does not use the terms “employee information” and “employee records” interchangeably. For example, the policy classifies “employee information” as

which the Company has an ownership interest by virtue of its participation, acquisition, development, or license rights; and information that, if not properly safeguarded, might impair the security or privacy of Facilities and personnel, such as information relating to nuclear plant “protected areas,” and “critical infrastructure information” as defined by the Federal Energy Regulatory Commission.

³ Section 5.2 of the Information Policy states in its entirety:

5.2 Protection of Confidential Information. In addition to the rules above for Information Assets in general, employees, agents, and contractors shall:

5.2.1 protect Confidential Information from disclosure, either accidental or intentional, to all parties, both inside and outside of the Company, who do not have a legitimate business “need to know” for the purposes of the Company’s operations or management;

5.2.2 comply with any Confidentiality or Nondisclosure Agreement that applies to such Confidential Information;

5.2.3 take care in the access to, and storage, reproduction, control, transmission, and destruction of materials containing Confidential Information;

5.2.4 ensure the timely termination of access to Confidential Information by individuals who are no longer employed by Entergy or by its agents or contractors, or who otherwise no longer have a “need to know” such information to perform their job; and

5.2.5 not use file-sharing services that have not been approved through the GUARD process for sharing Confidential Information.

“confidential,” (Section 3.1) but classifies “employee records” as “sensitive” (Section 3.14), a subset of confidential.⁴

The General Counsel also challenges the confidentiality restriction that the Respondent sets forth in a separate policy on “Issue Resolution.” The Issue Resolution Policy describes a process by which issues between non-unit employees and the Respondent may be investigated and resolved. Section 5.13 of that policy sets forth the following confidentiality provision that restricts the use of information collected during that process:

5.13 Confidentiality - All communications and documents generated during this process will be treated as confidential. Disclosure, circulation, distribution, or discussion of the information collected by the Panel should be limited to those individuals who have a legitimate business need to know the contents. Release of any of this information beyond this limited circulation must be approved by the Senior Vice President Human Resources/Chief Diversity Officer.

B. PROVISIONS RELATING TO GOVERNMENT INVESTIGATIONS

The General Counsel alleges that the Respondent has also violated Section 8(a)(1) by maintaining rules that place restrictions on employee participation in government investigations. The complained of provisions are Code of Entegry Section 5.I., and Government Investigations Policy Sections I. (policy summary) and 5.1 through 5.5. These provisions, which are set forth below, create multiple obstacles to employees’ ability to avail themselves of the assistance of government agencies and to cooperate with government agencies. For example, the provisions: prohibit employees from answering any questions posed by a government investigator without first contacting the company’s legal department; prohibit employees from providing any documents requested by a government investigator without first contacting the company’s legal department; require employees to refer any government requests for an investigative interview to the company’s legal department; state that “an employee should contact the legal department before contacting a governmental agency about the company’s business”; and warn that an employee who chooses to speak with a government official without the presence of a company attorney and without company approval “may be liable for any improper disclosure of any information.” The policy on government investigations makes certain exceptions for communications with a small number of identified government agencies, including the Nuclear Regulatory Commission, but makes no exception for communications with the NLRB or which otherwise safeguard employees’ independent access to NLRB processes.

Section 5.I. of the Code of Entegry, which the Respondent has maintained since at least December 11, 2014, states:

Section 5. I. GOVERNMENT INVESTIGATIONS AND INTERACTIONS
 All government requests for inspections, investigative interviews or documents should be referred to the Legal department for review and further instruction. Additionally, except to the extent that interaction with governmental agencies is part of an employee’s job function, the employee should contact the Legal department before contacting a governmental agency about the company’s business.

⁴ Section 3.1 of the Policy states that “Confidential Information includes but is not limited to: Sensitive Information” Section 3.14 defines “sensitive information” as information that is “highly confidential.”

The Respondent's Government Investigations Policy has, since at least October 1, 2015, included the following provisions:

I. POLICY SUMMARY

- 5 • Employees, agents and contractors approached by someone claiming to be a government investigator should contact a lawyer in the Company's Legal Department before answering any questions, providing any documents, or allowing access to Company facilities.

10 * * *

15 5.1 General. The Company is committed to cooperating with government agencies conducting investigations of alleged wrongdoing at the Company. When doing so, two goals are of prime importance: Government investigators must obtain a complete and accurate picture of the Company, and the Company must protect its legal rights. These two goals can best be reached by properly coordinating response to government investigations.

20 5.2 Legal Department Review. It is the Company's policy that all Subpoenas, Search Warrants, Civil Investigative Demands, written complaints, and requests for investigative interviews or documents be referred to the Company's Legal Department for review.

25 5.3 Government Investigator Activity. Government investigators may arrive unannounced at Company facilities or at the residence of present or former employees, agents or contractors and seek interviews and documents. Such persons when approached by someone claiming to be a government investigator shall, if possible, contact a lawyer in the Company's Legal Department before answering any questions, providing any documents, or allowing access to Company facilities. The Company's lawyers can instruct more fully on duties. Employees, agents and contractors shall not answer any questions, produce any documents, or allow access before making necessary contacts with Legal. However, if government investigators possess a search warrant and will not allow time to make such contact before executing the search warrant, employees, agents and contractors shall not prevent the investigators from proceeding but shall monitor their activities and contact Legal for additional direction.

30 35 40 45 50 5.4 Government Requests for Documents. Employees, agents and contractors may be asked by government investigators to provide documentation related to a government inquiry or investigation. Even if an employee, agent or contractor created, keeps, or updates documentation, it is nonetheless the Company's property. Employees, agents and contractors do not have the authority to produce documentation for the investigator without undertaking and following the steps below before disclosing any documentation to the government agency. If a Search Warrant is presented for the documentation, follow the additional guidelines below in Section 5.7.

(a) Contact the Company's Legal Department and immediately notify them of the government agency's request for documentation.

5

(b) Contact the appropriate Entergy supervisor to notify him or her of the government agency's request for documentation.

(c) Cooperate with the government investigator, but do not consent to provide any documentation.

10

(d) Ask if a Civil Investigative Demand, Subpoena or Search Warrant accompanies the request for documentation and, if so, request a copy of the Civil Investigative Demand, Subpoena or Search Warrant.

15

(e) Wait for an attorney from the Company's Legal Department to provide instruction on how to move forward with the request for documentation.

5.5 Government Request for an Interview. When government officials request an interview with an employee, agent or contractor, whether or not on the Company's premises, the employee, agent or contractor shall notify the Company's Legal Department of the request for an interview and provide the name, agency affiliation, business telephone number and address of the government official, and the reason for the interview, if known.

20

25

(a) The employee, agent or contractor shall ask if a Civil Investigative Demand, Subpoena or Search Warrant accompanies the request for an interview and, if so, request a copy of the Civil Investigative Demand, Subpoena or Search Warrant. If there is no Civil Investigative Demand, Subpoena or Search Warrant, the employee, agent or contractor may refuse to discuss any issues with the government official.

30

(b) Further, employees, agents and contractors have the option of speaking with the government official with or without the presence of an attorney and may decide to forgo any discussions with the government official until securing legal counsel. If employees desire to have an attorney present at any meeting with the government official, employees may request to consult with a private attorney or with an attorney from the Company's Legal Department prior to the interview.

35

40

(c) If an employee, agent or contractor decides to speak with a government official without an attorney from the Company's Legal Department present or without the Company's permission to speak on the Company's behalf, the employee, agent or contractor may be liable for any improper disclosure of any information provided to the government official regardless of whether the information harms the Company or whether or not private legal counsel has been obtained.

45

50

(d) Should an employee, agent or contractor participate in an interview, it is important that the interviewee understand

5 what the interview is about. The interviewee should always
 obtain clear and proper identification from a government
 agent before beginning an interview and make sure that he
 or she understands the purpose of the interview, the
 purpose of the investigation, and his or her status in the
 investigation. The Company's Legal Department can help
 the interviewee understand what the interview and
 investigation are about and what the Company's rights and
 obligations are in such a situation. Further, the
 10 interviewee's answers matter greatly in any investigation.
 Any answers given must first of all be true and in addition
 must accurately represent the interviewee and the
 Company to the investigator. The interviewee should
 remember to give clear and unambiguous answers, asking
 15 himself or herself whether the investigator could read
 something unintended into the answer. If so, the answer
 should be given in a different way or clarification of
 statements already made should be made. Speculation
 should be avoided as speculative answers are easily
 20 misunderstood and can be inaccurate.

ANALYSIS

25 In *The Boeing Company*, the Board announced standards for determining whether an
 employer's facially neutral rule interferes with employees' NLRA rights in violation of Section 8(a)(1) of
 the Act. 365 NLRB No. 154. The Board stated that unless the rule is of a type that the Board has
 already designated as being uniformly lawful or unlawful, the lawfulness of the rule, under Section
 8(a)(1), will be evaluated using a balancing test. First, the Board will determine whether the rule is one
 30 that the employees would "reasonably interpret[]" as "potentially interfer[ing]" with the exercise of
 NLRA rights." If it is, the Board will evaluate whether the "nature and extent of the potential impact on
 NLRA rights" outweighs any "legitimate justifications associated with" the rule. Slip op. at 3-4 and 16.
 The Respondent's rules regarding confidential information and regarding employee participation in
 government investigations are facially neutral and are not among those types that the Board has, as of
 this time, designated as uniformly lawful or unlawful. Therefore, the balancing test set forth in *Boeing*
 35 is the applicable analysis.

1. The General Counsel challenges the "confidentiality" restrictions set forth in the
 Respondent's Information Policy at Section 3.1 and 5.2, and in the Respondent's Issue Resolution
 Policy at Section 5.13. The General Counsel states that employees would reasonably interpret these
 40 provisions as interfering with their NLRA rights to, inter alia, discuss their wages and benefits. Turning
 first to the Information policy, there is no doubt that the General Counsel is correct that the provisions
 identified would be reasonably understood by employees to prohibit them from discussing their wages
 and other benefits of employment with one another and with their union or other outside entity. The
 Information Policy defines *all* "employee information" as "confidential" and states that employees are
 45 prohibited from disclosing such information to persons inside or outside of the Respondent unless
 those persons "have a legitimate business 'need to know' for the purposes of the [Respondent's]
 operations or management." This restriction interferes with employees' NLRA right to discuss properly
 obtained employee information such as wages, terms and conditions of employment, and contact
 information with, inter alia, co-workers and a union. See *Rio All-Suites Hotel and Casino*, 362
 50 NLRB 1690, 1691(2015), *Flex-Frac Logistics, LLC*, 358 NLRB 1131, 1131 (2012), enfd. 746

F.3d 205 (5th Cir. 2014), *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 (2001).⁵ The interference goes to the heart of employees' NLRA rights to seek to improve their working conditions and imposes a heavy burden on the exercise of those rights. Pursuant to the NLRA, "information [that] involves matters concerning the wages, hours, and working conditions of . . . employees . . . is precisely the type that may be shared by employees, provided to unions, or given to governmental agencies." *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011), reversed on other grounds 805 F.3d 309 (D.C. Cir. 2015).

The Respondent does not take the opportunity created by the balancing test announced in *Boeing* to attempt to show that "legitimate justifications" for the confidentiality rules outweigh the burdens those rules place on employees' NLRA rights. In its brief, the Respondent does not point to any "legitimate justifications" that it claims outweigh the negative impact that the confidentiality restrictions have on employees' ability to exercise their NLRA rights. I find that the evidence of record does not establish the existence of any legitimate justification that outweighs the heavy burden the Respondent has imposed on employees' exercise of their NLRA rights.

Rather than attempt to show that its confidentiality restrictions have a legitimate justification, the Respondent argues that the "savings clause" language that appears in a section of the policy that addresses "employee records" means that employees would not reasonably understand the challenged restrictions on the broader category of "employee information" to potentially interfere with their exercise of NLRA rights. This is an argument that I rejected prior to the remand and it is in no way improved by consideration of *Boeing*, which does not address the established Board law applicable to savings clause language. That Board law, which is discussed below, requires rejection of the Respondent's savings clause defense.

A savings clause "may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule." *First Transit, Inc.*, 360 NLRB 619, 621 (2014). To determine whether a savings clause remedies a provision's otherwise unlawful interference with NLRA rights, the Board has considered the following factors: whether the language "address[es] the broad panoply of rights" protected by Section 7 of the NLRA; the length of the document and the placement of the savings clause in relation to the ambiguous rules that it is claimed to remedy; whether the savings clause and the ambiguous rules reference each other; and, whether the employer has enforced the overbroad rule in a way that shows employees that the savings clause does not safeguard their NLRA rights. *Id.* at 621-622; see also *Care One at Madison Avenue*, 361 NLRB 1462, 1465 n.8 (2014), *enfd.* 832 F.3d 351 (D.C. Cir. 2016). In deciding whether a savings clause has succeeded in rendering an employer's otherwise impermissible

⁵ The Board has repeatedly held that employees have a protected right to discuss information about co-workers when they obtain that information in the normal course of work activity, and not by removing confidential business records from an employer's files. See *Rocky Mountain Eye Center*, 363 NLRB No. 34, slip op. at 9-10 (2015) (employee engaged in protected activity by providing union organizer with employee names and phone numbers obtained by accessing the employer's computer system), *Albertson's, Inc.*, 351 NLRB 254, 259 (2007) (employee engaged in protected activity by disclosing list of employees' names to the union), *Gray Flooring*, 212 NLRB 668, 669 (1974) (employee engaged in protected activity by providing union organizer with co-worker names and telephone numbers that were obtained from a list hanging in a supervisor's office and from index cards obtained from a supervisor's desk), *Ridgely Mfg. Co.*, 207 NLRB 193, 196-197 (1973), *enfd.* 510 F.2d 185 (D.C. Cir. 1975) (employee engaged in protected activity by providing union organizer with names of employees from timecards); *Anserphone of Michigan*, 184 NLRB 305, 306 (1970) (employee engaged in protected activity by providing union organizer with names and addresses of employees obtained from office manager); cf. *International Business Machines Corp.*, 265 NLRB 638, 638 (1982) (employee did not engage in protected activity by distributing employee wage information obtained from a confidential employer document).

prohibition lawful, the Board construes any ambiguity against the employer as the drafter of both the prohibition and the savings clause. *Century Fast Foods, Inc.*, 363 NLRB No. 97, slip op. at 11 (2016).

5 As noted above, the savings clause appears in a section entitled “employee records” and states that the policy is not meant to interfere with employee rights that “include, but are not limited to, the right to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment, such as the right to discuss his or her wages, benefits and employment conditions with others.” Three of the four considerations that the Board discussed in *First Transit* weigh against finding that this savings clause cures the otherwise unlawful confidentiality restrictions in Sections 3.1 and 5.2. First, the language the Respondent relies on does not address the “broad panoply” of NLRA rights because it makes no mention of employees’ rights to engage in union activity. Second, the sections that contain the challenged confidentiality prohibitions do not reference the savings clause or the section that contains it, and the savings clause does not reference the at-issue sections of the confidentiality policy. Moreover, I note that the savings clause does not appear in one of the Information Policy’s introductory or conclusory sections, where an employee might arguably understand it as applying to the entire Policy. Rather the language the Respondent relies on appears in a subparagraph of a provision that narrowly addresses employee “records,” not employee information or confidential information generally. Third, the language the Respondent relies on is not situated in proximity to the at-issue prohibitions. Within the 15-page policy, the savings clause appears in a subsection 7 pages distant from Section 3.1 (the provision that provides that “employee information” “must be protected from disclosure”).

25 The record does not show how, if at all, the Respondent has enforced the confidentiality provisions, and therefore does not show whether the Respondent has, or has not, enforced those provisions in a way that would lead employees to believe that the savings clause does not safeguard their NLRA rights. Given that the Board construes any ambiguity regarding the savings clause against the Respondent, *Century Fast Foods*, supra, this absence of evidence does not, in my view, weigh in favor of finding that the savings clause alleviates the interference with Section 7 activity. Even assuming that the lack of evidence regarding enforcement weighs in the Respondent’s favor, it does so only lightly and is outweighed by the other three considerations, all of which heavily favor finding that employees would reasonably read the policy as interfering with their NLRA rights.

40 I also find that employees would reasonably interpret the Respondent’s Issue Resolution Policy to interfere with the exercise of NLRA rights and that this interference was not shown to be outweighed by any legitimate justifications associated with the rule. The Respondent’s Issue Resolution Policy sets forth a process by which problems between non-unit employees and the Respondent may be investigated and resolved. The General Counsel challenges the confidentiality provision in that policy, Section 5.13, which states that “all communications and documents generated during this process will be treated as confidential.” This provision further limits the “[d]isclosure, circulation, distribution, or discussion of the information collected by the” decision-making panel unless management’s approval is obtained. The Board has recognized that employee discussions regarding employer investigations involving themselves or coworkers are “vital to employees’ ability to aid one another in addressing employment terms and conditions with their employer.” *Banner Estrella Medical Center*, 362 NLRB 1108, 1109 (2015), enfd. 851 F.3d 35 (D.C. Cir. 2017), citing *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 5-6 (2014); see also *SNE Enterprises*, 347 NLRB 472, 472 fn.4 (2006), enfd. 257 Fed. Appx. 642 (4th Cir. 2007). The Board stated that the Act not only makes it unlawful for an employer to prohibit such discussions, but also makes it unlawful for an employer to maintain a rule that, like part of the Respondent’s rule here, “requires employees to

secure permission from their employer as a precondition to engaging in protected concerted activity.” *Victory Casino Cruises*, 363 NLRB No. 167, slip op. at 4 (2016), quoting *Brunswick Corp.*, 282 NLRB 794, 795 (1987); see also *UPMC*, 362 NLRB 1704, 1728 (2015), *Alternative Community Living, Inc.*, 362 NLRB 435, 451 (2015).

5

Employees would reasonably understand the Respondent’s blanket confidentiality rule regarding information gathered in an issue resolution investigation to interfere with the exercise of their rights both to discuss employer investigations involving themselves or coworkers with co-workers and outside entities, and to share information generated by the decision-making panel’s investigation. The Respondent argues that employees would not reasonably understand the restriction to apply to them because “[t]here are no words in the policy that limit the ability of the employee to discuss his/her discipline.” This is not persuasive. The prohibition is expressed generally and does not enumerate specific groups of individuals to whom the restrictions apply. There is nothing in the restriction indicating that it only limits the prerogatives of managers, supervisors, or any groups of individuals who do not have rights under Section 7 of the NLRA.

10

15

At the time I issued my original decision, I applied existing Board precedent under which a balancing test was used to evaluate the lawfulness of employer confidentiality rules relating to employer investigations. See, e.g., *Midwest Division—MMC, LLC*, 362 NLRB 1746, 1748-49 (2015), enf’d. 867 F.3d 1288 (D.C. Cir. 2017). Under that test, I evaluated the confidentiality rule by balancing the burden that the restriction placed on NLRA rights against the Respondent’s need for the restriction. The balancing test formulation set forth in the *Boeing* decision, while it modified the analysis for many types of workplace rules, does not appear to have meaningfully altered the balancing test that already applied to the confidentiality restrictions in the Respondent’s Issue Resolution Policy, and does not alter my conclusion that those restrictions unlawfully interfere with employees’ NLRA rights. Under either articulation of the balancing test, I adhere to the Board precedent holding that an employer may prohibit employee discussion of an investigation only when the employer’s need for confidentiality with respect to that specific investigation outweighs employees’ NLRA rights. This permits an employer to lawfully impose such a restriction only on a case-by-case basis and by considering whether the circumstances of the particular investigation create legitimate concerns of witness intimidation or harassment, the destruction of evidence, or other misconduct tending to compromise the integrity of the inquiry. See *Banner Estrella*, 362 NLRB at 1109-1110. A “blanket” confidentiality provision, such as the one the Respondent imposed here, clearly fails to satisfy the requirement that the employer consider the particulars of each investigation and thus the provision unlawfully interferes with employees’ NLRA rights. See, e.g., *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011); see also *SNE Enterprises*, 347 NLRB at 472 fn.4 and 492-493 (confidentiality rule that applied after the investigation was completed cannot be justified as necessary “to protect the sanctity of an ongoing investigation”).

20

25

30

35

40

Even if, under *Boeing*, a blanket prohibition on the sharing of information from investigations could be rendered lawful by a sufficiently weighty justification, the result would be the same because the record does not establish any such justification. There was no evidence that the Respondent has experienced recurring problems with witnesses being harassed or intimidated, evidence being destroyed, false testimony or other false evidence being created, or with anyone otherwise exploiting information from investigations to interfere with those investigations. The record does not show that the blanket prohibition in its Issue Resolution Policy is necessitated by requirements imposed on the Respondent by the Nuclear Regulatory Commission. Indeed, in its brief on remand, the Respondent does not even make an argument that legitimate justifications for the confidentiality restrictions in its Issue Resolution Policy outweigh the burdens that those restrictions impose on employees’ exercise of their NLRA rights.

45

50

Since at least July 22, 2015, the Respondent has violated Section 8(a)(1) of the Act by maintaining Section 3.1 and Section 5.2 of its Information Protection Policy, which contain overly broad prohibitions on the disclosure of “employee information” and interfere with employees’ exercise of their rights under the Act. Since at least October 1, 2015, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 5.13 of its Issue Resolution Policy, which sets forth an overbroad confidentiality restriction on information gathered in the issue resolution process and interferes with employees’ exercise of their rights under the Act.

2. The General Counsel also alleges that the Respondent has violated Section 8(a)(1) of the Act by maintaining rules that restrict employees from communicating or cooperating with government agencies investigating the Respondent. The challenged restrictions, which are set forth above in the statement of facts, appear in the Respondent’s Code of Entegrity at Section 5.1. and in the Government Investigations Policy in the “policy summary” section and Section 5.1 to 5.5. The explicit language of these provisions requires employees to notify the Respondent’s Legal Department whenever they are contacted by an agent of a government agency and to get the Respondent’s permission before cooperating with, or providing evidence to, a government agency. The United States Supreme Court has recognized that guaranteeing the public coercion-free, independent, access to the Board’s processes is key to “the functioning of the [National Labor Relations] Act as an organic whole.” *NLRB v. Marine & Shipbuilding Workers Local 22*, 391 U.S. 418, 424 (1968); see also *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Employees would reasonably understand the challenged restrictions regarding government investigations to prohibit them from initiating contact with the NLRB, responding to the inquiries of NLRB investigators, providing information to the NLRB, or responding to NLRB subpoenas unless the Respondent’s Legal Department is informed about, and authorizes, this employee activity. Such restrictions interfere with, and would reasonably be understood by employees to interfere with, employees’ right to have “coercion-free, independent, access to the Board’s processes.”⁶

In its brief on remand, the Respondent does not set forth any legitimate justification that, under the *Boeing* balancing analysis would, outweigh this burden on employees’ NLRA rights and on the Board’s processes. At any rate, I find that the record evidence does not establish the existence of any such justification for the challenged restrictions in the Government Investigations Policy. Instead of arguing that some legitimate justification outweighs the interference with NLRA rights, the Respondent contends that because most of its employees are unionized “no reasonable employee would understand this policy as restricting access to the NLRB or its processes.” That argument does not hold water. The Respondent cannot escape a finding of violation by arguing that no reasonable employee would believe the Respondent would be so brazen as to maintain a policy that does exactly what its policy says it is doing – i.e., interfering with employees’ ability to avail themselves of, or cooperate with, government agencies such as the NLRB.

The Respondent has violated Section 8(a)(1) of the Act: since at least December 11, 2014, by maintaining Section 5.1. in its Code of Entegrity; and since at least October 1, 2015, by maintaining Sections I. (policy summary) and 5.1 to 5.5 of its Government Investigations Policy.

⁶ The administrative law judge reached the same conclusion in *DISH Network Corp.*, 359 NLRB No. 108, slip op. at 1 fn.1 and 6 (2013), however, that finding was not challenged before, or ruled on by, the Board in that case.

CONCLUSIONS OF LAW REGARDING REMANDED ALLEGATIONS

1. Since at least July 22, 2015, the Respondent has violated Section 8(a)(1) of the Act by maintaining Section 3.1 and Section 5.2 of its Information Protection Policy.

5 2. Since at least October 1, 2015, the Respondent has violated Section 8(a)(1) of the Act by maintaining Section 5.13 of its issue resolution policy.

10 3. The Respondent has violated Section 8(a)(1) of the Act since at least December 11, 2014, by maintaining Section 5.I. in its Code of Entegrity, and since at least October 1, 2015, by maintaining Sections I. (policy summary) and 5.1 to 5.5 of the policy on government investigations.

REMEDY

15 Having found that the Respondent maintains overbroad restrictions that unlawfully interfere with employees' Section 7 activity, I will require the Respondent to rescind the unlawful restrictions.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.⁷

20 ORDER

The Respondent, Entergy Nuclear Operations, Inc., Plymouth, Massachusetts, its officers, agents, successors, and assigns, shall

25 1. Cease and desist from

30 (a) Maintaining or promulgating any over broad rules that unlawfully interfere with employees exercising their rights, guaranteed by Section 7 of the NLRA, to engage in protected union and/or protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the NLRA.

35 2. Take the following affirmative action necessary to effectuate the policies of the Act.

40 (a) Within 14 days from the date of this Order, rescind the following provisions at the Respondent's Plymouth facility: Section 3.1 and Section 5.2 of its Information Protection Policy; Section 5.13 of its Issue Resolution Policy; section 5.I. of its Code of Entegrity and Sections I. (policy summary) and 5.1 to 5.5 of the Policy on Government Investigations.

(b) Within 14 days from the date of this Order notify all employees at the Respondent's Plymouth, Massachusetts, facility that the employer provisions referenced in the preceding paragraph are rescinded, void, of no effect, and will not be enforced.

45 (c) Within 14 days after service by the Region, post at its facility in Plymouth, Massachusetts, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice

forms provided by the Regional Director for Region One, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 11, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 4, 2019



Paul Bogas
Administrative Law Judge

reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain any over broad rules that unlawfully interfere with your rights to engage in protected union and/or protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of this Order, rescind the following provisions maintained at the Pilgrim Nuclear Power Station in Plymouth, Massachusetts: Section 3.1 and Section 5.2 of our Information Protection Policy; Section 5.13 of our Issue Resolution Policy; Section 5.I. in our Code of Entegrity; and Sections I. (policy summary) and 5.1 to 5.5 of our Policy on Government Investigations.

WE WILL, within 14 days from the date of this Order notify all employees at the Plymouth, Massachusetts, facility that the employer provisions referenced in the preceding paragraph are rescinded, void, of no effect, and will not be enforced.

ENTERGY NUCLEAR OPERATIONS, INC.

(Employer)

Dated _____ By

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

10 Causeway Street, 6th Floor, Boston MA 02222-1072
(617) 565-6700, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/01-CA-153956 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE
OFFICER (857) 317-7816.