

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 1, 2016

TO: Cornele A. Overstreet, Regional Director
Region 28

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Navopache Electric Cooperative, Inc.
Cases 28-CA-118333 & 28-CA-160585

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These Section 8(a)(1) cases were submitted for advice regarding 1) (b) (5)

2) (b) (5)

whether the Employer's maintenance and enforcement of the Director Elections Policy is unlawful; and 3) whether the Employer's maintenance of its Personnel/Board Relationship Policy, which restricts employees' access to the board of directors regarding personnel matters, is unlawfully overbroad. (b) (5)

(b) (5)

(b) (5)

further conclude that the Employer has not unlawfully maintained or enforced the Director Elections Policy because employees have no Section 7 right to participate in the selection of high-ranking officials, such as the board of directors here, who have no direct impact on their employment conditions. The Personnel/Board Relationship Policy, however, is facially unlawful because employees would reasonably construe it to restrict their Section 7 right to make workplace-related communications to the board of directors.

1 (b) (5)

FACTS

Navopache Electric Cooperative, Inc. (the Employer), is a private, non-profit cooperative headquartered in Pinetop/Lakeside, Arizona, that provides electrical services to its members. The Employer is divided into eight districts—seven in Arizona and one in New Mexico. A board of directors, consisting of between three and nine individuals, oversees the Employer’s business. The board of directors has delegated management of the Employer’s day-to-day operations to a Chief Executive Officer (CEO).

The Employer maintains a set of Board Policies in addition to its employee handbook. The Employer’s Director Elections Policy #E5.070 (Policy #E5.070) states in pertinent part:

Employees, spouses of employees or cohabitants of employees shall not take active part, other than voting, in any campaign for elections of a [Employer] Director.

Violation of this policy is grounds for dismissal.

The Employer’s Personnel/Board Relationship Policy #E5.270 (Policy #E5.270) states in pertinent part:

The Board of Directors employs the General Manager.² The General Manager is expected to be present at Board meetings. Department Managers or employees presenting reports, etc., at Board meetings do so at the direction and call of the General Manager.

All employees are to understand that they, ultimately, report to the General Manager and do not have access to the Board of Directors at regular or special meetings of the Board on personnel matters.

Most employees are members of [the Employer]. Should there be issues as a member, not related to personnel matters, then employees have the same access to visit with the Board of Directors as any member of [the Employer].

IBEW, Local Union No. 387, AFL-CIO (the Union) has represented employees at the Employer’s Arizona facilities for over thirty years. Sixty-five employees are in the

² It is unclear whether the reference to “General Manager” is to the CEO or someone working under the CEO.

bargaining unit. The Employer and the Union are signatories to a collective-bargaining agreement that applies to all of the Employer's Arizona and New Mexico facilities. The most recent collective-bargaining agreement was effective from June 12, 2013 to November 1, 2015.

In late July 2013,³ while at a convenience store, a (b) (6), (b) (7)(C) who has worked for the Employer for (b) (6), (b) (7)(C) years signed a petition supporting a long-time acquaintance's campaign for a seat on the Employer's board of directors. The (b) (6), (b) (7)(C) told other employees that (b) (6), (b) (7)(C) had signed the petition, although there is no evidence that the discussions pertained to working conditions or the candidate's positions regarding those issues. A few days later, the (b) (6), (b) (7)(C) contacted a Union steward, who told the (b) (6), (b) (7)(C) to inform the Employer's HR office that (b) (6), (b) (7)(C) had signed the petition. Subsequently, the (b) (6), (b) (7)(C) and steward met with HR representatives, who gave the (b) (6), (b) (7)(C) a Counseling Guide. The Counseling Guide documented a "verbal counseling" for the (b) (6), (b) (7)(C) on (b) (6), (b) (7)(C) and specified that: (1) the (b) (6), (b) (7)(C) name had appeared on a petition supporting a candidate for a director position, (2) Policy #E5.070 forbid employees from taking an active part in any campaign for the election of a director, and (3) the (b) (6), (b) (7)(C) had violated the policy by signing the petition.

By letter dated August 27, the Union notified the Employer that it objected to Policy #E5.070 because employees who are eligible voters should be permitted to support board-of-directors candidates, including contributing to their campaigns, signing nominating petitions, and otherwise offering their support on their own time. The letter further stated that the policy violated the Act because Section 7 rights include, among other things, the right to support or oppose individuals who have or may have control over employees' wages, hours, and working conditions. Finally, the letter requested that the Employer immediately cease enforcing the policy, rescind the (b) (6), (b) (7)(C) discipline, and remove the notice from the (b) (6), (b) (7)(C) personnel record.

By letter dated September 23, the Employer rejected the Union's proposals. The Employer's letter stated, among other things, that Policy #E5.070 is consistent with the collective-bargaining agreement and the Act. The letter also stated that activities "beyond simply voting, e.g., campaigning, may create an appearance (mistaken as it may be) of favoritism or retaliation depending on the outcome of the election and later acts by Board member(s)" and "may also be disruptive of the business, creating potential workplace friction."

On December 4, the Union filed an unfair labor practice charge, which was amended on January 31, 2014, alleging, among other things, that Policy #E5.070 was facially unlawful and that the warning issued to the (b) (6), (b) (7)(C) for violating the policy also violated Section 8(a)(1). The Region found the allegations to be arguably

³ Hereafter, all dates are in 2013 unless otherwise noted.

meritorious and, on April 14, 2014, *Collyer* deferred these allegations to the parties' grievance and arbitration procedure.

On May 8, 2015, the arbitration hearing was held. At the outset of the hearing, the parties informed the arbitrator that she was authorized to consider and resolve the unfair labor practice allegations that the Region had deferred.

On September 16, 2015, the arbitrator issued her Opinion and Award. In her discussion of Policy #E5.070 and the warning issued to the (b) (6), (b) (7)(C), the arbitrator acknowledged the Union's position that the maintenance of the policy and the discipline violated the Act, that the Union had not filed a traditional contractual grievance, and that the Union had not cited any contractual provision to support its request for relief. The arbitrator then concluded that, based on her interpretation of the collective-bargaining agreement, the (b) (6), (b) (7)(C) discipline did not violate any existing, tangible provision of the collective-bargaining agreement. She also found that the collective-bargaining agreement did not contain any provision under which she, acting within the authority granted to her by that agreement, could find that Policy #E5.070 violated the Act. Accordingly, she ruled in favor of the Employer.

On September 22, 2015, the Union requested that the Region reject the arbitrator's decision and resume processing the unfair labor practice allegations. That same day, the Union filed an additional ULP charge alleging that the Employer violated Section 8(a)(1) by maintaining Policy #E5.270, which was not at issue in the arbitration, because that policy prohibits employees from communicating with members of the board of directors over issues involving employees' wages, hours, and other terms and conditions of employment.

ACTION

(b) (5)

[REDACTED]

[REDACTED]. We further conclude that the Employer has not unlawfully maintained or enforced the Director Elections Policy (Policy #E5.070) because employees have no Section 7 right to participate in the selection of high-ranking officials, such as the board of directors here, who have no direct impact on their employment conditions. The Personnel/Board Relationship Policy (Policy #E5.270), however, is facially unlawful because employees would reasonably construe it to restrict their Section 7 right to make workplace-related communications to the board of directors.

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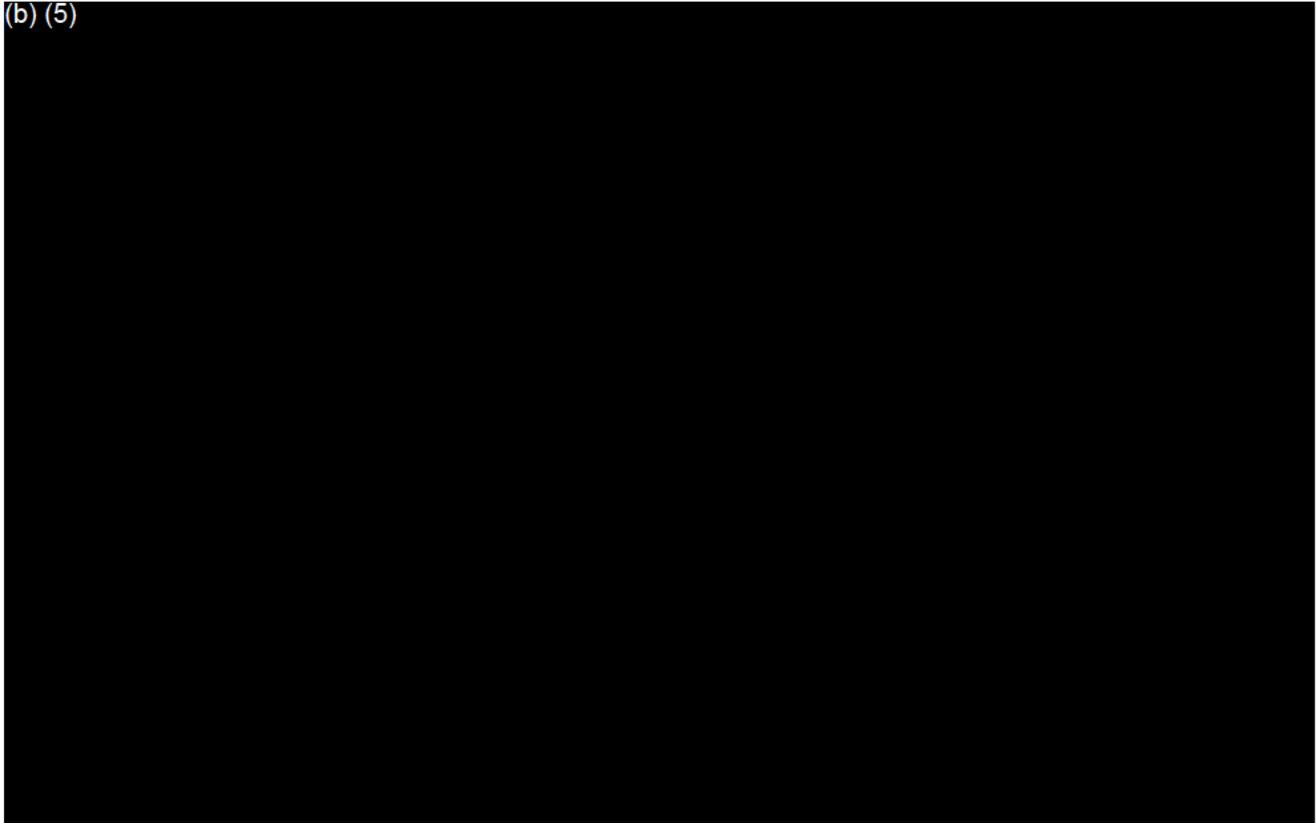
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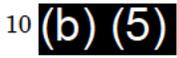
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9 (b) (5)

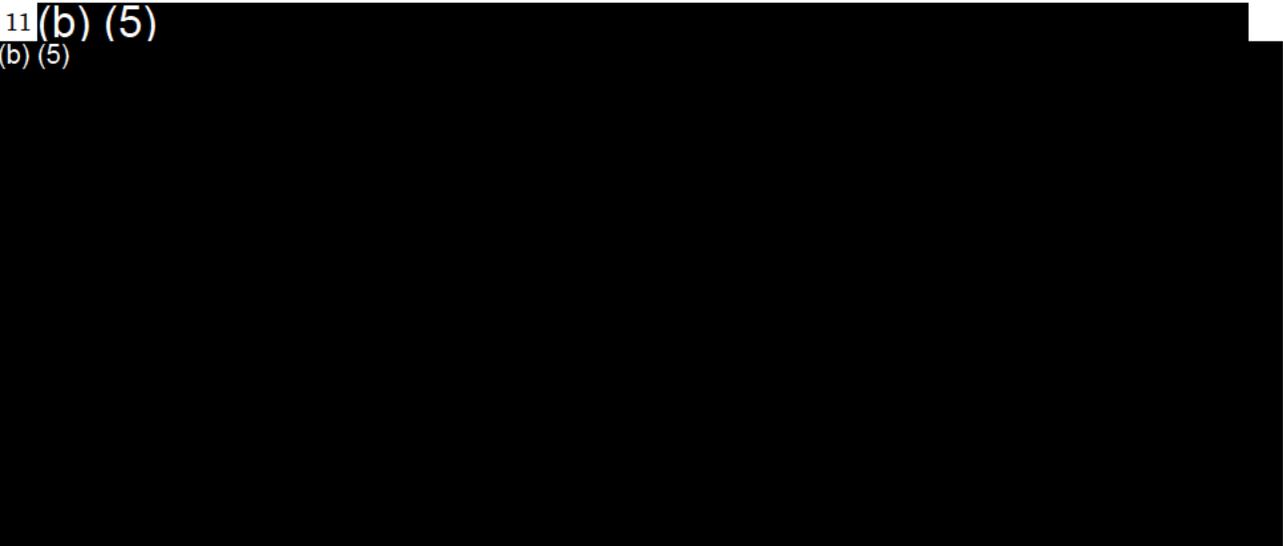


10 (b) (5)



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(b) (5)



12 (b) (5)



(b) (5)



II. The Employer’s Maintenance and Enforcement of Policy #E5.070 Does Not Violate Section 8(a)(1) of the Act.

In general, “employee efforts to affect the ultimate direction and managerial policies of the business are beyond the scope” of Section 7.¹⁴ For that reason, employees have no protected right to engage in activities designed solely make changes in the management hierarchy.¹⁵

Thus, the Board in *Co-Op City*, affirming the ALJ, decided that a rule prohibiting employees from “participating either directly or indirectly in the electioneering process” for a residential co-op board of directors would not on its face reasonably tend to chill employees in the exercise of their Section 7 rights.¹⁶ The Board found that the board of directors of the co-op operated “like the directors of any corporation, i.e., they set corporate policy, look out for the interests of stockholders, and delegate day-to-day management of the business to professionals hired for that purpose.”¹⁷ The Board

¹³ *Id.*, slip op. at 7.

¹⁴ *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41 (1980).

¹⁵ *Retail Clerks Union, Local 770*, 208 NLRB 356, 357 (1974).

¹⁶ *See Co-Op City*, 341 NLRB 255, 257 (2004).

¹⁷ *Id.* at 255.

then held that the rule did not reach Section 7 activity because employees generally do not have a protected right to participate in the selection of individuals who set corporate policy.¹⁸ The Board distinguished cases in which an employee engages in a protected protest over the selection of a supervisor or management official because the official has a “direct impact” on employee job interests and the work they are hired to do.¹⁹ The Board emphasized that only in “exceptional circumstances,” such as where the official’s activities parallel those of low-level supervisors who make job assignments and play a role in the day-to-day operations of an enterprise, are employee actions aimed at selecting high-level officials protected.²⁰ The Board found that there was no evidence that the directors had a “direct impact” on employee terms and conditions of employment similar to lower-level supervisors.

We conclude that, like the rule in *Co-Op City*, Policy #E5.070 would not tend to chill employees in the exercise of their Section 7 rights. The rule, which restricts “employees, spouses of employees or cohabitants of employees [from taking an] active part, other than voting” in the election of the Employer’s directors, is limited in its scope to electioneering activity regarding the board of directors. And the directors are a part of the Employer’s management hierarchy, which employees generally have no protected right to influence.²¹ In this regard, there is no evidence that the board of directors has a “direct impact” on employee terms and conditions of employment. At most, the Union asserts that during negotiations for the collective-bargaining agreement, the CEO briefed the board of directors regarding management’s main

¹⁸ See *id.* at 257 (citing *Retail Clerks Union, Local 770*, 208 NLRB at 357). See also *Harrah’s Lake Tahoe Resort*, 307 NLRB 182, 182 (1992) (employee activity advocating an employee stock option plan to buy 50% of employer’s parent company unprotected as an attempt to advance employee interests not as employees, but only as “entrepreneurs, owners, and managers”).

¹⁹ See *Co-Op City*, 341 NLRB at 257-58 (citing *Dobbs Houses, Inc.*, 135 NLRB 885, 888 (1962), *enforcement denied*, 325 F.2d 531 (5th Cir. 1963)).

²⁰ See *id.* at 258 n.7 (citing *NLRB v. Oakes Machine Corp.*, 897 F.2d 84 (2d Cir. 1990) (finding that company president who assigned employees to work on his personal projects directly affected employee salaries)); see also *Caterpillar, Inc.*, 321 NLRB 1178, 1178-79 (1996) (finding employee activity aimed at removing employer president protected where president decided to permanently replace employees at a sister plant and personally threatened an employee on the plant floor with plant shutdown if the employee did not get the union to accept a contract).

²¹ *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41 (1980).

objectives, received input from the board regarding negotiations topics, and apprised the board of what was being addressed during bargaining. And, upon reaching agreement with the Union on all issues, the CEO informed the board of the parties' agreement and recommended its acceptance, and the board adopted a motion to accept the CEO's recommendation. Assuming that the Union's assertions are true, the board of directors' effect on terms and conditions of employment is similar to that of the board of directors in *Co-op City*, i.e., indirect and attenuated at best.²² Because the Employer's employees have no Section 7 right to electioneer with respect to the board of directors, Policy #E5.070 is not facially unlawful.

We further conclude that the Employer did not promulgate or enforce the policy in response to protected Section 7 activity. To the contrary, it appears that the Employer created the policy out of a concern that any activities beyond simply voting, e.g., campaigning, would create an appearance of favoritism or retaliation regarding later acts by the board member(s), and that such activities could also create workplace friction. Furthermore, the Employer did not enforce the policy against any employee for engaging in Section 7 activity; the (b) (6), (b) (7)(C) was not engaged in Section 7 activity when (b) (6) signed an acquaintance's campaign petition for a seat on the board of directors.²³ Therefore, we conclude that the Employer's maintenance and enforcement of Policy #E5.070 did not violate Section 8(a)(1) of the Act.²⁴

²² Compare *Co-Op City*, 341 NLRB at 258 (“Obviously, all kinds of management decisions made by a company’s board of directors could eventually have some conceivable effect on rank and file employees. Under case law, however, the impact must be ‘direct,’ not speculative, eventual, or trickle down.”), with *NLRB v. Oakes Machine Corp.*, 897 F.2d at 84 (conduct of high-level supervisor “directly related to employee working conditions” where, inter alia, he gave employees job assignments that prevented them from qualifying for pay increases), and *Caterpillar, Inc.*, 321 NLRB at 1178-79 (employee activity aimed at removing employer president protected because the case involved “exceptional facts,” i.e., a “high-level manager directly affect[ing] working conditions” and having “direct contact with employees”).

²³ See *Co-Op City*, 341 NLRB at 258 (employer lawfully enforced rule against unprotected activity of campaigning against a board of directors candidate). Cf. *Avondale Industries*, 333 NLRB 622, 640 (2001) (“Employees who engage in union activities are not immune from nondiscriminatory discipline when they violate lawful plant rules unrelated to employee Section 7 rights.”).

²⁴ We also conclude that this case is not a good vehicle for considering whether to ask the Board to overturn *Co-Op City*. There is no evidence to suggest that Policy #E5.070 was promulgated in response to any employee activity regarding wages, hours, other terms and conditions of employment, or union activity. Nor is there any evidence tying any board-of-directors candidate’s campaign to issues concerning employee

III. The Employer's Maintenance of Policy #E5.270 Violates Section 8(a)(1) of the Act.

Employers violate Section 8(a)(1) if they interfere with employee activity inspired by concerns within the range of interests to which Section 7 is addressed, i.e., “legitimate activity that could improve [the employees’] lot as employees.”²⁵ The maintenance of a rule that would reasonably have a chilling effect on employees’ Section 7 activity violates Section 8(a)(1).²⁶

In *Teachers AFT New Mexico*, the Board found that a union-employer maintained an unlawfully overbroad provision that prohibited employees from participating in its “internal politics,” including lobbying its executive council members on “any items that are likely to come before them to be voted on including personnel matters.”²⁷ The Board concluded that employees would reasonably understand the provision’s ambiguous reference to lobbying on personnel matters as encompassing concerted efforts to influence the union-employer’s leadership on issues implicating terms and conditions of employment, such as “complaints about management personnel; decisions involving hiring, promotion, or discipline; or questions of union representation and collective bargaining.”²⁸ The Board reasoned that, “faced with such ambiguity, the employees might well err on the side of caution—given the related directive that breach of the provision is grounds for discharge—and refrain from engaging in Sec. 7 activity.”²⁹

We conclude that Policy #E5.270, like the provision in *Teachers AFT New Mexico*, would reasonably tend to chill employees’ Section 7 activity. Policy #E5.270 states

working conditions. Finally, the (b) (6), (b) (7)(C) signed the campaign petition because a long-time acquaintance asked (b) (6), (b) (7) to do so; (b) (6), (b) (7) actions had no connection to any employee concerns regarding working conditions or union activity.

²⁵ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978).

²⁶ *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999) (table decision); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

²⁷ *Teachers AFT New Mexico*, 360 NLRB No. 59, slip op. at 1 n.2 (Feb. 28, 2014) (internal quotation marks omitted).

²⁸ *Id.*

²⁹ *Id.*

that employees ultimately report to the Employer's general manager and do not have access to the Employer's board of directors at regular or special board meetings regarding "personnel matters." Like the rule in *Teachers AFT New Mexico*, the policy's broad reference to "personnel matters" would lead employees to believe that they are restricted from addressing the board of directors on matters related to their terms and conditions of employment, e.g., management decisions, the general manager's behavior, or their rate of pay. Furthermore, the policy includes no limiting language that would remove the ambiguity of the phrase "personnel matters" and thereby limit its broad scope.³⁰ Prohibiting employees from commenting on "personnel matters" before the board of directors strikes at the heart of Section 7 activity.³¹

We reject the Employer's assertion that Policy #E5.270 is facially lawful because it implicitly permits employees to raise "personnel matters" with the board of directors in a variety of social settings, so long as they are outside that body's regular and special meetings. Limiting employees' ability to raise "personnel matters" with directors in this way deprives employees of the opportunity to address the directors as a unit and in the board's official capacity. Therefore, we conclude that the maintenance of Policy #E5.270 violates Section 8(a)(1) of the Act because it would reasonably tend to chill employees in the exercise of their Section 7 rights.

Accordingly, (b) (5); the Region should dismiss, absent withdrawal, the charge alleging that the Director Elections Policy (Policy #E5.070) was unlawfully maintained and enforced; and the Region should issue complaint, absent settlement, alleging that the Personnel/Board

³⁰ *University Medical Center*, 335 NLRB 1318, 1320-21 (2001) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no . . . limiting language [that] removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in relevant part sub nom. Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003).

³¹ *See Flex Frac Logistics, LLC*, 358 NLRB 1131, 1131 (2012) (finding unlawful rule prohibiting disclosure of "personnel information and documents" to persons "outside the organization" overbroad because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment, an activity protected by Section 7 of the Act), *enforced*, 746 F.3d 205 (5th Cir. 2014).

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Relationship Policy (Policy #E5.270) is facially unlawful.

/s/

B.J.K.

H:ADV.28-CA-118333.Response.Navopache Electric (b) (6), (b) (7)(C)