The Region submitted this case for advice on the lawfulness of two handbook provisions maintained by the Employer, a provider of support services for disabled adults in their own homes. We conclude that the Employer has a legitimate justification for maintaining a rule restricting employees from discussing any work-related issues with clients or within earshot of clients with respect to those employees who work in its Intensive Support Services program, serving clients who need intensive direct care. However, the maintenance of this rule with respect to employees who work in the Supported Living Life program, serving high functioning clients who require only minimal assistance, violates Section 8(a)(1). We also conclude that employees would not reasonably construe the rule prohibiting them from disclosing client names or addresses to anyone in their “private life” to restrict the exercise of their Section 7 right to discuss working conditions and grievances with their fellow employees or Union representatives.

FACTS

The Employer, Kitsap Tenant Support Services, Inc., provides support services to adults with physical and mental disabilities living in community residential settings. The Charging Party Union, Washington Federation of State Employees Council 28, AFSCME, was certified on March 23, 2012 to represent a bargaining unit of approximately 150 direct service staff. Unit employees assist clients in living as independently as possible in their own homes. Specifically, employees assist with, among other things, personal safety, health and hygiene, communications skills, food preparation, home management, money management, shopping, transportation, and accessing community resources. All services are provided to the client in the client’s home. Clients in the Employer’s Intensive Supported Services (ITS) program need intensive direct care, while clients in the Supported Living Life (SL) program are high functioning and require only minimal assistance.
The instant charge alleges that various provisions in the Employer’s Handbook are unlawfully overbroad. The Region has requested advice as to two of these allegedly unlawful provisions.

The first provision appears in the section of the Handbook entitled “Employee Professional Relationships.” The introduction to that section states: “In care giving you are often working in close proximity to Clients and this presents unique opportunities for therapeutic interactions, but also provides unique challenges for staff in maintaining clear professional boundaries with their Clients.” The section then sets forth “behavioral requirements that all staff must follow....” Among those requirements is the following: “You understand that you are not allowed to discuss any issues related to your job performance or relationships with co-workers or supervisors, with Clients or within earshot of Clients.” (Emphasis supplied). The Employer lifted this provision from a training handout provided by the Washington Department of Social and Health Services. Although the provision states that it is designed to maintain “professional boundaries,” the Employer asserts that it is also designed to prevent unnecessary disturbances to clients and maintains that all areas where the rule applies are “patient care” areas.

The second provision at issue here appears in the section of the Handbook that defines “Misconduct.” The introductory paragraph states that the Employer is following Washington State’s definition of misconduct, set forth in a referenced state statute. There then follows a list of such misconduct. In a bullet point regarding abandoning clients, the following language appears: “No one in your private life should know your Client[']s name or place of residence.” (Emphasis supplied). No such provision appears in the cited state statute.

ACTION

We conclude that with respect to employees who work with clients in the SL program, maintenance of the rule prohibiting discussions of working conditions violates Section 8(a)(1). However, the Employer has a legitimate business justification maintaining such a rule with respect to those employees who work with clients in its ITS program, who need intensive direct care. We also conclude that employees would not reasonably construe the rule prohibiting them from disclosing client names or address to anyone in their “private life” to restrict the exercise of their Section 7 right to discuss working conditions and grievances with their fellow employees or Union representatives.

Generally, an employer violates Section 8(a)(1) through the mere maintenance of a work rule if the rule “would reasonably tend to chill employees in the exercise of
their Section 7 rights.” The Board utilizes a two-step inquiry to determine whether a particular rule would reasonably tend to chill employees in the exercise of their Section 7 rights.2 First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. Second, if the rule does not explicitly restrict protected activities, it will nevertheless violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.3 The Board will not find a violation, however, simply because a rule could conceivably be read to restrict Section 7 activity.4 Here, there is no evidence that the rules at issue were promulgated in response to protected activity or have been applied to restrict protected activity.

The challenged Employer handbook provision prohibiting employees from discussing “any issues related to your job performance or relationships with co-workers or supervisors” with clients explicitly restricts Section 7 protected activities. As the Board held in Kinder-Care Learning Centers, employees have a Section 7 right to communicate regarding their terms and conditions of employment to other employees, an employer’s customers, the media, and the public in general.5 Yet, as in Kinder-Care, the Employer’s rule interferes with employee Section 7 rights by barring employees from discussing work-related issues with the Employer’s customers.6

The Employer relies upon court decisions upholding limitations by hospital employers upon solicitation in patient care areas to defend its interference with its employees’ Section 7 right to communicate workplace concerns to third parties.7


3 Id. at 647.

4 Id.

5 Kinder-Care Learning Centers, 299 NLRB 1171, 1171 (1990).

6 Id. at 1171-72 (employer that operated child care centers violated Section 8(a)(1) by maintaining rule that barred employees from communicating with parents who utilized the centers).

7 See, e.g., Beth Israel Hospital v. NLRB, 437 U.S. 483, 495-505 (1978) (upholding Board rule allowing hospitals to prohibit solicitation even on nonworking time in strictly patient care areas but finding that Board appropriately struck down ban on solicitation in hospital cafeteria); NLRB v. Baptist Hospital, 442 U.S. 773, 784-85
Employer asserts that its employees work only in patient care areas and therefore may be precluded from discussing workplace concerns with their clients or within their earshot. However, hospital employers are permitted to prohibit solicitation in patient care areas because “the primary function of a hospital is patient care and ... a tranquil atmosphere is essential to the carrying out of that function.”

The Employer’s clients are not patients in an acute care setting undergoing medical procedures and treatment. In fact, those in the SL program are high functioning and require only minimal support. The rationale underlying special rules for hospital employers is therefore not applicable to that program. Accordingly, we conclude that the Employer has not established a substantial and legitimate business justification for restricting employees’ Section 7 right to discuss terms and conditions of employment with third parties with respect to the employees who work with SL clients. On the other hand, clients in the ITS program apparently require intensive direct care more akin to the type of care that hospital patients require, and for that reason, we conclude that the Employer’s maintenance of this rule with respect to employees who work with ITS clients is not unlawful.

We also conclude that the Employer’s handbook provision admonishing employees that, “No one in your private life should know your Client’s name or place of residence” would not reasonably be construed by employees to prohibit protected activity. Given that the clients’ residences are the employees’ workplace, there might be instances when employees would need to disclose such information to fellow employees or Union representatives in order to pursue a workplace concern or grievance. But employees would not reasonably read this rule as precluding such protected activity since the rule prohibits disclosure of sensitive client information only to individuals in the employee’s “private life.”

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer’s maintenance of a handbook provision restricting communications with clients regarding terms and conditions of employment is unlawful with respect to

(1979) (finding no substantial evidence to support Board’s holding that hospital failed to justify its ban on solicitation in hospital corridors and sitting rooms on patient floors); Aroostook County Regional Ophthalmology Center v. NLRB, 81 F.3d 209, 213-14 (D.C. Cir. 1996) (denying enforcement of Board holding that rule which prohibited employees from discussing grievances “within earshot of patients” was overly broad).

8 Beth Israel Hospital v. NLRB, 437 U.S. at 495, quoting St. John’s Hospital, 222 NLRB 1150, 1150 (1976), enforced in pertinent part, 557 F.2d 1368 (10th Cir. 1977).
employees who work in the SL program and should dismiss, absent withdrawal, the other allegations submitted for advice.

/s/
B.J.K.