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

SECURITY WALLS, LLC

and Case 28-CA-22701

ROYAL JACOBS, an Individual

Mara-Louise Anzalone, Esq.,
for the General Counsel
George Cherpelis, Esq. (Jackson, Lewis, LLP),
Phoenix, AZ, for the Respondent

DECISION

Statement of the Case

JEFFREY D. WEDEKIND, Administrative Law Judge. The General Counsel alleges that Respondent, a private security subcontractor at the U.S. nuclear waste facility in Carlsbad, New Mexico, violated Section 8(a)(1) of the Act in various respects while investigating the unauthorized release of a "controlled"/"official use only" document to the General Counsel in a prior unfair labor practice proceeding. Specifically, the General Counsel alleges that the Respondent unlawfully told employees that they were not allowed to copy or distribute documents relating to wages, hours, and other terms of employment, interrogated employees about whether they or other employees had done so, and solicited employees to monitor and report on other employees' use of such documents.

The underlying charge was filed by Royal Jacobs, an individual, on September 22 2009. Jacobs subsequently amended the charge on November 30, 2009, and the General Counsel issued the complaint the same day. The Respondent thereafter filed its answer denying the substantive allegations on December 10, 2009.

Following two prehearing conferences, the case was tried before me in El Paso, Texas, on February 23 and 24, 2010. The Respondent and General Counsel thereafter filed posthearing briefs on March 31, 2010.[1] After considering the briefs and the entire record, including my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

The Respondent is a limited liability company that provides contract security at the Waste Isolation Pilot Plant (WIPP) in Carlsbad, New Mexico. The Respondent admits, and I find, that in conducting its operations during the 12-month period ending September 2009, it

[1] Charging Party Jacobs did not appear or testify in the proceeding.

performed services valued over $50,000 outside the State of New Mexico, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The relevant facts are essentially uncontroverted. Respondent has provided security at the nuclear waste facility since April 1, 2008, pursuant to a subcontract with Washington True Solutions, LLC (WTS), the general contractor responsible for running the facility for the Department of Energy (DOE). Respondent directly employs 28 security protective officers (SPOs) and 7 additional security and administrative staff at the site. Tr. at 21-22 and 85.

At the time of the relevant events here, work rules for the SPOs were set forth in the Employee Handbook, which Respondent provided to every employee without restriction on removal from the facility (i.e. the employees were allowed to take the handbook home). However, guidelines for carrying out daily duties and assignments were also set forth in so-called "protective force orders" (PFOs).

PFOs were "official use only" (OUO), and therefore "controlled", documents, and were stamped as such when created.[2] Accordingly, they were kept in a security manual reserved for such OUO documents (a loose-leaf binder formally titled "WIPP Security Administration Manual"), which in turn was kept in the facility's central alarm station, a hardened structure with bullet resistant walls and windows that is manned 24/7. Although the security protective officers had access to the PFOs in the manual, they were not allowed to disclose them to unauthorized individuals. Tr. at 22-29, 44-53, 60-61, 73, 82-84, 106, 131-132, and 144-145.

Respondent's project manager at the WIPP site, Richard De Los Santos, was ultimately responsible for ensuring that PFOs were properly designated/stamped as controlled. However, the author of a document was initially responsible for determining whether it should be marked as OUO by referring to DOE Order 471.3, "Identifying and Protecting Official Use Only Information" (GC Exh. 5). Tr. at 28-30.[3] The DOE order, which has been in effect since

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[2] "Controlled" documents also included various other types of information, all of which had an even higher controlled status or "sensitivity" than OUO documents. Such information included, but was not limited to, sensitive information, sensitive unclassified information (SUI), unclassified nuclear information (UCNI), confidential information, restricted data, secret information, and top secret information (the highest level). Tr. at 26, 67-68, and 109-110.

[3] According to De Los Santos, after the relevant events here occurred, he designated his operational security officer, Clint Casingham, to be the "coordinator" and "go to guy" for the Respondent's protective force orders and procedures. In that function, Casingham now conducts the initial review of all documents to determine if they have "information in there that could be used by an adversary against us" and should therefore be designated OUO or higher. Tr. at 28-31, and 54. Various other changes for simplifying procedures and protecting OUO documents were also instituted. See Tr. at 79 – 81.

2003,[4] provides that, to be designated "official use only,"

> the information must be unclassified; have the potential to damage governmental, commercial, or private interests if disseminated to persons who do not need to know the information to perform their jobs or other DOE-authorized activities; and fall under at least one of eight Freedom of Information Act (FOIA) exemptions (exemptions 2 through 9 . . .) (par. 4.a).

Consistent with the above, the order provides that access to documents marked OUO or containing OUO information "must only be provided to those persons who need to know the information to perform their jobs or other DOE-authorized activities" (par. 4.e). If a FOIA request is filed for an OUO document, it must be reviewed and processed under the Agency's FOIA regulations (par. 4.h). See also Tr. at 88 and 112.

With respect to enforcement, the order provides that an "administrative penalty" may be imposed against any employee who intentionally or negligently releases such documents or information, intentionally does not mark a document known to contain OUO information, or intentionally marks a document known not to contain OUO information (par. 4.g). An attachment to the order (Attachment 2) further indicates that the contractor (in this case WTS) is responsible for compliance and for "flowing down" the requirements to subcontractors (in this case Respondent Security Walls). See also Tr. at 89-90, 113-117, and 133-139.

B. Unauthorized Release of Document to General Counsel

On July 28 and 29, 2009, an unfair labor practice hearing involving the Respondent was held before Administrative Law Judge Margaret G. Brakebusch. The complaint in the case (28-CA-22483) alleged that the Respondent committed various Section 8(a)(1) violations between April 2008 and February 2009, including reprimanding Jacobs and another employee, discharging a third employee (Orlando Franco), and maintaining overbroad confidentiality rules in the Employee Handbook and Restrictive Covenants Policy that effectively prohibited employees from discussing wage rates, benefits, promotions, demotions, bonuses, or other terms and conditions of employment.

During the hearing in the case, a four-page document from the security manual was offered by the General Counsel for admission into the record. The first page was the cover page of the security manual, titled "WIPP Security Administration Manual, Waste Isolation Pilot Plant, Carlsbad, New Mexico." It was stamped "Controlled Document" and also contained the following information inside a box at the bottom:

[4] Although the order on its face states that it "expires 4-9-07", DOE's current legal counsel and FOIA liaison in Carlsbad, George William Hellstrom, testified that it has remained in effect since that time. Tr. at 114.

OFFICIAL USE ONLY

Contains "Circumvention of Statute" Information[5]
Department of Energy approval required
prior to public release

Reviewer: _____[signed]_____
JR Galle, DOE-CBFO Security Manager

Date: _____10 Sep 2001_____

Attached to the cover page were three pages specifically relating to security officer staffing and procedures including shift captain and SPO responsibilities with respect to assignment and administration of overtime at the nuclear waste facility. The first of these three pages indicated that the provisions (referred to as "Procedure No. SEC-020") were part of the security manual, had been last revised on September 26, 2007, and were approved at that time by the WIPP security manager (Lawrence Barela), who worked for the previous subcontractor, Santa Fe Securities. Like the cover page of the manual, it was stamped "Controlled Document." "OFFICIAL USE ONLY" also appeared at both the top and bottom of the page, although without any indication that this designation was reviewed by DOE.[6] Each subsequent page was similarly stamped "Controlled Document" and "OFFICIAL USE ONLY". GC Exh. 3; and Tr. at 21, 51, 144, and 236-237.

When the General Counsel attempted to introduce the document through a witness at the hearing, De Los Santos noticed the cover page and immediately advised Respondent's counsel that the General Counsel was not supposed to have the document without authorization. Respondent's counsel thereupon objected to the document's admission, and the

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[5] As indicated by Hellstrom, DOE's legal counsel/FOIA liaison in Carlsbad (Tr. at 118), the phrase "circumvention of statute" refers to the so-called "high 2" Exemption in FOIA for predominantly internal documents the disclosure of which would risk circumvention of agency statutes and regulations. This exemption protects from disclosure, inter alia, personnel practices and procedures that could pose a security risk if made public. See *Elliott v. U.S. Dept. of Agriculture*, 596 F.3d 842 (D.C. Cir. 2010), and cases cited therein.

[6] The record is insufficient to determine whether DOE's official OUO designation on the cover of the manual 6 years earlier, in September 2001, would have carried over to the September 2007 revision. Hellstrom's testimony indicates that this might depend on whether the original document existed in the manual when it was reviewed by DOE. In any event, Hellstrom confirmed De Los Santos' testimony that a subcontractor such as the Respondent could itself designate a document OUO if it satisfied the requirements of DOE Order 471.3. Hellstrom further testified that DOE presumes a document is properly marked OUO until a review shows otherwise. See Tr. at 123-131.

General Counsel eventually withdrew it. See Resp. Exh. 1, p.2 (describing events of July 29, 2009); and Tr. at 15, 33, 51, and 233.[7]

C. Respondent's Investigation

According to De Los Santos, the Respondent suspected that alleged discriminatee Franco, who had filed the underlying charge challenging his discharge, had given the document to the General Counsel. Tr. at 34-35. Nevertheless, that was not the end of the matter. On August 5, 2009, WTS contract administrator Mark Friend wrote a letter to Juanita Walls, the Respondent's co-owner and chief manager in Knoxville, Tennessee, regarding "Inappropriate Document Control" at the facility. The letter, which was copied to De Los Santos, expressed concern that the unauthorized disclosure indicated "a breakdown in the controls associated with such documents." It therefore directed Respondent to "immediately conduct an internal investigation to determine how the document was obtained, what was the extent of staff involvement, and what breakdown in controls allowed the document to be released." GC Exh. 2; and Tr. at 36, 89, and 160-161.

In response to this letter, later the same month, Roderick Walls, Juanita Walls' husband and co-owner of Security Walls (and a former FBI agent), traveled to the WIPP facility and developed an interview plan, including a list of prepared questions. After running the questions by his wife and several WTS officials, and receiving no objection or revisions, he proceeded to individually interview each and every person employed by Respondent at the site, including De Los Santos. Tr. at 37-43, 85-86, 152, 162, 165, 171, 180-184, and 216-217. At each interview, after initial introductions, Walls asked/read the following four questions -- and only the following questions -- from his prepared list:

> 1. Are you aware that it is prohibited activity to engage in the unauthorized copying and or removal (from the WIPP site) of any sensitive or restricted documents or material? Are you further aware that it is prohibited activity to engage in the re-distribution of such documents and or material to un-authorized individuals?
>
> 2. Have you ever engaged in unauthorized copying, removal or distribution of Official Use Only (OUO), sensitive, or restricted documents belonging to the WIPP site?
>
> 3. Have you ever observed any other Security Walls WIPP employee engage in the unauthorized copying, removal or distribution of OUO, sensitive or restricted documents or materials?
>
> 4. Do you have any knowledge that any Security Walls WIPP employee has been engaged in the unauthorized copying or removal of sensitive or restricted documents?

[7] Judge Brakebusch's decision in the case (which found a violation only with respect to certain of the Respondent's confidentiality rules) issued on November 25, 2009 (JD (ATL)-31-09), and is currently pending before the Board on exceptions. The decision does not address the circumstances surrounding the General Counsel's acquisition of the subject document or its relevance, confidentiality, and/or admissibility.

Walls also took notes of the employees' answers, and he requested the employees to review them and sign the document. See GC Exhs. 4 (p. 3), 6, and 7; Resp. Exh. 4; and Tr. at 100-104, 145-147, 185-187, 192, 199, and 211.

After the investigation was completed, Walls and De Los Santos prepared a summary report, which was submitted to WTS. The report concluded, albeit without any direct evidence, that Franco had provided the document to the General Counsel. Resp. Exh. 1; and Tr. at 40, 91-93, and 105.

D. Evidentiary Issues

Before and during the hearing in this case, a substantial dispute arose over the admissibility and relevance of the four-page document that the General Counsel had initially sought to introduce at the prior hearing before Judge Brakebusch. After considering the parties' pretrial briefs on the issue, at the beginning of the hearing I gave notice that I was inclined to admit the document subject to a protective order, but reserved a final ruling until after testimony on the matter (Tr. 11–13). Thereafter, at the close of the trial, I did, in fact, admit the document (GC Exh. 3) over the Respondent's objection. However, over the General Counsel's objection, I also issued a protective order, requiring that the document "be placed in a sealed file to be opened only by Agency personnel as necessary to evaluate and decide the issues in this particular case," and that it "not . . . be furnished or disclosed to outside non-governmental sources or the public pursuant to a request under the Freedom of Information Act or otherwise" (Tr. at 239).

Having reviewed the entire record, I hereby reaffirm my ruling. The Respondent has advanced a number of arguments against admission of the document. At the outset of the hearing, Respondent asserted that it "was not properly released," is "not appropriately in the hands of the General Counsel," and "is the equivalent of a stolen document" (Tr. at 10 and 48). However, the Board has long held that even "stolen" documents are admissible, at least in the absence of any showing (and there is none here) that the Government acted in collusion with the thief. See *NLRB v. South Bay Daily Breeze*, 415 F.2d 360, 363-365 (9th Cir. 1969)(thoroughly discussing the reasons for the policy and upholding it); and *Air Line Pilots Assn.*, 97 NLRB 929, 933 (1951). See also *U.S. v. Janis*, 428 U.S. 433 (1976).

At the close of trial and in its posthearing brief, the Respondent also asserted that the last three pages of the document had not been sufficiently identified, i.e. no witness had testified that SEC-020 was actually the document attached to the cover page at the prior hearing. However, a document may be identified and authenticated by circumstantial as well as direct evidence. See FRE 901(b)(4). See also *Sunland Construction Co.*, 311 NLRB 685, 692-698 (1993). Here, all four pages indicate on their face that they are part of the "WIPP Security Administration Manual" and, when shown them at the hearing in this case, De Los Santos testified that he recognized them from the manual (Tr. at 49, 53, and 59). In addition, both De Los Santos and Friend (who has worked at the site for 17 years) testified that no other controlled document has ever been compromised before (Tr. at 59-60 and 159-164). Moreover, Ms. Anzalone, counsel for the General Counsel in this proceeding, verified on the record that the four-page document is the document that was given to her by counsel for the General Counsel in the prior case (Tr. at 235). Finally, there is no evidence that it is not the four-page document that counsel had attempted to introduce in that proceeding, or that it has been altered in any way. Accordingly, I find that a prima facie showing has been made that the document is what it is purported to be, and that this showing has not been rebutted. See *Alexander Dawson, Inc. v. NLRB*, 586 F.2d 1300, 1302 (9th Cir. 1978), enfg. 228 NLRB 165 (1977).

I also reaffirm my finding of good cause under FRCP 26(c) to issue a protective order. Neither the contents of the document nor the Respondent's security procedures have remained entirely confidential. Indeed, counsel for the Respondent himself read a portion of the document into the record during opening arguments (Tr. at 11-12). Further, a fairly detailed description of the security officer force appears in the recent decision issued by Judge Brakebusch in the earlier unfair labor practice proceeding, which is available to the public on the NLRB website (http://www.nlrb.gov/ research/decisions/alj_decisions.aspx). Moreover, De Los Santos testified that the document was superseded by new orders after the events here, is no longer in effect, and is currently "archived" pending destruction (Tr. at 45-46, 81-83, and 97). However, Hellstrom testified that it nevertheless remains presumptively exempt from disclosure under FOIA and should be "properly managed in accordance with nondisclosure or within the court as a sealed document" (Tr. at 135-139). In light of this testimony by DOE's legal counsel/FOIA liaison, the nature of Respondent's business (providing security at a nuclear waste facility), and the nation's greatly heightened security awareness since 9/11 (of which I take judicial notice under FRE 201), I conclude that the protective order remains appropriate and that the document should therefore not be disclosed without prior DOE approval. See generally *Teamsters Local 917 (Peerless Importers),* 345 NLRB 1010, 1011 (2005).

E. Analysis of Substantive Allegations

As indicated above, the complaint alleges that, in conducting the August 2009 employee interviews, Respondent violated Section 8(a)(1) of the Act by: 1) orally promulgating an overly broad and discriminatory rule prohibiting employees from copying and/or removing, or distributing to unauthorized individuals, documents relating to their wages, hours, and other terms and conditions of employment; 2) interrogating employees about their concerted activities and those of other employees; and 3) soliciting employees to ascertain and disclose to Respondent the concerted activities of other employees. GC Exh. 1(e). For the reasons discussed below, I find that a preponderance of the evidence supports the first (in part) and second of these alleged violations, but not the third.

1. Alleged overbroad confidentiality rule

As a threshold matter, Respondent contends that no confidentiality "rule" was actually promulgated or communicated during the interviews. See, e.g., Tr. at 19. However, the evidence establishes otherwise. Walls conceded at trial that he intended the first questions to be "rhetorical" in order to make sure that employees were aware that they are not supposed to engage in the unauthorized copying, removal, or distribution of sensitive or restricted documents. Tr. at 188. He also specifically admitted that employees were "reinstructed" regarding the proper controls associated with duplication and dissemination of controlled documents and the disciplinary repercussions for violations. Tr. at 94. See also Resp. Exh. 1, p. 4, par. C (Remedial Actions). Thus, in agreement with the General Counsel, I find that Walls did, in fact, communicate a confidentiality rule to the employees during the interviews.

Respondent also contends that, even assuming a rule was communicated, it was not overbroad and did not restrict employees in the exercise of their Section 7 rights as alleged. However, again, for the reasons set forth below, I find that a preponderance of the evidence establishes otherwise.

It is well established that employees have a protected right to discuss and distribute information regarding wages, hours, and other terms and conditions of employment. See, e.g., *Mobile Exploration & Producing U.S., Inc*., 323 NLRB 1064,1068 (1997), enfd. 156 F.3d 182 (5th Cir. 1998). Indeed, it has been described as "the most basic of Section 7 rights." *Double*

Eagle Hotel & Casino, 341 NLRB 112, 115, fn. 14 (2004). See also *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976)(dissatisfaction with wages and benefits is the "grist" and "sinew" for concerted action). Accordingly, the Board has held that employer confidentiality rules must be carefully crafted to avoid impermissibly interfering with that right.

Extant Board law sets forth the following framework for evaluating such employer rules. The rule must first be examined to determine whether it explicitly restricts Section 7 activity. If it does not, the circumstances must be evaluated to determine whether: 1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; 2) the rule was promulgated in response to Section 7 activity; or 3) the rule has been applied to restrict the exercise of Section 7 rights. If the answer to any of the above is affirmative, the rule infringes on employee rights under the Act. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). It is therefore unlawful unless the employer articulates and establishes a legitimate and substantial business justification for the rule that outweighs the infringement on employee rights. See, e.g., *Caesar's Palace*, 336 NLRB 271 (2001); and *Phoenix Transit System*, 337 NLRB 510 (2002). But see *Double Eagle Hotel & Casino*, supra; and *NLS Group*, 352 NLRB 744, 745 (2008).

Here, the confidentiality rule communicated at the employee interviews did not expressly refer to employee wages, hours, or other terms and conditions of employment. Neither the initial, rhetorical questions, nor any of the other questions asked by Walls, specifically mentioned employee records or material. Walls also did not mention or refer to the prior unfair labor practice proceeding initiated by former-employee Franco or the release of the PFO regarding staffing and overtime to the General Counsel in that proceeding. Tr. at 145-146, 192, and 211-212.[8] Accordingly, I find that the rule did not expressly restrict Section 7 rights.

I also find that the rule was not promulgated in response to Section 7 activity or applied to restrict Section 7 activity (and therefore was not "discriminatory" as alleged in the complaint). The investigation was conducted at the direction of WTS, which was not a party to the prior Board proceeding and had no interest in Respondent's internal personnel matters or in protecting Respondent-sensitive information, as opposed to DOE-sensitive documents exempt

[8] Respondent contends that there is no evidence that Walls, De Los Santos, or any other official of Respondent or WTS even knew what the document was about at the time of the investigation. However, the document indicated in bold letters on the cover page (which De Los Santos admitted seeing) that it was from the security manual (which contains PFOs) and surfaced in an unfair labor practice proceeding (in which a central issue was the assignment of overtime). Thus, a reasonable person would have inferred that it was a PFO and related to SPO duties and responsibilities. Further, both De Los Santos and Friend testified that they eventually learned, at least generally, what the document was about. Although it is not clear when this occurred, the record reflects that there were conversations between WTS and the NLRB's regional office during the relevant period about the document. See Tr. at 34 and 162-163. In any event, I would reach the same conclusions herein regardless of whether or not the Respondent knew, at least generally, that the document related to SPO duties and responsibilities.

under the "high 2" FOIA exemption (see fn. 5, supra).[9] The rule as communicated was also generally consistent with WTS' interest and direction as it addressed only "documents and materials" (rather than discussions). Moreover, the rule was not new; OUO and other "sensitive" and "restricted" documents had long been considered "controlled" and/or confidential (see fn. 2, supra, and discussion below).[10] Further, as noted above, Walls interviewed managers and supervisors as well as employees, and never mentioned Franco or the prior Board proceeding.[11] Finally, there is no evidence that any employee has been disciplined for violating the rule.

As indicated above, however, a confidentiality rule may also violate Section 8(a)(1) under *Lutheran Heritage* if employees would have reasonably construed its language to restrict protected activity. Here, the Respondent provides security at a nuclear waste facility and its employees are security protective officers. Further, the terms "sensitive" and "restricted" are often used when formally designating controlled documents at the facility. See fn. 2, supra. Thus, on first impression, it might appear that the SPOs would not reasonably assume that Walls was referring to their personnel records when he referred to "sensitive" or "restricted" documents, particularly in the absence of any reference during the interviews to employee records or the prior Board proceeding. See the Board's discussion and cases cited in *Double Eagle Hotel & Casino*, supra, 341 NLRB at 113-115.

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[9] Friend testified that the only purpose for directing Respondent to conduct the investigation was "enforcing the directives from the DOE, my customer, to prevent this from happening again." Tr. at 163. See also testimony by WTS General Counsel Raeburn Josey, Tr. at 218. Both Friend and Josey also testified that WTS could terminate Respondent's contract and/or seek financial penalties if it failed to comply with the contract or DOE directives and orders that are "flowed down" through WTS. Tr. at 169 and 218.

[10] The General Counsel at least implicitly challenges whether the document was properly marked as controlled/OUO in the first place. However, the Respondent's predecessor created and marked the document, not the Respondent. Further, the complaint does not expressly attack the procedures and guidelines for marking documents as OUO (which appear to be set by DOE).

[11] Although Walls admitted that "everyone knew that Franco was involved in a lawsuit," (Tr. at 201 and 206-207), there is insufficient evidence that the employees were aware that Franco or some other individual had provided a PFO from the security manual to the General Counsel in that proceeding. Further, the complaint does not allege that the interviews interfered with the right of employees to use the Board's processes. Cf. *Jack in the Box Distribution Center Systems*, 339 NLRB 40 (2003). I therefore need not decide in this case whether the unauthorized release to the General Counsel of such a controlled/OUO document, obtained from a manual marked as controlled/OUO by the DOE pursuant to the "high 2" FOIA exemption, constituted protected activity.

However, Walls admitted at the hearing that he intended the term "sensitive" in his questions to be "an encompassing term", including "any document which might be released which shouldn't be released." Tr. at 194.[12] Further, as noted by the General Counsel, both Walls and De Los Santos acknowledged that employee wage and benefit information is, in fact, considered "sensitive" to the Respondent to the extent it could be used by its competitors, and that employee disciplinary records are also "sensitive" and "restricted". Tr. at 66-69, 149-151, and 195-196.

Moreover, the employees had previously been advised that this was the Respondent's policy. As fully discussed in Judge Brakebusch's recent decision in the earlier proceeding, since at least October 2008, the Respondent maintained a provision in its "Restrictive Covenants" specifically prohibiting both current and former employees from disclosing

> personal and/or sensitive information regarding any Security Walls, LLC employee, with particular emphasis on salary/hourly wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, or other actions which are clearly within the authority of the Human Resource Department.[13]

In short, the Respondent not only considered such information "sensitive," it had clearly communicated this to employees in the past. In these circumstances, I find that a preponderance of the evidence supports a conclusion that the employees would have reasonably interpreted the rule to restrict copying and distribution of employee information contained in personnel records, as well as other Respondent and/or DOE-"sensitive" or "restricted" information. See *Longs Drug Stores California,* 347 NLRB 1 (2006)(finding employer's general confidentiality provision unlawful in light of another, more specific confidentiality provision and the testimony of employer's human resource manager that wage rates were confidential information). Accordingly, for this limited reason alone, I find that the confidentiality rule Walls communicated to employees at the August 2009 interviews interfered with their Section 7 rights under the test set forth in *Lutheran Heritage*.

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[12] The General Counsel also cites Walls' notes, which indicate that two employees mentioned at the end of their interviews that Franco had requested a copy of a job description and a disciplinary write up. GC Exhs. 6 and 7. However, according to De Los Santos, an SPO's job description is considered an OUO document. Tr. at 151. Further, the relevant test set forth in *Lutheran Heritage* is an objective one. Accordingly, I have not given the two employee's subjective responses any weight in evaluating the rule. Cf. *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001); and *Miami Systems Corp*., 320 NLRB 71 fn. 4 (1995), enfd. in relevant part and remanded 111 F.3d 1284 (6th Cir. 1997)(employees' subjective responses to alleged interrogation not relevant).

[13] This fact appears to have been undisputed; in any event, I take judicial notice of it. See generally *Detroit Newspapers*, 330 NLRB 505, 506 (2000); and *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394-395 (1998), enfd. mem. 215 F.3d 1327 (6th Cir. 2000).

Finally, I find that the Respondent has failed to articulate or establish an overriding legitimate and substantial business justification for such a broad rule.[14] The rule as communicated was not limited to documents contained in files to which employees generally had no right of access or possession. Rather, given the previously announced policy set forth in the "Restrictive Covenants," it could reasonably be interpreted by employees to prohibit copying and distributing of any documents relating to wages, hours, and other terms and conditions of employment, even if properly in their own possession or voluntarily and properly provided to them by other employees. Further, there is no evidence that the Respondent assured employees, either orally or in writing, that its confidentiality rule did not prohibit disclosure of such documents to third persons other than its competitors, such as a union or Board agent. Cf. *Carney Hospital*, 350 NLRB 627, 644 (2007)(employer's confidentiality rule was unlawful, as it could reasonably be interpreted to include information coworkers voluntarily divulged to each other, but was not unlawful as subsequently modified because the modification specifically stated that employees were not prohibited from discussing terms and conditions of employment in an appropriate manner); *Biggs Foods*, 347 NLRB 425 (2006)(employer's confidentiality rule prohibiting disclosure of salaries "to anyone outside the company" was unlawful as it could reasonably be interpreted to include disclosures to union representatives); *Mobile Exploration & Producing U.S., Inc*., supra (employer failed to show sufficient business justification for applying confidentiality policy to prohibit employees from disseminating information to other employees as opposed to competitors); *IBM*, 265 NLRB 638 (1982)(employer established business justification for discharging employee pursuant to confidentiality rule where employee received the confidential documents anonymously and not in the normal course of employment); and *Texas Instruments Inc*., 637 F.2d 822 (1st Cir. 1981), denying enf. of 237 NLRB 253 (1980) (finding, in similar circumstances, that employees' distribution of information in documents was not protected).

Accordingly, for all the foregoing reasons, I find that the rule as communicated to employees was overbroad, i.e. infringed on employee Section 7 rights well beyond any mandate by DOE or Respondent's legitimate and substantial confidentiality interests, and therefore violated Section 8(a)(1).[15]

2. Alleged coercive interrogation of employees

Having found that the employees would have reasonably interpreted the confidentiality rule to prohibit protected concerted activity, I find that the related questions Walls asked employees about whether they or any other employee had violated the rule had a reasonable tendency to restrain protected concerted activity, particularly since Walls was an owner of the company. The questions therefore constituted unlawful interrogation. See *Trump Marina Assoc. LLC*, 354 NLRB No. 123 (Dec. 31, 2009) and cases cited therein.

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[14] This issue is not specifically addressed in the Respondent's posthearing brief, which argues only that the General Counsel failed to establish a prima facie case.

[15] This conclusion is consistent with Judge Brakebusch's legal conclusion in the earlier proceeding with respect to the confidentiality rule in the "Restrictive Covenants." However, it is not dependent on it. Cf. *Longs Drugs Stores California*, supra (relying in part on a specific confidentiality provision in finding a general provision unlawful, even though the specific provision was not separately alleged to be unlawful).

3. Alleged solicitation to monitor other employees

As indicated above, the last allegation alleges, in essence, that Walls also solicited employees to monitor (i.e. "spy") and report on other employees protected concerted activities. See Tr. at 16 (GC's opening statement). However, his questions contained no such express solicitation; indeed, they were all directed at past rather than future conduct. Further, there is no record evidence that the Respondent had previously communicated to employees that they were required, as part of their job duties, to monitor each other for violations of Respondent's confidentiality or other rules. Thus, the alleged solicitation also cannot be inferred from all the circumstances. Finally, no supporting case law has been cited for finding such a violation on the same or similar facts. Accordingly, I find that the General Counsel has failed to prove this alleged violation.

Conclusions of Law

1. By orally promulgating an overbroad confidentiality rule prohibiting employees, without qualification or exception, from copying, removing, or distributing to "unauthorized" persons any "sensitive" or "restricted" documents or materials, which would reasonably be interpreted by its employees to include employee personnel records that discuss salary, wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, and other terms and conditions of employment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By interrogating employees about whether they or fellow employees have copied, removed, or distributed any "sensitive" or "restricted" documents or materials that contain information on salaries, wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, and other terms and conditions of employment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. The Respondent did not solicit employees to monitor and report on other employees' protected concerted activities in violation of the Act.

Remedy

Having engaged in certain unfair labor practices, the Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Accordingly, on the above findings of fact and conclusions of law, and the entire record, I issue the following recommended[16]

ORDER

The Respondent, Security Walls, LLC, Carlsbad, New Mexico, its officers, agents, successors, and assigns, shall

[16] 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.

1. Cease and desist from

(a) Orally promulgating an overbroad confidentiality rule that prohibits employees, without qualification or exception, from copying, removing, or distributing to "unauthorized" persons any "sensitive" or "restricted" documents or materials that contain information on salaries, wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, and other terms and conditions of employment.

(b) Coercively interrogating employees about whether they or fellow employees have copied, removed, or distributed to "unauthorized" persons any "sensitive" or "restricted" documents or materials that contain information on salaries, wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, and other terms and conditions of employment.

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

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

(a) Rescind the overbroad confidentiality rule it orally communicated to employees at the August 2009 interviews.

(b) Within 14 days after service by the Region, post at its facility in Carlsbad, New Mexico, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 28, 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. 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 August 5, 2009.

(c) 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. April 21, 2010

Jeffrey D. Wedekind
Administrative Law Judge

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice 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 orally promulgate an overbroad confidentiality rule that prohibits you, without qualification or exception, from copying, removing, or distributing to "unauthorized" persons any "sensitive" or "restricted" documents or materials that contain information on salaries, wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, and other terms and conditions of employment.

WE WILL NOT coercively interrogate you about whether you or your fellow employees have copied, removed, or distributed to "unauthorized" persons any "sensitive" or "restricted" documents or materials that contain information on salaries, wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, and other terms and conditions of employment.

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 Act.

WE WILL rescind the overbroad confidentiality rule we orally communicated to you during the interviews we conducted in August 2009.

SECURITY WALLS, LLC

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.nlrb.gov.

JD–26–10
Carlsbad, NM

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

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, 602-640-2146.