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

Advice Memorandum

DATE: October 24, 2001

TO : Robert H. Miller, Regional Director
Joseph P. Norelli, Regional Attorney
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Region 20

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

SUBJECT: Cobalt Painting, Inc.
Case 20-CA-30243-1

This case was submitted for advice as to whether six rules contained in the Employer's nation-wide employee handbook violate Section 8(a)(1) of the Act under Lafayette Park Hotel[1] and K-Mart d/b/a Super K-Mart.[2]

The Employer is a painting contractor with an office and place of business in San Jose, California. The Union alleges that the Employer's maintenance of several of the rules contained in its employee handbook is in violation of Section 8(a)(1) of the Act. There is no allegation that any of these rules has been enforced against any employees in a manner that violates the Act. The Region has solicited position statements from both parties but none has been provided to date.

I. Rule 6.1 — Work Rules and Policies
Rule 6.7 — Confidentiality and Trade Secrets

These rules state as follows:

6.1 Work Rules and Policies

Although it is not possible to provide an exhaustive list of all types of impermissible conduct and performance, the following are some examples:

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[1] 326 NLRB No. 69 (1998), enfd. sub nom, Lafayette Park Hotel v. NLRB, 203 F.3d 52 (D.C. Cir. 1999).

[2] 330 NLRB No. 29 (November 30, 1999).

> Misusing or disclosing the Company's trade secrets or confidential information without advance authorization from the Company; copying and/or distributing company documents, files, field information, or reports to any person or entity outside of our Company.
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> Rule 6.7 Confidentiality and Trade Secrets
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> You may be exposed to the Company's confidential or trade secret information during the course of your work at this Company. The protection of the Company's confidential and trade secret information is essential for both the Company and its employees' financial security. None of this information should be disclosed in any manner to any person, employee or non-employee, unless specifically authorized or required in the course of the employee's job duties. An employee who discloses confidential or trade secret information, except as provided above, is subject to immediate discharge and to other civil and equitable remedies which the Company may have.
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> Confidential or trade secret information includes, but is not limited to, personnel records of Company employees; payroll and financial information of Company employees; property locations; software; business plans and strategies; policy and personnel manuals; bid information; backlog; overhead and other administrative burdens; bond rates; productivity; labor usage; costs; constructibility; feasibility; alternative methods of construction; customers and vendors (mainly contact persons); special terms/discounts offered by vendors; means and methods of estimating and bidding; quality control; accounting systems and controls; and any other information designated by the Company as confidential. Once information has been designated as confidential, it should be clearly identified as such and properly secured.

We conclude, in agreement with the Region, that these rules violate Section 8(a)(1). Rule 6.7 is overbroad because its proscription against the disclosure of confidential information expressly extends to information about other employees and employment-related issues, such as "personnel records," "payroll and financial information of Company employees," and personnel manuals, as well as "any other information designated by the Company as

confidential."[3] Further, this rule forbids the disclosure of such information to any person, including fellow employees. Likewise, the portion of Rule 6.1 which prohibits disclosure of "confidential information" without advance authorization also violates the Act when read in conjunction with Rule 6.7. Thus, it prohibits disclosure of "confidential information," and that term is defined in Rule 6.7 to include information about employees and employment issues that employees must be permitted to divulge pursuant to protected Section 7 activity.

II. Rule 8.12 — Requests for Information Regarding Current or Former Employees

This rule states as follows:

> The Company is extremely concerned about the accuracy of information provided to individuals outside the Company regarding current or former employees. Consequently, no employees may provide (either on or off-the-record) any information regarding current or former employees to any non-employee without the specific written approval of management. This includes letters of reference.
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> The Personnel Department should be promptly advised of any formal or informal requests for information about current or former employees. The Personnel Department will normally verify, upon written request, only a former employee's dates of employment, position held, and final rate of pay. A written disclosure authorization and release may be required before any information is furnished.

We conclude, in agreement with the Region, that the portion of this rule prohibiting employees from providing "any information regarding current or former employees to any non-employee without the specific written approval of management," and the requirement to notify the Employer's personnel department regarding any requests for such information is violative of Section 8(a)(1). This language could reasonably be construed by employees as prohibiting them from providing information about themselves or their fellow employees to a labor organization for organizing purposes or in furtherance of other types of protected

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[3] See Flamingo Hilton-Laughlin, 330 NLRB No. 34, n. 3 (1999).

activity.[4] Although the provision appears to be directed primarily at employment references, it is not limited to those activities and, indeed, states that the rule applies to the disclosure of information about employees, "including letters of reference" (emphasis added).

III. Rule 8.3 — No-Solicitation/No Distribution Rule.

This rule states as follows:

> Our objective as an organization is to focus on our customers' needs. Therefore, certain types of solicitation and distribution of literature are prohibited.
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> The following rules apply to non-employees:
>
> No solicitation on Company property at any time.
> No distribution of literature on Company property at any time.
>
> The following rules apply to employees:
>
> No distribution within working areas.
> No solicitation of other employees for any purposes in working areas.
> No solicitation or distribution of literature to other employees when either the employee who is soliciting/distributing or the employee being solicited is on working time.
>
> These rules do not apply during break times and meal times or other periods during the workday when employees are not engaging in performing work tasks and are not in work areas.

We conclude, in agreement with the Region, that this rule violates Section 8(a)(1) in that it prohibits solicitation by employees in work areas during non-work periods. The Board has long held that no-solicitation rules which are not limited to work time are overbroad and invalid.[5] Although it is possible that this Employer's

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[4] Id.

[5] See, e.g., Our Way, Inc., 268 NLRB 394 (1983) (rule prohibiting solicitation during "working hours" presumptively invalid as overbroad because it includes employees' own non-work-time periods).

employees are never in work areas except during work times,[6] in the absence of evidence that such is the case, the rule is facially overbroad. The Employer has produced no evidence to show that this aspect of the rule is necessary for safety or other legitimate business concerns.

IV. Rule 6.1 — Work Rules and Policies

This rule states as follows:

> Although it is not possible to provide an exhaustive list of all types of impermissible conduct and performance, the following are some examples:
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> * * *
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> Using language at work that is offensive, abusive, threatening or demeaning; any form of discrimination or harassment (see Policy Against Harassment)

We conclude, in agreement with the Region, that this rule does not violate Section 8(a)(1).

In Lafayette Park Hotel, the Board found unlawfully overbroad a rule that prohibited "false, vicious, profane or malicious statements" because it would prohibit forms of labor speech, such as false but not maliciously defamatory statements, that are protected by Section 7.[7] Similarly, in Adtranz,[8] the Board found unlawful an employer rule prohibiting "abusive or threatening language to anyone on company premises" because "abusive language" was not defined in the rule and that term reasonably could be interpretted to include lawful union organizing propaganda or rhetoric.[9]

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[6] The last sentence of the rule may indicate that "work areas" are reserved exclusively for work time.

[7] 326 NLRB No. 69, slip op. at 5.

[8] Adtranz ADB Daimler-Benz Transportation N.A., Inc., 331 NLRB No. 40 (May 31, 2000), enf. denied 253 F.3d 19 (D.C. Cir. 2001).

[9] 331 NLRB No. 40, slip op. at 5-6, citing Linn v. United Plant Guards, 383 U.S. 53 (1966) (union campaign rhetoric is protected even when it includes "intemperate, abusive, and inaccurate statements"). See also Flamingo Hilton-

In several recent cases, Advice dismissed allegations that rules prohibiting "abusive" language were unlawful, notwithstanding Adtranz and Flamingo Hotel, because the rules appeared amongst a list of rules addressing serious, job-related misconduct and therefore would not reasonably be construed by employees to address Section 7 conduct.[10] In Adtranz and Flamingo Hotel, by contrast, the rules outlawing "abusive language" stood alone and without any definition.

Recently, the Board in University Medical Center[11] found unlawful a rule that prohibited:

> Insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual

The Board reasoned that by prohibiting all "disrespectful" conduct, which by definition would include any language "lacking in deference or special regard," the rule could reasonably be interpretted by employees to outlaw vigorous protected union activity which might annoy other employees. The Board found that "defining due respect, in the context

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Laughlin, 330 NLRB No. 34 (1999) (rule prohibiting loud, abusive or foul language" was unlawful); Great Lakes Steel, 236 NLRB 1033, 1036-37 (1978) (rule prohibiting distribution of literature which was "libelous, defamatory, scurillous, abusive or insulting" was unlawful).

[10] See Webvan Group, Case 32-CA-18695, Advice Memorandum dated July 16, 2001 (other rules on same list outlawed possession of weapons, threats of violence, and possession of controlled substances); Wal-Mart Stores, Case 32-CA-18745, Advice Memorandum dated May 11, 2001 (other rules on same list outlawed fraud, theft, falsification of records, and possession of firearms); Mariner Post-Acute Network, Case 11-CA-18096, Advice Memorandum dated February 10, 1999 (other rules on same list outlawed misuse of employer property, failure to follow safety regs, and performing non-employer work during work hours).

[11] Community Hospitals of Central California d/b/a University Medical Center, 335 NLRB No. 87 (Sept. 26, 2001).

of union activity, seems inherently subjective."[12] The Board held that its decision did not conflict with the D.C. Circuit's decision overturning the Board in Adtranz because the rule in that case outlawed only "abusive" and "threatening" language, which could constitute harassment and/or violence and trigger employer civil liability under other federal and state laws.

Here, the rule prohibits "offensive, abusive, threatening or demeaning" language, and then states that "any form of discrimination or harassment" is prohibited. Although it is possible to construe the term "abusive," by itself, as including protected Section 7 rhetoric, that is not a reasonable interpretation of the term in the context of this anti-discrimination and harassment rule. Thus, as in the aforementioned Advice cases, this rule is different than those found unlawful in Adtranz and Flamingo Hotel. Furthermore, although language that is "offensive" or "demeaning" could arguably encompass legitimate Section 7 activity, employees reasonably would interpret these words in context to prohibit racial or sexual harassment. University Medical Center is distinguishable because prohibiting "offensive" and "demeaning" language, where the rule is directed at discrimination and harassment, is far less likely to interfere with protected Section 7 activity than prohibiting merely "disrespectful" language.

It is noted that, in University Medical Center, the Board refused to strictly apply the rule of "ejusdem generis" -- which would require interpretation of the term "disrespectful" to mean conduct of a nature similar to the other named misconducts (e.g., insubordination) mentioned in the rule -- and stated that such rules of construction "guide attorneys in drafting legal documents but not lay employees in attempting to understand employment rules of conduct."[13] However, notwithstanding that statement, the decision in University Medical Center turned on the Board's conclusion that outlawing all "disrespectful" conduct would likely chill Section 7 activity and not merely insubordination. The Board did not hold that it is inappropriate to consider the full text of a rule in determining whether employees reasonably would interpret it to outlaw Section 7 activity. Indeed, the Board expressly relied on such considerations in distinguishing the rule against "disrespectful conduct" from the lawful Lafayette Park rule prohibiting employees from "being uncooperative"

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[12] Id., slip op. at 5.

[13] Id., slip op. at 5.

in a way that did not support the hotel's "goals and objectives."[14]

[14] Id., slip op. at 4.

V. Rule 6.6 — Conflict of Interest

This rule states, in pertinent part, as follows:

> Company policy requires that employees refrain from engaging in any activity outside the Company that might result in a direct conflict between self-interest and Company interest. Employees are expected to observe the highest standards of ethics and good judgement in all transactions relating to their duties as representatives of the Company and to review with their immediate supervisors any situation which may conflict with Company interests or have the appearance of impropriety. If an employee is unsure whether his or her actions may constitute a conflict of interest or lead to a conflict of interest, s/he must immediately discuss the matter with Cobalt Painting, Inc.
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> While it is not possible to list all possible conflicts of interest that could develop, some of the more common conflicts are listed below.
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> Violation of this policy may result in disciplinary action up to and including possible discharge.

The "conflicts of interest" that are listed as examples of "the more common conflicts" include collaboration with competitors to establish prices, acceptance of outside employment with competitors or other companies that have business dealings with the company, financial investment in competitor businesses, and acceptance of more than minimal gifts from customers or vendors.

We conclude, in agreement with the Region, that the Employer's maintenance of Rule 6.6 does not violate Section 8(a)(1). Although the rule contains broad language regarding activities that "might result in a direct conflict between self-interest and company interest," this language appears in a context that makes clear that the rule is directed at loyalty to the company vis-à-vis its competitors and suppliers. Thus, employees would reasonably interpret this rule to apply to valid Employer interests and not to Section 7 activities. There is no evidence that the rule has been applied in a manner so as to inhibit employee Section 7 rights. Under these circumstances, the Region should dismiss this allegation, absent withdrawal.

Accordingly, the Region should issue complaint, absent settlement, alleging violations of Section 8(a)(1) by the Employer's maintenance of: Rule 6.1 and 6.7, to the extent they pertain to the "confidential information" described above; Rule 8.12, regarding requests for information about employees; and Rule 8.3, to the extent it extends to periods when employees are on non-work times in work areas. The Region should dismiss the allegations, absent withdrawal, regarding Rule 6.6, relating to conflicts of interest, and Rule 6.1, regarding "offensive, abusive, threatening or demeaning" language.

B.J.K.