

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**AMERICAN BAPTIST HOMES OF THE
WEST d/b/a PIEDMONT GARDENS**

and

**Cases 32-CA-78124
32-CA-80340**

**SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE
WORKERS-WEST**

**COUNSEL FOR THE ACTING GENERAL
COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

The Honorable Jay R. Pollack
Administrative Law Judge
National Labor Relations Board
Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103

Submitted by:
Judith J. Chang
Counsel for the Acting General Counsel
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612

Date: December 17, 2012

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I. Preliminary Statement

This case is before the Administrative Law Judge on a Complaint alleging that American Baptist Home of the West d/b/a Piedmont Gardens (Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Complaint alleges that Gayle Reynolds, Executive Director of Respondent unlawfully denied employees access to a representative of the Service Employees International Union, United Healthcare Workers-West (the Union) who was scheduled to meet with individual employees in the employee break room on April 3, 2012 by posting a sign that same day outside the employee break room, which said, "NO UNION MEETING HERE. The union is not permitted to hold meetings in the employee break room."

The Complaint further alleges that Respondent has unlawfully maintained and enforced rule 33 of the “Chart of Infractions” which specifically states:

Employees may not clock-in for duty before their shift begins, nor are they to remain on the grounds after the end of their shift, unless previously authorized by their supervisor. Employees must have prior supervisor authorization before working/incurred overtime.

Finally, the Complaint alleges that on April 16, 2012, Respondent disparately enforced this no-access rule by requiring off-duty employees who were present at the Piedmont Gardens facility to participate in a mutually agreed upon meeting with Union representatives and managers to leave the facility while at the same time permitting access for off-duty employees for purposes such as to pick up their pay checks, meet with Human Resources representatives, and for other reasons with Respondent’s permission.

II. Facts

A. Background

Respondent is engaged in the operation of a continuing care community, providing a continuum of care beginning with residential independent living and progressing through assisted living, skilled nursing care, and memory care and memory support (GC Exh. 1(a)).¹ Respondent has maintained a bargaining relationship with the Union since at least 2007 which relationship has been embodied in the 2007-2010 collective-bargaining agreement (the Agreement) (GC Exh. 2).² The Union currently represents a bargaining unit of certified nursing assistants (CNA’s), housekeeping, dietary, maintenance, and activities employees, as well as

¹ References to the record are as follows: Tr. for transcript; GC Exh. for General Counsel Exhibits and R Exh. for Respondent’s Exhibits.

² As reflected in GC Exh. 2, the Agreement covers certain of Respondent’s employees as well as employees of another employer called Grand Lake Gardens. However, as clarified at the hearing, this proceeding pertains only to Respondent.

those employees set forth in Section 1. Union, 1.1 Recognition of the Agreement. Negotiations for a successor collective-bargaining agreement last occurred in August 2010, and the parties have not recommenced negotiations since that time. (Tr. 21, 4-10).

B. The Posting of Reynolds' Flyer on April 3, 2012 in the Employee Break Room³

1. The Written Access Rules

The parties' written agreement regarding Union access to the facility for the purpose of meeting with employees is described in the Agreement as well as other mutually negotiated written rules. Section 1.4 of the Agreement provides the following with regard to representation:

A duly authorized Field Representative of the Union shall be allowed to visit the Home at reasonable times for the purpose of ascertaining whether or not this Agreement is being observed and to check upon complaints of employees, provided:

3. The Union Field Representative confers with employees solely on the employee's free time and in a non-work area; provided, however, this sub-section shall not be construed so as to prevent a Union Field Representative from conferring with an employee and his supervisor or another representative of the Employer on the Employer's time in connection with a specific complaint or problem concerning the employee. (GC Exh. 2):

Respondent and the Union have also agreed upon additional "ground rules" governing the access rights of Union representative Donna Mapp as well as future Union agents. This agreement is contained in an email message between Respondent's counsel David S. Durham and Myriam Escamilla, the Union's Nursing Home Division Director, dated February 4, 2010. Noteworthy within these "ground rules" are the following provisions:

2. A duly authorized field representative of the Union will be allowed to visit the Communities at reasonable times for the purpose of ascertaining whether the contract is

³ All dates occurred in the year 2012 unless otherwise noted.

being observed and to check upon complaints and concerns of the members. **The parties understand the field representative may need to access the Communities during late night or early morning hours to confer with NOC shift employees.**

6. **And the field representative shall have access to employees' break rooms.** (emphasis added) (GC Exh. 3)

2. The Past Practice of the Union Holding Meetings in the Break Room

Donna Mapp testified without contradiction that consistent with the access rules above, she has held numerous meetings over the years with employees in the break room. These meetings have varied in times from as many as every day to once a week depending on the issue involved, and have involved different sized groups of employees, ranging from a low of 3-4 to a high of 15 employees. (Tr. 26: 14-22; 28: 3-6). Typically, during these meetings Mapp sat on a chair at a table in the break room. Employees who wished to speak with her would gather around that same table. Mapp has used different methods of notifying unit employees of these meetings, either by flyer, or by telephone banking (calling members over the telephone) (Tr. 28, 7-9, 21-25, 29, 3-6).

Geneva Henry, an employee of the Employer for the past twenty-five years, and currently a CNA, corroborated Mapp's testimony with regard to the past practice of holding meetings in the break room. Henry testified that on many occasions, she would see Mapp in the break room and she would join her there after her shift ended at 7:30 a.m. (Tr. 74, 1; 75, 22-25; 76, 1-10). While in the break room, Henry and other employees would sit with Mapp and discuss working conditions. (Tr. 76, 13-15).

3. The April 3 Incident

On April 2, Mapp posted a flyer on the Union bulletin board in the break room of the facility announcing to employees that she planned on being in the break room on April 3 to meet with the employees. Mapp also distributed copies of the same flyer to the employees. (GC Exh. 4; Tr. 30, 16-25, 31, 1-10). Mapp testified that she intended to discuss many issues at this April 3rd meeting, including: the status of the Union; what was happening with the contract; benefits; management's treatment of workers; as well as the rumors about unit employees supporting another union – NUHW. (Tr. 32, 4-19).⁴ Mapp explained that her reasoning for the long duration of the meeting - i.e. 7:30 a.m. to 9:00 a.m.; 10:00 a.m. to 1:00 p.m.; 2:00 p.m. to 6:00 p.m. - was to ensure that she would catch as many employees as she could during their breaks on the three main work shifts: a.m. shift, p.m. shift, and night shifts. (Tr. 33, 5-8). This was not the first time that Mapp held such a lengthy meeting in the break room. (Tr. 60, 11-17).⁵ Mapp stated that her intention was to hold this particular April 3rd meeting as she has held numerous other meetings: with her seated, while employees were seated, and the meeting would be casual and conversational with the aim of addressing employees' concerns. (Tr. 59, 3-20). There was no intention on Mapp's part to hold a "formal presentation" or to take over the entire break room

⁴ On cross-examination, Mapp admitted that one of the purposes of the meeting could have been to discuss the issue of employees taking back authorization cards they signed on behalf of NUHW. (Tr. 51, 5-7). However, the record evidence is clear that this was only one of the many reasons for the meeting, as Mapp credibly testified to wanting to answer employees' questions about the contract (Tr. 50, 16-18). As such, it is clear that the subjects to be discussed during this meeting fell clearly within the scope of the contractual access language "to check upon complaints and concerns of the members."

⁵ In fact, in Cases 32-CA-25247, 32-CA-25248, 32-CA-25266, 32-CA-25271, 32-CA-25308, and 32-CA-25498, 2011 WL 3489626, Administrative Law Judge Burton Litvak ruled that Respondent unlawfully enforced Rule 33 of the Chart of Infractions in a disparate manner and evicted off-duty unit employees (but not on-duty employees) from its facility to deter said employees from assisting the Union with a strike authorization vote. However, the testimony in the record of those cases revealed that Donna Mapp, along with other Union representatives, were present during the strike authorization vote in the break room, which were held throughout the days on June 17 and 18, 2010, before and after employees' shifts, and during break periods. Thus, any claim by Respondent that the length of the April 3 meeting at issue was inconsistent with past history should be absolutely discounted.

thereby prohibiting other employees who were not participating in the meeting from using the break room. (Tr. 59, 21-23).

On the morning of April 3, Mapp arrived at the Respondent's facility at approximately 6:30 a.m. After checking in, she headed towards the break room. (Tr. 29, 11-17). Soon thereafter, she encountered Executive Director Gayle Reynolds walking down the hallway. Reynolds accosted Mapp, and asked her "what are you doing here?" She further questioned Mapp, "why are you having a meeting here?" while pointing to the flyer advertising the Union meeting (Tr. 30, 7-15). Reynolds then said "you can't have these kinds of meetings in the break room at Piedmont Gardens." (Tr. 113, 20-22).⁶ According to Mapp, Reynolds said she believed this meeting was not supposed to happen, while Mapp began to explain that she and the employees were allowed to be in the break room. (Tr. 33, 12-15). As Reynolds testified, "[Mapp], of course, insisted that she could (have these types of meetings in the break room) and it was obvious that we weren't going to persuade one another of the other's point of view, and so I left." (Tr. 113, 22-24). Then Reynolds went to her office. (Tr.114, 1-2).

When she got to her office, Reynolds created a sign stating, "NO UNION MEETING HERE. The union is not permitted to hold meetings in the break room." (GC Exh. 5) In creating this sign, Reynolds admitted that she was guided by certain assumptions about the meeting scheduled that day. Rather than simply asking Mapp questions to determine the accuracy of these assumptions, Reynolds instead assumed that the meeting would be different

⁶ During her direct examination, Reynolds admitted that Mapp had an established past practice of meeting with small groups of employees in the break room. However, she then attempted to draw a distinction between meeting informally with small groups of employees and holding a "union meeting" in the break room, as stated on the Union flyer. (Tr. 112, 22-24; 113, 1-3). But, this alleged distinction is illusory and elevates a minor semantic difference over the use of the term "union meeting" into a pretextual excuse to preclude Mapp from meeting with unit employees.

than the ones Mapp had held in the past in the break room, and that the meeting would be about NUHW, and not about the collective-bargaining agreement. (Tr. 117-119).⁷

As Respondent conceded, at about 9:30 a.m., Reynolds's entered the break room and posted a sign in Respondent's enclosed glass-covered bulletin board. (Tr. 33, 17-25; 34, 1-12). Mapp observed her opening up the bulletin board with the key, and posting the sign (GC Exh. 5). The sign read "NO UNION MEETING HERE. The Union is not permitted to hold meetings in the employee break room." However, in spite of the fact that Reynolds had posted this sign, Mapp remained in the break room during the designated times that day and she continued to talk to small groups of employees who came into the room on their breaks. (Tr. 58, 1-4, 11-15). However, many of the employees who came into talk to Mapp noticed the sign that Reynolds had posted, they reacted strongly to it, and they expressed their worry and fear to Mapp by

⁷ Reynolds's credibility during her cross-examination was called into question in light of her great difficulty in directly answering questions regarding her action of creating the sign (.GC Exh. 5). For example, when the question before her was if she had assumed in creating the sign that Mapp's April 3 meeting was going to be different from those meetings she had held in the past, Reynolds contradicted her earlier testimony regarding the significance of the phrase "union meeting" by testifying that "It wasn't the language, 'Union meeting' in particular. It was the phrase 'please join us for an informational meeting and learn how we can take back our Union and our signature.'" And later, when asked again if she thought the language meant that Mapp was going to have a larger meeting than past meetings, Reynolds said, "Well, 'join us' based on this flyer, there are two names on the flyer, so that would say to me, 'join us,' meant those two people (i.e. Union representatives Mapp and Sanjanette Fowler-Brown) planned to be there. That's what I took from the flyer." In addition, when she was asked if she had assumed that the April 3 meeting that Mapp intended to hold was about NUHW and not about the Agreement, she stated: "I didn't say anything about NUHW." This contradicted earlier testimony she had provided to the Board in the underlying investigation of these proceeding that she understood that the meeting would pertain to the Union's dispute with NUHW. (Tr. 118, 12-23; 118, 24-25; 119, 1-15). This contradiction between her testimony at trial and her affidavit, as well as her evasive answers at trial, undercut her credibility on this point. Finally, any credibility findings with regard to Reynolds must factor in credibility findings concerning her testimony made in earlier proceedings against Respondent, including those of Judge Litvak as well as Judge Gerald M. Etchingham in American Baptist Homes of the West d/b/a Piedmont Gardens, Case 32-CA-63475, 2012 WL 1309213, dated April 16, 2012. Judge Etchingham adopted Judge Litvak's credibility findings with regard to Reynolds and ultimately found that her testimony was "unbelievable, disingenuous, and outweighed by more reliable testimony," in deciding to accord her testimony less weight in comparison with other evidence. To support his decision to adopt Judge Litvak's credibility findings, Judge Etchingham cited Grand Rapids Press of Booth Newspapers, 327 NLRB 393, 394-395 (1995), enfd. mem., 215 F.3d 1327 (6th Cir. 2000); Detroit Newspapers Agency, 326 NLRB 782 n. 3 (1998), enfd. denied, 216 F.3d 109 (D.C. Cir. 2000); and Sunland Construction Co., Inc., 307 NLRB 1036, 1037 (1992).

asking her whether they were allowed to meet and asking why Mapp could not hold this Union meeting. (Tr. 58, 16-18). Others questioned if the sign meant that the employees could no longer even talk to Mapp (Tr. 35, 1-2).

Mapp's testimony regarding the April 3rd incident, and the impact of the flyer on employees was fully corroborated by employee Elizabeth Shoaga.⁸ Shoaga testified that she initially wanted to attend the April 3rd meeting to learn about the Union's status and the status of the contract, along with the rumors of another Union - NUHW. It was clear to Shoaga however, that Respondent did not want this meeting to take place when she overheard the argument between Mapp and Reynolds that morning in the break room. (Tr. 65, 2-6). Later that morning, after Shoaga saw the sign Reynolds posted, she reacted with fear and wondered if she might "be fired" if she participated in any union or talked with any union members. (Tr. 66, 21-23).

C. Respondent's Eviction of Elizabeth Shoaga and Geneva Henry on April 16 and Enforcement of its Unlawful Access Policy

1. Respondent's Access Rules for Off-Duty Employees

It is undisputed that Respondent maintains an off-duty access rule as set forth in Rule 33 of the Chart of Infractions (GC Exh. 8) (Tr. 93, 15-25; 94, 1-3). This rule has an effective date of July 1, 2009. Rita Jennings, Respondent's Administrative Manager, recently reaffirmed this access policy in a memorandum dated September 6, 2011 that she sent to the front desk staff and security guards. (GC Exh. 9) (Tr. 94, 10-25). Within this memorandum is the following statement:

⁸ Shoaga, who is still employed by Respondent, is a thirteen-year certified nursing assistant (CNA), and has worked the night shift, from 11:00 p.m. to 7:30 a.m. for the past six years. (Tr. 63, 10-12).

2) No employees are allowed inside the building when not scheduled to work unless they have prior approval of their supervisor/manager, Human Resources, or the Executive Director.

However, in spite of the presence of Rule 33 and Jennings' memorandum, there is no factual dispute that Respondent has permitted off-duty employees to have access to its facility for certain limited reasons. (Tr. 46, 20-25; 47, 4-9; 67, 3-20; 81-82, 1-25). As Human Resources Director Lynn Morgenroth testified, Respondent has permitted off-duty employees to access the facility for meetings with Human Resources to answer employee questions regarding their employment and disability benefits. (Tr. 84, 13-25; 85, 1-8). With regard to the disability benefits, Morgenroth gave the example of an off-duty employee who is partially disabled and would be allowed into the facility so that he/she could undergo an "interactive process" in order to determine the potential for reasonable accommodations. (Tr.85, 8-23). In a similar vein, Mapp testified that she has had conversations with off-duty employees in the break room in which the employees have admitted to her that they were there for "personnel issues." (Tr. 47, 4-9). In addition, Respondent conceded that off-duty employees are permitted to enter the employee entrance, specifically at the security desk, to pick up their paychecks, but are not permitted beyond this area. (Rule 4 of GC Exh. 9). Thus, to a more limited extent, off-duty employees have access to the facility for the purpose of picking up their paychecks. (Tr. 83, 4-25).⁹ It is undisputed that these employees are all "off-duty" and are not paid for this time.¹⁰

⁹ It is anticipated that Respondent will argue, based on an email from Morgenroth to Mapp dated August 24, 2011 (R Exh. 1), that the parties "bargained" over and indeed reached agreement on these allegedly unlawful access provisions. (Tr. 99-101). This argument should be accorded little if no weight on several grounds. First, a plain reading of Morgenroth's email (R Exh 1) shows that the subject matter of discussion between her and Mapp on August 22, 2011 centered on the impact of the off-duty access rules on the NOC (night shift) employees concerning their transportation and safety issues. There is nothing in the email suggesting that the parties discussed the access rules in general, or that Morgenroth's request for feedback from Mapp extended to the overall off-duty access policy. In fact, Morgenroth acknowledged in her testimony that at the meeting on August 22, 2011, Mapp "had some concerns about the no access rule, specifically dealing with NOC shift employees." This apparently led to the

2. The April 16 meeting

In the afternoon on April 3, the same day Mapp was attempting to meet with employees in the break room, Mapp emailed Morgenroth and requested a meeting. (Tr. 37, 5-13).

Thereafter, between April 3, and April 16, Mapp and Morgenroth exchanged several email messages in an effort to schedule the meeting. (GC Exh. 6). Mapp's April 3rd meeting request was premised on employees' voiced concerns over various issues, including which time clock to use, the privacy concerns of their personal information, Respondent's sick leave policy, and policies regarding leaves of absences, work load, and management's attitude towards employees. (GC Exh. 6). There is no dispute that this string of emails constituted the only communication

attached "supplement to the access rule" dated August 24, 2011. Thus, as it is unclear that Morgenroth's "offer to bargain" was expanded to the overall access policies in general, it cannot be argued that Mapp's failure to give her feedback or object to the rule in general constituted a waiver of the employees' right to have a uniform, and clearly defined access rule in place for off-duty employees. Moreover, the email itself contains Morgenroth's suggestion that the parties re-visit the issue in 30 days, which points to a lack of finality as to this issue of access. Therefore, even assuming the parties discussed access, it is highly unlikely, given Morgenroth's email, that the parties reached a final resolution with regard to the access issue. Finally, Morgenroth testified that she solicited feedback from Mapp and she did not provide such feedback (Tr. 100, 19-20; 101, 2). It is anticipated that Respondent will argue that Mapp's silence on this one occasion on August 24, 2011 constituted a waiver of the statutory right of access to be present at an employer's facility for union activities such as to participate in a union meeting. However, any alleged acquiescence of Mapp's, fails, under Board standards, to amount to a legal waiver of the right of access by off-duty employees. In this regard, it is well-settled Board law that waivers of statutory rights must be clear and unmistakable (Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983)), and will not be lightly inferred by the Board (Owens-Corning Fiberglass Corp., 282 NLRB 609 (1987)). Moreover, the party seeking to establish this clear and unmistakable waiver has a "weighty burden" of demonstrating that this standard has been met. NLRB v. New York Telephone Co., 930 F.2d 1009, 1011 (2d Cir. 1991). In applying this legal rationale, Respondent has failed to meet this heavy burden, as its claim of waiver is premised only on Mapp's alleged failure to respond to this email, without any evidence establishing the precise nature of the communication between Morgenroth and Mapp on August 22, 2011, and whether the Union "clearly and unmistakably" waived its rights to discuss the off-duty access policies.

¹⁰ The record also contains ample evidence of other instances where employees who are off-duty have been granted access by Respondent. In this regard, Respondent has itself admitted in its August 23rd Answer to the Consolidated Complaint that off-duty "employees are permitted to enter the building through the Linda Street entrance and wait at the security desk in order to pick up their paychecks on their days off, and they are also admitted with **Respondent's advance permission.**" (emphasis added) In addition, the express language of Rule 33 of the Chart of Infractions (GC Exh. 8) on its face carves out an exception and allows for access of off-duty employees with prior "**authorization by their (the employee's) supervisor.**" (emphasis added). Thus, in its Answer and the clear language of Rule 33, the record contains exceptions to the Respondent's off-duty access policy.

between the Union and Respondent with regard to the scheduling of this meeting, which was set early on in the communication for April 16th at 10:00 a.m.

The issue of off-duty employees' participation at this meeting was not raised until Mapp's email of April 13th at 9:24 p.m. (Tr. 38, 15-20). In this e-mail, Mapp requested that off-duty employees be allowed to attend. Morgenroth did not respond to Mapp's April 13th message until 8:23 a.m. on April 16, a mere hour and a half prior to the meeting's scheduled 10:00 a.m. start time. In her response, Morgenroth stated "Employees that are not scheduled to work may not attend these meetings." (Tr. 89, 4-8, 12-20, 22-23; GC Exh. 6).¹¹

Mapp testified on direct examination that she read Morgenroth's message that morning sometime at around 9:00 a.m. while having breakfast with two off-duty employees (Shoaga and Henry) at the IHOP restaurant in Emeryville.¹² (Tr. 39, 6-20). Mapp testified that she called Morgenroth during breakfast to confirm the meeting. (Tr. 40, 4-6). After placing the call on speaker phone, Mapp advised Morgenroth that she had two off-duty employees with her who would be coming to the meeting that morning. (Tr. 40, 13-19). In response, Morgenroth referred to the email message she had sent Mapp at 8:23 a.m. (Tr. 40, 15-18). Thereafter, Morgenroth stated that workers would not be allowed to enter the premises to attend the meeting if they are not scheduled to work. (Tr. 40, 21-25). Mapp countered that there were two off-duty employees already with her as well as on their way. (Tr. 40, 21-25). Morgenroth responded by telling her that she should get off the phone and get in touch with these people and tell them they

¹¹In its case in chief, Respondent, by Morgenroth, claimed that Mapp had changed "the parameters" of the meeting on April 13 by wanting a group meeting. (Tr. 88, 6-8). An examination of the email exchange (GC Exh. 6) establishes that Mapp never agreed to Respondent's April 16 email request to have individual meetings. Morgenroth also never raised this demand again until her last email message sent on the morning of April 16. Thus, the evidence fails to support Respondent's claims in this regard.

¹²Earlier that morning, she had gone to the Respondent's facility and offered to take Shoaga and Henry out for coffee to wait for the pre-scheduled 10:00 a.m. meeting. (Tr. 39, 22-25).

were not allowed to come into the building. (Tr. 40, 24-25; 41, 1-2). Morgenroth then stated that the two members with Mapp would similarly not be allowed to enter the building. (Tr. 41, 3-4). Finally, Morgenroth said that Reynolds insisted that she would not meet with the employees if they were not scheduled to work and that she would only meet with them individually. (Tr. 41, 6-9). However, despite the serious disagreements about the particular details of the meeting, Morgenroth never canceled the meeting. Nor did she at any time urge Mapp to reconsider appearing for the meeting. (Tr. 41, 16-20). In fact, the only clear direction she gave Mapp was her repeated instruction on the morning of April 16 that if anyone “off duty intended on coming, call them and tell them to turn around and go home because they are not allowed to be at the meeting.” (Tr. 90, 15-18, 20-24).¹³

After the phone conversation with Morgenroth concluded, Mapp, Shoaga and Henry headed to Respondent’s facility. (Tr. 41, 22-25). Upon their arrival at the lobby on the 41st St. entrance, they announced their visit to the security guard at the front desk and signed in. (Tr. 42, 1-7). The sign in sheets for that day reflect that all three signed in at approximately 10:00 a.m. (GC Exh. 7). Minutes later, Morgenroth appeared and told Shoaga and Henry that she was sorry but because they were not on duty, they were not allowed to be at the meeting. Instead, Reynolds told them that she would only be willing to meet with them one-on-one on their shift. (Tr. 43, 14-20). In response, employees Shoaga and Henry immediately left. (Tr. 43, 20).

After the employees’ departure, Respondent, by Morgenroth, attempted to persuade Mapp to hold a meeting without any employees present. (Tr. 44, 2-5). However, Mapp emphasized the futility of meeting without members by saying, “why would we want to meet?”

¹³ Shoaga also corroborated Mapp’s testimony with regard to the phone conversation between Mapp and Morgenroth that morning. She testified that she heard Morgenroth telling Mapp that if off-duty employees were planning on coming to the meeting, they could not come into the building.

There is nobody here to meet. You're not allowing nobody to meet... How would there be a meeting without the members?" (Tr. 44, 7-11).

III. Argument

A. Respondent Has A History Of Violating Section 8(a)(1) of the Act by Unlawfully Denying Access to the Facility to Off-Duty Employees

As a threshold matter, Counsel for the Acting General Counsel requests that the Administrative Law Judge take judicial notice of a prior unfair labor practice proceeding before Administrative Law Judge Burton Litvak in Cases 32-CA-25247, et. al. which is currently before the Board. On February August 9, 2011, Judge Litvak issued his decision finding that Respondent had violated the Act by, *inter alia*, enforcing the chart of infractions rule 33 in a disparate manner or implementing a new work rule by evicting off-duty bargaining unit employees from its facility in order to deter said employees from assisting the Union with a strike authorization vote.¹⁴ In reaching this decision, Judge Litvak relied on evidence that in enforcing rule 33 of the Chart of Infractions (the access rule), Respondent has allowed off-duty employees access to its facility under certain circumstances, such as to pick up paychecks or with its permission and to participate in grievance meetings and disciplinary meetings. These findings are clearly relevant here as once again, Respondent has unlawfully and disparately enforced its access rule by its actions of evicting off-duty employees Shoaga and Henry.¹⁵

¹⁴ See American Baptist Homes of the West d/b/a Piedmont Gardens (NLRB Div. of Judges) (August 11, 2011). 2011 WL 3489626.

¹⁵ In the prior proceeding before Judge Litvak, the Region did not plead that Rule 33 was unlawful on its face since the record at that time was unclear whether Rule 33 was in fact an off-duty employee access rule. That question has now been answered in the affirmative, as reflected particularly in Respondent's admission to this effect in its Answer. Thus, raising this issue now does not implicate concerns under Jefferson Chemical, 200 NLRB 992 (1972) and Respondent would not be prejudiced, or unduly burdened by litigating the current issue of the facial invalidity of Rule 33.

B. Reynolds' Posting of the Sign on April 3 Violated Sections 8(a)(1) of the Act

1. Applicable Legal Principles

An employer violates Section 8(a)(1) of the Act when it engages in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. Am. Freightways Co., 124 NLRB 146 (1959). In determining whether conduct constitutes an unlawful threat to employees' Section 7 rights and activities, the Board has specifically concluded that the test is objective, and based on the perspective of a generic, typical, or reasonable employee. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). These Section 7 rights include not only the right to self-organization, to form, join, or assist labor organizations, and to bargain collectively through representatives of their own choosing, but also to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The clear meaning of this section includes employees' rights to communicate to one another about common problems they are having at the workplace and that such communications are protected.

Board law is equally well-settled that a union's access to represent employees on an employer's premises is a mandatory subject of bargaining. American Commercial Lines, 291 NLRB 1066, 1072 (1988). In addition, a union access provision in a collective-bargaining agreement is a term and condition of employment that survives the agreement's expiration. Oaktree Capital Management, LLC and TBR Property, LLC, a Single Employer, d/b/a/ Turtle Bay Resorts, 353 NLRB No. 127 (2009), citing TLC St. Petersburg, Inc., 307 NLRB 605 (1992), *enfd. mem.* 985 F.2d 579 (11th Cir. 1993); Frontier Hotel & Casino, 309 NLRB 761 (1992), *enforced in relevant part*, NLRB v. Unbelievable, Inc., 71 F.3d at 1438 (9th Cir. 1995).

Furthermore, the Board has concluded that an employer's threats to exclude union agents from a jobsite violates Section 8(a)(1) of the Act because such action has been found to interfere with union-related communication and unreasonably coerced employees. Swardson Painting Co., 340NLRB 179 (2003) (where the Board upheld ALJ's finding that the Respondent violated Section 8(a) (1) of the Act by threatening to close its shop and to discharge employees who engaged in union activity and by instructing a union representative to leave its jobsite.) By this same reasoning, ejecting a union representative from a jobsite is similar to prohibiting employees from speaking with their elected union official who has a contractual right to be on the premises. Ultimately, this action has the effect of obstructing the right of employees to speak with their union about their workplace complaints or problems.

2. Mapp had a Right to be in the Break Room on April 3 under the Contract and by Past Practice

Under the above principles, it is clear that Mapp had a right to be in the break room on April 3 to meet with employees. Her right to hold this meeting is supported by the contract and the February 4, 2010 ground rules, as well as by past practice. As noted above, the union access provisions are applicable in the instant case regardless of the expiration of the contract. Moreover, the language under Section 1.4 of the contract is clearly broad enough to encompass the purposes of the meeting Mapp scheduled on April 3 because it states that the Union representative has access to the facility not only to monitor the agreement itself, but also to "check upon complaints of employees."

Similarly, the ground rules and the past practice fully support Mapp's right to hold the meeting of April 3rd. First, the ground rules specifically permit Mapp's access to the break rooms for the purpose of meeting with employees under the restrictions set forth in the contract.

More importantly, Mapp and Henry both provided undisputed testimony that Mapp has a long-standing past practice of holding various meetings in the break room. Finally, Reynolds herself conceded to a history of her knowing of Mapp's presence in the break room to confer with employees with problems. (Tr. 113, 1-3).

3. Reynolds' Sign Constituted Unlawful Interference with Employees' Section 7 Rights to Union-Related Communication and Thus Violated Section 8(a)(1) of the Act.

In spite of this undisputed evidence establishing Mapp's contractual and past practice right to be in the break room, Respondent fully concedes that Reynolds created and posted the "No Union Meeting Here" sign (GC Exh. 5) in the break room on the morning of April 3. While it urges the Administrative Law Judge to consider the fact that Reynolds never told Mapp to leave the building or not to talk to employees, Counsel for the Acting General Counsel submits that Respondent is missing the point. The language of the sign itself clearly informed employees that the Union was "not permitted to hold meetings in the employee break room" and thus, the sign had a major impact on employees. Although Reynolds testified that she did not tell Mapp to leave the building or not to talk to employees, the sign elicited fear and confusion amongst employees that not only was Mapp unable to meet with employees in the break room that day, but in the future as well. Under these circumstances, it is submitted that by posting the "No Union Meeting Here" sign, Respondent violated Section 8(a)(1) of the Act.

In addition, even assuming that Reynolds had some arguably reasonable concerns about the type of meeting Mapp intended to hold in the break room on April 3, she simply never inquired from Mapp what her intentions were. Instead, she reacted by writing the sign in language that contained a false and misleading representation of the union's access rights to the

break room. In that manner, the language of the sign was overly broad and failed to be sufficiently tailored to address Reynold's alleged legitimate concerns. In so doing, the sign threatened employees' Section 7 rights by sending the message that the person charged with administering their collectively bargained rights was no longer allowed inside Respondent's facility in the break room. Accordingly, the evidence clearly supports a finding Respondent violated Section 8(a)(1) of the Act by posting this sign on April 3.

4. Respondent's Defenses

Respondent will likely argue that the main thrust of the April 3 meeting was to discuss the NUHW issue and thus the purposes of the meeting did not comply with the contractual access rules. But this contention is simply not borne out by the record evidence. Both Mapp, and Shoaga testified that employees had many questions about the status of the Union as well as the contract and its derivative benefits and that the April 3rd meeting was scheduled in order to address all of these issues. There is simply no way to take the NUHW portion of the meeting out of the context of the employees' many other legitimate concerns about the Union and the existing contract. Respondent has simply not met its burden of showing that the sole purpose of the April 3rd meeting was to discuss NUHW. This failure to do so must be juxtaposed next to the undisputed testimony given by Mapp and Shoaga that employees had legitimate concerns about the Union and the state of the current contract. Thus, later in the afternoon on April 3, Mapp proposed a meeting with Respondent to discuss employee work-related concerns over various work-related issues unconnected to NUHW. It is clear that Respondent's defense in this regard must fail and should be discounted in reaching a decision in this matter.¹⁶

¹⁶ In making this argument, Counsel for the Acting General Counsel is not conceding that if the sole purpose of the April 3 meeting was to discuss NUHW that this would have been beyond the scope of the Union's access rights. For example, employees could have voiced concerns about how selecting NUHW as their representative could impact

C. Respondent Has Maintained An Unlawful Access Policy And Disparately Enforced This Policy on April 16 By Evicting Two Off-Duty Employees From Its Premises

1. The Applicable Legal Principles

In Tri-County Medical Center, 222 NLRB 1089 (1976), the Board held that a rule denying off-duty employees access to an employer's premises is lawful only if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." The Board has recently reaffirmed this longstanding principle. Thus in Sodexo America LLC, 358 NLRB No. 79 (2012), the Board held that employer policies which carve out exceptions to off duty employees' access cannot give the employer unfettered discretion to permit employees to enter its facility as specifically directed by management. Citing Saint John's Health Center, 357 NLRB No. 170, slip op at 3-6, (2011), the Board reasoned that such rules unlawfully tell employees "You may not enter the premises after your shift except when we say you can." See also JW Marriott Los Angeles, 359 NLRB No. 8 (2012), (no access rule was unlawful for allowing exceptions to the general rule based on managerial discretion).

2. Under Tri-County, Rule 33 of the Chart of Infractions is Unlawful

Under the above legal principles, Respondent's access rule is unlawful on its face as it specifically allows for exceptions to the general no access rule with the express prior approval of a supervisor/ manager, Human Resources or the Executive Director. (GC Exh. 8, 9). For an

their wages, benefits and other conditions of employment. Instead, because of the undisputed evidence establishing that the Union had many other reasons for this meeting that indisputably fall within the scope of these rights, it is simply not necessary to reach this issue.

access rule to be valid under Tri-County, the rule must be uniformly applied in all instances, and not only in certain circumstances subject to the discretion of an employer. Thus, the rule is facially invalid and violates Section 8(a)(1) of the Act.

3. Respondent's April 16 Eviction of Shoaga and Henry Constituted Disparate Enforcement of the Access Rule and Thus Violates Section 8(a)(1) of the Act

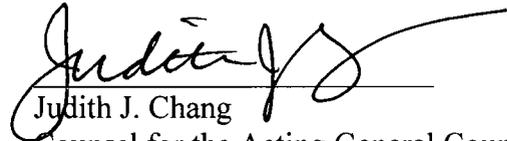
The undisputed evidence also shows that Respondent violated Section 8(a)(1) of the Act by disparately enforcing its access rule by preventing off-duty employees from attending the April 16 Union grievance meeting. In this regard, the evidence is clear that Mapp had scheduled a meeting with Reynolds, Morgenroth and employees for April 16 to discuss working conditions. Mapp provided undisputed testimony to this effect, which was largely corroborated by Morgenroth herself. Significantly, it is also undisputed that Mapp repeatedly requested that Respondent allow off-duty employees to attend this meeting and that Respondent repeatedly refused this request. Finally, it is undisputed that off-duty employees Shoaga and Henry came to Respondent's facility at around 10:00 a.m. on April 16 to attend this meeting but they were denied access by Respondent even though Respondent, both by the rule and admitted practice, allows employees who are off-the-clock to access the facility to meet with Human Resources (i.e. Morgenroth and Reynolds) with Respondent's permission. Because the record is clear that Respondent has permitted exceptions to this general rule of no access of off-duty employees, Respondent's action of evicting the off-duty employees on April 16 constituted disparate enforcement of this rule, and thus violated Section 8(a)(1) of the Act.

IV. Conclusion

For the reasons set forth above, it is respectfully submitted that Respondent violated Section 8(a) (1) of the Act on April 3 when Executive Director Gayle Reynolds posted the “No Union Meeting Here” sign in the employee break room. It is also submitted that Respondent further violated Section 8(a)(1) of the Act both by maintaining Rule 33 of the Chart of Infractions, as affirmed by the September 6, 2011 memorandum, and by disparately enforcing this rule by its action on April 16 of evicting two off-duty employees (Elizabeth Shoaga and Geneva Henry) from its facility. Accordingly, the Administrative Law Judge is urged to make appropriate findings of fact and conclusions of law and to issue a remedial order requiring Respondent to, *inter alia*, (1) cease and desist from maintaining and enforcing its off-duty access rule; (2) cease and desist from posting notices to employees in the break room informing them that there are no Union meetings allowed in the break room; (3) cease and desist from disparately enforcing the no-access rule by allowing off-duty employees to enter the facility for certain purposes but to prohibit off-duty employees to enter the facility to engage in lawful Union activities protected by Section 7 of the Act; (4) allow employees to meet with Union representatives in the break room; (5) allow off-duty employees to enter the facility to engage in lawful conduct protected by Section 7 of the Act under circumstances when they allow off-duty employees to enter the facility for other purposes; (6) rescind or revise Rule 33 to comply with the Act; and (7) post a notice containing provisions such as those set forth in the attached proposed notice.

DATED AT Oakland, California this 17th day of December, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Judith J. Chang", written over a horizontal line.

Judith J. Chang
Counsel for the Acting General Counsel
National Labor Relations Board, Region 32
1301 Clay Street, Room 300N
Oakland, CA 94612-5224

(PROPOSED NOTICE)
FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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 do anything to prevent you from exercising the above rights.

WE WILL NOT post notices to employees informing them that there are no Union meetings allowed in the break room.

WE WILL NOT disparately enforce our no-access rule by allowing off-duty employees to enter the facility for certain purposes but to prohibit off-duty employees to enter our facility to engage in lawful Union activities protected by Section 7 of the Act.

WE WILL allow employees to meet with Union representatives in the break room.

WE WILL allow off-duty employees to enter our facility to engage in lawful conduct protected by Section 7 of the Act under circumstances where we allow off-duty employees to enter our facility for other purposes.

WE WILL rescind or revise Rule 33 of our Chart of Infractions.

WE WILL furnish you with a revised Rule 33 that does not contain the unlawful provision or substitute a lawfully-worded provision.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

PIEDMONT GARDENS

(Employer)

Dated: _____ **By:** _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy 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 or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

AMERICAN BAPTIST HOMES OF THE
WEST d/b/a PIEDMONT GARDENS

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE
WORKERS – WEST

Case(s) 32-CA-078124
32-CA-080340

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, state under oath that on **December 17, 2012**, I served the above-entitled document(s) *electronically*, upon the following persons, addressed to them at the following addresses:

David S. Durham, Esq.
Arnold & Porter LLP
Three Embarcadero Center, 7th FL
San Francisco, CA 94111-4024
VIA EMAIL: david.durham@aporter.com

Christopher Foster
Arnold & Porter LLP
Three Embarcadero Center, 7th FL
San Francisco, CA 94111-4024
VIA EMAIL: christopher.foster@aporter.com

Manuel A. Boigues, Attorney
Weinberg Roger & Rosenfeld
1001 Marina Village Pkwy, Ste 200
Alameda, CA 94501-6430
VIA EMAIL: mboigues@unioncounsel.net

National Labor Relations Board
Division Of Judges
901 Market St., Suite 300
San Francisco, CA 94103
E-FILE

December 17, 2012
Date

Frances Hayden, Designated Agent of NLRB

Name



Signature