

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

**THE HONORABLE JAY R. POLLACK, PRESIDING**

**In the Matter of:**

**American Baptist Homes of the West d/b/a  
Piedmont Gardens,**

**Case Nos. 32-CA-078124;  
32-CA-080340**

**Employer/Respondent,**

**and**

**Service Employees International Union,  
United Healthcare Workers-West,**

**Union.**

---

**POST-HEARING BRIEF OF EMPLOYER/RESPONDENT**

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

---

David S. Durham  
Christopher M. Foster  
ARNOLD & PORTER LLP  
Three Embarcadero Center, 7th Floor  
San Francisco, California 94111-4024  
Telephone: 415.434.1600  
Facsimile: 415.217.5910

Attorneys for Employer/Respondent  
**AMERICAN BAPTIST HOMES OF THE  
WEST d/b/a PIEDMONT GARDENS**

## TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. STATEMENT OF FACTS.....	3
A. Piedmont Gardens.....	3
B. Union.....	3
C. Access Policies And Supplemental Access Agreements.....	3
1. Off-Duty Employee Access.....	3
2. Union Representative Access.....	6
D. Union’s April 3, 2012 Flyer Invited Employees To Join Two Union Representatives In The Only Break Room At Piedmont Gardens For An All-Day “Informational Meeting” On “Taking Back Our Signature” From A Rival Union.....	7
E. The Employer Voluntarily Agreed With The Union To Hold Meetings On April 16, 2012 With On-Duty Employees In One-On-One Format (Also With Their Union Representative) Regarding Their Various Concerns, <i>Provided</i> That The Union First Give The Names Of Those Attending So That Coverage Could Be Scheduled.....	9
III. ARGUMENT.....	13
A. The Employer’s Posting Of The Notice Inside The Break Room On May 3, 2012 Did Not Violate Section 8(a)(1) Because The Union Had No Statutory Right To Hold A Union Meeting In The Employer’s Break Room For Any Purpose, Much Less An “Off-Hours” Meeting For Political Purposes.....	13
1. There Can Be No Section 8(a)(1) Violation As A Matter Of Law Because The Employees Have No Statutory Right To Have Access To Union Representatives On The Employer’s Property.....	13
2. The Employer’s Reasonable Enforcement Of The Contractual Access System Did Not Violate Section 8(a)(1).....	16
a. The Union Violated The Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Announcing An Informational Meeting With Employees.....	18

b.	The Union Violated The Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Not Limiting The Purpose Of The Conference To Ascertaining Whether The Contract Is being Observed And Listening To Employee Complaints. ....	18
c.	The Union Violated The Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Announcing A Meeting To Be Conducted By More Than One Union Representative. ....	19
d.	The Union Violated The Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Being “Unreasonable” In The Exercise Of The Access Privilege. ....	20
e.	The Union Violated the Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Scheduling Access Before 9:00 a.m. And After 5:00 p.m. Without Prior Management Approval. ....	21
3.	In Any Event, There Can Be No Violation As There Was No Actual Interference With The Employees’ Ability To Confer With Union Representative Mapp. ....	21
B.	The Employer’s Unambiguous Off-Duty Employee Access Policy Is Valid And Is Applied In A Lawful, Non-Discriminatory Way. ....	22
1.	The Employer’s Off-Duty Employee Access Policy Is Valid Under <i>Tri-County Medical Center</i> Because It Unambiguously (And Without Employer Discretion) Prohibits Access Unless Off-Duty Employees: (1) Decide To Wait In Reception While Their Checks Are Brought To Them, (2) Decide To Wait In An Enclosed Vestibule Outside Reception Before NOC Shift Begins, Or (3) Decide To Attend A Scheduled Meeting With HR. ....	23
2.	In Any Event, The Promulgation Of Rule 33 Does Not Violate Section 8(a)(1) As The Union Agreed To Its Terms. ....	25
3.	The Employer Even-Handedly Applied Its Off-Duty Access Policy, And In Any Case, The Off-Duty Employees At Issue Here Had No Reason To Be At Piedmont Gardens After The Employer Notified Their Union Representative That Employer Would Not Voluntarily Meet With Them As Group While They Were Off-Duty. ....	26
a.	The Employer Even-Handedly Applies Its Off-Duty Access Policy. ....	26

b. The Off-Duty Employees At Issue Here Were Not Granted Access Because They Had No Scheduled HR Meeting To Attend And Had No Other Reason (Valid Or Otherwise) To Be At the Piedmont Gardens..... 27

IV. CONCLUSION..... 28

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Amcar Div. of ACF Indus., Inc.</i> , 247 N.L.R.B. 1056 (1980) .....	26
<i>Charleston Nursing Ctr.</i> , 257 N.L.R.B. 554 (1981) .....	28
<i>Energy Coop. Inc.</i> , 290 N.L.R.B. No. 78 (1988) .....	25
<i>Holyoke Water Power Co.</i> , 273 N.L.R.B. 1369 (1985) .....	14, 15
<i>Marriot Int'l</i> , 359 N.L.R.B. No. 8 (2012) .....	24
<i>NLRB v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956) .....	14
<i>Peck/Jones Constr. Corp.</i> , 338 N.L.R.B. 16 (2002) .....	16, 17
<i>Phillips Pipe Line Co.</i> , 302 N.L.R.B. 732 (1991) .....	25
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945) .....	23
<i>St. John's Health Ctr.</i> , 357 N.L.R.B. No. 170 (2011) .....	23, 24, 25
<i>Sodexo America</i> , 358 N.L.R.B. No. 73 (2012) .....	24, 25
<i>Southdown Care Ctr.</i> , 308 N.L.R.B. 225 (1992) .....	23, 25
<i>Tri-Cty. Med. Ctr.</i> , 222 N.L.R.B. 1089 (1976) .....	2, 23, 26, 27
<b>Statutes</b>	
Nat'l Lab. Relations Act § 8(a)(1) .....	1, 13, 14, 16, 17, 18, 22, 25

## I. INTRODUCTION.

It is alleged in the present Consolidated Complaint (“Complaint”) that American Baptist Homes of the West, d/b/a Piedmont Gardens (“Employer”) committed two violations of Section 8(a)(1) of the National Labor Relations Act (the “Act”), in the first instance by denying employees access to their union representative in the break room, and in the second instance by disparately enforcing a facially invalid access policy against off-duty employees.<sup>1</sup> Neither allegation is supported by the factual record or the law.<sup>2</sup>

The first allegation is that the Employer violated Section 8(a)(1) by posting a “No Union Meeting Here” notice in the Piedmont Gardens break room on August 3, 2012. However, no violation has been established. First, under applicable Board and court precedent, any right that employees may have to access their representative under these circumstances *on the Employer’s premises* is contractual, not statutory. Accordingly, if there was any breach of any obligation to allow access (which the Employer vigorously denies), it would not interfere with Section 7 rights and would therefore not rise to the level of an 8(a)(1) violation. In any event, the evidence is undisputed that this notice was in response to a Union flyer which could only be read as announcing that the Union was going to hold a union “meeting” in the Community’s only break room to address the threat created by a *rival* union’s organizing activities. The only fair reading of the Union’s flyer (complete with confetti) is that the Union was planning on holding a full-blown union meeting, not at the union hall, but on the Employer’s premises. Not only is the evidence undisputed that such a meeting was unprecedented, but that the holding of such a meeting would have violated numerous aspects of the Parties’ expired collective bargaining

---

<sup>1</sup> The bargaining unit consists of employees at both the Piedmont Gardens and Grand Lake Gardens communities. (Complaint ¶ 6(a); Answer ¶ 6(a); GC Exh. 2). It is not clear whether any violations regarding Grand Lake Gardens have been alleged. In any event, all of the evidence in the record relates solely to Piedmont Gardens. Absent any record evidence regarding Grand Lake Gardens, no violation with respect to Grand lake Gardens has been established.

<sup>2</sup> The present Complaint does not allege that the Employer unilaterally implemented or otherwise unlawfully changed any of its policies in violation of the Act.

agreement (“contract”) and supplemental “Ground Rules” access agreement, which, among other things, provided that only *a single* Union representative would have access to the break room at Piedmont Gardens; that the visits be limited to 9:00 a.m. to 5:00 p.m. (absent prior special arrangements with management); and that the representative could “confer with” employees for the sole purpose of “ascertaining whether or not (the) Agreement is being observed and to check upon complaints of employees.” Second, the Employer was well within its rights by posting the “No union meeting here” sign as the Employer reasonably determined that an *en masse* meeting would be disruptive to nearby residents and other employees (including non-Union employees) who used the break room to relax at lunch, thereby violating the requirement in the collective bargaining agreement that the “privilege” of union visitation onto the Employer’s premises be exercised “reasonably.” In any event, there was no actual interference with employees’ access to their representative. Union members still met with their assigned representative in the break room that day to discuss various issues even after the Employer posted its flyer *in the break room* (not outside, as alleged). In fact, the Union representative sent an email to the Employer to schedule meetings regarding the concerns which employees brought her *after the Employer’s sign had been posted*. Thus, there was no denial of employee access to their representative.

The second allegation is that the Employer violated Section 8(a)(1) by disparately applying its off-duty employee access policy when the Employer refused to meet with two off-duty employees on April 16, 2012 who appeared unannounced and in contravention of the meeting arrangements previously made between the Employer and the Union. The Employer provided uncontroverted evidence that its policy is valid under the Board’s access policy decision in *Tri-County Medical Center*, 222 N.L.R.B. 1089 (1976), and that its off-duty access policy was even-handedly applied to exclude access to off-duty employees who did not satisfy any of its narrowly-tailored exceptions required for access.

For all of the above and following reasons, the Employer respectfully requests dismissal of the Complaint in its entirety.

## II. STATEMENT OF FACTS.

### A. Piedmont Gardens.

American Baptist Homes of the West, d/b/a Piedmont Gardens is a non-profit Continuing Care Retirement Community located in Oakland, California. (Complaint ¶ 2(a); Answer ¶ 2a).<sup>3</sup> Piedmont Gardens provides its 300 plus elderly residents with an entire continuum of care, from independent residential living and assisting living, to skilled nursing care and memory support. (Tr. 104:6-24). Piedmont Gardens' Executive Director is Ms. Gayle Reynolds, and its Human Resources ("HR") Director is Ms. Lynn Morgenroth. (Complaint ¶ 5; Answer ¶ 5).

### B. Union.

Charging Party Service Employees International Union-UHW ("Union") represents approximately 150 employees at Piedmont Gardens, including, but not limited to, nursing assistants, dietary department workers, and maintenance workers. (Tr. 106:7-8, GC Exh. 2).<sup>4</sup> Ms. Donna Mapp ("Mapp") has been the Union's assigned representative at Piedmont Gardens for the past 2 and a half years. (Tr. 19:7-24).

### C. Access Policies And Supplemental Access Agreements.

#### 1. Off-Duty Employee Access.

The Employer has created and strictly applies a Chart of Infractions, which among other things, includes an access policy pertaining to off-duty employees. (GC. Exh. 8). Chart of Infractions Rule 33 provides, in relevant part:

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. . . . *Id.*

---

<sup>3</sup> References to "Tr." Are to the official transcript of the hearing held on November 13, 2012, before Hon. Jay R. Pollack, Administrative Law Judge at the offices of Region 32 in Oakland, California. Citations to the General Counsel's exhibits are referenced as "G.C. Exh", and citations to the Employer's/Respondent's exhibits are referenced at "Resp. Exh."

<sup>4</sup> The bargaining unit also includes employees employed at Piedmont Gardens' sister facility, Grand Lake Gardens. (Complaint ¶ 6(b); Answer ¶ 6(b)).

As reasonable and necessary exceptions to the off-duty access policy, off-duty employees are able to access the facility if they satisfy one of three conditions.<sup>5</sup>

First, off-duty employees are able to access the facility when they schedule an individual meeting with HR. (Tr. 84:13-17). For example, an employee may make an individual appointment to discuss benefits, or to discuss completing an interactive process while out on legally-protected disability to prepare for returning to work with potential accommodations. (Tr. 84:20-85:23).

Second, off-duty employees are granted access when they decide they wish to pick-up their paychecks on their day off. (Tr. 83:4-9). However, strict limitations apply. They are required to wait by the security desk immediately inside the 41st Street entrance while their paycheck is brought to them by a supervisor. (Tr. 83:7-25). They are not permitted to roam the facility and they must leave immediately after receiving their checks. *Id.*

Third, graveyard (“NOC”) shift employees who, because of limited bus schedules, must arrive prior to the commencement of their shift are not required to wait outside but are permitted to enter the vestibule just outside of the 41st Street entrance while they wait for their shift to begin. (Tr. 100:6-18; Resp. Exh. 1). Employees are permitted to wait in this confined area for up to an hour. *Id.* The Employer agreed to this exception in August 2011 after a meeting where the Union expressed the concerns of certain NOC employees who believed that waiting outside the facility before their shift began was unsafe and inconvenient for those commuting by public transportation. (Resp. Exh. 1). The Employer understood that this additional, narrowly-construed exception, requested by the Union, effectively balanced employees’ safety and comfort concerns with the Employer’s valid interest in “avoid[ing] uneven enforcement of the [access] rule.” *Id.*

---

<sup>5</sup> The General Counsel did not present any evidence that the Employer has knowingly permitted off-duty employees access to the facility for any other reason. Indeed, employees attending in-services, receiving vaccinations, or attending mandatory trainings or other meetings are paid and considered on-duty. (Tr. 82:3-83:3).

To clarify the off-duty policy and its narrowly-tailored exceptions, on August 24, 2011, the Employer provided the Union's representative with an explanatory email and accompanying memorandum, which stated, in relevant part: <sup>6</sup>

All employees must abide by the "No Access Rule" contained in Section 33 of the Chart of Infractions.

\* \* \*

For safety and security purposes Employees who work the NOC shift may wait in the vestibule immediately outside the locked doors of the 41st Street entrance for as long as necessary, up to one hour before the beginning of their work shift. Employees are also welcome to wait outside the locked doors of the Linda Street entrance under the covered entrance area.

\* \* \*

Employees who are picking up their paycheck on their day off must enter Piedmont Gardens through the Linda Street entrance. Upon entering, the off-duty employee will be required to sign the "Employee Log" and advise the security person that they are at Piedmont Gardens to pick up their check. The off-duty employee must wait at the security desk while the security person contacts the supervisor to deliver the paycheck to the security desk. The off-duty employee is not authorized to leave the security desk area for any reason. Upon receipt of their paycheck the off-duty employee must immediately leave Piedmont Gardens property.<sup>7</sup>

(Resp. Exh. 1)

In September 2011, the Employer circulated another memorandum to staff further clarifying the off-duty access policy:

1) All employees regardless of shift must enter Piedmont Gardens via the Linda Street entrance. **(See exception below for NOC shift employees (graveyard shift)).** All Employees must wear their badge upon entering the property, and sign the "Employee Log" located at the Security Desk.

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.

---

<sup>6</sup> The Union was asked whether it would like any further revisions to the access policy, but it provided no response, apparently agreeing to its terms and conditions. (Tr. 100:1-101:2).

<sup>7</sup> As the email correspondence attached to the supplement shows, the Employer requested that the Union provide any feedback about the policy, but the Union never did so. (Tr. 100:23-101:13; Resp. Exh. 1).

3) Only NOC shift (graveyard shift) employees who arrive up to one hour early due to transportation issues and who elect to wait in the closed in area/vestibule at the 41st Street entrance have permission to enter the building through the 41st Street entrance. When it is time to punch in for their shift they may enter the lobby 10-15 minutes before their shift and go to the break room. Upon entering they must wear their badge and sign the "Employee Log" located at the Reception/Security Desk on the 41st Street entrance. Employees are also welcome to wait outside the locked doors of the Linda street entrance under the covered entrance area.

4) Employees who are picking up their paycheck on their day off may enter Piedmont Gardens through the Linda Street entrance. The off-duty employee will be required to sign the "Employee Log." The off-duty employee **must wait** at the security desk while the security person contacts the supervisor to deliver the paycheck to the security desk. Upon receipt of their paycheck the off-duty employee must leave Piedmont Gardens property. (GC. Exh. 9) (Emphasis in original).

## 2. Union Representative Access.

Regarding the Union's assigned representative's access to Piedmont Gardens, Section 1.4 of the Parties contract provides, among other things, that:

- a. A duly authorized Field Representative of the Union shall be allowed to visit the Home [Piedmont Gardens] at reasonable times for the purpose of ascertaining whether or not the Agreement is being observed and to check upon complaints of employees, provided:
  1. This privilege is exercised reasonably.
  2. The Union Field Representative advises the Administrator the Employer, or his designee, immediately upon entering the premises of the Employer, states which department or area he wishes to visit, and confines his visit to such department or area.
  3. The Union Field Representative confers with employees 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.
  4. The Union Field Representative dose not unduly interfere with the work of any employee.

(GC Exh. 2) (Emphasis added).

On or around February 4, 2011, the Parties entered into a "Ground Rules" agreement that clarified the Union's access rights at Piedmont Gardens. (GC Exh. 3). The Ground Rules

reiterated that Section 1.4 of the collective bargaining agreement continued to govern the Union representative's access rights and must be adhered to, that the Union would still only be permitted to have a single representative confer with employees in the break room from 9:00 a.m. to 5:00 p.m. "for the purpose of ascertaining whether the contract is being observed and to check upon complaint and concerns of its members." *Id.*

**D. Union's April 3, 2012 Flyer Invited Employees To Join Two Union Representatives In The Only Break Room At Piedmont Gardens For An All-Day "Informational Meeting" On "Taking Back Our Signature" From A Rival Union.**

On August 2, 2012, Mapp distributed flyers announcing a Union "Informational Meeting" to be held the following day in the only break room at Piedmont Gardens.<sup>8</sup> (GC Exh. 4). On August 3, 2012, Mapp posted the same flyer, which stated under the word "Tomorrow" (which was surrounded by large images of confetti):<sup>9</sup>

**Join Us for**

**Union Meeting**

SOME INDIVIDUALS ARE JEOPARDIZING OUR FUTURE  
AND WE NEED TO COME TOGETHER TO DISCUSS NEXT  
STEPS AND HOW WE CAN PUT AN END TO THE  
CONFUSION.

Please Join Us for An Informational Meeting and to Learn How we  
can take back our Union and our signature!

(GC Exh. 4) (font sizes changed to point 12).

The flyer specified that the "Union Meeting" would take place on Tuesday, April 3, 2012 from 7:30 a.m. to 9:00 a.m., 10:00 a.m. to 1:00p.m., and 2:00 p.m. to 6:00 p.m., and that

---

<sup>8</sup> The break room is an approximately 300 square feet room with six tables, and is used by all employees, including those not represented by the Union. (Tr. 25:18; 107:20-108:2; 122:1-5; Resp. Exhs. 2-5). The break room is on the main floor, near the Assisted Living department and the beauty shop used by residents. (Tr. 75:11-15). Visitors and staff walk through the break room to get to the other side of the facility because it opens onto the facility's central courtyard. (Tr. 25:18-21; Resp. Exhs. 4, 5).

<sup>9</sup> Mapp did not normally put up flyers to announce meeting with employees. (Tr. 28:7-9). Reynolds had never seen the any Union meeting announcement flyers before. (Tr. 124:7-12).

employees seeking more information should contact Union representatives Donna Mapp or Sanjanette Fowler-Brown.<sup>10</sup> (GC Exh. 4).

After noticing Mapp's flyer, Reynolds was immediately concerned that the upcoming union meeting would not only be disruptive, but it would be a clear violation of the collective bargaining agreement and the supplemental agreement on union access referred to as the "Ground Rules." (Tr. 112:2-24). Reynolds understood that the flyer's use of the phrase "[p]lease join us for an informational meeting and learn how we can take back our Union and our signature" in conjunction with the names of two Union-representatives (Mapp and Brown) indicated that Mapp was not planning on having only a single union representative in the break room as required but was planning on having at least two union representatives present. (Tr. 112:5-12; 118:9-11). Also, the references to an "informational meeting" made it clear to her that the event was not going to be limited to "conferences" with individual employees as Mapp had done in the past, and which was permitted by the contract and the Ground Rules, but instead was going to be an actual union meeting on the Employer's premises.<sup>11</sup> (Tr. 117:21-118:12). Moreover, Reynolds also reasonably understood that the Union's representatives were planning on discussing plans to roust a rival union (National Union of Healthcare Workers, or "NUHW") instead of the administration of the Parties' contract because the flyer stated that it was time to "take back our Union and our Signature!" (Tr. 50:21-51:8; 112:2-5; 118:15-23; GC Exh. 4).

---

<sup>10</sup> Sanjanette Fowler-Brown was a former employee at Piedmont Gardens and was described by Mapp at hearing as "technically" a Union representative. (Tr. 49:20-24). The Employer requests that the ALJ take judicial notice of the NLRB, Region 32 Regional Director's August 27, 2011 letter to the Union's Counsel dismissing the Union's charge that alleged the Employer unlawfully excluded Union representative Fowler-Brown. (Attachment A). The Regional Director's letter states "The evidence presented that the past practice has been to allow only one Union representative at a time in the facility to meet with employee. This position is supported by the Employer's reasonable interpretation of the collective bargaining agreement which provides access to a representative."

<sup>11</sup> The Union had never been permitted to hold union meetings in the break room previously. (Tr. 112:22-24).

In order to address these concerns, Reynolds went into the break room on the morning of April 3, 2012 and spoke with Mapp. (Tr. 113:18-24). Reynolds told Mapp that she could not: “have these kind of meetings in the break room at Piedmont Gardens.” *Id.* Mapp insisted that she could. (Tr. 113:22-23). Realizing that they were not going to resolve this issue then and there, Reynolds left. (Tr. 113:18-24).<sup>12</sup>

Reynolds immediately went to her office and created a sign—which she then posted *in the break room*—to inform employees that there would be “No Union Meeting Here”.<sup>13</sup> (Tr. 114:1-2; GC Exh. 5). Reynolds also took down the Union’s flyer, but did not tell Mapp or Union members that they could not confer with Mapp or hold individual, small-scale meetings.<sup>14</sup> (Tr. 114:18-115:8). In any case, Mapp remained in the break room and spoke with employees, giving her ample opportunity to discuss the situation with employees as well as their various individual concerns. (Tr. 34:22-23; 35:10-15).

**E. The Employer Voluntarily Agreed With The Union To Hold Meetings On April 16, 2012 With On-Duty Employees In One-On-One Format (Also With Their Union Representative) Regarding Their Various Concerns, Provided That The Union First Give The Names Of Those Attending So That Coverage Could Be Scheduled.**

On April 3, 2012, Mapp emailed Morgenroth to request a meeting with her and Reynolds regarding “several complaints and concerns” that employees in “various departments” had recently reported to her, including earlier in *the day after* Reynolds had posted the “no meeting”

---

<sup>12</sup> Interestingly, Mapp did not assure Reynolds that morning that she was not actually planning on holding a union meeting about the threat of NUHW or that she was merely “conferring” with employees about contract compliance or individual workplace concerns. (Tr. 122:24-123:17). Mapp merely insisted that she was acting within her rights in holding such a meeting. (Tr. 113:18-24).

<sup>13</sup> The Complaint erroneously alleges that the Employer posted the flyer in question *outside* the break room as the means of denying employees access to their Union representative. The General Counsel’s own witnesses confirmed Reynolds testimony that she posted the flyer on a bulletin board *in the break room, near* where Mapp was sitting (and continued to sit while she met with employees about their concerns). (Tr. 33:17-34:3). Thus, employees would not be in a position to see the sign unless they were already in the break room.

<sup>14</sup> Indeed there was no testimony that Reynolds had any conversation with an employee about the subject of Mapp’s flyer. Nor was there testimony at hearing that any employee saw Reynolds take down the sign, or that employees spoke to another about having seen her to do.

notice. (Tr. 34:22-35:15; 37:6-13; GC Exhs. 5, 6). In her email, Mapp mentioned that employees had raised a wide range of individual issues, from problems with time clocks and concerns about controlling employees' personal information, to individual employees' experiences with work load and taking leaves of absence. (GC Exh. 6). Mapp concluded her email by stating "[I]et me know how would you have the members attend this meeting, I have a suggestions, but will wait to here from you." *Id.* [sic].

After conferring with Reynolds, Morgenroth emailed Mapp on April 3, 2012 to propose April 16, 2012 as the date to hold the meetings. *Id.* The e-mail set out the terms upon which she would agree to meet. She stated in that e-mail: "We think it would be best if we excuse one CNA at a time and meet with them individually." Morgenroth also stated that Mapp would need to let her know the names of the employees attending the meetings so that she could coordinate with employees' supervisors regarding the schedule to "make sure that there is coverage" and "resident care is not an issue." (April 4, 2012 e-mail, GC Exh. 6, p. 3)

Mapp responded immediately, requesting an earlier meeting date. *Id.*

Morgenroth, in-turn, quickly responded that April 16th was the first available date, to which Mapp responded:

If that the best you can do, i will go ahead and lock that date in for the meeting. If there is changes I will let you know. I will also get back to you with the names of the workers who will be attending the meeting. *Id.* (Underlining added).<sup>15</sup>

Mapp failed to live up to her promise that she would inform Morgenroth in advance of the Monday, April 16 meeting of the identities of those attending so that adequate coverage could be assured. Without providing any further communications for 10 days, on Friday, April 13, 2012 at 9:24 p.m., Mapp sent an email to Morgenroth stating that she had spoken with members and they suggested that the meetings take place in a group format, with half of the

---

<sup>15</sup> Mapp never objected to Morgenroth's condition for agreeing to the meeting that employees be released one at a time, nor did she object to the requirement that the names be disclosed ahead of time to ensure adequate coverage. (GC Exh. 6).

employees meeting at one time, and the second group afterwards.<sup>16</sup> *Id.* Mapp also informed Morgenroth *for the first time* that “[a]lso there are a few members who is off that will be coming to the meeting.” *Id.* (Tr. 38:18-20). She then provided three employees’ names, each in a different department.<sup>17</sup> (GC Exh. 6).

Arriving at work early on Monday, April 16th, Morgenroth immediately conferred with Reynolds, and then sent an email at 8:23 a.m. responding to Mapp’s proposals to change the format of the meetings. (Tr. 89:12-23). Morgenroth reminded Mapp that she had not provided the list of names of employees (which Mapp had agreed to provide in her April 3rd email), and that as a result the Employer had not been able to schedule coverage to ensure residents continued to receive care during the meetings. (GC Exh. 6). Additionally, Morgenroth pointed out that the Parties had agreed to meet with employees on an individual basis, not in two big groups, since such a format would be an inefficient way to address the wide range of issues (many of which were individual-specific) that Mapp had identified in her April 3rd email. She also stated that the Employer was not willing to meet with off-duty NOC shift employees, and that as an accommodation, she could schedule another meeting so that they could participate on a time when they were on-duty.<sup>18</sup> (GC Exh. 6).

---

<sup>16</sup> Mapp had been the assigned Union representative at Piedmont Gardens for almost three years, and knew that Morgenroth only worked at the facility on Mondays and Wednesdays, and thus would be not be at work on Friday, much less at 9:24 p.m. (Tr. 88:18-25). Indeed, while Mapp testified at the hearing, she never testified that she was unaware of Morgenroth’s schedule, nor did she give any explanation as to why she waited till the eve of the meeting to propose a drastic revision to the procedures which the Employer required as a condition to agreeing to the meeting in the first place. Her explanation for the late email, that she needed to contact night shift employees, may have justified the time of day she sent her email, but not the April 13th date.

<sup>17</sup> The named employees were “Monique Higgens” (Assisted Living), “Salvador Miranda” (Dietary), and “Mhret Weldeabzgh” (Skilled Nursing). (GC Exh. 6). Mapp testified that she did not provide Morgenroth with the names of employees because “they didn’t want to give management their names” out of fears of Employer retaliation, but she gave no explanation as to why she provided these three names. (Tr. 57:7). And in any case, there was no direct evidence at hearing that any employees actually feared retaliation by the Employer, or that such a fear would have been objectively reasonable.

<sup>18</sup> That the Union planned to bring off-duty employees to the meeting was first mentioned in the Friday night April 13th email. (Tr. 38:18-20; 90:8-11; GC Exh. 6). There was no discussion of that previously. That the parties assumed the employees would be on-duty is made clear by the

Footnote continued on next page

Mapp called Morgenroth shortly thereafter. (Tr. 90:1-5). Morgenroth explained that Mapp's late night Friday e-mail had unilaterally and impermissibly changed the parameters of the meeting which the Employer had agreed to, and that she had never provided the list of names so that the Employer could arrange schedules as necessary. (Tr. 90:8-18). Morgenroth also told Mapp to call the off-duty employees whom she was planning to bring, and tell them there would be no meetings for them to attend. *Id.* Unbeknownst to Morgenroth, Mapp had been speaking to Morgenroth over speakerphone so that the two off-duty employees she was planning to bring (and whom she was meeting with over breakfast) could hear that there was no meeting for them to attend.<sup>19</sup> (Tr. 39:10-41:13; 69:20-22).

Despite being told that the Employer would not accept her last-minute changes to the format of the meetings, Mapp nonetheless brought two NOC shift employees (Ms. Geneva Henry and Ms. Elizabeth Shoaga) to the facility's 41st Street entrance. (Tr. 40:24-41:12; 91:3-6; GC Exh. 7). The front desk notified Morgenroth, and she went to the front desk to personally explain that there was no meeting for them to attend. (Tr. 72:13-15; 91:8-14).<sup>20</sup> However, Morgenroth also explained to them that Reynolds and she would be more than happy to meet with them individually that night during their shifts if they wanted, and that since they had no reason to be at the facility they would need to leave. (Tr. 72:14-21; 91:8-14). Henry and Shoaga left, and Mapp followed Morgenroth to Reynolds' office for a meeting. (Tr. 91:13-14).

---

Footnote continued from previous page  
previous e-mail trail in GC Exh. 6, where the parties discussed the need to reveal the names of the employees who would be attending so that coverage on the floor could be provided.

<sup>19</sup> At hearing, Mapp testified that she told Morgenroth over the phone that she had already invited off-duty employees to their meeting who were "on their way." (Tr. 40:23-24). However, at the time she said this, Mapp by her own account was still having breakfast with Henry and Shoaga. Indeed, Mapp testified that after her call with Morgenroth (during which she said was told "to get in touch with the workers and tell them don't bother to show up"), she then "head on over" to Piedmont Gardens with Henry and Shoaga. (Tr. 41:23-25).

<sup>20</sup> Of course, they were already aware that the Employer would not be meeting with them as they were surreptitiously listening to Mapp's previous cell phone conversation with Morgenroth as Mapp (without informing Morgenroth) had placed the call on speakerphone.

At the meeting between Mapp, Morgenroth, and Reynolds, Mapp agreed to schedule an individual employee meeting with Monique Higgins to discuss her concerns with the three of them (as they had originally agreed to do) for the next Wednesday, April 18, 2012 during her shift. (Tr. 92:17-25). Morgenroth contacted Higgins' supervisor to arrange for coverage, and the meeting was held as planned. *Id.*

### **III. ARGUMENT.**

The General Counsel has failed to prove any element of either alleged 8(a)(1) violations in the Complaint. Instead, the Employer has demonstrated that the factual record does not support either allegation, and that in any case the Parties' contract and access agreements privileged its actions, which were also otherwise reasonable and consistent with past practice.

#### **A. The Employer's Posting Of The Notice Inside The Break Room On May 3, 2012 Did Not Violate Section 8(a)(1) Because The Union Had No Statutory Right To Hold A Union Meeting In The Employer's Break Room For Any Purpose, Much Less An "Off-Hours" Meeting For Political Purposes.**

The Complaint alleges that the Employer "acting through Gayle Reynolds, at its Piedmont Gardens facility, denied Combined Unit employees access to a representative of the Union, who was scheduled to meet with individual employees in the employee break room, by posting a sign outside the break room door. . . ." (Emphasis added). This allegation is factually and legally faulty, as the employees had no Section 7 right to attend a union meeting on the Employer's premises, and in any event, the Employer did nothing more than enforce the Parties' contractual agreements on Union access.

#### **1. There Can Be No Section 8(a)(1) Violation As A Matter Of Law Because The Employees Have No Statutory Right To Have Access To Union Representatives On The Employer's Property.**

General Counsel alleges that the Employer violated Section 8(a)(1) by posting a single "No Union Meeting Here" notice in the break room on April 3, 2012. Our assessment of the validity of this allegation necessarily begins with a review of the Union's access rights under applicable Board law. For, if a union has no statutory right of access, the employees necessarily

have no corresponding Section 7 right to meet with union representatives on the employer's premises.

The Board and the courts have long recognized that notwithstanding a premises' status as a work place, employers nonetheless have property rights which must be respected. Of course, those rights are not absolute. Thus, in situations where access to the employer's premises is necessary to the union's fulfillment of its statutory obligations, an employer violates Section 8(a)(1) by refusing a union's *reasonable request* to enter onto the employer's premises at reasonable times and places to fulfill that statutory obligation. See *Holyoke Water Power Co.*, 273 N.L.R.B 1369 (1985). In that case, the employer operated a power plant with a "forced draft fan room" which housed two large fans that were extremely noisy. The union made a request of the employer that an industrial hygienist selected by the union be allowed to enter the room to survey potential health and safety hazards. The employer provided certain information, but refused the union's request for access.

The Board rejected the decision of the ALJ which had analogized a request for access to a request for information, which must be granted whenever the information was "relevant to" the union's statutory obligations. Instead, citing the U.S. Supreme Court in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Board reasoned that "an employer's right to control its property is a factor that must be weighed in analyzing whether an outside union representative should be afforded access to an employer's property." *Holyoke Water Power Co.*, 273 N.L.R.B. at 1370. In performing this balance between the employer's property rights and the employees' right to "proper representation," the Board applied the following analysis:

Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, this employer's property rights must yield to the extent necessary to achieve this end . . . On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access. *Id.*

Applying this careful balancing test, the Board concluded in that case that the “employees’ right to responsible representation entails the union’s obtaining accurate noise level readings for the fan room to ascertain the extent of the hazard and to suggest means of ensuring that employees are properly protected.” *Id.* Since accurate noise levels could not be obtained except by an industrial hygienist being granted access to perform readings, the Board held that the employer’s property rights must yield that particular case. However, the Board cautioned that the right was not absolute. “However, access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer’s operations.” *Id.*

In the instant case, General Counsel has made no showing, persuasive or otherwise, that the Union could only fulfill its representational duties by being allowed unannounced access to the Employer’s break room for three separate periods commencing at 7:30 a.m. and concluding at 6 p.m. for any purpose, much less the purpose of lobbying members to resist the siren song of a rival union. When one compares the Employer’s legitimate property interests (as the case law says we must do), this is not a close call. Faced with a confetti-embellished flyer announcing an all-day union “informational meeting”, the Employer was legitimately concerned that the Union’s apparent domination of the *only break room in the community* would not only interfere with the use and the enjoyment of the room by other employees, but it threatened the peace and tranquil enjoyment of the adjoining courtyard which was regularly used by the elderly residents of the community.<sup>21</sup> (Tr. 111:25-113:5).

In any event, even though the Board in *Holyoke Water Power Company* concluded that the employer’s property interest must yield in that case, the violation occurred when the employer denied the union’s *request* to schedule a hygienist at some future time. It did not hold

---

<sup>21</sup> Whether in hindsight the “informational meeting” turned out to be noisy and disruptive or not is irrelevant to whether the Employer had a legitimate concern over this announced meeting. At the time of the sole event alleged to constitute a violation in this case, which was in the morning of April 3, 2012, the Employer had no way of knowing for certain what would develop later in the day.

that an employer must put up with a situation such as the instant, where the union did not even give the Employer advance notification, much less seek permission to enter the premises. Rather it acted like it “owned the place” by commandeering this small but important common area. Since it has not been established that the “responsible representation” of the employees could only be achieved through such an unannounced union meeting on the Employer’s premises, the Employer’s property rights prevail and no violation of Section 8(a) (1) has been made out.

**2. The Employer’s Reasonable Enforcement Of The Contractual Access System Did Not Violate Section 8(a)(1).**

Of course, even if though there is no general statutory right of access to the Employer’s private property, a union and an employer can always to agree to grant the union *contractual* rights in excess of access rights guaranteed by law.<sup>22</sup> However, once agreed upon, the union is bound to follow applicable procedures upon which access was granted, and an employer does not violate Section 8(a)(1) when it denies access to a union that does not follow the appropriate procedures. *See Peck/Jones Constr. Corp.*, 338 N.L.R.B. 16 (2002). In *Peck/Jones Construction*, the parties’ collective bargaining agreement provided that “[t]he Business Agent of the Union shall be permitted on all jobs, but will in no way interfere with the men during working hours unless permission is granted by the individual employer.” *Id.* The employer had established rules requiring all visitors to sign in at the employer’s trailer and to have an escort with them at all times while on the job site. Two union representatives entered the job site, but did not sign in, nor were they escorted. The employer ejected them from the site. General Counsel alleged that in so doing, the employer violated 8(a)(1). The Board affirmed the ALJ’s dismissal of the complaint, reasoning that since there was nothing in the access provision that exempted union agents from the employer’s reasonable and non-discriminatory rules, the

---

<sup>22</sup> Mapp testified that the Ground Rules was a “document that was created by both sides to – there was some issues that happened while I was being the representative there, and both sides came up with this document as a way of smoothing –.” (Tr. 23:12-18). Mapp was unable to complete her sentence as Counsel for the General Counsel cut her off before she could finish her sentence.

employer was within its rights in ejecting the agents and no violation of 8(a)(1) had been established.

In the instant case, the terms of the contractual access privilege are set out in Section 1.4 of the expired collective bargaining agreement (G.C. Exh. 2, pp. 3-4) as well as the Ground Rules (G.C. Exh. 3), which also expressly incorporate the access rights in Section 1.4. Through these agreements, the Union has been granted certain limited contractual access rights, but only under specific conditions. The Union is granted the right to:

1. "Confer" with employees in the Break room.
2. During non-working times;
3. For the purpose of "ascertaining whether or not [the] Agreement is being observed" and to check on employee complaints;

However, the rights are subject to specific limitations and requirements;

1. The access as set out in the procedure may be granted only to a single union representative.
2. The access must take place between 9:00 a.m. and 6:00 p.m. unless prior arrangements are made with the Executive Director; and
3. The "privilege" must be "exercised reasonably".

Here, the record is undisputed that the Union completely ignored not merely unilaterally imposed employer procedures (as was the situation in *Peck/Jones Construction*), but the *actual provisions of the access agreement itself*. Also, Mapp did not merely violate a single contractual requirement of the access agreement; she violated virtually *all of them*. The Employer was well within its rights to attempt to limit Mapp's access to the terms of the agreed-upon access procedures. Accordingly, no violation of Section 8(a)(1) has been established.

a. **The Union Violated The Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Announcing An Informational Meeting With Employees.**

Section 1.4 of the Parties' contract provides that the Union representative is granted access to "check upon complaints of employees" and to "confer" with employees. (GC Exh. 2). In the instant case, the Union representative Mapp did far more than to announce that she was available in the break room to "confer" with employees about their problems or possible contract violations. Here, the Union's flyer (emblazoned with confetti) announced a "UNION MEETING" to last from 7:30 a.m. to 6:00 p.m. (in three parts) where employees would "come together." (GC Exh. 4). As Mapp candidly put it at hearing, the Flyer was announcing a union meeting "to get the members together and to talk about the Union, NUHW local stuff that was happening to them. . . ." (Tr. 32:14-17). Since the Union's flyer announced a meeting that went far beyond the parameters of the union contract and the Ground Rules, the Employer would have been permitted (consistent with Section 8(a)(1)) to eject Mapp from the premises. *See Peck/Jones Construction, Supra*. If ejection was permissible, *a fortiori*, the posting of a notice narrowly tailored to the specific violation is likewise permissible and not violative of the Act.

b. **The Union Violated The Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Not Limiting The Purpose Of The Conference To Ascertaining Whether The Contract Is being Observed And Listening To Employee Complaints.**

Section 1.4 of the Parties' contract states that the Union representative is allowed access to "confer" with employees "for the purpose of ascertaining whether or not the agreement is being observed and to check upon complaints of employees. . ." (GC Exh. 2). Additionally, the Parties' Ground Rules, which reiterates that Section 1.4 must be observed, repeats in almost identical terms, that the Union representative is granted access "for the purpose of ascertaining whether the contract is being observed and to check upon complaints and concerns of members." (GC Exh. 3). Taken together, Section 1.4 and the Ground Rules could not be clearer in placing a condition on the Union representative's access, namely that conferences with

employees must be *for the purpose of* ensuring the contract is being observed and to check on employee complaints and concerns.

Here, the Union's flyer promised a union meeting that was not being held for the purpose of listening to employee complaints or concerns. It was an "Informational Meeting" *for the purpose of* combating a rival Union's efforts to organize its members. The Union was not holding a meeting to determine whether the contract was being observed or to listen to employee complaints, but rather to rally employees to "take back our Union and our Signature!" (GC Exh. 4). The flyer itself leaves no doubt that this was the meeting's *impermissible* purpose: "SOME INDIVIDUALS ARE JEOPARDIZING OUR FUTURE AND WE NEED TO COME TOGETHER AND DISCUSS NEXT STEPS AND HOW WE CAN PUT AN END TO THE CONFUSION." Mapp herself bluntly confirmed at hearing that a primary purpose of the meeting was to discuss NUHW. (Tr. 32:14-15; 50:21-51:8).

In any case, even if Mapp planned to discuss other subjects (not mentioned on the flyer) in addition to NUHW, as she claimed at hearing, the inclusion of *any* discussions about a rival Union would violate the meeting purpose restriction in Section 1.4 and the Ground Rules. As a result, the Employer was perfectly within its rights to post the notice at issue.

**c. The Union Violated The Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Announcing A Meeting To Be Conducted By More Than One Union Representative.**

Section 1.4 of the contract and the Parties' Ground Rules could not be more clear in granting access to the Union on the condition that *only one* representative is permitted to meet with employees. Section 1.4 and the Ground Rules refer repeatedly to "a duly authorized Field representative," "[t]he Union Field Representative," "[t]he Field Representative," "[a] Union Field Representative" "[t]he field rep," in addition to exclusive use of singular personal pronouns to refer to this one representative. (GC Exhs. 2, 3). Here, the Union's flyer was subject to the reasonable interpretation by Reynolds that the Union was planning on having two representatives at its union meeting with employees. First, the flyer directs employees desiring "more

information” to contact “Our Union Reps Donna Mapp . . . or Sanjanette Fowler Brown.” (GC Exh. 4). Second, the flyer repeatedly invites employees to “Join Us,” in an apparent reference to the fact that both “Our Union Reps” would be in attendance.<sup>23</sup> Third, the total duration of the meeting from 7:30 a.m. to 6:00 p.m., and the seriousness of the subject to the Union, namely the encroachment by a rival union, reasonably suggested that the union meeting would have two “Union Reps” As listed on the flyer, in express violation of the contract and Ground Rules.

**d. The Union Violated The Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Being “Unreasonable” In The Exercise Of The Access Privilege.**

The Parties’ contract and Ground Rules provide that the Union Representative is only granted access under the express condition that “[t]his Privilege is exercised reasonably.” (GC Exh. 2, 3). Here, the Union’s poster invited *all* employees to a union meeting in the Employer’s 300 square foot break room. (Tr. 25:18; 107:20-108:2; 122:1-5; Resp. Exhs. 2-5). Mapp testified at hearing that the reason for lengthy duration of the meeting was to make sure all employees, on *every shift*, could attend. (Tr. 32:24-33:8). Indeed, the union meeting as advertised reasonably appeared to anticipate so many employees that the Union had two representatives assisting with its organization and/or execution (as discussed above). The meeting was also certain to be loud and energetic, given the tone of the poster (clad in confetti) in rallying employees to “take back our Union and our Signature!” (GC Exh. 4).

Reynolds justifiably concluded that it would be unreasonable for the Union to hold such a potentially energetic and large rally in the Employer’s only break room, a place used by other non-Union employees to relax during breaks, and located just down the hall from residents in Assisted Living or using the nearby beauty shop. As a result, Reynolds was reasonable in concluding that the union meeting, as advertised, was not a reasonable exercise of the access

---

<sup>23</sup> Although Mapp denied at hearing that Brown was going to be at the meeting, the use of the term “we” throughout her testimony and “Join Us” on the flyer she created indicates otherwise.<sup>23</sup> (Tr. 50:10-13).

privilege and would violate the conditions of the Union representative's access as specified in the contract and Ground Rules, thus justifying the remedial measure of posting the notice.

**e. The Union Violated the Access Provisions Of The Collective Bargaining Agreement And The Ground Rules By Scheduling Access Before 9:00 a.m. And After 5:00 p.m. Without Prior Management Approval.**

The union meeting, as advertised on the flyer, expressly violated the terms of the Ground rules because the flyer specified that it would also run in three parts from 7:30 a.m. to 6:00 p.m., even though Parties had expressly agreed to Ground Rules that provided that Mapp would only be permitted on-site from 9:00 a.m. to 5:00 p.m. without prior approval from or notice to Piedmont Gardens' Executive Director.<sup>24</sup> (GC Exhs. 3, 4). Here, there is no dispute that Mapp did not seek or otherwise receive such approval from Reynolds. (Tr. 30:13-15; 31:11-12; 111:23-113:5). As a result, Reynolds reasonably concluded that the meeting violated the Union representative's condition of access under the Ground Rules. *Id.*

**3. In Any Event, There Can Be No Violation As There Was No Actual Interference With The Employees' Ability To Confer With Union Representative Mapp.**

Despite the fact that the Union's planned meeting would violate the Parties' contract, access agreements, and past practice, and would also cause an undue disruption to residents' and other staff's enjoyment of the facility, Union members continued to meet with Mapp in the break room on April 3, 2012. (Tr. 34:22-32; 35:10-14). Thus, the Complaint's allegation that the Employer "denied" employees "access to a representative of the Union" is completely without factual basis.

Contrary to the allegation in the Complaint that the notice was posted outside the break room, it is undisputed that Reynolds posted the "no meeting" sign *inside* the break room right

---

<sup>24</sup> Although the Ground Rules specify that "[t]he Parties understand that the field representative *may need* to access the Communities during late night or early morning hours to confer with NOC shift employees," such permissive language is clearly subject to the final provision in the Ground Rules which states "[i]f the field rep believes that reasonable visits outside of these parameters are necessary, the field rep is encouraged to speak with the Executive Director or designee *to obtain permission* for such additional visits." (GC Exh. 3) (Emphasis added).

next to Mapp, who continued to meet with employees. (Tr. 33:22-34:3; 114:1-14). It is undisputed that Mapp had handed out flyers inviting employees to the meeting the day before inviting employees to the break room. (Tr. 31:8). Thus, the employer's posting of a flyer in the break room could not have had (and did not have) any impact on denying employees access to their representative. Also, Employees could not see the sign until they were already in the break room. If employees came to the break room to meet with Mapp, they would have seen Mapp and been able to meet with her. And in fact, employees did continue to meet with Mapp after Reynolds posted the no meeting sign.<sup>25</sup> (Tr. 34:22-23).

**B. The Employer's Unambiguous Off-Duty Employee Access Policy Is Valid And Is Applied In A Lawful, Non-Discriminatory Way.**

The Complaint alleges that the Employer violated Section 8(a)(1) of the Act by maintaining Rule 33 of its Chart of Infractions, which governs the access rights of off-duty employees. It is also alleged that the Employer violated Section 8(a)(1) by enforcing this rule in such a way that allows off-duty employees are able to enter the Employer's facilities for reasons such as picking up paychecks or meeting with HR while barring access to off-duty employees seeking access for other purposes. Essentially, the General Counsel alleges that the Employer's off-duty access policy is facially invalid and that it was discriminatorily applied. (Tr. 8:2-8).

The evidence introduced at hearing shows the exact opposite. Namely, that the Employer has an unambiguous and narrowly-circumscribed access policy that affords it no discretion in granting off-duty employees access, and that its refusal on August 16, 2012 to meet with two off-duty employees, due to the Union's refusal to satisfy the agreed-upon conditions for the meeting, shows an even-handed (not disparate) application of this policy by prohibiting access to off-duty employees who did not meet any of the three exceptions to the off-duty access policy.

---

<sup>25</sup> As a result of these conferences, Mapp received feedback from employees which she then used to request a meeting with the Employer, the same meeting that is the subject of the second alleged 8(a)(1) violation in the present case.

1. **The Employer's Off-Duty Employee Access Policy Is Valid Under *Tri-County Medical Center* Because It Unambiguously (And Without Employer Discretion) Prohibits Access Unless Off-Duty Employees: (1) Decide To Wait In Reception While Their Checks Are Brought To Them, (2) Decide To Wait In An Enclosed Vestibule Outside Reception Before NOC Shift Begins, Or (3) Decide To Attend A Scheduled Meeting With HR.**

The Board held in its seminal decision *Tri-County Medical Center*, 222 N.L.R.B. 1089, 1089 (1976) that an employer's off-duty access policy is valid if it "(1) limits access solely with respect to the interior of the plant and other working area; (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." (Emphasis added).

Counsel for the General Counsel's apparent theory is that the Employer's off-duty employee access policy violates the third prong of *Tri-County Medical Center* in that it allows limited exceptions for picking-up paychecks, meeting with HR or waiting in the vestibule outside reception before NOC shift begins.<sup>26</sup> However, under applicable Board precedent, these narrow and exceptions do not render the Rule 33 unlawful.

In *Tri-County Medical Center*, the Board held that an employer's off-duty access policy was invalid as it applied to an off-duty employee who was distributing union literature outside the facility.<sup>27</sup> 222 N.L.R.B. at 1090. Subsequent Board decisions interpreting *Tri-County Medical Center* have held that off-duty access rules are lawful so long as any exceptions were unambiguous and narrowly defined. For example, in *Southdown Care Ctr.*, 308 N.L.R.B. 225, 231-32 (1992), the Board upheld an employer's off-duty access rule because it was limited to instances where an off-duty employee was visiting friends or families who were residents.

---

<sup>26</sup> Piedmont Gardens' HR Director for the past 13 years (Morgenroth) provided uncontroverted testimony that the three exceptions specified above are the only exceptions to the off-duty employees. (Tr. 81:17-85:23). The General Counsel provided no evidence indicating otherwise.

<sup>27</sup> The Board's decision in *Tri-County* was based on the U.S. Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), which invalidated an employer's blanket prohibition against solicitation. As the Board noted in *Saint John's Health Center*, 357 N.L.R.B. No. 170 (2011), Board's off-duty access jurisprudence focuses on protecting union activity at employer facilities (and preventing discrimination against such activity) and not simply protecting off-duty employees' access for its own sake.

In its more recent decisions, the Board has focused on ensuring that access policies do not provide the employer with unchecked discretion to arbitrarily withhold access rights. In *Saint John's Health Center*, 357 N.L.R.B. No. 170 (2011), the Board invalidated an employer's access policy because it provided an ambiguous (and wholly undefined) exception for "health-center sponsored events." The Board interpreted this policy to mean "[i]n effect, the Respondent is telling its employees, you may enter the premises after your shift except when we say you can."

Similarly, in *Sodexo America*, 358 N.L.R.B. No. 73 (2012), the Board invalidated an employer's "ambiguous" no-access policy that provided an exception for "hospital-related business," which the Board interpreted mean that the Employer had "free reign to set the terms of off-duty employee access." In invalidating this rule, however, the *Sodexo* Board noted that not all off-duty access policies with any exceptions were invalid, citing that case of *Southdown Care Center* as an example, but instead only those off-duty access policies that gave the employers "unfettered discretion." See also *Marriot Int'l*, 359 N.L.R.B. No. 8, fn. 2-3 (2012) (invalidating off-duty access policy because it afforded the employer with "broad, standard-less" discretion, but reiterating that an off-duty access policy that had "narrow" exceptions would be valid so long as it they were not "not subject to the complete discretion of the employer.") (Emphasis added).<sup>28</sup>

Here, as in *Saint John's Health Center* and its progeny, the Employer's off-duty access policy is unambiguous, narrowly-tailored, and affords the Employer no "unfettered discretion" to grant or withhold access to off-duty employees on its whim. The Employer's policy strictly prohibits access to all off-duty employees unless *an employee decides* to invoke one of three exceptions to the access policy. First, off-duty employees can decide to wait in the 41st Street entrance lobby while their paycheck is brought to them by a manager. Second, off-duty

---

<sup>28</sup> To the extent that *Sodexo*, *Marriot Int'l* or any other subsequent cases are read to establish an absolute rule that a no-access rule is valid if it allows for no exceptions, they are wrongly decided and should not be followed. The Act does not require employers to choose between an unworkable, and indeed ridiculous, no-access rule or no rule at all.

employees can decide to wait in the vestibule outside the 41st Street entrance before their NOC shift begins. And third, off-duty employees can decide to schedule an appointment with HR, for example to discuss benefits or receiving reasonable accommodations due to disability.

Each of the above exceptions to the off-duty access policy is reasonably necessary for the Employer's effective operation of its facility and to provide comfort and convenience to the employees while ensuring there is not "uneven enforcement of the [access] rule." (Resp. Exh. 1). Unlike *Saint John's Health Center*, the Employer is not telling employees "you may not enter the premises after your shift except when we say you can," and unlike *Sodexo America*, the Employer's off-duty access policy does not afford it "unfettered discretion." Rather, like *Southdown Care Center*, where the Board approved of an off-duty policy that permitted employees to visit family and friends who were residents, the Employer's policy includes exceptions for the convenience and safety of its employees while protecting the Employer's right to ensure that its facility is secure, safe, and efficiently operated.

**2. In Any Event, The Promulgation Of Rule 33 Does Not Violate Section 8(a)(1) As The Union Agreed To Its Terms.**

Even assuming *arguendo* that Rule 33 is invalid on its face, continued promulgation of the Rule is nonetheless permitted, as the evidence is undisputed that the Union was aware of the Rule, never objected to it and indeed actively participated in and acquiesced to modifications and exceptions to the rule in specific situations. In August of 2011, the Union itself actively engaged in fine-tuning the Access policy with the Employer so that NOC shift employees could wait in the vestibule outside the 41st Street entrance before their shift began for safety and convenience reasons. (Tr:100:6-15; Resp. Exh. 1). This resulted in a draft "Supplement To Access Rule" which was sent via e-mail to Mapp on August 24, 2011 (Er. Exh. 1). Thus, whether the Rule is invalid on its face or not is not relevant, as the union has agreed to the terms and thus has waived any defects. See *Phillips Pipe Line Co.*, 302 N.L.R.B. 732, 737 (1991) (upholding union's right to agree to settlement that waived employees' rights to file a charge); *Energy Coop. Inc.*, 290 N.L.R.B. No. 78 (1988) (finding that strike settlement validly waived sick and disabled

employees' rights to receive benefits during strike); *Amcar Div. of ACF Indus., Inc.*, 247 N.L.R.B. 1056 (1980) (upholding union's right to enter into "no-strike" agreement).

**3. The Employer Even-Handedly Applied Its Off-Duty Access Policy, And In Any Case, The Off-Duty Employees At Issue Here Had No Reason To Be At Piedmont Gardens After The Employer Notified Their Union Representative That Employer Would Not Voluntarily Meet With Them As Group While They Were Off-Duty.**

In order to prove the Complaint's allegation of discriminatory enforcement of the Employer's off-duty access rule, the General Counsel was required to show examples where the Employers refused access to off-duty employees conducting Union activities as opposed to off-duty employees conducting similar non-union related activities. See *Tri-County Med. Ctr.*, 222 N.L.R.B. at 1092 (holding that the General Counsel had failed "to establish by a preponderance of evidence its claim of disparate enforcement of the rule."). The General Counsel has failed to provide any such an example here. Instead, the Employer provided uncontroverted evidence that it strictly applies its off-duty access policy. Additionally, in any case, the off-duty employees at issue here had no reason whatsoever to be at the Employer's facility and they were justifiably refused access as a result.

**a. The Employer Even-Handedly Applies Its Off-Duty Access Policy.**

Counsel for the General Counsel attempted to put on some limited, conclusory testimony that the Employer's enforcement of the access rule was unsteady and subject to lax enforcement. However, this testimony is not persuasive in light of the overwhelming contrary evidence of strict enforcement. Morgenroth provided reliable and uncontroverted testimony that the Employer strictly applies its off-duty access policy when it is aware that off-duty employees are seeking access. (Tr. 81:21-85:23). Mapp's testimony to the contrary is unpersuasive.

First, Mapp's testimony that she met with "off-duty" employees occasionally is not reliable as it is apparent that she merely assumed without factual basis that they were off-duty. In

fact, many of the employees she identified as “off-duty” were actually on-duty because she stated that they were at the facility to receive a “physical” or attend an “in service.”<sup>29</sup> (Tr. 47:5-9). In both such cases, the employees would have been receiving pay and considered “on duty.” (Tr. 82:3-83:3).

Second, Mapp’s assertion that she has met with an unspecified number of off-duty employees in the past who were picking up checks or meeting with HR is irrelevant absent any evidence that the Employer knew of or at least should have known about the alleged incidents.<sup>30</sup> Indeed, there was no indication that her meetings with an unspecified number of off-duty employees lasted more than a few minutes or were otherwise open and notorious: “Several occasions, I’ve been in the break room having meeting or conversations with one-on-one, and somebody that was off would come in and say hi. They might talk about an issue. And they would be off and come to the building for a different reason.” (Tr. 46:24-47:3).

**b. The Off-Duty Employees At Issue Here Were Not Granted Access Because They Had No Scheduled HR Meeting To Attend And Had No Other Reason (Valid Or Otherwise) To Be At the Piedmont Gardens.**

The only evidence of application of the Rule to exclude employees was the Employer’s refusal to meet with off-duty employees Geneva Henry and Elizabeth Shoaga on the morning of April 16, 2012. There is no dispute that the off-duty employees in question arrived at the Employer’s facility after Morgenroth had told their Union Representative (while they listened

---

<sup>29</sup> Meeting with employees while on-duty was consistent with the Employer’s practice of ensuring that employees are paid for time spent engaging in work-related obligations, such as mandatory meetings, in-services, and physicals. (Tr. 82:3-83:3).

<sup>30</sup> Henry’s testimony that she had met with Mapp an unspecified number of times for unspecified durations while off-duty is not credible, as her testimony was conclusory and completely lacking in specificity. In any event, Henry did not testify that the Employer was ever aware that she did so, nor is it likely that the Employer could have been aware given that she apparently met with Mapp at the end of her NOC shift. In *Tri-County Medical Center*, the Board held that the General Counsel failed to prove disparate enforcement of an off-duty no-solicitation rule where, as here, there was evidence that the employees at issue were not in fact off-duty, and that there was no evidence that management had been aware of the occasional violations of the rule, not resulting in discipline, which had been raised at hearing. 222 N.L.R.B. at 1092.

over Mapp's cell phone's speakerphone) that the Employer was unwilling to meet with them and accordingly there would be no meeting for them to attend. (Tr. 40:21-41:12; 90:15-24). The Employer had only agreed to meet with on-duty employees, *provided that* the Union first provide employee names so that coverage could be provided and provided that the meetings were in a one-on-one format so that the wide range of individual issues Mapp had in her April 3rd email could be addressed efficiently. There is no dispute that Mapp agreed to these terms, despite her late efforts to suggest a new format. (GC Exh. 6).

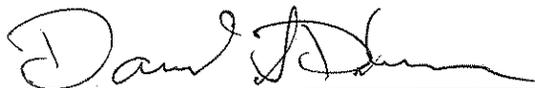
There is also no dispute that Mapp satisfied none of terms for the meeting that she had agreed to, and that as a result the Employer was under no duty to meet with off-duty employees and Mapp. *See Charleston Nursing Ctr.*, 257 N.L.R.B. 554, 555 (1981) (holding that an employer has no general obligation to meet with employees when there is no agreement providing otherwise, and that it is not illegal for an employer to refuse to deal with employees except on an individual basis). As a result, the Employer was justified in denying access to the off-duty employees who had no meeting to attend and who offered no valid reason (or even interest in) entering the facility.

#### IV. CONCLUSION.

For each and every of the above reasons, the Employer respectfully requests that the Complaint be dismissed.

Dated: December 18, 2012

Respectfully submitted,



---

DAVID S. DURHAM  
ARNOLD & PORTER LLP  
Three Embarcadero Center, 7th Floor  
San Francisco, California 94111-4024  
Attorneys for Respondent/Employer

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

# **ATTACHMENT A**



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, D.C. 20570

August 27, 2012

MANUEL A. BOIGUES, ATTORNEY  
WEINBERG ROGER & ROSENFELD  
2629 FOOTHILL BLVD STE 357  
LA CRESCENTA, CA 91214-3511

Re: Piedmont Gardens  
Case 32-CA-078119

Dear Mr. Boigues:

Your appeal from the Regional Director's refusal to issue complaint has been carefully considered. The appeal is denied substantially for the reasons in the Regional Director's letter of July 30, 2012.

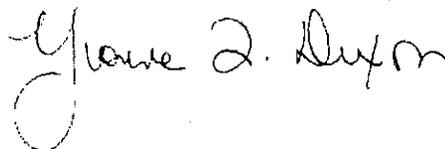
Contrary to your contentions on appeal, the Regional investigation did not disclose sufficient evidence that the Employer's denial of access to a Union representative was unlawful. The evidence presented established that the past practice has been to allow only one Union representative at a time in the facility to meet with employees. This position is supported by the Employer's reasonable interpretation of the collective bargaining agreement which provides access to a representative. While the Union presented evidence that it has assigned more than one representative to the facility, it did not provide sufficient corroborative evidence that the Employer has allowed more than one representative to enter the facility at the same time. Based on the evidence presented, the Employer's denial of access to one Union representative while another was already in the facility is not unlawful.

Contrary to the assertions on appeal, the Regional Office's investigation was deemed adequate. Thus, all parties were given the opportunity to present their evidence and position on the case, and you accepted this opportunity. The Regional Director's decision to dismiss the case was based solely on the evidence presented and the relevant case law. Although you have alleged that the Regional Office did not allow you the opportunity to provide additional evidence, a review of the Regional file revealed that the Union was given ample opportunity to provide evidence to support its position and failed to do so. Accordingly, further proceedings are unwarranted.

Sincerely,

Lafe E. Solomon  
Acting General Counsel

By:



---

Yvonne T. Dixon, Director  
Office of Appeals

cc: WILLIAM A. BAUDLER  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS  
BOARD  
1301 CLAY ST STE 300N  
OAKLAND, CA 94612-5224

GILBERT J. TSAI, ESQ.  
ARNOLD & PORTER LLP  
3 EMBARCADERO CENTER 7TH FL  
SAN FRANCISCO, CA 94111-4024

GAYLE REYNOLDS  
PIEDMONT GARDENS  
110 41ST ST  
OAKLAND, CA 94611-5250

SUSIE MIRANDA  
SERVICE EMPLOYEES INTERNATIONAL  
UNION, UNITED HEALTHCARE  
WORKERS - WEST  
560 THOMAS L. BERKLEY WAY  
OAKLAND, CA 94612-1602

mjb



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, D.C. 20570

August 7, 2012

MANUEL A. BOIGUES, ATTORNEY  
WEINBERG ROGER & ROSENFELD  
1001 MARINA VILLIAGE PK.WY STE 200  
ALAMEDA, CA 94501

Re: Piedmont Gardens  
Case 32-CA-078119

Dear Mr. Boigues:

Receipt of your appeal in the above matter is acknowledged. Upon receipt of the investigative file from the Regional Director, the appeal will be assigned for processing. You may be assured your appeal will receive careful consideration and that you and all interested parties will be advised, as soon as possible, of our decision.

Sincerely,

Lafe E. Solomon  
Acting General Counsel

By:

---

Yvonne T. Dixon, Director  
Office of Appeals

cc: WILLIAM A. BAUDLER  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS  
BOARD  
1301 CLAY ST  
OAKLAND, CA 94612-5224

GAYLE REYNOLDS  
PIEDMONT GARDENS  
110 41ST ST  
OAKLAND, CA 94611-5250

SUSIE MIRANDA  
SERVICE EMPLOYEES  
INTERNATIONAL UNION, UNITED  
HEALTHCARE WORKERS - WEST  
560 THOMAS L. BERKLEY WAY  
OAKLAND, CA 94612-1602

GILBERT J. TSAI, ESQ.  
ARNOLD & PORTER LLP  
THREE EMBARCADERO CTR 7TH FL  
SAN FRANCISCO, CA 94111-4024

mab



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

REGION 32  
1301 CLAY ST  
STE 300N  
OAKLAND, CA 94612-5224

Agency Website: [www.nlr.gov](http://www.nlr.gov)  
Telephone: (510)637-3300  
Fax: (510)637-3315

July 30, 2012

MANUEL A. BOIGUES, Attorney  
WEINBERG, ROGER & ROSENFELD  
1001 MARINA VILLAGE PKWY  
STE 200  
ALAMEDA, CA 94501-6430

Re: Piedmont Gardens  
Case 32-CA-078119

Dear Mr. BOIGUES:

We have carefully investigated and considered your charge that Piedmont Gardens has violated the National Labor Relations Act.

**Decision to Dismiss:** Your charge alleges that the Employer violated Section 8(a)(1) and (5) of the Act by failing to allow locked out employee and Union Representative Sanjannette Fowler access to its facility on April 2, 2012. The investigation disclosed that the parties' expired collective-bargaining agreement contains an access provision which states that "a" duly authorized field representative of the Union shall have access to the Employer's facility. The investigation further disclosed that from time to time there has been more than one Union representative assigned to the Employer's facility. The dispute at the heart of this investigation is whether the access provision allows more than one representative to be present at the facility at the same time. As to past practice, the investigation revealed insufficient evidence that the parties have an agreed-upon past practice to allow more than one Union representative access to the Employer's facility at the same time. Thus, there was evidence that when the Employer was aware that there was more than one Union representative present at its facility at the same time it required one representative to leave, and the Union acquiesced. On April 2, 2012, a Union representative was already at the facility on a visit in the break room when newly appointed Union Representative Fowler also arrived for a visit, at which time the Employer denied her access.

Based on the foregoing, there is an insufficient basis from which to conclude that the Employer, when it denied Fowler access on April 2, 2012, deviated from established past practice as regards the access rights of union representatives. Access rights on the part of union representatives are a matter of contractual agreement between the parties, and absent such an agreement, union representatives do not ordinarily have a right of access to an employer's private premises. Accordingly, insofar as Fowler was seeking access to the Employer's premises as a Union representative, it cannot be concluded that

her denial of access on April 2, was unlawful. Moreover, the evidence was insufficient to establish that the Employer categorically denied Fowler access to its facility because she is also a locked out employee in the parties' ongoing labor dispute. Thus, even assuming that the Employer would not be free to deny her access as a duly designated Union representative on that basis alone, there is no evidence that Fowler has returned to the facility to gain access since April 2, 2012, and, therefore, there is no evidence that she has ever been denied access when she was the only Union representative seeking access to the facility. Accordingly, I am dismissing this charge.

**Your Right to Appeal:** You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at [www.nlr.gov](http://www.nlr.gov). However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision to dismiss your charge was incorrect.

**Means of Filing:** An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.

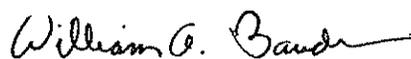
**Appeal Due Date:** The appeal is due on August 13, 2012. If you file the appeal electronically, we will consider it timely filed if you send the appeal together with any other documents you want us to consider through the Agency's website so the transmission is completed by **no later than 11:59 p.m. Eastern Time** on the due date. If you mail the appeal or send it by a delivery service, it must be received by the Office of Appeals in Washington, D.C. by the close of business at **5:00 p.m. Eastern Time** or be postmarked or given to the delivery service no later than August 12, 2012.

**Extension of Time to File Appeal:** Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to [www.nlr.gov](http://www.nlr.gov), click on **File Case Documents**, enter the NLRB Case Number and follow the detailed instructions. The fax number is (202)273-4283. A request for an extension of time to file an appeal **must be received on or before** August 13, 2012. A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

**Confidentiality:** We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA).

Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,



WILLIAM A. BAUDLER  
Regional Director

Enclosure

cc GENERAL COUNSEL  
OFFICE OF APPEALS  
FRANKLIN COURT BUILDING  
NATIONAL LABOR RELATIONS  
BOARD  
1099 14<sup>TH</sup> STREET, NW  
WASHINGTON, DC 20570

GAYLE REYNOLDS  
PIEDMONT GARDENS  
110 41ST ST  
OAKLAND, CA 94611-5250

GILBERT J. TSAI, ESQ.  
ARNOLD & PORTER LLP  
7TH FLOOR, THREE EMBARCADERO  
CENTER  
SAN FRANCISCO, CA 94111-4024

SUSIE MIRANDA  
SERVICE EMPLOYEES  
INTERNATIONAL UNION, UNITED  
HEALTHCARE WORKERS - WEST  
560 THOMAS L BERKLEY WAY  
OAKLAND, CA 94612-1602

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

**APPEAL FORM**

To: General Counsel  
Attn: Office of Appeals  
National Labor Relations Board  
Room 8820, 1099 - 14th Street, N.W.  
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

---

Case Name(s).

---

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

---

*(Signature)*

**PROOF OF SERVICE**

1. I am over eighteen years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 3 Embarcadero Center, 7<sup>th</sup> Floor, San Francisco, CA 94111.

2. On December 18, 2012, I served the following document:

POST-HEARING BRIEF OF EMPLOYER/RESPONDENT AMERICAN BAPTIST HOMES OF THE WEST d/b/a PIEDMONT GARDENS

3. I served the above-specified document on the following persons:

Judith H. Chang, Esq.  
[judy.chang@nlrb.gov]  
National Labor Relations Board, Region 32  
Representing the General Counsel

Manuel A. Boigues, Esq.  
[mboigues@unioncounsel.net]  
Weinberg, Roger & Rosenfeld  
Representing SEIU-UHW West

4. The above-specified document was served by the following means:

**By Electronic Service (E-mail)**. In accordance with the National Labor Relations Board's Rules and Regulations, I transmitted the above-specified document and an unsigned copy of this declaration to the persons at the email addresses listed in Item 3 on December 18, 2012 before 11:59 p.m. PST.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 18, 2012

Signature: \_\_\_\_\_

  
Christopher Foster