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

Advice Memorandum

REVISED

DATE: August 13, 2012

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: U.S. Security Associates, Inc.
Cases 4-CA-66069, 2-CA-65325, 22-CA-63206

512-5012-0125
512-5012-0133
512-5012-0133-1600
512-5012-0133-5000
512-5012-1700

The Region submitted these cases for advice on whether the Employer violated Section 8(a)(1) by maintaining facially unlawful work rules in its Security Officer's Guide, including rules regulating employee use of social media.[1] Initially, we agree with the Region that under current Board law, the Employer's use of the phrase "on duty" in several challenged rules, as opposed to "working time," make them unlawfully ambiguous and overbroad. Further, as detailed below, while we agree that several of the challenged rules are facially unlawful, we conclude that employees would not reasonably construe certain other rules to prohibit Section 7 activity.

BACKGROUND

U.S. Security Associates, Inc. ("the Employer") provides security services to various customers across the country. It employs over 46,000 employees in 45 states to provide these services to over 4,700 clients. In October 2010, the Employer issued its revised employee handbook, called the Security Officer's Guide ("Guide"), which contains the challenged rules discussed below. In mid-2011, the Union began a campaign to organize the Employer's guards working at several facilities in and around Philadelphia,

[1] Region 4 is coordinating the processing of all charges filed by Service Employees Local 32BJ ("the Union") against the Employer. Although we have considered the analysis and recommendations from each Region involved in these cases, references to "the Region" denote only Region 4.

New York City, and Newark.[2] In fall 2011, the Union filed several charges alleging that the Employer violated § 8(a)(1) by maintaining facially unlawful rules in the Guide that interfered with its employees' right to engage in § 7 activities.

ACTION

In determining whether an employer has violated § 8(a)(1) by maintaining a work rule, the first issue is "whether the rule *explicitly* restricts activities protected by Section 7."[3] If it does, the rule is unlawful and the employer has violated § 8(a)(1) by maintaining it. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[4] Regarding the first prong,

> [t]he ultimate question in these cases is whether employees reading [the disputed rule] would reasonably construe [it] as precluding them from discussing their terms and conditions of employment with other employees or a union, or would they reasonably understand that the [disputed rule] was designed to protect their employer's legitimate proprietary business interests.[5]

In making this determination, rules are to be given a reasonable reading, particular phrases are not to be read in isolation, and there is no presumption of improper interference with employee rights.[6] However, "any

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[2] The Union also has filed charges in related cases alleging that the Employer violated § 8(a)(3) by discharging guards for supporting the organizing campaign. This memorandum does not deal with those allegations.

[3] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (emphasis in original).

[4] *Id.* at 647. Accord *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007), enforcing in relevant part 344 NLRB 809, 809 (2005).

[5] *Cintas Corp. v. NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007) (modifications in original), enforcing 344 NLRB 943, 943, 946 (2005).

[6] See *Lutheran Heritage Village-Livonia*, 343 NLRB at 646; *Longs Drug Stores California*, 347 NLRB 500, 500 (2006).

ambiguity in the rule must be construed against the [employer] as the promulgator of the rule."[7] Moreover, work rules that are patently ambiguous concerning their application to § 7 activity are unlawful absent some clarifying language indicating that the rule was not meant to restrict the exercise of § 7 rights.[8] Conversely, work rules that clarify their scope by including examples of non-Section 7 or clearly illegal conduct that is prohibited are lawful.[9] We apply these principles to the challenged rules below.

1. Rule 2.3.16: *No insignia, emblems, buttons, or items other than those issued or authorized by USA will be worn on or with the uniform while on duty.*[10]

First, we agree with the Region that this rule is unlawfully overbroad because employees would reasonably construe the phrase "on duty" to prohibit them from wearing Union paraphernalia while on breaks or meal periods. An employer violates § 8(a)(1) by maintaining a rule that prohibits employees from wearing union paraphernalia during non-working time.[11] The Board has held that employees could reasonably understand a work rule prohibiting conduct while "on duty" to mean "from the time that they came on

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[7] *Lafayette Park Hotel*, 326 NLRB 824, 828 & n.22 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

[8] See, e.g., *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (2011) (finding rule that subjected employees to discipline for "inability or unwillingness to work harmoniously with other employees" unlawful absent definition of phrase "work harmoniously").

[9] See, e.g., *Tradesmen Intl.*, 338 NLRB 460, 461 (2002) (finding rule prohibiting conduct "disloyal, disruptive, competitive, or damaging to the company" lawful; employees would not construe rule to prohibit § 7 activity because it specified such conduct included illegal acts in restraint of trade or concurrent employment with another organization); *Stevens Constr. Corp.*, 350 NLRB 132, 142 & n.5 (2007) (rule limiting "employees' involvement in certain outside activities" lawful because it specified type of prohibited outside activities, such as employment with competitor, which did not implicate § 7 activities).

[10] The challenged language in each rule is italicized.

[11] See, e.g., *Albertsons, Inc.*, 272 NLRB 865, 866 (1984) (finding unlawfully overbroad rule stating that "[n]one of our employees are allowed to wear buttons provided by any union" because it applied to non-selling areas and non-working time).

duty or began their shift, including during breaks or meal periods."[12] For example, in *Central Security Services*, the employer violated § 8(a)(1) by maintaining an overbroad rule that stated, "[o]nce on duty, the carrying and reading of any type of literature is strictly forbidden."[13] Thus, the Employer's complete ban on Union insignia and buttons while employees are "on duty" violates § 8(a)(1) because employees would reasonably construe the rule to restrict § 7 activities during breaks and meal periods on their shift.

Second, in alleging that this aspect of the rule is unlawful, the Region should not ask the Board to reconsider past precedent and conclude that the phrases "on duty" and "working time" are the same. For over 70 years, the Board has clarified the principle that "working time is for work"[14] by construing the language of various work rules so that § 7 rights are preserved. Thus, the Board has concluded that, in addition to "on duty," phrases such as "company time,"[15] "business hours,"[16] and "working hours"[17] are ambiguous and can reasonably be construed to include an employee's non-working time after a shift begins. Therefore, since the Board has already clearly decided that "on duty" is so general that it cannot be equated with the concept of "working time," the Region should argue only that there is a violation based on current Board law.[18]

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[12] *Central Security Services*, 315 NLRB 239, 243 (1994). See also *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 9 (1999) (finding unlawfully overbroad rule prohibiting production and maintenance employees from "[s]oliciting or selling on company premises except when all concerned are relieved from duty"), enfd. in relevant part 230 F.3d 286, 293 (7th Cir. 2000) ("Such a rule would prohibit protected activities even during breaks and lunches, and would be presumptively unlawful.").

[13] 315 NLRB at 243 (involving rule that applied to court security officers).

[14] *Our Way, Inc.*, 268 NLRB 394, 394 (1983) (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943)).

[15] See, e.g., *Southeastern Brush Co.*, 306 NLRB 884, 884 n.1 (1992).

[16] See, e.g., *Ichikoh Mfg.*, 312 NLRB 1022, 1022 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994) (consent judgment).

[17] See, e.g., *Nations Rent*, 342 NLRB 179, 186 (2004); *Our-Way, Inc.*, 268 NLRB at 394-95.

[18] This conclusion is not undercut either by the Board's or the court's decision in *Guardsmark, LLC*, 344 NLRB 809, 810-11 (2005), enfd. in relevant part 475 F.3d 369, 374-75, 377 (D.C. Cir. 2007). The aspects of the work rules (in force while employees were "on duty") that were challenged in that case involved prohibitions that could only have applied to non-working time.

Finally, although prior Advice memorandums may have indicated otherwise, we conclude that the Region should also allege that this rule is unlawfully overbroad because it imposes a complete ban on the display of Union buttons while employees are on working time. Section 7 entitles employees to wear union insignia in the workplace absent such special circumstances as "situations where [the] display of union insignia might . . . 'unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.'"[19] The Employer contends that, as a security service, it needs to have a neatly uniformed employee as part of its public image. But mere customer exposure to union insignia, a requirement that employees wear a uniform, or a prohibition on all types of buttons are not special circumstances.[20] The Employer's rule bans all insignia, emblems, or buttons no matter how inconspicuous,[21] and the Employer has not demonstrated that the appearance and message of all union insignia reasonably tends to interfere with its public image or its ability to convey the air of authority needed to properly perform the duties of a security officer.[22] Indeed, there is evidence to suggest that other security employers routinely permit the wearing of some kinds of union pins or buttons on employee uniforms. Since the rule prohibits the wearing of any kind of union insignia, it is unlawfully overbroad.

Moreover, the Advice memoranda in *Hannon Security Services*, Case 18-CA-18047, Advice Memorandum dated August 11, 2006, *Allied Barton Security Services*, Cases 4-CA-34212, et al., Advice Memorandum dated March 3, 2006, and *Pinkerton's, Inc.*, Cases 18-CA-16257-1, et al., Advice Memorandum dated January 3, 2003, did not directly address this issue.

[19] *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007). See also *Meijer, Inc.*, 318 NLRB 50, 50 (1995), enfd. 130 F.3d 1209, 1217 (6th Cir. 1997), rehg. and rehg. en banc denied March 4, 1998; *Inland Counties Legal Services*, 317 NLRB 941, 941 (1995) ("Special circumstances exist if an employer can show by substantial evidence that the wearing by its employees of insignia for a union adversely affected its business . . . and that, because of deleterious effects on these interests, the employer's ban on the wearing of such insignia outweighs the employees' statutory right to do so.").

[20] See *P.S.K. Supermarkets*, 349 NLRB at 35 (finding unlawfully overbroad rule stating "[n]o pins or buttons other than those issued by [employer] to promote our programs").

[21] See *Eckerd's Market,* 183 NLRB 337, 338 (1970).

[22] *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068, 1072-73 (6th Cir. 1994).

2. Rule 3.1.22: *Security Officers shall not act other than respectfully to any other Security Officer or to any other employee of USA or the client to which they are assigned.* The use of threatening and/or abusive, demeaning, vulgar and profane language toward another, on or off duty, is prohibited, as is any threat of violence or actual violent act."

We conclude that employees would not reasonably construe this rule's requirement to "not act other than respectfully" toward coworkers and clients as prohibiting § 7 activity. The first sentence of the rule must be read in tandem with the second,[23] which prohibits employee language and conduct that the Board has concluded employers have a legitimate right to restrict, including threatening, abusive, and profane language and actual violence.[24] These types of language and conduct "are not inherent aspects of union organizing or other Section 7 activities."[25] In this context, employees would conclude that acting "respectfully" only means that they should not engage in the types of conduct specified, and thus the rule does not interfere with the exercise of § 7 rights.[26]

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[23] See, e.g., *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (finding unlawful communication rule that prohibited disclosure of confidential information; rule had to be read "in tandem" with confidentiality rule, which defined confidential information in terms of wages and working conditions), enfd. 414 F.3d 1249, 1260 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006); *Bigg's Foods*, 347 NLRB 425, 425 n.4, 436 (2006) (when confidentiality policy and confidentiality statement employees signed were considered together, employees would conclude they could not discuss salaries with persons outside employer); *Longs Drug Stores California*, 347 NLRB at 501 (finding general confidentiality provisions in employee handbook unlawful when read in context of particular confidentiality provision and testimony that employer considered wage rates to be confidential information).

[24] See, e.g., *Palms Hotel & Casino*, 344 NLRB 1363, 1367-68 (2005) (finding lawful rule that prohibited "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons"); *Lutheran Heritage Village-Livonia*, 343 NLRB at 647-48 (finding lawful rule that prohibited "[u]sing abusive or profane language in the presence of, or directed toward, a supervisor, another employee, ...").

[25] *Palms Hotel & Casino*, 344 NLRB at 1367.

[26] Compare *Tradesmen Intl.*, 338 NLRB at 461 (finding rule prohibiting conduct "disloyal, disruptive, competitive, or damaging to the company" lawful; employees would not construe rule to prohibit § 7 activity because it specified such conduct included illegal acts in restraint of trade or concurrent employment with another organization), with *University Medical Center*, 335

3. Rule 3.1.25: ***Security Officers, Supervisors and Project/Site Managers of USA shall not reveal or divulge information regarding current or former employees except as provided elsewhere in this manual or as required by management. Specifically, information contained in personnel records, official correspondence and other information ordinarily accessible only to USA employees, is considered CONFIDENTIAL in nature.*** **Indiscriminate and/or unauthorized disclosure of this and similar information reflects gross misconduct and shall be grounds for immediate dismissal.**

Security Officers shall treat the official business of USA and their respective clients as confidential. Information on the business of USA and/or their respective clients shall be disseminated only to those for whom it is intended, as directed by a Supervisor, or under due process of law, and in compliance with existing USA directives. Violations of this policy shall be grounds for immediate dismissal.

We agree with the Region that this confidentiality policy is unlawfully overbroad. Employees would reasonably construe the prohibition on disclosing information about current or former employees, from personnel records and other information only available to the Employer's employees, as prohibiting them from discussing their terms and conditions of employment with coworkers and outside parties, including labor organizations. Thus, employees would reasonably construe the rule to prohibit § 7 activity.[27]

NLRB 1318, 1320-22 (2001) (work rule that prohibited "[i]nsubordination, refusing to follow directions, obey legitimate requests or orders, or other *disrespectful* conduct" was overbroad where there was no clarifying language to suggest that the term "disrespectful" would not prohibit § 7 activity), enf. denied in relevant part 335 F.3d 1079, 1088-89 (D.C. Cir. 2003).

[27] See, e.g., *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 1, 12 (2011) (finding unlawful rule that prohibited "[a]ny unauthorized disclosure of information from an employee's personnel file"); *Cintas Corp.*, 344 NLRB 943, 943, 945 (2005) (finding unlawful confidentiality rule that subjected employees to discipline for disclosing "any information concerning" employees), enfd. 482 F.3d 463, 468-69 (D.C. Cir. 2007); *IRIS USA, Inc.*, 336 NLRB 1013, 1013, 1018 (2001) (rule stating that "[e]ach employee's personnel records are considered confidential and will normally be available only to the named employee and senior management" violated 8(a)(1)); *Flamingo Hilton-Laughlin*, 330 NLRB at 288 n.3, 291-92 (finding unlawful confidentiality rule that prohibited employees from revealing "information regarding our

4. Rule 3.2.3.2: Security Officers are expected to stay on their shifts until properly relieved or excused and should sign out at the end of their shifts, putting down the exact time they stopped working. *Security Officers will not remain at their place of work once relieved unless requested by their supervisor or client representative.* If requested to stay late, the Security Officer must record on his Daily Activity Log the name and title of the person making the request as well as the reason for the request.

We agree with the Region that this rule is unlawfully overbroad under *Tri-County Medical Center*.[28] Specifically, the rule fails to make clear that off-duty employees are not prohibited from being in parking lots, gates, and other outside non-working areas after their shifts have ended.[29] In the event that the Employer asserts that the phrase "place of work" limits the rule to working areas, we would reject that defense. At best, the phrase is ambiguous as to what areas are included in the prohibition, especially given the lack of any specificity in the rule, and any ambiguity in the rule must be construed against the Employer as its promulgator.[30] Moreover, the Region

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customers, fellow employees, or Hotel business"); *Fremont Mfg. Co.*, 224 NLRB 597, 603-04 (1976) (finding unlawful provision in confidentiality rule that prohibited employees from "[m]aking any statement or disclosure regarding company affairs . . . without proper authorization from the company"), enfd. 558 F.2d 889 (8th Cir. 1977).

[28] 222 NLRB 1089, 1089 (1976).

[29] See *Ark Las Vegas Restaurant Corp.*, 343 NLRB 1281, 1283-84 (2004) (in case involving employer operating on third party's property, finding unlawful rules prohibiting employees from "[r]eporting to property more than 30 minutes before a shift . . . or staying on property 30 minutes after a shift" and "[r]eturning to the Company's premises . . . during unscheduled hours"). See also *Palms Hotel & Casino*, 344 NLRB at 1363, 1390-91 (finding unlawful rule prohibiting employees from "loitering in company premises before and after working hours"; rule was not limited to interior and seemed to encompass entire facility, including exterior areas); *Teletech Holdings*, 333 NLRB 402, 404 (2001) (finding unlawful rule prohibiting "unauthorized presence on the premises while off duty"); *Lafayette Park Hotel*, 326 NLRB at 828 (finding unlawful rule stating "[e]mployees are required to leave the premises immediately after the completion of their shift and are not to return until the next scheduled shift").

[30] See, e.g., *Ark Las Vegas Restaurant Corp.*, 343 NLRB at 1282 & n.6 (terms "property" and "premises" in employer's no-access rule were ambiguous and construed against employer in determining whether rule was lawful), citing *Lafayette Park Hotel*, 326 NLRB at 828 & n.22. Furthermore, because

has already determined that the Employer has construed the rule in a related case to restrict the exercise of § 7 rights, which further supports finding that the rule is unlawfully overbroad.[31]

5. Rule 3.2.8.3: "On-duty" Security Officers will not: * * * Use profane, *indecent* or abusive language or gestures.

We agree with the Region that employees would not reasonably construe the prohibition on indecent language or gestures to prohibit § 7 activity. The meaning of the term "indecent" is clarified here by its accompanying types of activity.[32] As discussed above, the Board has held that employers have a legitimate right to prohibit their employees from using "profane" and "abusive" language, which is not an inherent aspect of § 7 activity, and that employees would not construe a ban on such language as prohibiting such activity.[33] Thus, this rule is lawful.

6. Rule 3.2.8.7: "On-duty" Security Officers will not: * * * *Discuss information of any kind concerning his duty assignment with anyone except his supervisor or recognized client representative.*

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compliance with the requirements of *Tri-County Medical* requires granting off-duty guards access only to outside, non-working areas, the Employer's concerns with maintaining the safety and security of client premises, limiting access to restricted areas, and workers' compensation claims are not valid defenses.

[31] See *Lutheran Heritage Village-Livonia*, 343 NLRB at 647 (third prong of test). In Case 4-CA-69654, the Region concluded that the Employer had violated 8(a)(1) by telling an employee that he was not allowed to visit the Employer's client facilities to speak to coworkers about unions. In that case, an off-duty employee, with one or two non-employee Union organizers, visited sites at which he did not work and spoke with guards about organizing while they were at their posts. An Employer branch director made the unlawful statement to that employee while looking through the Guide and telling him that there was a rule prohibiting him from going to other client sites and discussing the Union. The Employer resolved that case by entering an informal, bilateral settlement agreement.

[32] See the cases cited at footnote 9, above.

[33] See the cases cited at footnote 20, above.

Employees have a § 7 right to communicate with their co-workers, and with third parties, including an employer's customers, regarding their terms and conditions of employment.[34] Thus, we agree with the Region that by limiting with whom the employees can discuss their duty assignments, which is clearly an employment term, this rule unlawfully prohibits employees from engaging in § 7 activity.[35]

We reject the Employer's reliance on cases such as *Super K-Mart*,[36] where a rule prohibiting employees from disclosing "[c]ompany business and documents" was found lawful, and *Lafayette Park Hotel,*[37] where a rule prohibiting employees from disclosing "Hotel-private information" to unauthorized persons also was found lawful. Unlike the rules in those cases, the rule here specifically prohibits employees from discussing employment terms, i.e., "information of any kind concerning" their work assignments, with unauthorized persons. We also reject the Employer's argument that the rule is necessary to maintain the confidentiality of its clients' security requirements. The rule in its current form is ambiguous in that employees could reasonably construe it to preclude them from discussing issues that do not involve a client's security requirements, such as being overworked. Any

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[34] See *Roomstore*, 357 NLRB No. 143, slip op. at 1 n.3, 17 (2011) ("As a general matter, rules prohibiting employees from engaging in protected discussions with their coworkers concerning working conditions violate Sec. 8(a)(1)."); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-72 (1990); *Guardsmark, LLC*, 344 NLRB 809, 809 (2005), enfd. in relevant part 475 F.3d 369, 375 (D.C. Cir. 2007). Cf. *Valley Hosp. Medical Center*, 351 NLRB 1250, 1252 (2007) ("Thus, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute."), enfd. sub nom. *Nevada Service Employees Union Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009); *CleanPower, Inc.*, 316 NLRB 496, 497-98 (1995) (employee of janitorial contractor who circulated petition protesting increased workload and intended to present it to employer's client, i.e., building manager, to enlist his support was engaged in protected concerted activity).

[35] See *Kinder-Care Learning Centers*, 299 NLRB at 1171-72 (finding rule directing employees to discuss terms and condition of employment only with employer's director unlawful because it interfered with employees' right to communicate with third parties about their employment terms); *Bigg's Foods*, 347 NLRB at 425 n.4, 436 (finding unlawful confidentiality policy that prohibited employees from disclosing, among other things, salaries to "anyone outside the company"; rule could have prohibited discussions of salaries with union representatives).

[36] 330 NLRB 263, 263 (1999).

[37] 326 NLRB at 826.

ambiguity in the rule must be construed against the Employer as its promulgator.[38]

7. Rule 3.2.8.21: "On-duty" Security Officers will not: * * * Congregate with other Security Officers while *on duty*, unless so directed by a supervisor for training or official purposes.

The only aspect of this rule that is challenged is the use of the phrase "on duty." We agree with the Region, based on the analysis set forth in the first part of Section 1, above, that this phrase makes the rule unlawfully overbroad because employees would reasonably construe it to restrict § 7 activity during breaks and meal periods on their shift.

8. Rule 3.2.8.33: "On-duty" Security Officers will not: * * * Verbally or physically threaten anyone or use *disrespectful*, obscene or profane language to another while on duty.

We conclude that employees would not reasonably construe the prohibition on using "disrespectful" language as prohibiting § 7 activity. As with Rule 3.1.22, which is analyzed in Section 2, above, the meaning of the term "disrespectful" here is clarified by its accompanying terms.[39] As discussed above, employers have a legitimate right to prohibit their employees from threatening coworkers or using "profane" language, and employees would not reasonably construe a ban on such language as prohibiting § 7 activity.[40]

9. Rule 3.1.1: Each U.S. SECURITY ASSOCIATES Security Officer is responsible for and subject to these rules. Willingness to obey them is an accepted condition of employment and any breach of established rules will result in disciplinary action up to and including discharge.

Rule 3.1.2: PROBLEM RESOLUTION: Any Security Officer or employee who is dissatisfied with his treatment as a Security Officer may file a complaint. *The Security Officer must first follow the chain of command by reporting the matter to his (in the order indicated)*:

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[38] See, e.g., *Lafayette Park Hotel*, 326 NLRB at 828 & n.22.

[39] See the cases cited at footnote 9, above.

[40] See the cases cited at footnote 20, above.

- **Immediate Supervisor (shift leader, site/project manager, field/patrol supervisor)**
- **Operations Supervisor (at operating unit/branch level)**
- **Operations Manager (at operating unit/branch level)**

Rule 3.1.2.1: If the above management representatives fail to provide satisfactory resolution, then the Security Officer may file a formal complaint in writing to the Branch/District Manager.

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Rule 3.1.3: ***Every Security Officer should follow the Problem Resolution procedure outlined in this section whenever he has any issues related to his terms and conditions of employment. Involving the client personnel at the client site could jeopardize USA's relationship with the client and result in the loss of our security contract.***

Rule 3.1.4: If a USA employee has a concern with regard to a USA environmental/ safety/ health issue or an issue of fraud/waste/abuse, ***the employee may direct his concern to the appropriate governmental agency responsible for resolution of such issues and/or problems but not to the client.***

We agree with the Region that employees would reasonably construe the chain-of-command rule set forth in these provisions as prohibiting § 7 activity. Although Rule 3.1.3 states that employees "should" follow the chain-of-command, the procedure set forth in Rule 3.1.2 states that a "Security Officer must first" follow the chain of command in reporting a complaint. Thus, unlike in cases where the Board has not found a violation because the rule merely suggested a course of action,[41] these provisions, when read together, mandate that an employee first bring work-related complaints to

[41] See *U-Haul Co. of California*, 347 NLRB 375, 378-79 (2006) (statement in employee handbook that "if your supervisors cannot resolve your problems, you are expected to see [employer's president]," did not prohibit employees from presenting workplace problems to others and did not require employees to contact management before pursuing other avenues), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007); *Easter Seals Connecticut*, 345 NLRB 836, 836, 838 & n.6 (2005) (rule stating "should an employee have a concern that is not resolved, he/she should put such in writing to his/her supervisor" did not prohibit employees from discussing complaints with coworkers).

management.[42] This mandate is reinforced by Rule 3.1.1, which states that employees will be subject to discipline, including discharge, for failing to follow the rules.[43] Thus, the rule here explicitly interferes with the statutory right of employees to communicate their work-related complaints to persons and entities other than the Employer, including a union or the Employer's customers.[44] Indeed, Rule 3.1.4 specifically prohibits employees from contacting the Employer's clients regarding certain work-related concerns. As discussed above, employees have a § 7 right to communicate with third parties, including an employer's clients, regarding their terms and conditions of employment.[45]

10. Rule 3.3.2: [Disciplinary Program] Violations which may result in immediate termination:

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- ***Dishonesty***

*** * ***

- ***Conduct unbecoming a Security Officer***

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We agree with the Region that the Employer did not violate § 8(a)(1) by maintaining these two prohibitions. Regarding the first prohibition, a statement made "with knowledge of its falsity, or with reckless disregard of whether it was true or false" loses the protection of the Act.[46] As the Region notes, "dishonesty" implies something more than a false statement, which an

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[42] See the cases cited at footnote 19, above.

[43] See *Kinder-Care Learning Centers*, 299 NLRB at 1172 (threat of discipline shows that compliance with the policy is required).

[44] *Id*. See also *Guardsmark, LLC*, 344 NLRB at 809.

[45] See *Guardsmark, LLC*, 344 NLRB at 809 (finding unlawful rule that prohibited guards from contacting clients with work-related complaints); *Kinder-Care Learning Centers*, 299 NLRB at 1171-72 (finding unlawful rule prohibiting employees from contacting parents, i.e., clients, regarding terms and conditions of employment).

[46] *KBO, Inc.*, 315 NLRB 570, 570 (1994), enfd. 96 F.3d 1448 (6th Cir. 1996) (unpublished table decision). See also *Valley Hosp. Medical Center*, 351 NLRB at 1252.

employer cannot prohibit,[47] and is more akin to a knowingly false statement Indeed, "dishonesty" is generally defined as a "lack of honesty or integrity: disposition to defraud or deceive" and "a dishonest act: fraud."[48] Because the Employer's rule merely prohibits employees from engaging in unprotected conduct, it cannot be construed to restrict § 7 activity. Finally, as the Region notes, this rule is included in a larger list of misconduct that would not be protected by the Act, such as theft, reporting to work under the influence of alcohol or drugs, sleeping on duty, and sexual harassment. That context would also prevent employees from concluding that the rule is intended to prohibit § 7 activity.[49]

Regarding the second prohibition, it is similar to those found lawful in *Ark Las Vegas Restaurant Corp.*,[50] *Flamingo Hilton-Laughlin*,[51] and *Lafayette Park Hotel*,[52] and as with the prohibition on dishonesty, is included in a larger list of misconduct that would not be protected by the Act.

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[47] See, e.g., *Lafayette Park Hotel*, 326 NLRB at 828.

[48] Webster's New Collegiate Dictionary, at 325 (2d ed. 1972).

[49] See, e.g., *Tradesmen Intl.*, 338 NLRB at 462 (finding lawful rule prohibiting "[v]erbal or other statements which are slanderous or detrimental to the company or any of the company's employees" where rule was listed among 19 others that prohibited egregious misconduct, including sabotage and racial or sexual harassmenet).

[50] 335 NLRB 1284, 1284 n.2, 1291 (2001) (finding lawful rules that prohibited either "[c]onducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company" or "[p]articipating in any conduct, on or off duty, that tends to bring discredit to, or reflect adversely on, yourself, fellow associates, the Company . . . or that adversely affects job performance or your ability to report to work as scheduled"), remanded on other grounds 334 F.3d 99 (D.C. Cir. 2003).

[51] 330 NLRB at 288-89 (finding lawful rule that prohibited "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel").

[52] 326 NLRB at 826-27 (finding lawful rule prohibiting "[u]nlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community").

11. Rule 3.3.5: Violations which may result in verbal warning (1st offense), written warning (2nd offense), suspension (3rd offense), and termination (4th offense):

- **Reporting for duty without proper uniform**
- **Date and/or become romantically involved with client employees, vendors, visitors or truck drivers or fellow Security Officers assigned to the same client site**
- ***Congregating and/or gossiping with other Security Officers while on duty***
- **Watching television, listening to radios or *reading unauthorized material while on duty***

We agree with the Region that the Employer's prohibitions on "congregating" and "reading unauthorized material" are unlawfully overbroad, but only to the extent that they are prohibited while "on duty." As set forth in the first part of Section 1, above, the phrase "on duty" makes this rule ambiguous in that employees would reasonably construe it to restrict § 7 activities during the break and meal periods on their shift.[53]

Moreover, we agree with the Region that the Employer's prohibition on "gossiping" is lawful. In *Hyundai America Shipping Agency*, the Board recently concluded that a rule that threatened employees with disciplinary action for "indulging in harmful gossip" was lawful.[54] The Board majority reasoned that because "gossip" is defined in Webster's Dictionary as "rumor or report of an intimate nature" or "chatty talk," employees would not reasonably construe the rule to prohibit § 7 activity. Moreover, as in *Hyundai America,* this rule does not prohibit gossiping about "managers," and it is similarly limited to "gossip" rather than employee conversations in general, which may include § 7 activity. There is also no evidence that the Employer here has applied the rule to restrict § 7 activity.

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[53] See, e.g., *Central Security Services*, 315 NLRB at 243 (finding unlawfully overbroad rule instructing court security officers that "[o]nce on duty, the carrying and reading of any type of literature is strictly forbidden").

[54] 357 NLRB No. 80, slip op. at 2 (2011), petition for review docketed No. 11-1413 (D.C. Cir. October 26, 2011) (petition filed by respondent-employer).

12. Rule 4.21: PERSONAL BLOGGING AND SOCIAL NETWORKING POLICY:

U.S. Security Associates, Inc., respects the right of employees to use personal websites, social networking web sites, multi-media sites, wikis, texting sites, and blogs (web logs) during non-working times on their personal computers as a medium of self-expression. Employees should bear in mind, however, that although web sites, wikis, or blogs are generally viewed as a medium of a person's personal expression, the posting of certain comments and information may have a harmful effect on the company, its reputation, and its employees, customers, etc.

U.S. Security Associates, Inc.'s (USA) Personal Blogging and Social Networking Policy has been developed for employees who maintain personal blogs, access social networking web sites or wikis, or engage in texting that contain any references or postings about USA's business, products, services, or employees. This policy is also applicable to employees who make such postings on the blogs of others. Blogs are personal expressions, not USA communications. Any USA employee engaged in communication on or through the above-mentioned means is personally responsible for his or her posts and should understand that what is posted is track-able, traceable and permanent.

Individuals who identify themselves as USA employees or discuss matters related to USA's business may create the impression of speaking on behalf of USA. For this reason, employees posting blog entries, entries on social networking web sites or wikis, or texting are subject to and must adhere to the following rules and policy directives. Failure to adhere to this policy may result in legal action or discipline up to and including termination of employment.

- **Employees must make clear that the views expressed by them are their own and do not necessarily represent the views of USA. [a]** ***If you identify yourself anywhere on a web site, blog, or text as an employee of USA, make it clear to your readers that the views you express are yours alone and that they do not necessarily reflect the views of the company. To***

reduce such possible confusion, we require that you put the following notice in a reasonably prominent place on your site: "The views expressed on this web site/blog are mine alone and do not necessarily reflect the views of my employer, U.S. Security Associates, Inc."

- **Employees must always respect confidential and proprietary information. [b]** ***Therefore, employees may not disclose sensitive, proprietary, confidential, or financial information about USA, its customers, clients, parents, subsidiaries, or affiliates.***

*** * ***

- **[c]** ***Do not link or otherwise refer to the company web site without obtaining the advance written permission of the company.***

*** * ***

- **Employees must obey the law. [d]** ***Therefore, employees should not post any material that is*** **obscene, defamatory, profane, discriminatory, libelous, threatening, harassing, abusive, hateful,** ***embarrassing to another person or entity, about the company or our customers or clients or that violates company policy or the privacy rights of another.*** **Employees are legally responsible for any content they post and can be held personally liable for such content.**

- **[e]** ***Employees must respect their readers and fellow employees. Employees are free to express themselves, but they must do so in a respectful manner.*** **Therefore, employees should not post any material containing slurs, derogatory insults, obscenities,** ***or that violates the privacy of another.***

*** * ***

a. We conclude that requiring employees, when they identify themselves as the Employer's employees on various social media, to state that the views expressed are their own is lawful, because the Employer has a legitimate interest in protecting itself against unauthorized postings purportedly on its behalf and the requirement would not unduly burden employees in the exercise of their Section 7 right to discuss working

conditions.[55] Although one could argue that the disclaimer requirement would be unduly burdensome if it was applicable to text messages, in light of their brevity, the Employer's rule requires the disclaimer only on a "site," where posting the disclaimer would not be a burden.[56]

b. We agree with the Region that employees would reasonably look to construe the provision of this rule prohibiting them from disclosing "confidential" information to prohibit § 7 activity. This provision must be read in tandem with Rule 3.1.25, which states that "personnel records, official correspondence and other information ordinarily accessible only to USA employees" are confidential.[57] By labeling such information confidential, especially personnel records, we conclude that this provision is unlawfully overbroad based on the same analysis as in Section 3, above.[58]

Furthermore, we agree with the Region that this rule also is unlawfully overbroad because it prohibits employees from disclosing "sensitive" information on social media. That term is ambiguous and must be clarified by its context, including the term confidential, which the Employer defines as including information in personnel records.[59] Thus, it could interfere with employee discussions about their terms and conditions of employment.[60]

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[55] See *Windsor Manor Rehabilitation Center, et al.*, Cases 32-CA-65468, et al., Advice Memorandum dated May 22, 2012, at page 4; *DISH Network*, Case 16-CA-66142, Advice Memorandum dated January 6, 2012, at page 3. The reasoning set forth in *Laboratory Corp. of America*, Case 28-CA-23503, Advice Memorandum dated November 16, 2011, at page 11, has been superseded by these more recent Advice Memoranda.

[56] Of course, if the Employer applies this rule to discriminate against protected concerted activity, or otherwise relies on it to interfere with the exercise of § 7 rights, such unlawful application would invalidate the rule. See, e.g., *Lutheran Heritage Village-Livonia*, 343 NLRB at 647 (third prong of test).

[57] See the cases cited at footnote 19, above.

[58] See the cases cited at footnote 23, above.

[59] See *Double Eagle Hotel & Casino*, 341 NLRB at 113-15 (finding unlawful communication rule that prohibited employees from "communicat[ing] and confidential or sensitive information concerning the Company or any of its employees to any non-employee without approval" from management).

[60] See the cases cited at footnote 23, above.

c. We agree with the Region that directing employees not to link or refer to the Employer's website absent prior written approval from the Employer is unlawful. First, employees will be hindered in exercising their § 7 rights if, when discussing their work-related concerns and complaints on social media, they cannot refer third parties to the Employer's website to support, and garner support for, their position. Moreover, the Employer's website is available to, and can easily be found by, the public. Thus, the interest in protecting the employees' ability to effectively exercise their statutory rights significantly outweighs any interest the Employer may have in controlling access to its website. Furthermore, any work rule that requires employees to secure permission from their employer prior to engaging in § 7 activities, is unlawful.[61]

d. We agree with the Region that the Employer's rule prohibiting employees from posting on social media material that is "embarrassing" to another person, the Employer, or customers is unlawful. Such a work rule is similar to those found unlawful because they prohibited "[n]egative conversations about associates and/or managers"[62] or "derogatory attacks on fellow employees, patients, physicians or [employer] representatives."[63] Employees would reasonably construe this rule to bar them from discussing work-related complaints, particularly those involving their managers.[64]

e. We conclude that employees would not reasonably construe the Employer's rule mandating that they express themselves on social media in a "respectful manner" as prohibiting § 7 activity. As discussed with the rules

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[61] See, e.g., *Brunswick Corp.*, 282 NLRB 794, 794-95 (1987) (finding no-solicitation rule unlawful where it required employer's "express permission" to solicit during non-work time); *Teletech Holdings, Inc.*, 333 NLRB at 403 (finding no-distribution rule unlawful because it required employees to secure employer's "proper authorization," and was not limited to working time and working areas).

[62] *Claremont Resort & Spa*, 344 NLRB 832, 832 & n.4 (2005).

[63] *Southern Maryland Hosp. Center*, 293 NLRB 1209, 1222 (1989), enfd in relevant part 916 F.2d 932, 940 (4th Cir. 1990).

[64] The Employer improperly relies on *Sears Holdings*, Case 18-CA-19081, Advice Memorandum dated December 4, 2009, to assert that its social media policy is lawful. The challenged portion of the rule in that case prohibited "[d]isparagement of company's or competitor's products, services, executive leadership, employees, strategy, and business prospects." In that case, the rule contained clarifying examples, including prohibitions addressing unprotected conduct, that informed employees the challenged portion was not concerned with § 7 activity. The same is not true here.

found lawful in Sections 2 and 8, above, the Employer has used the requirement of being respectful in other sections of the Guide in a manner that employees would not find such a directive to inhibit the exercise of § 7 rights. Thus, when read in that broader context, employees would not construe the mandate here any differently.[65]

However, we agree with the Region that the aspect of this rule prohibiting employees from posting material on social media that "violates the privacy of another" is unlawful. Employees would reasonably construe this ban as precluding them from sharing with coworkers or labor organizations information about their coworkers' terms and conditions of employment, even if that information was innocently obtained. Such a rule is unlawful because it would prohibit employees from engaging in the type of conduct that serves as the spark for initiating further protected concerted activity to improve working conditions.[66]

/s/
B.J.K.

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[65] See the cases cited at footnote 19, above, which discuss how different provisions in an employee handbook must be read together.

[66] See *Labinal, Inc.*, 340 NLRB 203, 209-10 (2003) (finding employer violated 8(a)(1) by maintaining rule that prohibited employees from discussing coworker's pay without latter's knowledge or permission; "By requiring that one employee get the permission of another employee to discuss the latter's wages, would, as a practical matter, deny the former the use of information innocently obtained, which is the very information he or she needs to discuss the wages with fellow workers before taking the matter to management."). See also *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 1, 12 (finding unlawful rule that prohibited "[a]ny unauthorized disclosure of information from an employee's personnel file"); *Cintas Corp.*, 344 NLRB at 943; *IRIS U.S.A., Inc.*, 336 NLRB at 1013; *Flamingo Hilton-Laughlin*, 330 NLRB at 288 n.3, 291-92.