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

DATE: November 14, 2018

TO: Cornele A. Overstreet, Regional Director
Region 28

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Nuance Transcription Services, Inc.
Case 28-CA-216065

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This case was submitted for advice, post-complaint, on whether the Employer violated the Act by: (1) issuing a directive to an employee requiring [redacted] to cooperate in Employer investigations; (2) maintaining a rule requiring employees to keep the handbook and its contents confidential; (3) maintaining a rule prohibiting non-business use of Employer email; and (4) maintaining a rule restricting the disclosure of payroll information and any other non-public information. We conclude that the Employer's directive requiring cooperation in Employer investigations is lawful, and that the Region should withdraw this allegation from the complaint, but that the Region should continue prosecuting the other submitted complaint allegations, as directed below.

FACTS

Nuance Transcription Services, Inc. (Employer) provides medical transcription services for hospitals and physician groups. The Charging Party was employed as a [redacted] from [redacted] until [redacted]. Like all of the Employer's [redacted], the Charging Party worked remotely from [redacted] home.

In an email dated December 10, 2017, the Charging Party complained to management that [redacted] supervisor had engaged in improper conduct over email. [redacted] also expressed concern that the supervisor had access to and could misuse [redacted] personal information, such as [redacted] Social Security number and [redacted] home address. Shortly thereafter, an Employer H.R. representative contacted the Charging Party by phone as part of an investigation into [redacted] allegations. The Employer claims that the Charging Party refused to answer the H.R. representative's questions over the phone.

On January 30, 2018, the Employer sent the Charging Party a letter regarding (b) (7)(C), accusations against the supervisor and various other work-related concerns (b) (7)(C), had raised. The letter conveyed the results of the Employer's investigation, including that the Charging Party had made "unsubstantiated or false allegations . . . in previous communications (*e.g.*, that [the supervisor] might come to your house or use your social security number)." Significantly, the letter also stated:

> As you have been made aware, employees are expected to participate in investigations of wrong-doing and refusing to do so is considered insubordination. Going forward, you will be expected to fully cooperate in any investigation. Failure to do so will subject you to disciplinary action, up to and including termination.

These points were reiterated at the end of the letter: "As set forth above, you will also be required to . . . fully participate in internal investigations . . . ." The Charging Party was discharged on (b) (7)(C), (b) (6)[1]

The Employer also maintains several rules in its handbook that are alleged to violate the Act.

Rule Precluding Disclosure of Handbook and Its Contents to Third Parties

The Foreword to the handbook states, inter alia, that "[t]his handbook and the information in it should be treated as confidential. No portion of this handbook should be disclosed to others, except [the Employer's] employees and others affiliated with [the Employer] whose knowledge of the information is required in the normal course of business."

Rules Restricting Employee Use of Employer's Email System

The handbook contains several provisions regarding employee use of the Employer's email system. The Unacceptable Use of Company Resources provision states that "[s]olicitation for any non-Company business or activities using Company resources is strictly prohibited" and that "[t]he e-mail system . . . [is] Company property intended for business use." The next provision, the Data Security Policy, states that all of the Employer's electronic communications systems, including email, "**are for business purposes only**" and that the Employer provides "internal and external electronic mail (e-mail) facilities to employees for **business purposes**." (Emphasis in original.) Also, an Electronic Email Security Policy, attached to the

[1] The Region found that the discharge was lawful.

handbook as Appendix L, states that "[t]he e-mail system will be used for company business" but "[i]ncidental personal use may be acceptable provided it does not violate any acceptable use guidelines." It defines inappropriate use as including, inter alia, "[t]ransmission of junk mail, chain letters, personal for-profit business or counterproductive messages that tie up system resources and are not considered in support of Nuance objectives."

Rule Restricting Communication of Payroll and Other Non-Public Information

The handbook also contains a Confidentiality/Non-Compete provision that restricts communication of "payroll" information and "any other information not available to the public." It states:

> During your employment with [the Employer], you may have access to commercially valuable technical and non-technical information. In order to protect the legitimate business interests of the Company, it is necessary that, as an employee, you respect and maintain the confidentiality of information, including processes, machinery, product designs, inventions, customer lists, supplies, payroll, and miscellaneous data from computer printouts, software, profits, costs, and any other information not available to the public.

On May 14, 2018, the Region issued complaint, alleging that the directive and the rules at issue violated Section 8(a)(1) of the Act. The hearing is currently scheduled for December 18, 2018.

ACTION

We conclude that the Employer's directive requiring cooperation in Employer investigations is lawful; therefore, the Region should withdraw this allegation from the complaint. We also conclude that the Region should continue prosecuting the other complaint allegations, as directed below.

(1) The Employer Lawfully Directed the Charging Party to Participate in Employer Investigations.

An employer may not require an employee to participate in the employer's investigation regarding an unfair labor practice charge, but rather must give the employee specific assurances that cooperation is strictly voluntary.[2] Therefore, where an employee would reasonably read an employer's rule to require participation in an unfair labor practice investigation, the Board has found the rule to be unlawful because it infringes upon the employee's Section 7 right to refuse to cooperate. For example, in *Beverly Health & Rehabilitation Services*, the Board found a rule prohibiting an employee's refusal to "cooperate in the investigation of any allegation of patient (resident) neglect or abuse or any other alleged violation of company rules, laws, or government regulations" to be unlawful on the narrow ground that the reference to "any government regulations" necessarily encompassed Board proceedings.[3] However, the Division of Advice has consistently distinguished *Beverly* and found that employees would not reasonably read a rule merely requiring cooperation with employee investigations to require participation in unfair labor practice investigations, absent some language or context that referenced that type of investigation; instead, they would interpret the rule to apply to employer investigations of workplace misconduct, when read in context with other provisions.[4]

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[2] *Johnnie's Poultry Co.*, 146 NLRB 770, 774-76 (1965), *enforcement denied*, 344 F.2d 617, 619 (8th Cir. 1965).

[3] 332 NLRB 347, 348-49 (2000), *enforced*, 297 F.3d 468 (6th Cir. 2002).

[4] *See T-Mobile USA, Inc.*, Cases 01-CA-142030, et al., Advice Memorandum dated June 15, 2015 (finding rule stating that employees must "fully cooperate in internal investigations" and that "refusal to cooperate in any investigation" may result in discipline lawful because rule did not reference ULPs or other violations of government regulations; was contained in handbook section titled "Workplace Expectations"; and other provisions in that section concerned rules on, inter alia, conflicts of interest, workplace romantic relationships, and disposition of company devices and products); *NRG Energy*, Case 5-CA-111283, Advice Memorandum dated Mar. 26, 2014 (finding rule stating that "[e]ach employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake" lawful because rule appeared in handbook's final section, under the heading "Other Conduct," which suggested that it referred to investigations related to employer's rules of conduct, and rule did not reference ULP investigations or violations of government regulations).

Here, we conclude that the directive to the Charging Party was lawful. Although the letter required the Charging Party to participate in "any investigation," it contained no references to unfair labor practices, the Board, government agencies in general, or any Section 7 activity. Rather, the letter focused on the Charging Party's allegations against the supervisor, communicated the results of the investigation, and described how the Charging Party had failed to cooperate. Therefore, viewed in context, the letter required the Charging Party to cooperate in Employer investigations into future claims of supervisory or other misconduct that (b) (7)(C). raises with management, rather than investigations of ULP allegations. Accordingly, the Employer's directive was lawful notwithstanding the absence of *Johnnie's Poultry* assurances.[5]

(2) The Employer Unlawfully Maintained a Rule Requiring Employees to Keep the Handbook and Its Contents Confidential.

We conclude that the rule stating that the handbook and its contents are confidential is unlawful and falls in *Boeing* Category 3 because it effectively precludes employees from discussing handbook policies regarding employee pay, benefits, and working conditions with unions and other third parties.[6] But even assuming that this rule falls in Category 2 because it does not apply to discussions with other employees (only third parties) and the handbook does not contain employees' actual pay rates or benefit plans, we conclude that the rule's adverse impact on Section 7 rights outweighs the Employer's business justification. A central aspect of protected concerted activity under the NLRA involves discussions and coordination between employees and unions or other third parties regarding terms and conditions of employment, including those contained in employee handbooks.[7] The Employer's

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[5] Although the directive is technically not a "rule," because it was only addressed to the Charging Party, we would reach the same result under a *Boeing* analysis.

[6] *See Boeing Co.*, 365 NLRB No. 154, slip op. at 15 (Dec. 14, 2017) (stating that a rule that "prohibits employees from discussing wages or benefits with one another" falls in Category 3); Memorandum GC 18-04, Guidance on Handbook Rules Post-*Boeing*, at 17-18 (June 6, 2018).

[7] S*ee, e.g., Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 548-49 (D.C. Cir. 2016) (finding that prohibition on disclosure of "handbooks," among other personnel information, "directly interferes with [employees'] ability to discuss their wages and other terms and conditions of employment with their fellow employees or union organizers, which is a core Section 7 right").

proffered business justification for the restriction—to prevent the handbook from falling into the hands of its main competitor—is relatively weak. To the extent that the handbook contains any confidential or proprietary information (the Employer has not specified any), the Employer could tailor a rule to protect that information without trenching upon employees' Section 7 rights to discuss terms and conditions of employment contained in the handbook with unions and other third parties.[8]

(3) The Employer Unlawfully Maintained a Rule Banning Non-Business Use of Its Email System.

The Employer provides its employees access to its email system as part of their work. Thus, the Employer's ban on personal use of its email system, which extends to non-working time, violates Section 8(a)(1) under extant Board law.[9] Although Appendix L to the handbook states that some incidental personal use of the email system is permitted, this fails to cure the violation.[10] Employees should not have to decide at their own peril which of two conflicting policies they are to follow.[11]

Accordingly, the Region should continue to prosecute the complaint allegation concerning the Employer's email policy, with the following qualifications. First, the Region should (b) (5)

[redacted]

[8] *Id.* at 549 (rejecting employer's claim that its handbook-disclosure ban advanced legitimate interest in protecting non-public information, as this argument "does nothing to legitimate the blunderbuss sweep of its existing rule").

[9] *Purple Communications, Inc.*, 361 NLRB 1050, 1063 (2016).

[10] *See, e.g.*, *Olathe Healthcare Center*, 314 NLRB 54, 58 (1994) (unlawful no-solicitation rule in handbook not cured by presence of different, lawful no-solicitation rule in handbook).

[11] *See, e.g.*, *DirecTV Holdings, LLC*, 359 NLRB 545, 547 (2013) (finding employer's Internet policy facially unlawful where employees would read confidentiality provision in a separate set of rules to prohibit Section 7-protected communications), *aff'd and adopted* 362 NLRB No. 48 (Mar. 31, 2015), *enforcement denied on other grounds*, 650 F. App'x 846 (5th Cir. 2016).

(b) (5) [12] (b) (5) Thus, the General Counsel has taken the position that employees should have the right to use their employer's email system on non-work time where "employees work in locations with lack of access to face-to-face communication and minimal or nonexistent cell phone coverage, or where there is no established workplace and employees have no way to exchange personal contact information." Since the (b) (7)(C), (b) (6) all work remotely, and they have no way to exchange personal contact information with coworkers in order to communicate via personal email or cell phones, they should be permitted to communicate with their coworkers concerning terms and conditions of employment, using work email addresses and over the Employer's email system, on non-work time.

Additionally, the Electronic Email Security Policy's restriction on incidental personal use of the email system for messages that "are not considered in support of [Employer] objectives" is an unlawful conflict-of-interest rule that falls in *Boeing* Category 2.[13] Here, employees would not interpret the rule, in context, as focusing on genuine business conflicts of interest.[14] The rule broadly bans messages that "are not considered in support of [Employer] objectives," and the prior reference to "counterproductive messages that tie up system resources" does not narrow the ban's

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[12] 351 NLRB 1110, 1114-16 (2007), *enforced in part and remanded sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

[13] *See* Memorandum GC 18-04, at 16 (broad conflict-of-interest rules that do not specifically target fraud or self-enrichment (Category 1) and do not restrict membership in or voting for a union (Category 3) fall in Category 2).

[14] *See Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 10 (Feb. 23, 2017) (Miscimarra, concurring, agreeing that overbroad conflict-of-interest rule restricting employee participation in an "outside organization" that may "interfere with" his or her work was unlawful because employees would interpret it as applying to union activity, such as a protected work stoppage, and rule's adverse impact on NLRA-protected rights outweighed legitimate interests served by the rule). *Cf. Schwan's Home Service*, 364 NLRB No. 20, slip op. at 17-18 (June 10, 2016) (Miscimarra, dissenting, arguing that a prohibition on "conduct on or off duty which is detrimental to the best interests of the company"—surrounded by examples such as supervising an immediate family member or someone with whom one has an intimate relationship—was a commonsense guideline to avoid conflicts of interest that neither had the aim nor the effect of dampening Section 7 activity).

meaning, because the clear implication is that all "counterproductive" messages inappropriately "tie up system resources." While much of the activity covered by the rule's broad language is unrelated to Section 7 activity, the rule would also cover protected concerted or union activity that might not be "in support of [the Employer's] objectives," e.g., communications concerning strikes, protests, or public expressions of workplace dissatisfaction. Accordingly, because the Employer's legitimate goals can be served by a narrower rule, this rule violates Section 8(a)(1).[15]

We also conclude that the prohibition on "[s]olicitation for any non-Company business or activities" using the Employer's email system is unlawful under current law because it is not restricted to work time.[16] However, if the Board finds that employees, including the (b) (7)(C), (b) (6), have no statutory right to use the Employer's email system, the rule would be lawful because, under *Register Guard*, "nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis."[17]

(4) The Employer Unlawfully Maintained a Rule Restricting Disclosure of Payroll Information.

The Confidentiality/Non-Compete rule is facially unlawful to the extent it restricts employee discussion of "payroll" information. The Board has stated that rules prohibiting employees from discussing wages or benefits with each other fall in Category 3.[18] Although this rule does not expressly ban discussion of employee wages or working conditions, it prevents disclosure of "payroll" information to third parties, and should also be considered a Category 3 rule. But even if this is considered a Category 2 rule, it is unlawful. Employees would reasonably construe a restriction on

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[15] Because this rule appears in a section permitting "incidental personal use" of the Employer's email system, it would be unlawful even if the Board finds that employees, including the (b) (7)(C), (b) (6), have no statutory right to use the Employer's email system. The rule would be unlawful under *Register Guard*'s discrimination exception because its overbroad restriction is content-based and thus constitutes "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." 351 NLRB at 1118.

[16] *See UPMC*, 362 NLRB No. 191, slip op. at 4-5 (Aug. 27, 2015) (finding prohibition on employees' use of email system to engage in solicitation, not restricted to working time, unlawful under *Purple Communications*).

[17] 351 NLRB at 1118.

[18] *Boeing Co.*, 365 NLRB No. 154, slip op. at 4, 15.

discussing "payroll" to include information in their paychecks regarding employee wages and benefits, and it is clear that discussion and coordination between employees, unions, and others regarding wages and benefits is a core Section 7 right. Although the restriction on "payroll" information is contained in a long list of items deemed confidential, none of which concern employees, this context does not indicate that the rule is referring to some aspect of the Employer's payroll system other than employee wages and benefits. The Employer has not raised a business justification that would outweigh the rule's adverse impact on employees' willingness to discuss their payroll information; the Employer claims only that the rule was designed to avoid competitively sensitive information being disclosed to its main competitor.

The Region should not continue to allege, however, that the restriction on sharing "any other information not available to the public" is unlawful. Once the "payroll" language is excised from the rule, employees would reasonably read "any other nonpublic information" to mean nonpublic information like the remaining list of confidential items ("processes, machinery, product designs, inventions, customer lists, supplies, . . . and miscellaneous data from computer printouts, software, profits, [and] costs") that do not concern Section 7 matters.[19]

Based on the foregoing, the Region should withdraw the complaint allegation concerning cooperation with Employer investigations and should continue prosecuting the allegations concerning the handbook rules (except for the allegation regarding the restriction on disclosing "any other information not available to the public"), as directed.

/s/
J.L.S.

ADV.28-CA-216065.Response.Nuance (b) (6)

[19] *See Tradesmen International*, 338 NLRB 460, 462 (2002) (finding that employees would not reasonably read prohibition against "statements which are slanderous or detrimental to the company or any of the company's employees" as applying to Section 7 activity, because rule found in list of egregious activities such as sabotage or racial or sexual harassment).