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**Wynn Las Vegas, LLC and Keli P. May and Kanie Kastroll.** Cases 28–CA–155984 and 28–CA–157203

May 29, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On September 26, 2016, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.<sup>1</sup> The Respondent filed cross-exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>2</sup> and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The main issue presented in this case is whether an employee’s act of encouraging a coworker, who was on working time, to vote for union representation in an upcoming election constituted prohibited union solicitation. For the reasons set forth below, we agree with the judge that the employee’s conduct constituted union solicitation, and, accordingly, we adopt the judge’s dismissal of the allegation that the Respondent’s discipline of the employee for violating its lawful solicitation and distribution policy

<sup>1</sup> On September 12, 2019, the Board severed allegations in this case that certain work rules maintained by the Respondent were unlawful under *Boeing Co.*, 365 NLRB No. 154 (2017), and that the Respondent disciplined Charging Party Keli May for violating one of those rules, and remanded those allegations to the judge. The Board retained for future consideration the allegations that the Respondent unlawfully disciplined Charging Party Kanie Kastroll and committed additional misconduct in connection with that discipline. All of the allegations that were remanded have now been resolved. Specifically, on October 11, 2019, the judge granted the General Counsel’s unopposed motion to withdraw rule-maintenance allegations set forth in pars. 5(a)(1)–5(a)(4) of the consolidated amended complaint and remand them to the Region. On February 12, 2020, the Region approved a partial settlement agreement with respect to the allegations in pars. 5(a)(3), 7(a) through (e), and 8 (insofar as it covers pars. 5(a)(3) and 7(a) through (e)) of the consolidated amended complaint. The allegations pertaining to Kastroll remain outstanding and are at issue here.

<sup>2</sup> The General Counsel has excepted to the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf’d. 188 F.2d 362 (3d Cir. 1951).

violated the Act. In affirming the judge, we overrule precedent that redefined the term “solicitation” in a manner inconsistent with established law and the purposes of the Act. We further clarify Board precedent to make clear that, although solicitation for a union ordinarily means that someone is asking an employee to join a union by signing a union authorization card, the definition of “solicitation” also encompasses the act of encouraging employees to vote for or against union representation.

Finally, the complaint alleges that the Respondent committed additional violations of the Act arising from its discipline of the employee for prohibited solicitation. As discussed below, we agree with the judge’s dismissal of those allegations as well.

II. FACTS

The Respondent is a hotel and casino located on the Las Vegas strip. Employee Kanie Kastroll has been a table games dealer (TGD) since April 2005. The TGDs work in the Respondent’s Table Games Department and are represented by the Transport Workers Union of America, Local 721, AFL–CIO (the Union). At all material times since May 13, 2014, the Respondent has maintained a written Solicitation and Distribution Policy (Solicitation policy). The purpose of the policy is to promote “a productive, efficient, and clean work environment, as well as to minimize the potential of any disruption to the Respondent’s guests.” The policy provides in relevant part:

2. All . . . solicitation by employees is prohibited in work areas during the work time of the employee initiating the solicitation or the employee being solicited.

....

We have carefully examined the record and find no basis for reversing the judge’s findings.

In affirming the judge’s credibility determinations, we do not rely on his statement that Kastroll was not a credible witness based on her behavior during the February 5, 2015 meeting in which she was questioned by the Respondent’s representatives who were investigating whether she violated the Respondent’s solicitation and distribution policy. It is clear that the judge implicitly credited Kastroll’s testimony in describing this meeting and other events. In addition, we do not rely on the judge’s finding that in-house general counsel for the Respondent Kevin Tourek was credible based on a statement he made during this meeting because the evidence shows that someone else made the statement. Rather, we find that the other reasons stated by the judge sufficiently support his determination to credit Tourek’s testimony.

At the hearing, the General Counsel withdrew the complaint allegation that the Respondent, by Joshua Browning, engaged in surveillance of employees to discover their union activities. In his decision, the judge dismissed this allegation. We agree with the General Counsel that the judge erred in ruling on this withdrawn allegation. However, we find that this ruling did not result in prejudice to the General Counsel.

4. Solicitation is oral communication asking or seeking a person to take some action, such as buying a product or service, contributing to a charity, or joining an organization. It also includes requests for employees to sign union authorization cards or representation petitions and the exchange of such documents for signature.

On February 2, 2015,<sup>3</sup> Kastroll approached an on-duty security officer, Johnny Moreno, after she had finished working her last game for the day. Officer Moreno, who did not know Kastroll, was stationed at Priority One Post, which is the highest customer traffic area on the Respondent's property.<sup>4</sup> Security officers working at Priority One Post are responsible for assisting guests as well as ensuring casino security.

After approaching Officer Moreno, Kastroll began speaking to him about the upcoming election involving the Security, Police and Fire Professionals of America (SPFPA), which at the time was attempting to organize the Respondent's security officers.<sup>5</sup> Kastroll began the conversation by stating: "Hey, I heard you guys are having an election pretty soon. Good luck on that. We pray for you." Officer Moreno responded, "Well, I don't know if . . . it's going to go through." After Kastroll asked why, Officer Moreno stated, "Well, we've been going to these mandatory meetings and the [Respondent's] president, Maurice [Wooden], is sitting up there telling us that that's the wrong union for us because there was some kind of embezzlement supposedly and that's just—that's not a good union for us." Kastroll replied as follows:

Well, hey, man, any union is better than no union and don't worry about it, don't worry about what they're saying because we've been through all kinds of stuff. The dealers did this, you can do it, too. You guys can do it, too. We've been through all those captive audience, you know, mandatory meetings. We've had all this anti-union propaganda mailed to our homes. We had even these supervisors that were receiving our tip money would sit at the bottom of the escalator passing out these union busting papers to us on the way to our breaks. . . . Don't listen to all that. Just you guys—you guys need to have your own voice and don't worry about it . . . just hang in there.

Numerous guests and other employees walked by Officer Moreno during Kastroll's interaction with him, which lasted approximately 3 minutes. Many guests

appeared to need directions, but because Officer Moreno's attention was directed toward Kastroll, they were unable to talk to him. In one instance, a guest seeking assistance bypassed Officer Moreno and approached a different security officer working at Security Post One, Officer Joshua Browning, specifically because Officer Browning was not talking to anyone.

After overhearing a part of Kastroll's interaction with Officer Moreno, Officer Browning approached the Respondent's president, Maurice Wooden, to inform him of the conversation. Wooden subsequently notified Kevin Tourek, the Respondent's in-house general counsel, that Officer Browning had observed a TGD having a conversation with a security officer about the security officer's upcoming union vote. Wooden asked Tourek to investigate the incident, noting that, because it was a sensitive time due to the upcoming SPFPA election, he wanted someone who would be cognizant of any legal repercussions to conduct the investigation. Because the incident concerned two different departments—TGDs and security officers—the Respondent's employee relations manager, Courtney Prescott, assisted Tourek in the investigation.

As part of his investigation, Tourek first reviewed the surveillance video, which showed Kastroll having a one-sided conversation with an on-duty security officer at Priority One Post for approximately 3 minutes. Then, on February 3, Tourek spoke to Officer Browning about the February 2 incident, asking him what he had observed and where the incident had taken place. Officer Browning replied that he had witnessed Kastroll speaking to Officer Moreno at Priority One Post for several minutes about why Officer Moreno should support the SPFPA. Prescott and Tourek also met with Officer Moreno during their investigation, asking whether or not he had a conversation with a dealer while he was stationed at the Priority One Post on February 2 and, if so, to describe the substance of that conversation. Neither Tourek nor Prescott asked Officer Moreno or Officer Browning how they were going to vote in the upcoming SPFPA union election.

On February 5, Tourek and Prescott met with Kastroll and Union Steward Donna Blair in the Employee Relations office. Prescott asked Kastroll a number of questions about whether she had engaged in a conversation with a security guard February 2, but Kastroll consistently maintained that she didn't recall the incident.<sup>6</sup> Tourek then

<sup>3</sup> All dates are in 2015 unless otherwise noted.

<sup>4</sup> Priority One Post is located at the intersection of the casino, the B-Bar, and the host office. It is considered the most important post for security and guest satisfaction given its location in the casino/hotel; it is the one place past which everyone will most likely walk when visiting the Respondent's premises. Priority One Post provides a panoramic view of everything that is going on.

<sup>5</sup> The SPFPA had filed a petition with the Board, and the election was to be held February 11.

<sup>6</sup> Prescott began the meeting, asking, "Do you remember having a conversation on Monday [February 2] with a security guard about unions?" Kastroll replied that she speaks about unions all the time with everyone, including guests sometimes, and she asked Prescott to be more specific. Prescott answered that it was between 4 and 6 p.m.; Kastroll

informed Kastroll that another employee had written a complaint against her regarding the conversation, and Prescott stated that they had a statement from a security guard. Tourek also asked Kastroll if she thought her interaction with the security officer had interfered with his job, reiterating that a guest had to seek assistance from another security officer. Kastroll continued to respond that she could not remember the incident. At some point in the meeting, Kastroll left to use the restroom, and, while she was gone, Blair told Tourek that she “was curious to see where this entire investigation was going” and asked “Kevin [Tourek] whether or not this [investigation] was going to lead to a warning slip.” In response, Tourek indicated that “he just wanted to put her [Kastroll] on notice.” During the meeting, Tourek and Prescott provided Kastroll with a copy of the Respondent’s Solicitation policy, and one of them informed her that she had violated the policy. Following the meeting, Prescott directed Kastroll as well as Officers Browning and Moreno to provide written statements regarding the February 2 incident.

On February 12, Prescott issued Kastroll a first written warning for her February 2 conversation with Officer Moreno. The warning states:

On February 2, 2015, Kanie [Kastroll] was witnessed and overheard having a conversation on the casino floor with a Security Officer regarding union organizing. This conversation happened while the officer was on duty (not on break) and in a high traffic, guest facing area. Kanie has been reminded of the Company’s Solicitation and Distribution policy. Further violations of Company policy may lead to discipline up to and including termination of employment.

At the time of the hearing, the Respondent had only enforced its Solicitation policy on two additional occasions since January 1, 2014. In the first, an employee who had left Avon makeup catalogs around the property was issued a second warning for the distribution. In the second, an employee who had demanded \$5 from another employee in return for assistance in helping her perform certain work was given a first written warning for selling goods or services.

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said that didn’t help. After Prescott indicated that it was at the Priority One Post, Kastroll asked whether it had been a male or female security officer. When Prescott responded “male,” Kastroll stated sarcastically, “Well, we’re down to 90 percent of the security officers.” Tourek then intervened and stated, “You were promoting the union.” Prescott further offered that there was a guest who had required assistance from another

### III. DISCUSSION

#### A. Kastroll’s Written Warning

The judge found that Kastroll’s interaction with on-duty Officer Moreno constituted union solicitation. The judge rejected the General Counsel’s argument that Kastroll did not solicit Officer Moreno but instead engaged in pro-union work talk that was equivalent to the type of talk she regularly has with coworkers on the main casino floor. The judge reasoned that Kastroll’s lengthy conversation with Officer Moreno at the Priority One Post, which interfered with his duties, was distinguishable from the type of short, casual prounion conversations that Kastroll had had in the past. As a result, the judge found that the Respondent lawfully issued Kastroll a written warning for violating its Solicitation policy in her interaction with Officer Moreno.

Relying on *Wal-Mart Stores*, 340 NLRB 637, 639 (2003), *enf. denied* in relevant part 400 F.3d 1093 (8th Cir. 2005), and *ConAgra Foods, Inc.*, 361 NLRB 944, 945 (2014), *enf. denied* in relevant part 813 F.3d 1079 (8th Cir. 2016), the General Counsel contends on exception that the judge incorrectly determined that Kastroll was engaged in union solicitation subject to the Respondent’s Solicitation policy in her February 2 conversation with Officer Moreno, but rather Kastroll was engaged in mere union talk in support of the SPFPA in the upcoming election. For the reasons set forth below, we find no merit in the General Counsel’s exception.

1. The Board’s decisions in *Wal-Mart Stores* and *ConAgra Foods* define “solicitation” too narrowly.

In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798 (1945), the Supreme Court made clear that the Board is required to balance “the undisputed right of self-organization assured to employees” with “the equally undisputed right of employers to maintain discipline in their establishments.” The balance between employees’ right to organize and employers’ property rights “must be obtained with as little destruction of one as is consistent with the maintenance of the other.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).<sup>7</sup>

The Board has long distinguished union solicitation from other types of employee activities that support union organizing. See, e.g., *W.W. Grainger*, 229 NLRB 161, 166 (1977) (“[S]olicitation’ for a union is not the same

security officer. Kastroll responded that she still didn’t recall the incident.

<sup>7</sup> However, where the property owner’s own employees are already rightfully on the property, the balance to be struck is that between the employees’ Section 7 rights and the owner-employer’s managerial interests rather than its property rights. *Hudgens v. NLRB*, 424 U.S. 507, 521 fn. 10 (1976).

thing as talking about a union or a union meeting or whether a union is good or bad.”), enfd. 582 F.2d 1118 (7th Cir. 1978). The Board has held that in the context of a union campaign, “[s]olicitation’ for a union usually means asking someone to join the union by signing his name to an authorization card.” Id.; see also *Int’l Signal & Control Corp.*, 226 NLRB 661, 665 (1976) (“Solicitation ordinarily means that someone is asking an employee to join a union by signing a union authorization card.”).

In *Wal-Mart* and *ConAgra*, however, the Board took this well-settled precedent an unprecedented step further. Specifically, in both cases, the Board held that, in order to constitute union solicitation, the solicitor’s conduct must include the contemporaneous tender of a union authorization card. *Wal-Mart*, 340 NLRB at 639; *ConAgra*, 361 NLRB at 945. In *Wal-Mart*, the Board found, among other things, that an employee did not engage in solicitation by telling a coworker to consider signing an authorization card where no card was tendered at the time. 340 NLRB at 639.<sup>8</sup> Similarly, in *ConAgra*, the Board majority found that an employee’s statement to two coworkers that she had placed authorization cards in their shared locker did not constitute solicitation because she did not simultaneously present them with cards. 361 NLRB at 945. In our view, this extremely narrow definition of “solicitation” is inconsistent with long-standing Board law establishing that the act of requesting an employee to sign an authorization card constitutes solicitation, even if a card is not presented at the time of the conversation. We also do not believe that such a narrow definition accurately reflects what constitutes union solicitation in the workplace. Accordingly, we hereby overrule this aspect of the *Wal-Mart* and *ConAgra* decisions.

To begin, it is informative that the United States Court of Appeals for the Eighth Circuit rejected the Board’s narrow definition of solicitation set forth in *Wal-Mart* and *ConAgra*. In both cases, the court found that the act of requesting an employee to sign an authorization card constitutes solicitation, even if a card is not presented at the time of the conversation. See *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1099–1100 (8th Cir. 2005); *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1087–1090 (8th Cir. 2016).

In *Wal-Mart*, the court explained that, under *W.W. Grainger*, 229 NLRB at 166, solicitation includes asking someone to join a union by signing an authorization card, and the evidence showed that the employee indicated that he would “like for [the co-worker] to have a [union

authorization] card to sign.” 400 F.3d at 1099. The court reasoned that, even though there was no evidence that an authorization card had been placed “directly in front of” the coworker, there was “little doubt” as to the “intent” underlying the “words” spoken, and that the coworker “understood the exchange as a request to sign the card, an understanding likely to be reached by the average person in a similar situation.” Id. at 1099–1100.

Likewise, in *ConAgra*, the court reasoned that

a categorical rule such as [requiring that a card be presented in order to constitute solicitation] would be contrary to the Act’s policy of balancing the rights of employers and employees. It would tilt that balance toward employees by providing a road map to organizers on how to garner support for union membership on working time and in work areas. Moreover, it would prevent employers from maintaining production and discipline.

813 F.3d at 1087.

Furthermore, it is clear that the definition of solicitation set forth in *Wal-Mart* and *ConAgra* is not, in fact, supported by precedent. In *W.W. Grainger*, for example, the Board did not say the solicitor had to present an authorization card or have a card physically on her person. The solicitor only had to ask someone to sign one. 229 NLRB at 166. Other cases cited in those decisions in support of their narrowly restrictive definition of solicitation did not even involve requests to sign authorization cards. See *Sahara-Tahoe Corp.*, 216 NLRB 1039, 1039 (1975) (an employee’s act of introducing a union representative to a coworker, and her subsequent statement that the coworker would go along with the union, did not constitute solicitation), enfd. in relevant part 533 F.2d 1125 (9th Cir. 1976); *Lamar Industrial Plastics*, 281 NLRB 511, 513 (1986) (employee did not engage in conduct lawfully proscribed by no-solicitation rules when she merely asked a coworker if she had a union authorization card). Accordingly, despite the assertions in *Wal-Mart* and *ConAgra* to the contrary, the new definition announced in those cases was created out of whole cloth.

As discussed above, in the context of a union campaign, solicitation for a union ordinarily means that someone is asking an employee to join a union by signing a union authorization card. However, solicitation is not limited to this act. We hold that solicitation for or against a union also encompasses the act of encouraging employees to vote for or against union representation. Such conduct constitutes union solicitation because the employee is

<sup>8</sup> The Board majority also found that an employee did not engage in solicitation when he entered a store while off-duty wearing a T-shirt that read “Union Teamsters” on the front and “Sign a card. . . [sic] Ask me how!” on the back and when, while on duty, he had conversations with

coworkers about attending a union meeting. *Wal-Mart*, 340 NLRB at 638–639. This aspect of the decision was enforced by the Eighth Circuit. See *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093 (8th Cir. 2005).

selling or promoting the services of the union (or urging employees to reject those services). This understanding of solicitation comports both with prior Board precedent and with the dictionary definition of the word.<sup>9</sup> Cf. *Home Depot, U.S.A., Inc.*, 317 NLRB 732, 732–733, 736 (1995) (asking employees if they had complaints about their job and passing out business cards constituted solicitation). See also *United States v. Kokinda*, 497 U.S. 720, 734–735 (1990) (describing solicitation in First Amendment context as disruptive because “one must listen, comprehend, decide, and act in order to respond to a solicitation”). Accordingly, defining solicitation to also encompass the act of encouraging an employee to vote a particular way in a union election is consistent with the purpose of employers’ no-solicitation rules, which is to prohibit conduct that interrupts business operations.

2. The Board’s decisions in *Wal-Mart Stores and ConAgra Foods* were based on a construction of “working time” that was inconsistent with Board law regarding no-solicitation policies.

The *Wal-Mart* and *ConAgra* decisions misapplied precedent by holding that solicitation for a union, although lawfully prohibited during “working time,” is permitted when there is only a “brief” interruption of work. In particular, in *Wal-Mart*, in finding that the employee’s statement that she would like a coworker to sign an authorization card and the employee’s invitations to her coworkers to attend a union meeting did not violate the employer’s no-solicitation rule, the Board majority relied on the fact that there was no evidence that the employee “significantly interrupted” the work of the employees with whom she spoke. 340 NLRB at 639. The Board observed “that simply informing another employee of an upcoming meeting or asking a brief, union-related question does not occupy enough time to be treated as a work interruption in most work settings.” *Id.* Similarly, in *ConAgra*, the Board majority relied in part on the brief duration of an employee’s statement that she had placed authorization cards in her fellow employees’ shared locker in finding that the statement did not constitute solicitation. 361 NLRB at 945–946. The Board majority stated that “a momentary interruption in work, or even a risk of interruption, [does not] subject employees to discipline for conveying such union-related information.” *Id.*

Significantly, the Eighth Circuit, in reversing the Board majority’s holding, rejected the rationale that solicitation

requires the presence of an actual disruption of work. *ConAgra*, 813 F.3d 1088–1089. The court explained:

[A]n employer may censure any discussion—about unions, the weather, or anything else—that is sufficiently disruptive. But when that discussion solicits union support it may be subject to a blanket prohibition by an employer during working time

*Id.* at 1088.

We agree with the Eighth Circuit that an actual interruption of work should not be a factor in determining whether a no-solicitation policy has been violated. Board and court precedent regarding no-solicitation policies is based on the principle that union solicitation is likely to disrupt work. As a result, a rule prohibiting solicitation during working time is presumed valid, and employers may lawfully discipline an employee who violates such a rule, even if the employee has not interrupted work. In our view, a requirement that there be a significant interruption, or indeed *any* interruption, of work to constitute prohibited solicitation interferes with the balance between employees’ right to organize and “the equally undisputed right of employers to maintain discipline in their establishments.” *Republic Aviation*, 324 U.S. at 797–798.

3. Clarification of the proper definition of “solicitation”

For the reasons set forth above, we overrule the Board’s decisions in *Wal-Mart* and *ConAgra* to the extent that they held that union solicitation takes place only when an authorization card is presented during the conversation and when there is a significant interruption of work. Going forward, the Board will not require that an authorization card be contemporaneously presented for signature or that a conversation last a certain amount of time in order for an act to be considered union solicitation.

Our objective in clarifying Board precedent regarding the definition of solicitation is twofold: to give employees appropriate protection in exercising their Section 7 rights, and also to emphasize that Board and court cases establish that these rights are not absolute during working time because an employer is entitled to insist that employees work during working time and refrain from conduct that tends to interfere with their own work or the work of others. As the Board said more than 75 years ago, “[w]orking time is for work.”<sup>10</sup> Accordingly, where an employee makes statements to a coworker during working time that are intended and understood as an effort to persuade the employee to vote a particular way in a union election, that

<sup>9</sup> The Merriam-Webster Online Dictionary defines “solicitation” as “the practice or act or an instance of soliciting,” and it defines “solicit” as “to approach with a request or plea” or “to urge (something, such as one’s cause) strongly.” See [http://www.merriam-](http://www.merriam-webster.com/dictionary/solicitation)

[www.merriam-webster.com/dictionary/solicitation](http://www.merriam-webster.com/dictionary/solicitation) and <http://www.merriam-webster.com/dictionary/soliciting> (most recently visited April 2, 2020).

<sup>10</sup> *Peyton Packing*, 49 NLRB 828, 843 (1943), *enfd.* 142 F.2d 1009 (5th Cir. 1944), *cert. denied* 323 U.S. 730 (1944).

employee has engaged in solicitation subject to discipline under an employer's validly enacted and applied no-solicitation policy.

#### 4. Application of Clarified Definition of Solicitation to Facts

Applying the principles set forth above, we agree with the judge that Kastroll engaged in prohibited union solicitation on February 2 because she was encouraging another employee to vote a particular way in a union election during that employee's working time. Such a finding is consistent with the purpose of the Respondent's Solicitation policy, which is to foster "a productive . . . work environment, as well as to minimize the potential of any disruption to the Respondent's guests."

Further, in finding that Kastroll engaged in prohibited union solicitation, we find that it is not determinative whether Kastroll's conduct actually interfered with Officer Moreno's work; it is sufficient that the union solicitation occurred during Officer Moreno's working time. Nonetheless, we observe that the record shows that Kastroll's solicitation of Officer Moreno to persuade him to vote for the SPFPA in the representation election did in fact interfere with the performance of Officer Moreno's job duties. Indeed, the evidence showed that another security officer, Officer Browning, had to assist a hotel guest during Kastroll's solicitation of Officer Moreno.

Moreover, we agree with the judge that the Respondent did not discriminate against Kastroll in violation of Section 8(a)(3) and (1) in issuing her a written warning on February 12. Even assuming the General Counsel met his initial burden under *Wright Line*,<sup>11</sup> the Respondent has met its burden of demonstrating that it would have taken the same action against Kastroll in the absence of her union activity. Specifically, we find that the Respondent showed that it issued Kastroll a written warning because she violated the Respondent's lawful Solicitation policy. As the judge found, the Respondent conducted a thorough investigation in determining whether Kastroll violated the policy. In this respect, Tourek and/or Prescott held meetings with Officers Browning and Moreno and TGD Kastroll in which they were all asked about Kastroll's February 2 interaction with Officer Moreno. Also, Officers Browning and Moreno and Kastroll were all required to

provide written statements about the incident. In addition, Tourek reviewed the surveillance video of Kastroll's interaction with Officer Moreno, which showed Kastroll engaging in a one-sided conversation for almost 3 minutes with an on-duty security officer at Priority One Post. Based on their investigation, Tourek and Prescott determined that Kastroll's union solicitation distracted the on-duty Officer Moreno from performing his job duties while the security officer was working at the most important security post. Finally, Kastroll's written warning confirmed that she was disciplined because she violated the Respondent's Solicitation policy. Accordingly, we dismiss the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing Kastroll a written warning.<sup>12</sup>

#### B. Alleged Impression of Surveillance

For the reasons set forth below, we agree with the judge that the Respondent did not create the impression of surveillance of Kastroll's union activity. The test for determining "whether an employer has created the impression of surveillance is whether the employee would reasonably assume from the employer's statements or conduct that their protected activities had been placed under surveillance." *Greater Omaha Packing Co., Inc.*, 360 NLRB 493, 495 (2014). Here, there was no evidence that would have caused Kastroll to reasonably assume that her conduct had been placed under surveillance. In this respect, when Tourek and Prescott met with Kastroll and Shop Steward Blair on February 5, they provided Kastroll with the source of their information by telling her that someone had complained about her interaction with the security officer and that the Respondent had a statement from a security officer. We find that a reasonable employee in Kastroll's position would not believe that her union activity was under surveillance. Cf. *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 26 (2019) (supervisor's statement to an employee that he knew how the employee voted unlawfully conveyed the impression of surveillance where the supervisor did not inform the employee that he learned the information from another coworker or previous statements, so the employee could reasonably believe that the supervisor's statement was based on information acquired through surveillance).<sup>13</sup>

<sup>11</sup> 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>12</sup> The General Counsel contends on exception that the judge did not address the complaint allegation that the Respondent overbroadly applied its Solicitation policy to restrict Kastroll's Sec. 7 activity in violation of Sec. 8(a)(1) of the Act. We agree that the judge did not analyze this complaint allegation in his decision. However, we dismiss this allegation because, as set forth above, the Respondent lawfully applied its Solicitation policy to Kastroll's conduct, which constituted prohibited union solicitation.

<sup>13</sup> We adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by unlawfully interrogating Kastroll, Officer Browning, and Officer Moreno when it interviewed them about the February 2 incident. In so doing, we emphasize that the Respondent had a legitimate basis for conducting an investigation to determine whether Kastroll violated the Respondent's Solicitation policy. See *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528 (2007) (interrogation of employee was lawful where it occurred as part of a legitimate investigation into whether the employee engaged in misconduct). Significantly, Prescott and Tourek asked Kastroll, Officer Browning, and Officer

*C. Alleged Oral Rule Promulgation and Threat of Reprisals*

The General Counsel argues that, during the February 5 meeting, by linking Kastroll’s union “conversations” and her “promoting the union” with a violation of company policy, Tourek promulgated a discriminatory directive that she could not talk about the union at work, where no such prohibition applied to other types of conversations. For the reasons discussed below, we agree with the judge that the Respondent did not orally promulgate a discriminatory directive that its employees could not talk about the union while they were on duty. Tourek and Prescott met with Kastroll on February 5 in order to confirm reports that her interaction with Officer Moreno at the Priority One Post violated the Respondent’s Solicitation policy. During the meeting, Tourek and Prescott gave Kastroll a copy of the Respondent’s Solicitation policy, and one of them told her that she was in violation of that policy. Further, Tourek asked Kastroll if she believed her conversation at Priority One Post kept the security officer from doing his job, noting that a guest had to ask another nearby security officer a question because of her disruption. Tourek also informed Kastroll that the Respondent had surveillance video that showed Kastroll having a conversation on the floor with a security officer at Priority One Post. Therefore, we find that it should have been clear to Kastroll that the purpose of the meeting was not to issue a directive that she could not discuss the union at work—something Kastroll admitted doing all the time without any threat of discipline—but rather to explain the Respondent’s belief that her interaction with a security officer at the Priority One Post was a violation of the Respondent’s Solicitation policy. Accordingly, we dismiss this allegation.

For the same reasons, we find no merit in the General Counsel’s contention that Tourek’s statement to Blair during the February 5 meeting that he wanted to put Kastroll “on notice” constituted an unlawful threat of unspecified reprisals. Accordingly, we agree with the judge that Tourek’s statement was intended to inform Kastroll that she violated the Respondent’s Solicitation policy, and we affirm the judge’s dismissal of this allegation.

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Moreno narrowly tailored questions to determine whether Kastroll violated the policy. In this respect, during the February 5 meeting, Prescott and Tourek did not ask Kastroll any questions related to her union activity that were unrelated to their investigation. Tourek told Kastroll that she was “promoting the union” because she refused to cooperate and acknowledge her interaction with Officer Moreno. Moreover, neither Tourek nor Prescott discussed the SPFPA with Officer Browning or Officer Moreno. They did not ask how those security officers intended to vote in the SPFPA election nor attempt to persuade the security officers to vote any particular way.

<sup>14</sup> The judge failed to address this complaint allegation in his decision.

*D. Alleged Disparate Application of Solicitation Policy*

The General Counsel contends that the Respondent’s application of the Solicitation policy to Kastroll on February 12 violated Section 8(a)(3) and (1) because it was selectively and disparately applied.<sup>14</sup> We find no merit to this exception.

The applicable legal standard is well established: rules prohibiting solicitation on working time are presumptively lawful, but that presumption is rebutted by evidence demonstrating that the employer permitted non-union solicitations during working time and enforced its rule only against union solicitation. *Verizon Wireless*, 349 NLRB 640, 642 (2007). Thus, an employer’s discipline of an employee based on its unlawful and disparately applied rule violates Section 8(a)(3). *Id.*

Here, the General Counsel failed to put forth any evidence that the Respondent has ever failed to discipline an employee for non-union solicitations during work time and enforced its rule only against union solicitation. The General Counsel did not present any evidence that the Respondent has tolerated violations of its Solicitation policy. Rather, the record demonstrated that the Respondent evenly enforces its policy when violations are brought to its attention. Aside from Kastroll’s February 12 written warning, the Respondent has enforced its Solicitation policy two other times since January 1, 2014. The Respondent issued a first written warning to an employee after the employee requested that her coworker pay her to help her make a duvet. Similarly, the Respondent issued a second written warning to another employee for attempting to sell Avon products. See *Wal-Mart Stores*, 350 NLRB 879, 881 (2007) (finding that General Counsel failed to show that the employer enforced its no-solicitation rule disparately against union activity where the evidence showed only one instance of tolerated solicitation). Accordingly, we dismiss this allegation.<sup>15</sup>

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 29, 2020

<sup>15</sup> The General Counsel argues that there is evidence of disparate treatment because Kastroll, Blair, and Security Officer Rick Rankin testified that they have engaged in a variety of nonwork-related conversations on the main casino floor and near Priority One Post. However, the General Counsel failed to show that these nonwork-related conversations constituted violations of the Solicitation policy. Further, the evidence shows that the Respondent treats nonwork-related conversations differently on the main casino floor versus the Priority One Post, which is the busiest duty location on the Respondent’s entire property and is the number one post for security.

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Julia M. Durkin*, for the General Counsel.

*Gregory J. Kamer, Esq.* and *R. Todd Creer, Esq. (Kamer Zucker Abbott)*, for the Respondent.

### DECISION

#### STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. Kanie Kastroll, an individual (Charging Party or Kastroll), filed her original charge in Case 28–CA–157203 on July 31, 2015,<sup>1</sup> and her first amended charge on October 28. Keli P. May, an individual (Officer May or May), filed her original charge in Case 28–CA–155984 on July 14 and her first amended charge on October 30. The General Counsel issued the original complaint against Respondent Wynn Las Vegas, LLC (Respondent or Wynn) on October 30 and amended it with a consolidated complaint (complaint) in this case on December 1, and at hearing. The Respondent answered the complaint generally denying the critical allegations of the complaint, as amended.

The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discriminating against Kastroll and May in regard to their tenure or terms and conditions of employment by issuing them adverse discipline by violating one of Respondent’s work rules against solicitation of employees to join the union or improperly using profanities at work in violation of an overbroad work rule prohibiting inappropriate conduct.

The complaint also alleges the Respondent violated Section 8(a)(1) of the Act by promulgating and/or maintaining overly broad rules regarding employee conduct and threatening employees with reprisal. The complaint further alleges the Respondent violated Section 8(a)(1) by unlawfully surveilling, interrogating, and threatening various employees with unspecified reprisals because they engaged in union or other protected concerted activities. Finally the complaint alleges that Respondent unlawfully interrogated Officer Moreno on February 3, 2015,

<sup>1</sup> All dates in 2015 unless otherwise indicated.

<sup>2</sup> The transcripts in this case are generally accurate, but I correct the transcript (Tr.) as follows: Tr. 449, line (l) 9: “hours” should be “errors.”

<sup>3</sup> Abbreviations used in this decision are as follows: “Tr.” for transcript; “R. Exh.” for Respondent’s exhibit; “GC Exh.” for General Counsel’s Exhibit; “GC Br.” for the General Counsel’s posthearing brief and

and Officer Brown at meetings in further violation of Section 8(a)(1) of the Act.

This case was tried in Las Vegas, Nevada, on February 16–18, 2016. On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following.

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent admits, and I find, that it is a limited liability company with an office and place of business in Las Vegas, Nevada (Respondent’s facility), and that Respondent has been operating a hotel and casino providing gaming, food, lodging, and entertainment where it annually derives gross revenues in excess of \$500,000 and purchases and receives at its facility goods valued in excess of \$50,000 directly from points outside the State of Nevada. The Respondent also admits, and I further find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Transport Workers Union of America, Local 721, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act. (Tr. at 35; GC Exhs. 1(o) at 2–3 and 1(q) at 1.)<sup>3</sup>

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### *A. The Respondent’s Operations and General Background and Its Solicitation and Distribution Policy as of February 2015*

Respondent Wynn Las Vegas, LLC, is a hotel and casino located on the Las Vegas strip. Many of Respondent’s employees are covered by collective-bargaining agreements. For example, approximately 3500 Respondent employees are covered by a collective-bargaining agreement between Respondent and the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165 (“Local Joint Board”). (Tr. 232–233.)

The table game dealers (TGD’s), which include Kastroll, work in Respondent’s Table Games Department and are represented by the Union which was certified as their majority collective-bargaining representative on May 23, 2007, after an uncontroverted Board-conducted secret-ballot election. (Tr. 35.) The CBA between Respondent and the Union extends through 2020.

Respondent hired Kastroll on April 20, 2005, and currently employs her as a TGD in Respondent’s Table Games Department. (Tr. 27.) As a TGD, Kastroll is responsible for dealing the game and all other functions associated with her assigned game, including providing positive guest interaction. (Tr. 28, 121–122.) Kastroll typically works the day shift from 12 p.m. to 8 p.m.; however, on February 2, 2015, Kastroll was working earlier hours due to an increase in guests from the Super Bowl weekend. (Tr. 39.)

“R. Br.” for the Respondent’s posthearing brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

Respondent maintains a written Solicitation and Distribution Policy. (GC Exh. 2.) Respondent's alleged purpose of the policy is to maintain a productive, efficient, and clean work environment, as well as to minimize the potential of any disruption to Respondent's guests. Id.

Respondent has an intranet site called The Wire, which employees can access from computers at work, or from home, using a password. (Tr. 141, 325). Employees can use The Wire to look up personal work information, such as their recorded hours of work, their vacation days, and their pay stubs. Respondent also maintains and updates its work rules and policies on The Wire with the latest revisions available to employees. (Tr. 141, 165–166, 325–326).

At all material times since May 13, 2014, Respondent has also maintained a Solicitation and Distribution policy on The Wire. (Tr. 258; GC Exh. 2). The policy states, among other provisions:

1. Solicitation and/or the distribution of materials anywhere on Wynn property at anytime that is related to the sale of any goods or services not offered by Wynn is prohibited at all times unless approved by the Vice President of Human Resources.
2. All other solicitation by employees is prohibited in work areas during the work time of the employee initiating the solicitation or the employee being solicited.
3. For the purpose of this policy, working time does not include breaks, lunch periods, or other designated relief periods during which an employee is not assigned to or expected to perform job duties, or time before or after work. Work areas do not include employee break areas, employee cafeteria, parking lots and areas outside of the facility.
4. Solicitation is oral communication asking or seeking a person to take some action, such as buying a product or service, contributing to a charity, or joining an organization. It also includes requests for employees to sign union authorization cards or representation petitions and the exchange of such documents for signature.

(GC Exh. 2). The Solicitation and Distribution policy applies to all Respondent's employees. (Tr. 168).

Respondent has generally enforced its Solicitation and Distribution Policy when violations are brought to its attention. Since 2014, there have been three (3) incidents that resulted in written warnings to employees, including the first written warning that Respondent issued to Kastroll, which is a subject of this case. (Tr. 281–282; GC Exh. 23; GC Exh. 24.)

Officer Rankin, Respondent's security officer for 11 years, explained his understanding of Respondent's policy for its security officers' job duties when he pointed out that if a Respondent

guest is lost or looking for an answer or directions, Respondent's security officers should assist the guest and go forward and approach that guest as part of a security officer's duties. (Tr. 462.)

Kastroll opined that she frequently has nonwork-related conversations on the casino floor but admits that such conversations depend on how busy the casino is and whether it is interfering with guest service. (Tr. 75, 77–78, 100.) Kastroll also acknowledges that before February 2, 2015, she has been orally warned on prior occasions to limit conversations. (Tr. 77–78, 138–140.) Kastroll also has never reported anyone for soliciting her while she was on duty. (Tr. 100, 140.)

*B. The February 2, 2015 Incident Involving Kastroll's Three-Minute Talk to Security Officer Moreno at Respondent's High Profile Priority One Post While Officer Moreno was On Duty*

On January 16, 2015, the Regional Director of Region 28 directed an election to be held in Case 28–RC–143406 in the following unit of Respondent's employees:

All full-time and regular part-time security officers employed by Respondent at its facilities in Las Vegas, Nevada, excluding all other employees, security officers at Trist, Surrender, XS, and Encore Beach Club at Respondent's facilities, office clerical employees, and supervisors, as defined by the Act.

(Tr. 11.)

The former in-house general counsel for Respondent, Kevin Tourek (Tourek), testified that he became aware that the security officers' union known as Security, Police and Fire Professionals of America (SPFPA) filed a petition with the Board seeking to represent Respondent's security officers almost immediately, and that he was also aware that the same election was to be held in February. (Tr. 171–172, 184–185.) On January 23, the Regional Director issued a further direction that the election in Case 28–RC–143406 was to be conducted at Respondent's facilities on February 11. (Tr. 11.)

Charging Party Kastroll was aware that Respondent's security officers were attempting to organize a union and she testified that in January and February she had about 40 conversations with security officers at the Respondent about organizing. She could not recall each specific conversation, and testified that they ranged in time, some being only 10 to 30 seconds long. (Tr. 37–38.)

On February 2, just before 5 p.m., Kastroll spoke to Security Officer Johnny Moreno (Officer Moreno) about the upcoming SPFPA union election. (Tr. 38, 40.) Kastroll was working as a TGD on the main casino floor that day. (Tr. 39–40.) She approached Officer Moreno, who was on-duty, did not know Kastroll, and was assigned to Priority One Post,<sup>4</sup> after she had

<sup>4</sup> Priority One Post (also known as "the crossroads"), is located at the intersection of the Casino, the B-Bar, and the Host Office, the highest customer traffic area on Respondent's entire property. Tr. 38–40. It is undisputed that Priority One Post is considered the busiest post at Respondent and is the number one post for security and guest satisfaction because given its location in the casino/hotel, it is the one place in Respondent where everyone will most likely walk by at one point or another during their time at Respondent. Tr. 214, 294, 482, and 543. Priority One Post provides a panoramic view of everything that is going on with significant amounts of guest traffic. Tr. 242–243, 442, and 483. In addition

to guest traffic, approximately 130 to 150 TGD's work on the main casino floor on an average day shift, along with 55 casino service team leads, and a number of other nongaming employees such as cocktail servers, engineers, Public Area Department ("PAD") employees, and security guards. Tr. 32–33. Kastroll admits that her February 2, 2015 talk to Officer Moreno for almost 3 minutes occurred away from the casino floor where she usually works and at Priority One Post with "a sea of people in the larger vicinity" around them. Tr. 46. Security officers assigned to Priority One Post must be highly vigilant and direct guests and ensure casino security. Tr. 187, 237–238, 294. Priority One Post is designed to

been tapped off her last game for the day and was heading down to the basement to clock out for the day. (Tr. 39–44, 97, 545–546.)

Kastroll approached Officer Moreno and identified him as a security officer. (Tr. 40–41.) When she approached him, there were no other security officers present and he wasn't speaking with anyone. (Tr. 42.) There were a number of guests and customers in the general vicinity. (Tr. 98–99; GC Exh. 11.)

Kastroll struck a one-sided conversation with Officer Moreno where she did almost all of the talking trying to encourage him to vote for the SPFPA later in the month. (Tr. 41, 43–44, 97, 545–546, GC Exh. 11.) Among other things, Kastroll said: "Hey, I heard you guys are having an election pretty soon. Good luck on that. We pray for you." Officer Moreno responded, "Well, I don't know if. . . it's going to go through." Kastroll asked why, and Officer Moreno stated, "Well, we've been going to these mandatory meetings and the president, Maurice [Wooden], is sitting up there telling us that that's the wrong union for us because there was some kind of embezzlement supposedly and that's just—that's not a good union for us." Kastroll responded with an almost 3-minute talk to Officer Moreno, including the following:

"Well, hey, man, any union is better than no union and don't worry about it, don't worry about what they're saying because we've been through all kinds of stuff. The dealers did this, you can do it, too. You guys can do it, too. We've been through all those captive audience, you know, mandatory meetings. We've had all this anti-union propaganda mailed to our homes. We had even these supervisors that were receiving our tip money would sit at the bottom of the escalator passing out these union busting papers to us on the way to our breaks. . . . Don't listen to all that. Just you guys -- you guys need to have your own voice and don't worry about it. . . just hang in there.

(Tr. 43–44).

Kastroll's talk to Officer Moreno lasted just shy of 3 minutes. (Tr. 44.) While Kastroll engaged Officer Moreno, a significant number of guests and other employees passed by Officer Moreno's post. (See generally Tr. 45–46, 88, 90, 98–99, 203–204, 207; GC Exh. 11.) Kastroll described the high traffic as a "sea of people in the larger vicinity" around them. (Tr. 46.) Some of the guests appeared to be in need of directions but did not approach Officer Moreno as he was engaged by Kastroll. (Tr. 207–213; GC Exh. 11 at 16:58:13–25.) At least one guest approached a different security officer, Officer Joshua Browning (Officer Browning), for assistance since he was momentarily in the vicinity and not otherwise engaged in conversation. (Tr. 235; GC Exh. 11.)

Officer Browning witnessed the interaction between Kastroll and Officer Moreno. (Tr. 44–45; GC Exh. 13.) Specifically, Officer Browning overheard a portion of Kastroll's pitch to Officer

Moreno which he confirmed lasted several minutes. (Tr. 176–177; GC Exh. 13.) Officer Browning observed that the interaction was mainly one-sided, with Kastroll repeatedly telling Officer Moreno to "vote yes" for the SPFPA and with Officer Moreno merely responding "yes" when Kastroll asked him if he understood what she was saying. (GC Exh. 13.) At one point Officer Browning assists a hotel guest during Kastroll's talk to Officer Moreno that arguably Officer Moreno would have handled if Kastroll and Officer Browning were not present. (GC Exh. 11 at 16:59:09:38.)

Officer Browning immediately informed his supervisor, Brenda Rawlins of the interaction. (GC Exh. 13.) Additionally, Officer Browning informed Respondent's president, Maurice Wooden (Wooden), when Wooden happened to walk past him in the lobby. *Id.*

After her conversation with Officer Moreno, Kastroll went downstairs to the basement to clock out for the day and went home. She didn't tell anyone about the conversation. (Tr. 46–47.) Kastroll's approximate 3-minute talk to Officer Moreno on February 2 is otherwise known as the February 2 Incident.

Once Kastroll left him alone, Officer Moreno was able to resume his regular duties in observing the casino for security threats and engaging guests uninterrupted by Kastroll. (Tr. 235237; GC Exh. 11 at 17:01:07, 17:02:04, 17:02:19.) Not once during the almost 3 minutes that Kastroll was talking to Officer Moreno did he assist or engage any of Respondent's guests. That changed soon after Kastroll left Officer Moreno's presence. (GC Exh. 11.)

### *C. Respondent's Investigation of the Feb. 2 Incident*

Tourek testified that he received a call from Respondent's president Wooden, who informed him that Officer Browning complained to him that Officer Browning had witnessed a dealer having a conversation with a fellow security officer about the security union vote. Wooden asked Tourek to investigate the matter since it was a sensitive time due to the upcoming SPFPA election and because he wanted someone who would be knowledgeable of any legal repercussions when conducting the investigation. (Tr. 175, 230–231.)

Tourek explained that it is not unusual for him to be involved in company investigations and that Wooden had frequently directed him to conduct investigations. (Tr. 175, 229–230.) Moreover, as the alleged conduct involved two (2) different departments—TGDs and security officers—Respondent's employee relations manager, Courtney Prescott (Prescott [ aka Courtney Swanson]), handled the investigation with Tourek rather than the Table Games Department manager. (Tr. 54.)

On February 3, 2015, Tourek talked to Officer Browning about the February 2 incident. (Tr. 176.) Tourek asked Officer Browning what he witnessed, and Officer Browning told him that he had witnessed a female dealer talking to a security officer

be highly interactive with guests and visitors. Tr. 460–462; R. Exh. 4. Security officers assigned to Priority One Post must be prepared to answer questions about both Wynn and Encore resorts, give detailed directions to guests and visitors, and assist guests in any way. *Id.* In addition to providing guest services, security officers assigned to Priority One Post must monitor the following locations for safety hazards, emergencies, guests needing assistance, and suspicious activities: the corridor

towards Parasol Up; the corridor towards the Respondent Tower Suites, the corridor towards the Respondent Elevators/Theater; the corridor towards the Buffet and Respondent Pool Elevators; the B-Bar, the Casino Host Lounge; the area in front of the Main Cage; and the immediate casino/gaming area. *Id.* Kastroll knows and understands that security officers assigned to Priority One Post give directions to guests and answer a lot of questions. Tr. 41, 99.

at Priority One Post for a long period of time and that she was talking about union support and how the officer should support the SPFPA. (Tr. 176–177.) Officer Browning identified Kastroll as the dealer involved and Officer Moreno as the security officer approached by Kastroll. (Tr. 270–271.)

Tourek asked Officer Browning how he came about to know about the February 2 incident at Priority One Post and Officer Browning explained that he wasn't a big supporter of the union, that they had been urging him to participate, so when he saw the conversation (between Kastroll and Officer Moreno) taking place he took it upon himself to eavesdrop. (Tr. 177.) According to Tourek, he asked Officer Browning where it happened and what he heard. (Tr. 179.)

Also, on February 3, Prescott and Tourek met with Officer Moreno in an Employee Relations conference room. (Tr. 173, 273.) Prescott acknowledged making note that Officer Moreno told them that he had heard that before the February 2 incident, Kastroll had talked to other people at work recommending the SPFPA union. (Tr. 276–277.)

Tourek also asked Officer Moreno about Officer Browning's complaint about the February 2 incident, whether or not it occurred, whether or not somebody came up and spoke to him, what was the substance of the conversation and basically what was going on. (Tr. 179–180.) Tourek also asked Officer Moreno whether or not he had a conversation with a dealer while he was on Priority One Post on a particular day and what was the substance of the conversation. (Tr. 180.) According to Tourek, the conversation led to the subject of a discussion regarding unions, because "eventually [Officer Moreno] got there" and figured out what Tourek was talking about. (Tr. 181.)

Officer Moreno did not know who Kastroll was without prompting when she approached him on February 2 to encourage him to vote for the SPFPA. (Tr. 545–546.) Tourek told Officer Moreno that the conversation with Kastroll on the floor was not appropriate because it is a distraction while he's supposed to be doing his job. (Tr. 251–252.) At no time did Tourek or Prescott ask Officer Moreno how he was going to vote in the upcoming SPFPA union election. (Tr. 547.)

Respondent maintains that since Officer Moreno remained at his post and the surveillance video footage showed that he did not instigate or encourage the conversation with Kastroll, Officer Moreno was not formally disciplined or threatened with discipline. (Tr. 252–253, 547.)

As part of its investigation, Tourek and Prescott also met with Kastroll and Union Steward Donna Blair (Blair) on Thursday, February 5. (Tr. 47.) That day Kastroll was relieved from her game and told to go to Employee Relations. (Tr. 47–48.) Once there, Kastroll met with Prescott and Tourek in a conference room, along with Blair. (Tr. 47.) Prescott opened the meeting

with, "Do you remember having a conversation on Monday [February 2 (3 days earlier)] with a security guard about unions?"

Kastroll responded that she talks about unions all the time with everybody, including guests sometimes, and she asked Prescott to be more specific. Prescott responded that it was between 4 and 6 p.m. Kastroll said that didn't help. Prescott stated that it was at the Priority One Post, B Bar intersection. Kastroll asked if it was a male or female security officer. When Prescott said male, Kastroll stated sarcastically, "Well, we're down to 90 percent of the security officers." Kastroll testified that at that point, Tourek interjected and stated, "You were promoting the union." (Tr. 49–51.) According to Kastroll, she then stated, "I know what this is about. You guys are having a union election, a representation election soon and now I get what this is all about. I've heard about a lot of disciplines going on in the security department. I see what's going on here." (Id.)

Prescott said that there was a guest who needed help from another security officer. Kastroll responded that she still didn't know what Prescott was talking about. (Tr. 51, 105.) Prescott also mentioned that someone had made a complaint and Respondent had a statement from a security guard. (Tr. 61.) Union Steward Blair testified that during the meeting Tourek also told Kastroll that another employee had written a complaint against Kastroll regarding the conversation she had had with a security guard. (Tr. 124–125.)

Tourek also informed Kastroll that Respondent had surveillance video that showed Kastroll having a conversation on the floor with a security officer at Priority One Post and it was regarding unionization. (Tr. 124–125.) Tourek attempted to refresh Kastroll's recollection of the February 2 incident a number of times, including describing the date, time, and location of the conversation. (Id.) Tourek asked Kastroll if she believed her conversation at Priority One Post kept the security officer from doing his job and informed Kastroll that a guest had to ask another nearby security officer a question because of her conversation with the security officer. (Tr. 124–126.) Kastroll indicated that she could not really recall the interaction. (Tr. 125.)

Blair noted that at some point in the meeting Kastroll excused herself to use the restroom, and while she was gone, Blair asked Tourek if this was going to lead to discipline. Specifically, Blair "was curious to see where this entire investigation was going" and she "asked Kevin [Tourek] whether or not this [investigation] was going to lead to a warning slip and he said that he just wanted to put her [Kastroll] on notice." (Tr. 126–127.)

At the February 5 meeting, Tourek and Prescott gave Kastroll a copy of Respondent's solicitation and distribution policy last revised in May 2014 and one of them told her that she's in violation of that policy.<sup>5</sup> (Tr. 52; GC Exh. 2.) Tourek explained that Kastroll was in violation of Respondent's solicitation and

<sup>5</sup> In response, Kastroll requested the prior versions of the solicitation and distribution policy because she wanted to see "the difference in the language, where it has changed, and whether [she] was aware of whatever changes and modifications there were." Tr. 52–53. However, Respondent's employees are responsible to know Respondent's current policies and procedures because they are made available to all employees on Respondent's intranet system known as the "WIRE," which is accessible both at work and on their personal computers, and which allows employees to electronically acknowledge receipt of policies. Tr. 126,

141–143, 325, 568, 619–620, 628. Respondent's policies are only in effect until a new revision is issued and provided on the WIRE. Tr. 165. As requested, Respondent subsequently provided copies of its prior versions of Respondent's Solicitation and Distribution Policy to Kastroll. Tr. 65; GC Exhs. 6–8. The acknowledgment document presented to and signed by Kastroll was taken from Respondent's template and was only provided to memorialize that Respondent provided her with the previous policy versions she specifically requested. Tr. 67, 284, 287, 307, 309.

distribution policy. Blair also testified that Tourek "made it seem that [Kastroll] had violated that policy and [Kastroll] had said that she didn't feel that she had violated that policy." (Tr. 127.)

Tourek left the February 5 meeting at some point and Prescott requested that Kastroll provide a written statement regarding the February 2 incident. (Tr. 53–55.) Kastroll then wrote a statement in the employee relations office in the presence of Blair which misstated the length of her talk to Officer Moreno and reads in relevant part:

... I have been accused of solicitation, on Monday, 2/2/15, between 4pm-6pm at the intersection of the BBar. I don't recall any specific person or instance related to solicitation. Mr. Tourek suggested that I made union promotions. At best, being a former union officer, I may have wished someone a salutation such as "Good luck; we are praying for you." I don't remember any lengthy conversation as I don't have time during my short break periods. I would never intend to hamper any guest experience, nor prevent someone from performing his job duties. I do not believe that has happened in any casual conversation with any security officer. It is highly unusual to have General Counsel present during an employee relations interview. I feel singled out.

(GC Exh. 3.)

Kastroll testified that in the course of acting as a union steward, she attended approximately 20 investigatory interviews with other employees, but neither Tourek nor Prescott was present for any of those meetings. Moreover, the meetings typically took place in the table games office, not the Employee Relations office. (Tr. 74.) Blair also testified neither Tourek nor Prescott were present for any of the 10 to 15 investigatory interviews she attended in her time as a union steward and that those interviews occurred in the casino manager's office. (Tr. 122–123, 129–130.) I find the reason for this unusual location for an interview was reasonably explained by Prescott to Kastroll at their February 5 meeting to be: "Because this [Feb. 2 Incident] involves two departments"—Kastroll being a dealer and Officer Moreno being a security officer, the meeting took place in the HR conference room. (Tr. 54.)

Prescott met with Officer Browning on February 6 to have him create and sign a written statement of the February 2 Incident. (Tr. 269–270; GC Exh. 13.) Prescott asked Officer Browning what he witnessed on the casino floor that led him to complain to a supervisor. Officer Browning told her that he witnessed Kastroll approach a security officer and initiate a conversation that lasted several minutes and that she told the officer that he needed to vote for the SPFPA union and they would protect him. Officer Browning created and signed a written statement describing the February 2 incident for Prescott. (Tr. 270–271; GC Exh. 13.)

Officer Moreno was also called down by Prescott to write a statement on February 9 about everything that was said in Kastroll's February 2 talk to Officer Moreno at Priority One Post while Officer Moreno was on duty. (Tr. 277–279, 547; GC Exh. 12.) Officer Moreno writes:

On Feb. 2 ... I was at my post (priority 1) on the casino floor. A dealer came up to me out of know [sic.] where to talk to me about the union. I have never talk [sic.] to this worker ever. I

didn't know her name. Someone had to let me know her name (Kanie [Kastroll]). She just started to talk to me about how I should go with the union. That she use to work with the union back in the day. She told me that no matter what they say to join the union. She explained to me that it was the best thing for me to do because we (security) have no say so on anything. That if the union comes in that we (security) can have more say so. She was talking to me for about 5-10 min. She just continued to really repeat herself about joining the union and good it would be to vote yes. Since this meeting employee relations lady has reach out to discuss this with me.

(GC Exh. 12.) Officer Moreno also testified that he was not disciplined for the February 2 incident, he was not threatened with discipline at any time by Respondent and no one asked him how he planned to vote in the upcoming union election at the February 9 meeting. (Tr. 547–548.) In addition, Prescott or Tourek told Officer Moreno that it was his choice whether he wanted to speak to the NLRB prior to trial where he would likely be called as a witness to discuss the February 2 incident and his related statement. (Tr. 557; GC Exh. 12.)

Tourek reviewed the surveillance video of Kastroll's talk to Officer Moreno during his investigation. (Tr. 194; GC Exh. 11.) Tourek explained that when he interviewed employees and viewed the surveillance footage, he was acting at the request of Respondent's president, Wooden, to look into the issue. (Tr. 201.)

*D. Respondent Issues Kastroll a First Written Warning Discipline on February 12 as a Result of the February 2 Incident.*

On February 12, Prescott issued Kastroll a first written warning for the February 2 incident. (Tr. 57–59, 262, 307–308; GC Exh. 4.) The warning states:

On February 2, 2015, Kanie [Kastroll] was witnessed and overheard having a conversation on the casino floor with a Security Officer regarding union organizing. This conversation happened while the officer was on duty (not on break) and in a high traffic, guest facing area. Kanie has been reminded of the Company's Solicitation and Distribution policy. Further violations of Company policy may lead to discipline up to and including termination of employment.

(GC Exh. 4.) Prescott drafted the discipline and signed it on February 12. (Tr. 261–262.) Tourek approved the language of the discipline before it was issued to Kastroll. (Tr. 173, 247; GC Exh. 4.)

The surveillance footage of the February 2 incident depicts Kastroll engaging in a one-sided talk to an on-duty security officer at Priority One Post, the main thoroughfare at Respondent, while hundreds of guests constantly walk past them. (GC Exh. 11.) Tourek and Prescott determined that Kastroll distracted the on-duty Officer Moreno for almost 3 minutes from performing his job duties while the security officer was posted at the most important security post given its casino security and guest relations responsibilities. (Tr. 186–187, 263–265, 293.) The conversation initiated by Kastroll was not work-related and lasted approximately three (3) minutes. (Tr. 187–188.) Kastroll's conduct prevented Officer Moreno from performing his job duties while he was actively on work time. (Tr. 227.)

Prescott testified that her reason for issuing the discipline was that Kastroll violated the solicitation and distribution policy as Kastroll interrupted or disrupted guest or customer services while talking to Officer Moreno for almost 3 minutes. (Tr. 262.) Kastroll violated the policy because she had a conversation with another employee on the floor. (Tr. 263.) She also testified that the subject matter of the conversation was a factor in issuing the discipline, because Kastroll was trying to persuade an employee to vote a certain way in a union election by "encouraging that person to vote in favor of electing a union ... [and] telling that person all of the reasons why a union would be favorable for that person to have." (Tr. 264–265.) Prescott testified that Kastroll violated the solicitation and distribution policy because "she was having a conversation where she was basically selling the services of the union, promoting the services of the union on the floor not in a break area but in a customer service area while another employee was on duty." (Tr. 308–309; GC Exhs. 2 and 8.)

Tourek explained that his reason for approving the discipline was that "[Kastroll] was an off-duty employee engaging in and distracting an employee who was on duty." (Tr. 186.) Tourek added that Kastroll was distracting Officer Moreno by having a conversation with him that took him away from his duties at Respondent's most important security position, particularly his duties to be observant of the casino floor for security purposes and provide guest services. (Tr. 186–187.) Tourek also explained that Kastroll was disciplined for being off-duty and engaging in a three minute conversation with an employee on duty. Tourek opined that the length of the conversation and the subject matter were both factors in deciding to discipline Kastroll. (Tr. 187–188.) He explained that subject matter was a factor because if Kastroll had a valid work-related reason for her long talk to Officer Moreno, she might not have received the warning. Tourek also opined that the only rule she violated was the solicitation and distribution policy. (Tr. 189.)

Tourek also admitted that when there is an upcoming union election approaching, Respondent investigates solicitation violations with "heightened intensity." He stated that during a union organizing campaign in February 2015, "there was a heightened awareness of people having conversations while they're on the clock" and whether employees are engaged in solicitation or not. (Tr. 230–231, 248–249.) He also testified that his definition of solicitation under Respondent's own policy is any discussions about the union while employees are on duty. (Tr. 249–250.) He testified that Respondent's policy covers discussions about the union, even where no union authorization card is at issue. (Tr. 250.)

On the other hand, Tourek distinguished situations where solicitations are freely allowed where he believes employees working on the main casino floor are generally allowed to talk to each other while they're on duty and that he's not aware of any policies in existence in February 2015 that broadly prohibited employees from talking to each other *on the main casino floor* outside the Priority One Post. (Tr. 251.) Kastroll admitted that she has engaged in thousands of non-work related conversations with other employees on the main casino floor. (Tr. 74–75.) She testified that these types of nonwork-related conversations occur all day long, depending on how busy they are. She testified that she's

had nonwork-related conversations with other employees, casino service team leader's (CSTL's), casino managers, and assistant casino managers. She testified that they've had discussions about sports, movies, concerts, politics, and union stuff (Tr. 76). The conversations ranged from 30 seconds to 20 minutes, depending on whether employees are on a dead game or in a dead pit, or if employees are on the same table game. (Tr. 77.) She testified that occasionally, an assistant casino manager walking around might ask employees to limit their conversations while on the main casino floor, but it did not depend on the subject matter. (Tr. 77–78.)

Blair also testified that she's had almost daily conversations with other employees on the main casino floor that do not pertain directly to her work. (Tr. 130–131.) She testified that she's had such conversations with dealers, cocktail waitresses, and security officers. (Tr. 131.) As an example, she recalled a conversation with a security officer, Joe Tuzleno, sometime in 2015 in Priority One Post area. She testified that he was in uniform and appeared to be working at the time and that their conversation lasted *one to two minutes*. They talked about "how as a security guard he should try to get on the floor in the casino itself." (Tr. 131–132.) She was not called into any investigatory interviews or issued any discipline based on that conversation. (Tr. 132.) She testified that she's also spoken to other security officers in the K-9 patrol unit on the main casino floor. She had two or three such conversations in 2015, while both she and the officer were at work, and the conversations were about dogs. (Tr. 133–134.) The conversations were usually *about a minute to two minutes long*. She was never called into any investigatory interviews or issued any discipline for those conversations. (Tr. 134.) Blair also testified that sometime in 2015, when she was opening up a game at the beginning of the day, she overheard a conversation between a TGD on the next game and a CSTL about an eyelash product she was trying to sell. (Tr. 134–135.)

Aside from Kastroll's February 12 warning, at the time of hearing Respondent has only enforced its solicitation and distribution policy two other times since January 1, 2014. (Tr. 310–311; GC Exh. 23 and 24.) One instance involved an employee leaving Avon makeup catalogs around the property. She was issued a second warning for the distribution. (Tr. 311, GC Exh. 24.) The other instance of a first written warning being issued by Respondent involved one employee demanding \$5 from another employee before he would help her make up the bedding. The employee was disciplined for selling goods or services. (Tr. 311; GC Exh. 23.)

In addition, I further find that Respondent disciplines employees for personal conversations - regardless of content - when such conversations distract other employees from performing their job duties or interfere with guest services and when such conduct is brought to Respondent's attention. (See. e.g., Tr. 611–612; R. Exhs. 13–14.) Also in the recent past, Respondent disciplined employees for such things as: speaking to coworkers instead of serving guests; ignoring security post duties while talking with another employee; ignoring the supervision of games due to conversations with another employee; engaging in a personal conversation about 1970s and 1980s pornography stars that was overheard by guests; failing to greet a guest because the employee was engaged in a conversation with a coworker; failing

to serve guests due to conversations with a coworker; and neglecting duties while engaged in personal conversations with coworkers. (R. Exh. 14 at 2-3, 5-8, 12, and 14.) Like Respondent's discipline of Kastroll here, these other discipline examples similarly show that Kastroll was not discriminated against due to her union solicitation but, like Respondent's employees in the above examples, Kastroll was disciplined because she distracted Officer Moreno for almost 3 minutes and interfered with his duties to help and direct Respondent's guests and monitor the casino area overlooking Priority One Post.

*E. Respondent's Questioned Work Rules.*

At all material times since January 31, 2015, Respondent has maintained its Code of Personal Conduct on The Wire, containing the following provisions:

1. Respecting others, which includes but is not limited to:
  - Displaying appropriate behavior at work, on Wynn business, or on property.
  - Never engaging in misconduct on or off-duty that (as determined by Wynn) materially and adversely affects job performance or tends to bring discredit to Wynn.
  - Promoting and respecting the diversity of the Wynn workforce by avoiding any form of discrimination or harassment, including:

\* Degrading comments or offensive language.

- Refraining from inappropriate conduct or horseplay [the Inappropriate Conduct Rule].

2. Striving for excellence in job performance, which includes but is not limited to:

- Never taking photographs in the public "front-of-house" area [the No Photographs, PDAs, Messaging, Calls, or Recording Rule].

3. Know and follow all Wynn policies and procedures, which include but are not limited to:

- Only using the facilities for the property you are scheduled to work, with the exception of the employee dining area.

\* When scheduled to work at Wynn you must park in the employee parking garage and utilize the back of the house area that pertains to and is exclusive to the property at which you are working with to and is exclusive to the property at which you are working with the exception of the employee dining area. All other exceptions to this rule can only be made with specific management authorization and/or written accompanying documentation [the Restricted Access Rule].

- Complying with copyright, patent, and trademark laws, which are intended to protect exclusive use of publications, productions, artistic works, and so forth.

\* Logos may not be used for any purpose aside from those for which they are intended.

\* Logos may not be altered in any way [the Restricted Intellectual Property Rule].

- Protecting the confidentiality of Wynn.
- Never using, accessing, possessing, copying, removing, or sharing any of Wynn confidential business information without authorization or for business reasons [the Confidentiality Rule].
- Never using personal communications devices such as beepers, cellular telephones and personal data assistance ("PDAs"), for incoming and outgoing messaging or calls while on duty, unless prior authorization is obtained from a department manager [the No Photographs, PDAs, Messaging, Calls, or Recording Rule].
- Except for off duty or pre-authorized use of personal communications devices for incoming and outgoing messaging or calls only, never using any device for audio, video or data recording/transmission, such as video and digital cameras, camera and recording components of cellular telephones/PDAs and digital recorders, at any time while on company property or while performing job duties off-company property, unless prior authorization is obtained from a department manager for a company business purpose [the No Photographs, PDAs, Messaging, Calls, or Recording Rule].
- Never using Wynn property for personal use [the No Personal Use Rule].

4. **Being honest**, which includes but is not limited to:

- Reporting any suspicious or improper activity to a manager or security officer (the Honesty Rule).
- Refraining from any activity in photographing or recording (either by audio or video means) others in the work environment, including coworkers, managers, guests, customers, or vendors, unless specific authorization has been given in advance by all individuals subject to the intended photography and/or recording activity or management has otherwise pre-authorized the activity for company business purposes [the No Photographs, PDAs, Messaging, Calls, or Recording Rule].

7. Failure to display proper conduct and abide by these standards may result in disciplinary action up to and including termination [the Failure to Obey Rules or Handbook Violation Rule].

(GC Ex. 1(o) & (q); R Ex. 7 & 12) (bold in original). The code of personal conduct applies to all employees of Wynn Resorts and its subsidiaries, including Respondent. (Tr. 167.)

*F. May's General Background as a Security Officer for Respondent.*

The SPFPA union and Respondent stipulated to an election agreement, an election was held on February 11, 2015, and the union failed to obtain a majority of votes to secure

representation. (GC Exh. 21.)

Respondent hired Charging Party Keli May (May) on April 11, 2005, and currently employs her as a security officer in Respondent's security department. (Tr. 320.) May's 10 year employment at Respondent is free of significant discipline other than one written warning issued against her.

As a security officer, May is responsible for monitoring and patrolling her assigned area to ensure guest and employee safety, minimizing potential for loss or damages, and responding to emergency situations. (Tr. 340.)

Most of Respondent's security officers working at its Wynn casino clock in and out of work using Respondent's Kronos timekeeping system by swiping their ID badge on time clocks located outside of the security offices of Respondent's facility. (Tr. 322.) The security offices at Respondent's Wynn facility are located in the basement underneath the buffet area on casino level. (Tr. 323.) Anyone going to Respondent's basement security offices must show a valid ID badge to a posted security officer to get into the basement. (Tr. 324.)

Employees can view their recorded time and worked hours using Respondent's intranet Wire with access at Respondent through kiosks in Respondent's basement or from an employee's home computer or telephone. (Tr. 325.) The Wire shows the times an employee has clocked in and clocked out. Id.

In May/June 2015 May reported directly to immediate supervisors Tammy Howell (Howell), Mr. Haire (Haire), and Paul Roberson (Roberson). (Tr. 326, 378.) These supervisors reported to Assistant Manager Corey Prowell (Prowell) who reported to Security Manager Rawlings (Rawlings). (Tr. 326–327.)

*G. May's Assignment's and Common Pay Issues Stationed at Respondent's WDD Flex Building in 2014–2015*

In 2014–2015, May was assigned to guard the Respondent Design and Development ("WDD") Flex Building located on Koval Lane and Sands Avenue. (Tr. 333–335.) Over these years May worked the dayshift at the WDD Flex Building from either 6 a.m. to 2 p.m. or 8 a.m. to 4 p.m. depending on the day of the week with other security officers—Robert Alameda (Alameda), Lavert Davis (Davis), and Officer Rankin. (Tr. 320–321, 335–354, 461.)

The WDD Flex Building is Respondent's satellite office that does not have a time clock for employees to clock in and out for their shifts. (Tr. 338–339, 342–343.) Instead, May and all other officers assigned to the WDD Flex Building either call the manager on duty or a dispatcher to convey start and stop times over the radio and inform him or her of their arrival, breaks, and their departure. (Tr. 341–342, 448, 468.)

This timekeeping procedure utilized at the WDD Flex Building led to a common payroll error with May approximately 15 times and other employees as well in 2014–2015 in which hours were not properly recorded. (Tr. 345–347, 448.) Each time the error resulted in lower pay to May and the other security officers at the WDD Flex Building. (Tr. 345–347.) An employee could discover an error for missed time recorded by viewing their missed time on the Wire. (Tr. 345–346, 449.) Errors usually involved whole days missing or overtime pay missing. (Tr. 346–347.) As a result, many times in 2014–2015 supervisory managers would forget or omit entry of start and stop times for security

officers working at the WDD Flex Building. (Tr. 345–347, 448–469.)

May discussed these payroll error issues all the time with her fellow security officers at the WDD Flex Building at least once a week. (Tr. 347–351, 449.) Every 2 weeks, Alameda and May would discuss whether their pay was correct or not for work at the WDD Flex Building. (Tr. 348.) If Alameda found his pay was wrong, he would tell May as usually if one security officer's time was incorrect then the other security officer on the same shift would also have an error in their pay. (Tr. 348.)

Officer Rankin worked at WDD Flex with May on Wednesdays and Thursdays in 2015. (Tr. 446–447, 461.) These pay errors were a constant topic of discussion between May and Officer Rankin and other security officers at the WDD Flex Building as the errors were common and conversations usually took place at lunch with another security officer at WDD Flex Building. (Tr. 348–349, 461.) Sometimes the errors related to missed overtime for May and Rankin as the dispatcher would not input the fact that they left WDD Flex at 4:10 p.m., 4:20, or 4:30 which are all overtime for their day shift that normally ended at 4 p.m. (Tr. 469.)

May would try to resolve these frequent pay errors while working at the WDD Flex Building over her lunch hour by going to the security offices at the Wynn. (Tr. 351.)

*H. May's Missing Pay Error on Her May 29 Paycheck*

On May 29 with her paycheck for time worked from May 11–23, 2015, the matter leading to discipline in this case began when yet another of Respondent's frequent payroll errors first came to May's attention and she discovered that the entire day of May 22 was omitted from her paycheck although she worked 8 hours on May 22. (Tr. 354–360; GC Exh. 25.) Consequently, because the incorrect paycheck was missing an entire 8-hour day on May 22, her paycheck was also missing May's overtime and double overtime hours worked. Id.

On the following Monday, June 1 May informed Prowell of the hours and pay shortage and Prowell told May that he would take care of it. (Tr. 357–360.) May gave Prowell her incorrect pay stub (GC Exh. 25) and a wire screen shot showing her time worked on payroll from May 11 to 24, 2015, to help him get the pay error resolved. (Tr. 358–360; GC Exhs. 25 and 26.)

The following day on June 2 May spoke to Howell on May's lunchbreak in the security offices about her same paycheck error and Howell told May that Prowell would correct the problem for her. (Tr. 362–363.) Also, on June 2, May also spoke to Dudoit about her unpaid time error and he also told May that Prowell would correct the mistake. (Tr. 363–364.)

An investigation into May's payroll issue later concluded that May's work time was not entered correctly by management and that May was issued a check on May 29, 2015, that mistakenly did not compensate her for eight (8) hours of overtime and two (2) hours of double time. (Tr. 355.) May's paycheck was \$291.52 short from the amount she was owed by Respondent. (GC Exh. 31.)

On June 12, 2015, Wynn issued a payroll check to May that resolved only part of her payroll issue because Prowell mistakenly submitted a request to the payroll department to compensate May for eight (8) hours of *regular* pay. (Tr. 364–365; GC Exh.

27.) As a result, May was still owed 6 hours of overtime pay and 2 hours of double-time pay for the week ending on May 24 (collectively referred to as the missing OT/DT pay). Id.

On Monday, June 15 May went to the security offices to advise that she had still been paid incorrectly. (Tr. 366.) May spoke to Haire about her continuing paycheck issue for the missing OT/DT pay and also noticed a new pay issue on the Wire where May's work on Tuesday, Wednesday, and Friday, June 9, 10, and 12 were now missing. (Tr. 367–368.)

Haire looked into Respondent's Kronos system, saw the missing dates for May's work, and manually entered in May's missing time for Tuesday and Wednesday, June 9 and 10, but Haire refused to enter the May's missing time for Friday, June 12, because it was his day off and he apparently did not believe what May was telling him. (Tr. 367–369.)

Haire later on June 15 entered May's missing Friday June 12 time and May told Haire that her May 29 paycheck was still incorrect. Id. Haire responded by telling May that she should go back to Prowell and Howell to get the missing OT/DT pay corrected. (Tr. 369.)

On June 16, 2015 May spoke to Howell in the security offices on May's lunchbreak and Howell told May that Howell would have to get Dudoit and Prowell to take care of the missing OT/DT pay problem. (Tr. 369–370.)

On June 17 May followed up with Howell at the security offices during May's break. (Tr. 370–371.) Howell told May that a check was going to be cut and Dudoit was helping Howell get a check cut and it was looking like May would receive her corrected pay later that same day on Wednesday, June 17. Id. May did not receive her corrected paycheck on June 17. (Tr. 371.)

On June 18 May spoke again to Howell at the security offices during her lunchbreak. (Tr. 371–372.) May told Howell that she had not received the corrected paycheck yet and Howell responded that Dudoit was working on it but Howell did not know the exact details because Dudoit was handling it. Id. May did not receive her corrected paycheck on June 18.

#### *1. May's June 19 Incident and Resulting Discipline from Respondent.*

On June 19, during her break May went directly to the payroll window located in the basement at Respondent's Wynn facility just down the hall from the security offices to see if there was a corrected paycheck there waiting for her. (Tr. 372–373.) There was no check with May's name on it waiting for her at the payroll window during her break. (Tr. 373.) The payroll window clerk advised May that there was no check for May and that May should go to her security department to inquire further. Id.

Later on June 19 May went to the security offices and spoke to Howell again informing her that there was no check waiting for May at the payroll window. (Tr. 373–374.) Howell went to her computer to look up her emails and an email she was copied on from Dudoit showed that Dudoit had filled out an application or requested one from a Nicole Saito (Nicole) in Payroll and the email request was dated Thursday June 18 at approximately 5 p.m. (Tr. 374–375.)

Howell told May that the request for May's missing OT/DT pay was submitted and Howell did not understand why there was not a paycheck waiting for May to pick up. Howell

recommended that May go on her lunch break so Howell would have time to look into the status of the missing OT/DT pay. (Tr. 375.) May left the security offices and went to lunch at the employee dining room (EDR). Id.

After eating lunch on June 19 May went to the payroll window again to collect her missing OT/DT paycheck. (Tr. 375.) May was told by the same payroll clerk as before that there was still nothing at the payroll window for May. Id. May then told the clerk that there was an email reflecting from Dudoit to Nicole in payroll and the clerk picked up the telephone and dialed a number. (Id.) Eventually, the clerk handed May the telephone and May explained to Nicole on the telephone why she was waiting for her paycheck from payroll, the entire sequence of events including the missed May 22 time and then the missed OT/DT pay. (Tr. 375–376.)

After hearing the detailed story, Nicole responded by telling May that Nicole is canceling the adjustment that had just been submitted by Dudoit and May was caught off guard by this as the check May was expecting to pick up was now being canceled by Nicole. (Tr. 376.) May responded by asking Nicole why she was canceling the check that May had been waiting to receive since the error was first discovered and management first began the process to correct the error on June 1—18 days earlier. (Id.) Nicole explained that all that had been submitted had been two regular hours pay and at May's regular rate of pay those two regular hours would not resolve the pay issue and add up to be the missing OT/DT pay amount of approximately \$91.10. (Id.) Nicole then tells May that she is canceling the transaction and tells May to go back to the security offices to see Howell or Dudoit. (Id.)

Later in the early afternoon of June 19, with the majority of employees, supervisors, and managers away on lunchbreak or in closed door meetings in the security department May leaves the payroll window and heads back to the security offices to try and resolve the missing OT/DT pay problem. (Tr. 377.) May intended to go directly to Dudoit's office when she returned to the security offices, but his door and blinds were closed, and it was dark inside indicating he was not there. (Tr. 377.) No hotel guests or customers are around in basement security offices which are off-limits to hotel guests and customers. (Tr. 453.)

May saw the 2 Ricoh copier repairmen near the printer and that Respondent investigator Brad Thomison's (Thomison's) office door was open and his lights were on. (Tr. 378.) May also saw that day shift security manager Romo's office blinds were open and Romo was seated at his desk in a meeting with Howell, Prowell, and Roberson with the door open. Id. May walked up to Romo's office and also noticed that the briefing room next door to Romo's office had a group of new officers there for training in a closed-door meeting. (Id.)

May tried to whisper to get Howell's attention to come out so as not to disrupt the meeting in Romo's office as the 4 managers there were talking amongst themselves and Romo's door was open. (Tr. 379.) May said to Howell: "Can I talk to you for just a moment?" Id. May leaned back and no one responded to May's question to Howell and the door closed and it became silent in the hall where May was standing by herself. (Id.)

Next May walked away from Romo's office toward the copier and coffee maker and Thomison's office. (Tr. 379–380.) May

walked back to the copier area as the Ricoh repairmen were packing up to leave and May said “hi” to Thomison who also said “hi” back to May. (Tr. 380.) May then stood by the copier for 5–10 minutes waiting for the Romo office meeting to end so she could talk to Howell about her missing OT and DT pay issue but the door to Romo’s office remained closed. Id.

May remained standing by the copier and coffee maker when Officer Rankin came into the security offices on his lunchbreak and near May asking her what she was doing there. (Tr. 381,450–453.) No one else was standing by May when Officer Rankin spoke to her. (Tr. 451.) May responded saying to Officer Rankin: “I’m trying to fix my payroll issue.” (Tr. 381,450–452.) Officer Rankin responds to May asking: “You’re in here again still trying to resolve your issue?” Id. May responds affirmatively and Officer Rankin asks: “where is everybody?” (Tr. 381–382.)

May replies that they are all behind closed doors in a meeting in Romo’s office. (Tr. 382, 452.) Officer Rankin responds next saying to May: “Get you fucking ass over there and demand your money right now.” (Id.) Officer Rankin denies using the word “fucking” and testified that he told May that “it’s bullshit, basically, that you have to go through this over and over and over again.” (Tr. 452–453.) I find May’s testimony more credible and that Officer Rankin’s common use of profanities is more consistent with other witness testimony of free use of profanities in the security offices by managers and others, the other references to the June 19 events and because Officer Rankin has received a prior verbal warning for his improper conversations at work in front of a hotel guest or customer and likely did not want to admit to his added use of profanities. (See Tr. 444–445, 453.)

May responds to Officer Rankin in a loud voice telling him:

Rick [Officer Rankin], I’ve already gone to four fucking people. How many more people do I need to go to get this taken care of? I’ve done enough to where I can’t do anything else. I’ve already gone to four different people. How do I go to anybody else to take care of this? I’ve already gone to two supervisors, an assistant manager, and an assistant director. These managers are all fucking idiots and no one knows shit. I don’t know what to do at this point. The girl’s [Nicole is] a fucking idiot as well. I’m just doing what I have to do to resolve it, and today’s the day where they keep telling me I’m getting money, and I haven’t gotten it yet. So now I’m staying here until we resolve this.

(Tr. 382, 390, 420–421, 453, 469–470, 518, 524–526.) Officer Rankin and May continue to their elevated discussion of May’s unpaid wages issue, how often this type of error happens and how it should not ever happen let alone occur frequently. (Tr. 452–453.) May repeated this loud outburst using the same profanities 2–3 times (collectively known as the June 19 Incident).

May admits to a “colorful worded conversation” and using profanities but not directly to Romo or Howell as they stayed behind closed doors in Romo’s office during the lunch hour. (Tr. 382, 390, 528; GC Exh. 28.)

After hanging up “relatively quickly” with a guest so they could not hear in the background May’s June 19 Incident down the hall, Director’s Assistant, Boguille (Boguille), got up from her desk, located in a back office outside her supervising director’s empty office down a hallway around the corner from where

May and Officer Rankin were standing, and approached them and asked them if everything was “ok”, “what’s going on”, and “how are you doing?” (Tr. 455, 523, 532–533; R. Exh. 6.) May and Officer Rankin responded to Boguille that “everything was fine.” (Id.)

Boguille next went to Thomison whose office was closest to Boguille’s to ask if he knew where May’s managers were. (Tr. 454, 530, 537–538.) Thomison was standing up in his office at this time and he told Boguille that all of the managers were in Romo’s office. (Tr. 532, 538.)

Boguille then went to Romo’s office, knocked on the door, and entered. (Tr. 530.) She saw that most of May’s managers were there, Howell, Roberson, Prowell and Romo. (Tr. 530–531.) Boguille informed Romo that May was loudly cursing, complaining about her payroll issue, calling management “fucking idiots,” and saying that nobody knows what they are doing about her unpaid wages. (Tr. 524–525, 531.) Boguille told Romo that he needs to address May’s unpaid wages issue with her because May is being extremely loud in the office. (Tr. 531.)

After being informed by Boguille of May’s conduct, Romo and Howell met with May to discuss her payroll issue and loud discussion with Officer Rankin. (Tr. 385, 456–457.) During that meeting, Romo advised May that she was welcome to come to him in the future if she was experiencing issues and then he, Howell, and May worked together and calculated that May was still owed compensation for one straight-time hour and two double-time hours. (Tr. 389.) May then returned to her station at the WDD Flex Building. (Tr. 390.)

Boguille admitted that she was not offended by the curse words used by May on June 19 but, instead, what bothered Boguille was that May was making the accusation that management somehow did not do their job right in connection with May’s various attempts to have management correct their unpaid wages situation with May. (Tr. 534.) Boguille admitted that she heard others use curse words in the security offices in her time there from 2011 to 2015. (Tr. 535.) Stated differently, Boguille was not offended at all by May’s use of profanities in the security office on June 19 but Boguille was upset that May was speaking loudly when she negatively criticized management for her unpaid wages. (Tr. 534–536.)

Boguille also admitted being inconvenienced by May’s June 19 Incident in her shortening her call with a guest, having to write a statement about the June 19 Incident, and the incident causing her “to get up and deal w/[it] completely.” (Tr. 532–33.)

Officer Rankin admitted that Manager Romo also used profanities in the security office in June 2015 just before a daily briefing in front of other managers, supervisors, and other security officers. (Tr. 456–458.) In addition, Officer Rankin has heard Manager Romo use words like “Son of a bitch” and “You guys get your asses in the briefing office.” Id.

New Security Human Resources Manager Brian Parker (Parker) also testified that he could hear May’s conversation with Officer Rankin in the employee hallway off limits to guests and customers and outside of the closed double-doors leading into the security office suite. (Tr. 504, 509, 513; R. Exh. 6.)

Parker was newly transferred to HR in June 2015 by Respondent to be responsible for overseeing disciplines, suspensions, and

investigations in the Security Department. (Tr. 503.) As a result, then-Security Department Director Karen Hughes (Hughes) asked Parker to investigate May's June 19 Incident. (Tr. 504.) Parker investigated the incident by speaking with Nicole, reviewing all of the transactions, and seeking statements from witnesses. (Tr. 393, 395; GC Exhs. 28 and 31.) Parker also overheard the June 19 Incident but being new to the department, Parker was unaware of the common profane language use in the department.

On June 22, 2015, Parker specifically spoke with May about the June 19 Incident and informed her that she was being suspended pending investigation. (Tr. 396, 505; GC Exh. 29.) After a five (5) day suspension without pay, May was brought back to work on June 26, 2015. (Tr. 399, 403–404.) May's discipline also included a second written warning for inappropriate conduct in violation of Respondent's Code of Conduct. (Tr. 405; GC Exh. 30.)

May's missing OT/DT pay owed to May from the last week of May 2015, were finally paid to May's bank account directly later on June 19, 2015, after the June 19 Incident. (Tr. 418–419; GC Exh. 31.)

## Analysis

### I. CREDIBILITY

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

I found Kastroll to be evasive and not credible when she could not recall her almost 3 minute talk to Officer Moreno when interviewed by Tourek and Prescott with Blair on February 5, just 3 days after the February 2 incident. Kastroll's almost 3 minute length talk to Officer Moreno was a much longer conversation than the simple 10–30 seconds passing talks Kastroll admitted she had about 40 times in January and February 2015, none of which lead to any discipline to Kastroll. (Tr. 37–38, 100–101.) Also Kastroll was not believable that she did not observe any hotel guests or managers around Officer Moreno and her the entire 3 minutes she spoke to him. In addition, Kastroll's February 5 written statement describing the February 2 Incident (GC Exh. 3) is inaccurate, not credible, and rejected as a fabrication of facts in contrast to the overwhelming evidence of the February 2 incident.

I reject Officer Rankin's testimony in Kastroll's written warning case that while working at Priority One Post, he's talked to other employees "all day long" as a gross exaggeration, that the

conversations can last several minutes, and that he's never been called into an investigatory interview to discuss his conversations with other employees on the main casino floor.<sup>6</sup> (Tr. 443–446.) This is inconsistent with Officer Rankin receiving a verbal warning for having such conversations while on duty at Priority One Post. (Tr. 445–446.) In addition, Officer Rankin admitted that he never actually timed any of his conversations with coworkers while at Priority One Post. (Tr. 463.) I also reject his further testimony that the conversations at Priority One Post can last several minutes because Officer Rankin is a poor estimator of time and some of them pertain to work. (Tr. 444.)

Officer Rankin also testified soon thereafter, however, that he was actually disciplined once previously for talking to another Respondent employee at Priority One Post. (Tr. 445.) Officer Rankin further admitted that he received a verbal warning from a supervisor to keep his conversation short or not talk so long at Priority One Post. (Id.) I find that Officer Rankin's experiences are distinguishable from the February 2 incident at issue here as they involve situations either away from Priority One Post, involve situations where the foot traffic from Respondent's guests and others at Priority One Post is lesser, the timing is not during Super Bowl weekend from 4–6 p.m., and the fact that Officer Rankin was verbally disciplined on at least one occasion is consistent and not disparate with Respondent's discipline of Kastroll here for her almost 3 minute talk to Officer Moreno.

I also reject portions of Officer Rankin's testimony concerning the May June 19 Incident where he denies using as many profanities as other witnesses attribute to him, he denies that use of profanities is commonplace in the security offices, and estimates that his conversation with May at the copier on June 19, 2015, lasted from 10–15 minutes. (See Tr. 453, 456–459.) As stated above, Officer Rankin does not estimate the passage of time very accurately and over-estimates the amount of time having passed. He has also been disciplined before for talking about pornography with another security officer in front of a guest while at Respondent and his testimony about the common use of profanities at work by managers in the security offices is inconsistent with May's and Boguille's more believable testimony. (See Tr. 471–472.) Moreover, Officer Rankin admitted that Manager Romo uses profanities in the security office in June 2015 just before a daily briefing in front of other managers, supervisors, and other security officers. (Tr. 456–458.) In addition, Officer Rankin has heard Manager Romo use words like "Son of a bitch" and "You guys get your asses in the briefing office." (Id.)

Tourek testified in a believable straightforward manner without hesitation. Since Respondent's president Wooden authorized Tourek to investigate Kastroll's Feb. 2 Incident, he is an agent of Respondent under Section 2(13) of the Act. His explanations concerning his frequent involvement in Respondent employee investigations and why Kastroll's February 2 incident came to his attention rather than directly to Kastroll's immediate supervisor is reasonable due to the fact that the matter involved 2 different departments—the unionized TGD's department where

changes in a much shorter time frame of no more than 30 seconds to 1 minute.

<sup>6</sup> Another example of Officer Rankin's exaggerated estimate of passing time is his statement that a typical traffic light lasts 3 minutes before it changes. Tr. 463. I take administrative notice that a typical traffic light

Kastroll works and the nonunionized security guards department where Officer Moreno works. Tourek also appeared credible when he described asking Kastroll at their February 5, 2015 meeting with Union steward Blair and Prescott if Kastroll believed her February 2 conversation at Priority One Post kept the security officer from doing his job and Tourek informed Kastroll that a hotel guest had to ask another nearby security officer a question because of her conversation with the security officer.

May testified in a direct and forthright manner and her testimony did not waver on cross-examination. For example, May's testimony was more believable that she tried a multitude of ways to correct her unpaid wage problem with no positive results prior to her June 19 frustrated outburst in the security office while her managers were in a closed door meeting and most other employees were at out at lunch.

II. RESPONDENT LAWFULLY ISSUED KASTROLL A WRITTEN WARNING IN RESPONSE TO HER ALMOST 3 MINUTE SOLICITATION TALK TO AN ON DUTY SECURITY GUARD AT PRIORITY ONE POST IN VIOLATION OF RESPONDENT'S SOLICITATION POLICY

Paragraphs 5(c), 5(d), 6(a)-6(c), 8, and 9 of the complaint allege that on February 12, 2015, Respondent acted unlawfully in violation of Section 8(a)(1) and Section 8(a)(3) and (1) of the Act when Respondent selectively and disparately enforced its Solicitation policy rule against union employee Kastroll and issued her a written warning because Kastroll assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

A. *The February 2 Incident Involves Kastroll's Prohibited Union Solicitation and Not Merely Prounion Talk*

Respondent's Solicitation policy, among other things, provides that "[a]ll other solicitation by employees is prohibited in work areas during the work time of the employee initiating the solicitation or the employee being solicited . . ." and "[s]olicitation is oral communication asking or seeking a person to take some action, such as buying a product or service, contributing to a charity, or joining an organization . . ." (GC Exh. 2.)

The General Counsel does not allege that Respondent's Solicitation policy, revised as of May 13, 2014 (GC Exh. 2), is unlawful but that it was enforced against Kastroll in an unlawful and discriminatory manner. I find that the General Counsel's argument lacks merit that Kastroll's almost 3 minute talk to on-duty Officer Moreno when he was stationed at Respondent's work area known as Priority One Post, to urge, allure, entice, and request that he vote in favor of the SPFPA union in an upcoming election is merely protected "pro-union talk" and somehow not "union solicitation." (See GC Br. at 40-41.)

With limited exceptions not applicable here, employees have the protected right under Section 7 of the Act to solicit and distribute literature to fellow employees on behalf of unions or other common interests dealing with wages, hours, and terms and conditions of employment, so long as the solicitation is during non-work time and the distribution is not in work areas. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802-805 (1945); and *Stoddard Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962). This includes the right to "engage in persistent union solicitation even when it annoys or disturbs the employees who are being

solicited." *Ryder Truck Rental*, 341 NLRB 761 (2004), *enfd.* 401 F.3d 815 (7th Cir. 2005).

The Board has, consequently, held that, "an employer may not generally prohibit union solicitation ... during nonworking times or in nonworking areas." *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987). Although employers can generally ban solicitation in working areas during working time, such bans cannot extend to working areas during nonworking time. *Food Services of America, Inc.*, 360 NLRB 1012, 1018 (2014).

As stated above, the General Counsel does not challenge Respondent's Solicitation policy here, and argues only that Kastroll did not solicit Officer Moreno but, instead, engaged in pro-union work talk the same as she regularly does without discipline in the course of her time at Respondent.

The General Counsel cites to the Board's *Conagra Foods, Inc.* decision, 361 NLRB 944, 945 (2014), *enfd.* in part, \_\_\_ F.3d. \_\_\_, 2016 WL 682979 (8th Cir. 2016), in support of her argument that the Board has consistently held that solicitation for a union *usually means* asking someone to join the union by signing his name to an authorization card at that time. The General Counsel then adds that "the Board has explained that drawing the solicitation line at the presentation of a card for signature makes sense because it is that act which prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if employees are supposed to be working. (internal quotations omitted and citations omitted)" *Id.*

The facts in *Conagra Foods, Inc.* are distinguishable from the facts here as the interaction at issue in *Conagra Foods, Inc.* lasted no more than a few seconds while the disruptive solicitation here lasted almost 3 minutes and interrupted Respondent's business operations including its ability to guard its casino against cheaters and assist its guests with directions at its busiest casino/hotel location.

I find that the General Counsel's citing *Conagra Foods, Inc.* in support of her position in this case is too limited in her focus on the lack of authorization cards in this case. Rather, the key language from the Board in *Conagra Foods, Inc.* is the balancing between an individual or individuals being solicited and the potential for interference with employer productivity if employees are supposed to be working. Here, I find that if you "solicit" an on-duty security guard to vote for the union nonstop for just under 3 minutes while that person is working at a casino/hotel employer's busiest duty station for a security guard, you have a disruptive solicitation for a union that can be regulated by an employer. (See R. Br. at 22-23 and citations therein.)

Moreover, the Webster's Dictionary defines "solicitation" as: "the act of soliciting; entreaty, urging, or importunity; a petition or request; enticement or allurement." I am unaware of any Board case authority that limits "solicitation for a union," for the purposes of disciplinary action, to only attempts to secure the signing of a union card. The whole point of such rules is that these activities are a distraction or interruption of productive work, which the employer has a right to limit, so whether the solicitation involves the passing out of a card, or literature, or lengthy verbal enticement, it is still a solicitation.

The 3 minute talk in this case is to be distinguished from a

short, casual prounion talk conversation that Kastroll and the General Counsel attempt to paint her almost 3 minute talk on February 2, 2015, to on-duty Officer Moreno at his on-duty station known as Priority One Post where the video evidence shows that Kastroll distracted Officer Moreno from performing his duties for just shy of 3 minutes. This 3-minute talk is certainly not the quick 10 second nonwork related (“what did you think of the game last night?” or even “go, union”) said while passing by, which is not intrusive or distracting or solicitation. Kastroll’s 177 second (almost 3 minutes) solicitation for a union to Officer Moreno, at Respondent’s busiest (Priority One Post) work duty location, while Officer Moreno is supposed to be on alert to catch casino cheaters while proactively providing directions and customer service to Respondent’s guests and caught on regular casino video is also “solicitation for a union” in every common sense of the words.

In sum, the General Counsel’s position characterizing Kastroll’s February 2 incident the same as talks during a dead poker game table on the casino floor or as a brief offhand comment at Priority One Post is unsupported by Board precedent—or a common understanding of the English language. Officer Browning assists a Respondent hotel guest while Kastroll disrupts Officer Moreno and interferes with Respondent’s business operations and soon after Kastroll leaves, Officer Moreno is seen on video assisting another Respondent hotel guest. While drawing a line somewhere between 10 seconds and almost 3 minutes would seem appropriate in deciding when a lengthy interference changes from nonsolicitation to solicitation that can be prohibited, I find that the line is drawn well before almost 3 minutes when the talk occurs at Priority One Post.

Consequently, I find that Kastroll’s almost 3-minute talk to Officer Moreno on February 2, 2015, while he was on-duty at Respondent’s Priority One Post was prohibited solicitation for a union and not merely prounion work talk. As such, I further find that Kastroll’s February 2 2015 union solicitation talk to Officer Moreno while he was on duty is not protected under Section 7 because it interfered with Officer Moreno’s job duties and Respondent’s business operations at Priority One Post and is subject to Respondent’s prohibition based on the facts of this case. Respondent made a justifiable showing with its surveillance video that Kastroll’s almost 3-minute talk to Officer Moreno while he was on-duty at Priority One Post interfered with Officer Moreno’s work and casino operations. Kastroll’s warning was, accordingly, lawful under Section 8(a)(1) of the Act.

*B. Kastroll’s February 12, 2015 Written Warning Is Justified and Not Discriminatory*

As stated above, Kastroll’s February 2, 2015 union solicitation talk to Officer Moreno while he was on duty is not protected under Section 7 because it is subject to Respondent’s Solicitation policy prohibition based on the facts of this case. Alternatively, if the February 2 incident involved protected concerted activity, a *Wright Line* analysis is appropriate to determine whether the General Counsel has proven Respondent’s discriminatory motivation in disciplining Kastroll on February 12, 2015.

The Supreme Court-approved analysis in 8(a)(1) and (3) cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert.

denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). Under the *Wright Line* framework, as subsequently developed by the Board, the elements required in order for the General Counsel to satisfy its burden to show that an employee’s protected activity was a motivating factor in an employer’s adverse action, “are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer.” *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enfd. 801 F.3d 767 (7th Cir. 2015). Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel’s showing, can avoid the finding that it violated the Act by “demonstrat[ing] that the same action would have taken place in the absence of the protected conduct.” *Wright Line*, supra at 1089.

In this case, I find that all of the elements of *Wright Line*, supra, are not met here. Even if Kastroll’s behavior in the February 2 incident is considered protected concerted activity, there is no evidence Respondent exhibited antiunion animus or that Kastroll was discriminatorily targeted by Respondent. Instead, it was Officer Browning, a nonsupervisory security guard and nonagent of Respondent who simply disliked the union and complained about his observing Kastroll’s conduct that triggered Respondent’s investigation of the February 2 incident.

Even if Officer Browning espoused antiunion animus, this cannot be imputed to Respondent in the instant case. Kastroll testified that she freely solicited union members while on-duty at her quiet card table outside the Priority One Post without being disciplined or briefly recommending a union vote while going on break in other work areas. No disparate treatment by Respondent has been shown by the General Counsel as no credible evidence has been provided that union solicitation conversations in the Priority One Post lasting as long as just under 3 minutes are allowed to occur without any discipline being issued. The video in this case shows that during Kastroll’s almost 3-minute talk to Officer Moreno, he was distracted by Kastroll and his work interrupted so he could not complete his regular work duties in a competent manner.

I further find that Respondent properly investigated Officer Browning’s complaint against Kastroll’s February 2 incident by interviewing Officers Browning and Moreno and later Kastroll. They returned to obtain written statements from Officers Moreno and Browning. I do not find any of Tourek’s or Prescott’s questions as part of the investigation inappropriate. Inquiring about the subject matter of the 3-minute talk is appropriate to determine as Tourek said whether the conversation involved job-related customer service or casino security or prohibited union solicitation. I also find it reasonable that Tourek would be on higher alert around the time of a union election as that is the expected time period when improper union solicitation is most likely to occur in working areas while employees are on-duty.

In addition, I further find that Respondent disciplines its employees for personal conversations—regardless of content—when such conversations distract other employees from performing their job duties or interfere with guest services and when such conduct is brought to Respondent’s attention, as done here. (See.

e.g., Tr. 611–612; R. Exhs. 13–14.) Also, Respondent has previously disciplined employees for such things as: speaking to coworkers instead of serving guests; ignoring security post duties while talking with another employee; ignoring the supervision of games due to conversations with another employee; engaging in a personal conversation about 1970s and 1980s pornography stars in the presence of a guest or customer; failing to greet a guest because the employee was engaged in a conversation with a coworker; failing to serve guests due to conversations with a coworker; and neglecting duties while engaged in personal conversations with coworkers (R. Exh. 14 at 2–3, 5–8, 12, and 14.)

Like Respondent’s discipline of Kastroll for her almost 3 minute talk to Officer Moreno which I find interfered with his ability to help and direct Respondent’s guests while at Priority One Post, these other discipline examples similarly show that Kastroll was not targeted or discriminated against due to her union solicitation but, like Respondent’s employees in the above examples, Kastroll was disciplined because she distracted Officer Moreno for almost 3 minutes and interfered with his duties to help and direct Respondent’s guests and monitor the casino area in Priority One Post.

As a consequence, I further find that Respondent has met its burden under *Wright Line* of demonstrating that it would have taken the same action against Kastroll in the absence of union activity. As stated above, if Kastroll had, instead, attempted to solicit a charity donation from Officer Moreno for almost 3 minutes, she would have received the same written warning as she did on February 12, 2015.

Accordingly, I find that the General Counsel has not proven that Respondent violated Section 8(a)(3) and (1) of the Act when it issued a written warning against Kastroll on February 12, 2015.

### III. RESPONDENT, THROUGH OFFICER BROWNING, DID NOT UNLAWFULLY ENGAGE IN SURVEILLANCE OF EMPLOYEES TO DISCOVER THEIR UNION ACTIVITIES

Paragraphs 5(e) and 8 of the complaint allege that on February 2, 2015, Respondent, by Joshua Browning, at Respondent’s facility, by standing beside employees and eavesdropping on their conversation, engaged in surveillance of employees to discover their Union activities in violation of Section 8(a)(1) of the Act.

The General Counsel argues that Officer Browning is an agent of Respondent under Section 2(13) of the Act. There was no evidence provided by the General Counsel that satisfies its burden to prove that Officer Browning is Respondent’s agent for surveillance purposes. In fact, the General Counsel did not call Officer Browning as a witness to support her allegations and did not show him to be unavailable and I draw an adverse inference that he would have testified against being Respondent’s agent and also against unlawfully engaging in surveillance of Kastroll for Respondent on February 2, 2015. See *Int’l Automated Machines*, 285 NLRB 1122, 1123 (1987) (When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge).

“The Board considers the position of the employee in addition

to the context in which the behavior occurred” to determine whether the alleged agent had the apparent authority to make the act in question. *Pessoa Construction Co.*, 356 NLRB 1253, 1255 (2011) (quoting *Pan -Oston*, 336 NLRB 305 (2001)). Here, the alleged conduct occurred when Officer Browning was acting as a non-supervisory fellow security officer on February 2, 2015, and stood close enough to Officer Moreno to eavesdrop on Kastroll’s almost 3-minute talk to Officer Moreno to determine what was said. There is no evidence that Officer Browning, in his position as security officer on February 2, was acting for Respondent and authorized to represent Respondent in interactions between a card dealer on break (Kastroll) and another security officer (Officer Moreno) on behalf of Respondent. Like Officer Moreno, Officer Browning was not a supervisor or agent of Respondent and he too was eligible to vote in the upcoming SPFPA union election.

Under these circumstances, I find that as of February 2, 2015, neither Kastroll nor Officer Moreno could reasonably perceive that Officer Browning was an agent of management and Officer Browning’s antiunion animus, if any, cannot be imputed to Respondent in this case. Officer Browning simply complained to management about the February 2 incident and he did not support the Union. As a result, I further find that on February 2, 2015, despite Officer Browning, at Respondent’s facility, standing beside employees and eavesdropping on their conversation, Respondent did not engage in surveillance of employees to discover their union activities in violation of Section 8(a)(1) of the Act.

### IV. RESPONDENT DID NOT UNLAWFULLY INTERROGATE KASTROLL, OFFICER BROWNING OR MARENO

The complaint also alleges incidents of interrogation (complaint paragraphs 5(f)(1)) occurring from February 2 and 12, wherein Prescott alone or with Tourek interrogated Officers Browning and Moreno about the February 2 incident and also interrogated Kastroll about the same incident on February 5, 2015. (Tr. 312, 317–318; GC Exh. 1(o).) On brief (GC Br. at 41–44), the General Counsel argues that Kastroll, Officer Browning, and Officer Moreno were unlawfully interrogated during their February 3 through February 9, 2015 meetings with Prescott alone or with Prescott and Tourek when they were all asked about the February 2 incident as part of Respondent’s investigation in response to Officer Browning’s complaint to management.

It is well established that not every interrogation is unlawful under the Act. Whether the questioning of an employee constitutes an unlawful coercive interrogation must be considered under all the circumstances and there are no particular factors “to be mechanically applied in each case.” *Rossmore House*, 269 NLRB 1176, 1178 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). While the Board has identified a number of factors that are “useful indicia” in determining whether the questioning of an employee constitutes an unlawful interrogation, the Board has explained that “[i]n the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising

rights protected by Section 7 of the Act." *Westwood*, supra at 940; *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

The Board has recognized that employers have a legitimate business interest in investigating facially valid complaints of employee misconduct. See *Fresenius USA Mfg., Inc.*, 362 NLRB 1065, 1065 (2015) (discussing an investigation of alleged employee harassment); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528 (2007) (interrogation of employee was lawful where it occurred as part of a legitimate investigation into whether the employee engaged in misconduct); and *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) (noting that the employer's initial investigation of harassment charges was permissible).

That basic premise is understandable, since the alleged employee misconduct may not implicate the employee's Section 7 rights. Moreover, even if the alleged misconduct does relate to the accused employee's Section 7 rights, Board law establishes that an employer nonetheless may discipline or discharge an employee if the employee engages in conduct that could have qualified as protected activity, but involved misconduct that was sufficiently egregious to remove the employee's activities from the Act's protection. See *Stanford Hotel*, 344 NLRB 558 (2005) (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)).

In light of those possibilities, it makes sense to afford employers some leeway to conduct an initial investigation and make an informed decision about whether the employee's alleged misconduct warrants disciplinary or other action, taking into account the employee's right to engage in Section 7 activity and other factors. On the other hand, the employer's right to investigate is not unlimited. Where it is apparent from an initial investigation that the employee engaged in activity that is protected by the Act, the employer may not disregard that fact and forge ahead with the investigation as a precursor to possible discipline. See *Consolidated Diesel Co.*, 350 NLRB at 1020 (finding that an employer's initial investigation of alleged employee misconduct while distributing union literature was permissible, but once that initial investigation showed that the alleged misconduct was protected by the Act, it was unlawful for the employer to continue the investigation before a committee that had the power to impose discipline).

Respondent claims that the questioning of Kastroll, Officer Browning, and Officer Moreno was warranted because Kastroll's unprotected almost 3-minute talk to Officer Moreno was prohibited by Respondent's Solicitation policy and Kastroll's conduct interfered with Officer Moreno's job duties. I find that this rule is lawful, as maintained, applied, and enforced in this instance. Indeed, that is not seriously contested. Here, Respondent's questioning of Kastroll, Officer Browning, and Officer Moreno was justified as part of Respondent's investigation to determine whether Kastroll had a legitimate work-related reason to interfere with Officer Moreno's job duties for almost 3 minutes or whether Kastroll violated Respondent's lawful Solicitation policy.

The questioning took place at the HR office with Prescott and Tourek asking the questions because 2 different departments were involved in the Feb. 2 Incident and Prescott and Tourek frequently were asked to investigate these types of matters. Kastroll was allowed her union representative Blair for the

February 5, 2015 meeting. Prescott and Tourek asked Kastroll general questions about the February 2 incident as no reasonable employee would deny specific knowledge and memory of an almost 3-minute talk to Officer Moreno that occurred just 3 days before at the end of Kastroll's work shift. They were merely testing Kastroll's ability to tell the truth about the February 2 incident and she, instead, falsely stated that she did not recall the almost 3-minute talk and tried to brush it off as a mere 3–10 second prounion talk. All of the meetings were justified given all activities that go on at Priority One Post and given the large volume of traffic at the casino's busiest location—Priority One Post, which overlooks the casino floor where large sums of money are present for use by customers and many guests travel in need of direction or answers from security officers. Thus, the "justification" for the questioning was to determine the subject matter of the February 2 talk and whether or not Kastroll interfered with Officer Moreno's job duties in violation of Respondent's Solicitation policy.

After Prescott and Tourek met with Kastroll and Blair and saw that Kastroll was not willingly accepting the consequences for her actions in the February 2 incident, it was reasonable that Prescott would call Officer Browning in again on February 6 to have him create and sign a written statement about the February 2 incident. Officer Moreno did the same thing by writing his own statement about the February 2 incident. Because of the Priority One Post location and the common presence of surveillance tapes at this busy location to monitor activities, Respondent reasonably anticipated that anyone who interrupts a security officer at this location for almost 3 minutes as Kastroll did, should be investigated and should receive discipline if the talk was not work-related. After Officer Browning complained to management and brought the February 2 incident to their attention, the investigation followed, including a review of a common surveillance video, and minor discipline—a written warning against Kastroll.

Under the circumstances of this case where Kastroll's unprotected talk to Officer Moreno lasted almost 3 minutes when he was on duty at Priority One Post, I find that the questioning of Kastroll, Officer Moreno, and Officer Browning in response to Officer Browning's complaint to management of the February 2 incident, a complaint confirmed by Respondent's surveillance tape, was not coercive or unlawful but was a proper response to the February 2 incident. Thus, based on the guidance drawn from the Board's case law, I find that Respondent did not unlawfully interrogate its employees or violate the Act when it interviewed Kastroll, Officer Browning, or Officer Moreno about the Feb. 2 Incident. The questioning of Kastroll, Officer Browning, and Officer Moreno was reasonably justified and did not violate Section 8(a)(1) of the Act.

V. NO UNLAWFUL ORAL RULE PROMULGATION OR THREAT TO EMPLOYEES TO NOT PROMOTE THE UNION WHILE ON DUTY AT RESPONDENT

Paragraphs 5(g)(1) and 8 of the complaint allege that on February 5, 2015, Respondent, by its in-house counsel Tourek at Respondent's facility (1) orally promulgated a discriminatory directive that its employees could not promote the Union while they were on duty; and (2) threatened its employees with

unspecified reprisals because they engaged in union and other concerted activities in violation of Section 8(a)(1) of the Act.

*A. Tourek Did Not Orally Promulgate a Discriminatory Directive that Respondent's Employees Could not Promote the Union While They Were on Duty*

The General Counsel argues that Respondent, by its in-house counsel Tourek at Respondent's facility, orally promulgated a discriminatory directive that its employees could not promote the Union while they were on duty in violation of Section 8(a)(1) of the Act. With this allegation, the General Counsel confuses pro-union talk "on the gaming floor" from an almost 3 minute solicitation of the union to an on duty security officer at Priority One Post.

At their February 5 meeting, Tourek was explaining Respondent's solicitation policy to Kastroll and Blair and acknowledged that prounion conversations on the casino gaming floor have been allowed to occur without discipline as there is no real interference with Respondent's business operations when this occurs unless an on duty employee is distracted from performing their job duties, a guest complains or the prounion talk contains unprotected matters as well. The February 2 incident is different from this prounion talk on the gaming floor during a dead game or a brief 10 second "vote for the union" utterance.

Tourek also explained to Kastroll and Blair that Respondent's solicitation policy applies to on duty employees and in this instance, to the February 2 incident where Officer Moreno was distracted by Kastroll's almost 3-minute solicitation of the union and Officer Moreno was unable to assist Respondent's guests and customers. As stated above, I further find that Respondent disciplines employees for personal conversations—regardless of content—when such conversations distract other employees from performing their job duties or interfere with guest services and when such conduct is brought to Respondent's attention. (See, e.g., Tr. 611–612; R. Exhs. 13–14.) As a result, I find that Respondent, by its in-house counsel Tourek at Respondent's facility, did not orally promulgate a discriminatory directive that its employees could not promote the Union while they were on duty in violation of Section 8(a)(1) of the Act.

*B. Tourek Did Not Threaten Respondent's Employees with Unspecified Threat of Reprisals Because They Engaged in Union and Other Concerted Activities*

An employer violates Section 8(a)(1) if it communicates to employees that they will jeopardize their job security, wages, or other working conditions if they support the union. *Metro One Loss Prevention Services*, 356 NLRB 89, 89 (2010). In addition, the Board has found that "be careful" warnings to an employee convey the threatening message that union activities would place an employee in jeopardy. *Gaetano & Associates Inc.*, 344 NLRB 531, 534 (2005) (finding that telling an employee to "be careful" was an unlawful threat). See also, e.g., *St. Francis Medical Center*, 340 NLRB 1370, 1383–1384 (2003) ("be careful" statement by supervisor in context of union activity held unlawful); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (supervisor's statements such as "watch out" are unlawful implied threats).

Further, the Board in *Hall Construction* adopted a finding of an unlawful threat of blacklisting where employees were told

that unionizing would mean "all of us guys would be blackballed from any work in the [the respective employers' field]. . . ." *Flamingo Hilton-Laughlin*, 324 NLRB 72, 116 (1997). As stated above, Tourek, as Respondent's agent, gave Kastroll an explanation of Respondent's Solicitation policy and differentiated allowed and *protected pro-union talk on the casino floor* where Kastroll works when there is a dead table or *brief pro-union utterances from unprotected almost 3 minute talks at the Priority One Post* that interfere with on duty security officer's job duties. Under the totality of circumstances here, Tourek's statements to Kastroll and Blair at the February 5, 2015 investigatory meeting were not unlawful threats but, instead, notice to Kastroll that she would receive some discipline from her unprotected activities on February 2, 2015, in connection with her almost 3 minute talk to Officer Moreno which interfered with his duties while he was on duty at Priority One Post. As a result, I find that Respondent, by its in-house counsel Tourek at Respondent's facility, did not threaten its employees with unspecified reprisals because they engaged in union and other concerted activities in violation of Section 8(a)(1) of the Act.

VI. NO UNLAWFUL IMPRESSION OF SURVEILLANCE OF KASTROLL

Paragraph 5(f)(2) of the complaint alleges that on or about February 5, 2015, Respondent through Prescott and Tourek, by asking Kastroll if she remembered talking to a security officer about the importance of unionization, created an impression among its employees that their union activities were under surveillance in violation of Section 8(a)(1) of the Act. (GC Exh. 1(o).)

The test for determining whether an employer has created an impression that its employees' protected activities have been placed under surveillance is "whether the employees would reasonably assume from the employer's statements or conduct that their protected activities had been placed under surveillance." *Greater Omaha Packing Co., Inc.*, 360 NLRB 493, 495 (2014); *Rood Industries*, 278 NLRB 160, 164 (1986). When an employer tells employees that it is aware of their protected activities, but fails to tell them the source of that information, it violates Section 8(a)(1) "because employees are left to speculate as to how the employer obtained the information, causing them reasonably to conclude the information was obtained through employer monitoring." (Id.)

In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test is whether under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005). The essential focus has always been on the *reasonableness* of the employees' assumption that the employer was monitoring their union or protected activities. Id. As with all conduct alleged to violate Section 8(a)(1), the critical element of reasonableness is analyzed under an objective standard. Id.

Here, Prescott and Tourek did not create the impression of surveillance by asking Kastroll general questions about the February 2 incident as no reasonable employee would deny specific knowledge and memory of an almost 3-minute talk to Officer Moreno that occurred just 3 days before at the end of Kastroll's

work shift. They were merely testing Kastroll's ability to tell the truth about the February 2 incident and she, instead, falsely stated that she did not recall the almost 3-minute talk and tried to brush it off as a mere 3–10 second pronoun talk. As a result, I find that Respondent did not create an impression of surveillance of union or concerted activities in violation of Section 8(a)(1) of the Act as alleged in the complaint.

VII. MAY'S SUSPENSION AND WRITTEN WARNING IN RESPONSE TO THE JUNE 19 INCIDENT

Respondent suspended May in response to the June 19 incident and issued her a second warning. The complaint alleges that these actions violated Section 8(a)(1) of the Act.

A. *May Was Unlawfully Suspended by Respondent in Violation of Section 8(a)(1) of the Act for the June 19 Incident*

Complaint paragraphs 7 and 8 allege that from on or about June 19, 2015, Officer May engaged in protected concerted activity when she complained to Officer Rankin regarding yet another delay in payment of wages in the normal course of working as a security officer at Respondent's WDD Flex Building. Concerted activity includes not only activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014).<sup>7</sup> If the employee or employees who are acting in concert are seeking to improve terms and conditions of employment, their actions are for mutual aid and protection of all employees within the meaning of Section 7. (*Id.*, slip op. at 3, 5–6.)

Thus, on June 19 when Officers May and Rankin met during their lunch breaks at the security office to discuss with management the frequent problems experienced by all security officers working at Respondent's WDD Flex Building—unpaid wages—they were acting in concert to try to improve their terms and conditions of employment on behalf of themselves and other security officer employees. Respondent has denied this and argues that the employees were not engaged in activity protected by the Act on June 19, 2015.

It is well established that wage discussions are “inherently concerted.” *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992). I find that Officer May's comments on June 19 with Officer Rankin during their lunch breaks, though containing profanities, were protected conduct involving a group grievance from security officers working at the WDD Flex Building regarding frequent underpayments of wages and reporting to management that yet another officer's paycheck (May's) was inaccurate, underpaid, and needed correction.

The issue raised by Respondent is whether Officer May's conduct by her adding profanities to the group grievance somehow took the concerted activity outside the Act's protection. I find that May's comments were not so egregious as to exceed the

Act's protection especially given the common usage of profanities in the security department. I do not rely on the application of the four-factor test in *Atlantic Steel Co.*, 245 NLRB 814 (1979), given that, here, the comments in question were made loudly to other employees and overheard by others during a lunch hour break for most employees and did not occur during direct communications between an employee and a manager or supervisor which would have brought in the 4-part criteria set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979). See generally *Triple Play Sports Bar & Grille*, 361 NLRB 308, 310 (2014) (“as a general matter, the *Atlantic Steel* framework is not well suited to address issues . . . involving employees' off-duty, offsite use of social media to communicate with other employees or with third parties”). Rather, I find that May's June 19 outburst did not lose its protected character under the totality of the circumstances. See, e.g., *Richmond District Neighborhood Center*, 361 NLRB 833, 834 fn. 6 (2014) (in the absence of exceptions, the Board, without deciding the appropriateness of the judge's test for analyzing private Facebook conversations, examined the egregiousness of the conduct under all the circumstances). See also *Pier Sixty, LLC*, 362 NLRB 505, 506–507 (2015) (Same).

In evaluating Officer May's June 19 Incident under the totality of the circumstances, I consider the following factors: (1) whether the record contained any evidence of the Respondent's antiunion hostility; (2) whether the Respondent provoked May's conduct; (3) whether Officer May's conduct was impulsive or deliberate; (4) the location of May's June 19 outburst; (5) the subject matter of the outburst; (6) the nature of the outburst; (7) whether the Respondent considered language similar to that used by Officer May to be offensive; (8) whether the employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon Officer May was typical of that imposed for similar violations or disproportionate to her offense. I find that an objective review of the evidence under the foregoing factors establishes that an analysis of them weighs in favor of not finding that May's June 19 Incident comments were so egregious as to take them outside the protection of the Act.

Two of the first three factors do not weigh in favor of finding that Officer May's June 19 comments lost the Act's protection. There is no evidence that the Respondent demonstrated its hostility toward any employees' union activity (the first factor). Officer May clearly found her managers' disinterested and unsuccessful efforts lacking to correct her unpaid May 2015 wages from June 1 through 19 to the point that management provoked Officer May's frustrations to her impulsive comments on June 19 (the second and third factors), and Officer May's comments reflected her exasperated frustration and stress after months of concertedly protesting disrespectful treatment by managers with frequent examples of underpaid wages to security officers working at the WDD Flex Building—activity protected by the Act. I find it egregious that Respondent's arcane and unreliable time-keeping system for its security officers stationed at its WDD Flex Building go unchecked from 2014 and 2015 to culminate in

<sup>7</sup> See also *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987),

supplemented, *Meyers Industries*, 281 NLRB 882, 887 (1980), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

Officer May's June 19 Incident.

The location and subject matter of May's June 19 incident (factors four and five) also do not weigh in favor of finding that Officer May's comments lost the protection of the Act. She made her comments while seemingly alone with Officer Rankin, on lunchbreak, while her managers were in a closed-door meeting and the security department was mostly empty due to lunch. There is very little evidence that her comments interrupted the Respondent's work environment or its relationship with its customers other than Boguille's minor shortened telephone conversation. Further, Officer May's comments echoed previous complaints about management's lax timekeeping methods that frequently underpaid its security officer employees at the WDD Flex Building.

Regarding factors six and seven, the overwhelming evidence establishes that, while distasteful, the Respondent tolerated the widespread use of profanity in the workplace, including the words "fucking ass," "son of a bitch," and "get your asses in the briefing office." Considered in this setting, Officer May's repeated use of those words in her June 19 incident would not cause her to lose the protection of the Act.

Also, evidence of the Respondent's policies and practices relating to the discipline of employees who use the type of language that Officer May used in her June 19 incident (factors eight and nine) does not persuade me that Officer May's June 19 incident comments were unprotected. I further find that the Respondent's "Code of Personal Conduct" policy, which it cited as the basis for suspending Officer May and issuing her a second written warning, neither specifically prohibits vulgar or profane language though it does say to avoid using "offensive language" in the context of promoting and respecting diversity of Respondent's workforce by avoiding any form of discrimination or harassment. (GC Exh. 1(o) & (q); R. Exh12.) Respondent does not allege that Officer May's June 19 Incident was directed at any protected classification listed in that policy or any member of Respondent's workforce. Further, prior to the June 19 Incident, little evidence was produced at trial showing that Respondent issued similar suspensions and written warnings to employees who had used profane language under the same circumstances here where the incident occurred outside the presence of Respondent's customer or guest areas during a lunchbreak where most employees were absent, the incident did not occur between an employee and their supervisor/manager, and profane language was common in the area it was uttered by the disciplined employee. As a matter of fact, there was no evidence that Officer Rankin was disciplined for his part of uttering similar profanities on June 19, 2015.

Moreover, as found below, Respondent's "inappropriate conduct" rule used to discipline May is overbroad in violation of the Act. To defend a suspension and written warning based on a rule that even "has a tendency to inhibit [protected] activity," an employer must show "legitimate and substantial business justification" for the rule. *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3rd Cir. 1976) (quoting *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967)). Respondent failed to make such a showing here as to its Inappropriate Conduct Rule. In addition, Respondent never alleged that May's June 19 incident was the result of her failure to promote and respect the diversity of the

Respondent's workforce and involved her discrimination or harassment, including the questioned degrading comments or offensive language.

I further find that the particular facts and circumstances presented in this case weigh in favor of finding that Officer May's conduct did not lose the Act's protection. Accordingly, I find that the Respondent violated Section 8(a)(1) by unlawfully suspending Officer May for her protected concerted activity on June 19.

*B. May's Second Written Warning for the June 19 Incident also Violated the Act Under Section 8(a)(1)*

May's second written warning for inappropriate conduct in violation of Respondent's Code of Conduct also violated the Act. (Tr. 405; GC Exh. 30.) The Board has held that discipline imposed pursuant to an unlawful rule is invalid under the following circumstances:

Discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. Nevertheless, an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. It is the employer's burden, not only to assert this affirmative defense, but also to establish that the employee's interference with production or operations was the actual reason for the discipline. In this regard, an employer's mere citation of the overbroad rule as the basis for discipline will not suffice to meet its burden. Rather, assuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule.

*Continental Group, Inc.*, 357 NLRB 409, 412 (2011) (citations omitted). See also *Dish Network, LLC.*, 363 NLRB No. 141, slip op. at 12-13 (March 3, 2016) (Same).

Officer May received discipline under Respondent's unlawful Inappropriate Conduct Rule for engaging in protected concerted activity (i.e. complaining to other employees about management's continued inability over 2 weeks to timely pay her earned wages and benefits). Respondent made no showing that Officer May's June 19 activities interfered with her own work, the work of others, or the security department in any material way. Officer May was disciplined specifically for violating Respondent's overbroad "inappropriate conduct" rule and not for insubordination or interference with Respondent's production. Her second written warning was also, accordingly, unlawful in violation of Section 8(a)(1) of the Act.

VIII. THE CHALLENGED HANDBOOK RULES

As detailed below, the complaint alleges that various employer rules violate Section 8(a)(1) of the Act. The General Counsel has the burden to prove that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1),

the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014).

As the Board stated in its *T-Mobile USA, Inc.* decision, 363 NLRB No. 171, slip op. at 1–2 (April 29, 2016), applicable here when analyzing an employer’s work rules handbook:

The consolidated complaint alleges that numerous provisions in written work rules and policies applicable to the Respondent’s employees are unlawful. An employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The analytical framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a work rule is unlawful if “the rule *explicitly* restricts activities protected by Section 7.” *Id.* at 646 (emphasis in original). If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if “(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.” *Id.* at 647.

The rules at issue before us are not alleged to explicitly restrict protected activities or to have been promulgated in response to or applied to restrict Section 7 activities. Thus, the relevant inquiry is whether employees would reasonably construe the challenged rules to prohibit Section 7 activity. In construing rules, *Lutheran Heritage* teaches that they are to be given a reasonable reading, and are not to be considered in isolation. *Id.* at 646. Further, any ambiguity in the rule must be construed against the drafter—here, the Respondent. *Lafayette Park*, above at 825.

*Id.* (Footnotes omitted.)

#### A. The Inappropriate Conduct Rule

The first questionable rule from Respondent’s handbook reads:

Respecting others, which includes but is not limited to:

- Displaying appropriate behavior at work, on Wynn [Respondent] business, or on property. Never engaging in misconduct on or off-duty that (as determined by Wynn [Respondent]) materially and adversely affects job performance or tends to bring discredit to Wynn. Promoting and respecting the diversity of the Wynn workforce by avoiding any form of discrimination or harassment, including degrading comments or offensive language;
- and refraining from inappropriate conduct or horseplay.

I find the rule does not expressly restrict Section 7 activity. I find, however, that employees would construe the requirement to refrain from “[n]ever engaging in misconduct on or off-duty that (as determined by Wynn [Respondent]) materially and adversely affects job performance or tends to bring discredit to

Wynn” and “inappropriate conduct” as restrictions on employees’ Section 7 rights under current Board law. “Never engaging in misconduct on or off-duty that (as determined by Wynn [Respondent]) materially and adversely affects job performance or tends to bring discredit to Wynn” and “...[I]nappropriate conduct” covers everyone, and would apply to supervisors and managers. In fact, the reference to “as determined by Wynn [Respondent]” is highly suggestive of subjective interpretation by supervisors and managers, although it may apply to other coworkers as well. That prohibition would reasonably be construed by employees to bar them from discussing supervisory and managerial decisions, thereby chilling them from engaging in protected activities.

Moreover, the rule “Never engaging in misconduct on or off-duty that . . . materially and adversely affects job performance or tends to bring discredit to Wynn” and “inappropriate conduct” contains a “patent ambiguity” in these phrases as employees “would reasonably construe the rule” as limiting their communications concerning employment. See *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1817 (2011).

In addition, the rule “never engaging in misconduct on or off-duty that materially and adversely affects job performance or tends to bring discredit to Wynn.” The Board has found that rules prohibiting “negative” speech and behavior are unlawful. For example, in *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011), the Board found a rule prohibiting “any type of ‘negative’ energy or attitudes” to be unlawful. In *Hills & Dales General Hospital*, supra, the Board found a rule prohibiting “negative comments about fellow team members,” “engag[ing] in or listen[ing] to negativity, and requiring employees to “represent [the Respondent] in the community in a positive and professional manner” was overly broad. On the other hand, the Board has found rules to be lawful when the conduct they aim to prohibit clearly falls outside the Act’s protection, such as conduct that is abusive, injurious, threatening, intimidating, coercing, and/or profane. See, e.g. *Lutheran Heritage*, supra; *Palms Hotel and Casino*, supra. Here, the rule “never engaging in misconduct on or off-duty that materially and adversely affects job performance or tends to bring discredit to Wynn [Respondent]” is broad and vague, and easily interpreted to include protected concerted activities protesting working conditions. As such, the rule would reasonably be interpreted to apply to attendance at a union event when the employee identifies himself or herself as an employee and complains about working conditions.

Therefore, I find the specific language I mention here of the Inappropriate Conduct Rule is overly broad as to the specific language prohibiting “Never engaging in misconduct on or off-duty that . . . materially and adversely affects job performance or tends to bring discredit to Wynn” and “inappropriate conduct” and in violation of Section 8(a)(1) of the Act. See also *First Transit, Inc.*, 360 NLRB 619, 621 ((2014). (Same) and *Claremont Resort & Spa*, 344 NLRB 832 (2005) (finding rule prohibiting “negative conversations” about coworkers and managers unlawful).

#### B. The No Photographs, PDAs, Messaging, Calls, or Recordings Rule

The next rule for analysis reads:

- Striving for excellence in job performance, which

includes but is not limited to never taking photographs in the public "front-of-house" area.

- Never using personal communications devices such as beepers, cellular telephones and personal data assistance ("PDAs"), for incoming and outgoing messaging or calls while on duty, unless prior authorization is obtained from a department manager.
- Except for off duty or pre-authorized use of personal communications devices for incoming and outgoing messaging or calls only, never using any device for audio, video or data recording/transmission, such as video and digital cameras, camera and recording components of cellular telephones/PDAs and digital recorders, at any time while on company property or while performing job duties off-company property, unless prior authorization is obtained from a department manager for a company business purpose.

Being honest, which includes but is not limited to:

- Refraining from any activity in photographing or recording (either by audio or video means) others in the work environment, including coworkers, managers, guests, customers, or vendors, unless specific authorization has been given in advance by all individuals subject to the intended photography and/or recording activity or management has otherwise pre-authorized the activity for company business purposes.

As stated above, under *Lutheran Heritage Village-Livonia*, 343 NLRB supra at 647, an employer violates Section 8(a)(1) when it maintains a work rule that employees would reasonably construe to prohibit Section 7 activity. Here, this set of related rules prohibit employees from using their own cellphones and other communications devices to talk to each other, record safety concerns, and other protected concerted activity for the entire time they are on duty, break times, or on Respondent's property, including nonwork areas like the EDR, parking lots and garages and parts of the casino while off duty. Employees have a right to photograph and make recordings in furtherance of their protected concerted activity. See *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (2011), enf'd sub nom. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012). Photography is protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. *Whole Foods*, 363 NLRB No. 87, slip op. at 3 (2015); *Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1693 (2015). See also *White Oak Manor*, 353 NLRB 795, 795 fn. 2 (2009) (photography was part of the res gestae of employee's protected concerted activity), reaffirmed and incorporated by reference at 355 NLRB 1280 (2010), enf'd. 452 Fed. Appx 374 (4th Cir. 2011).

Such protected conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and

publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment related actions. The rule does not differentiate between photography, PDAs, messaging, calls, and recordings that are protected by Section 7 and those that are not, and includes in its prohibition recordings made during non-work time and in nonwork areas.

In considering the legality of a rule prohibiting photography in *Flagstaff Medical Center*, 357 NLRB 659, 662–663 (2011), enf. granted in part, denied in part on other grounds 715 F.3d 928 (D.C. Cir. 2013), the Board emphasized the "weighty" privacy interests of the patients and the hospital's "significant interest in preventing the wrongful disclosure of individually identifiable health information," as required by Federal law. The Board concluded that the rule in *Flagstaff* was lawful, finding that employees would understand the rule as a "legitimate means of protecting the privacy of patients and their hospital surroundings." Id. Here, the rule is silent as to whether any "weighty" privacy interests, such as the privacy of its patrons, are the focus of Respondent's No Photographs, PDAs, Messaging, Calls, or Recordings Rule which include no indication that they are designed to protect privacy or other legitimate interests. Respondent argues this is the case that patrons have Nevada state privacy rights but does not limit its rules sufficiently.

I further find that the recording prohibition is not narrowly tailored to any legitimate business interest. As a result, I find that Respondent's employees would not reasonably interpret the No Photographs, PDAs, Messaging, Calls, or Recording Rule as related to the protection of patron privacy. Without such a limiting principle, the Respondent's employees are left to draw the reasonable conclusion that these prohibitions would prohibit their use of audio-visual devices in furtherance of their protected concerted activities.<sup>8</sup> See *Rio All-Suites Hotel and Casino*, 362 NLRB supra at 4. Based on the foregoing, I find that Respondent's employees would reasonably interpret Respondent's No Photographs, PDAs, Messaging, Calls, or Recording Rules to infringe on their protected concerted activity. Thus, these rules violate Section 8(a)(1) of the Act.

### C. The Restricted Access Rule

The third rule for analysis is related to a limited access rule. The rule reads:

4. Know and follow all Wynn policies and procedures, which include but are not limited to

- Only using the facilities for the property you are scheduled to work, with the exception of the employee dining area [EDR].
- When scheduled to work at Wynn you must park in the employee parking garage and utilize the back of the house area that pertains to and is exclusive to the property at which you are working with to and is exclusive to the property at which you are working with the

<sup>8</sup> "Of course, the fact that these prohibitions are subject to discretionary exemptions by the Respondent does not make them any less unlawful. [citation omitted]." *Rio All-Suites Hotel & Casino*, 362 NLRB supra at 4, fn. 10; see also *Brunswick Corp.*, 282 NLRB 794, 795 (1987) (Any

rule that requires employees to obtain an employer's permission before engaging in protected concerted activity on the employee's free time and in nonwork areas is unlawful.).

exception of the employee dining area. All other exceptions to this rule can only be made with specific management authorization and/or written accompanying documentation.

The Board evaluates the Respondent's access rule under the well-established test of *Tri-County Medical Center*, 222 NLRB 1089 (1976). In *Tri-County*, the Board held that an employer's rule barring off-duty employees from access to its facility is valid only if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. *Id.* at 1089.

Respondent argues that the rule applies to "on-duty" employees but ignores the fact that these same employees are actually "off-duty" when parking their vehicles and walking to clock-in and returning to their vehicles after clocking-out.

Under *Tri-County*, as applied in *Saint John's Health Center*, 357 NLRB No. 170 (2011), the Respondent's Restricted Access Rule is unlawful under the first and third prongs of the *Tri-County* test because it does not limit access solely with respect to Respondent's interior work areas and also includes nonwork areas and also "uniformly prohibit access to off duty employees seeking entry to the property for any purpose." *Id.*, slip op. at 6 (emphasis added). Thus, outside the facilities and employee parking garage closest to where an employee is scheduled to work, employees are denied access to other portions of Respondent's property (other parking garages, a public walkway at Respondent's Encore facility when scheduled to work at Respondent's Wynn facility, or the other casino or the WDD Flex Building. Moreover, it provides for any additional access solely with management's approval. This last exception effectively vests management with unlimited discretion to expand or deny off-duty employees' access for any reason it chooses. See *Piedmont Gardens*, 360 NLRB 813, 814 (2014); see also *Saint John's Health*, above, slip op. at 5 ("In effect, the [r]espondent is telling its employees, you may not enter the premises after your shift except when and where we say you can."). The Respondent's policy thus clearly fails the first and third prongs of the *Tri-County* test.<sup>9</sup>

Consequently, I find that Respondent's Restricted Access Rule is overbroad and in violation of Section 8(a)(1) of the Act.

#### D. The Restricted Intellectual Property Rule

The fourth rule to analyze reads:

- Complying with copyright, patent, and trademark laws, which are intended to protect exclusive use of publications, productions, artistic works, and so forth.
- \* Logos may not be used for any purpose aside from those for which they are intended.
- \* Logos may not be altered in any way [the Restricted Intellectual Property Rule].

<sup>9</sup> For similar reasons, the rule fails to pass muster under a *Lutheran-Heritage* analysis, because employees would reasonably construe the broad managerial-approval exception as requiring them to disclose their intent to engage in protected activity when seeking such approval, a

The special circumstances test reflects a balancing of the employer's interests and the employees' Section 7 rights. "The Board has long recognized that an employer has a legitimate interest in preventing the disparagement of its products . . ." *Triple Play Sports Bar*, 361 NLRB No. 31, slip op. at 4 (2014). See also *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252–1253 (2007) (discussing distinction between disparagement of products and communications related to labor disputes), *enfd. sub nom. Nevada Service Employees Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009). Employers have no such legitimate interest in preventing employees' discussion of their terms and conditions of employment. Accordingly, it is reasonable for the Board to treat the two kinds of cases differently and to require more proof from an employer who seeks to restrain employee speech concerning working conditions.

*Medco Health Solutions of Las Vegas*, 364 NLRB No. 115, slip op. at 5 (Aug. 27, 2016).

The Respondent's rule does not define what constitutes "Logos may not be used for any purpose aside from those for which they are intended." Most of the section pertains to confidentiality and does not explain in what respect use of the Respondent's name or trademarks may intended to protect exclusive use. Nor does the rule explain any uses of the Respondent's logo that are permissible. On its face, then, it chills employees from using the Respondent's logo. Although employees who use the logo for any purpose aside from those for which they are intended, is vague and uncertain and may prohibit employees from using the logo while engaged in Section 7 activities, I find that prohibiting such use is an unreasonable restriction on Section 7 activity. In addition, barring employees from using the Respondent's name and logo is unlawful as it is often necessary for employees to identify their employer when they are engaged in Section 7 activities and the Respondent presented no evidence to support the need for such a restriction. Since I find that employees would reasonably interpret any nonwork-related use of Respondent's name to be improper, I conclude that this portion of the rule violates Section 8(a)(1).

#### E. The Confidentiality Rule

The fifth rule to analyze reads:

- Protecting the confidentiality of Wynn.

Never using, accessing, possessing, copying, removing, or sharing any of Wynn confidential business information without authorization or for business reasons.

I find the language of the Respondent's Confidentiality Rule here to be analogous to the rule at issue in *Super K-Mart*, 330 NLRB 263, 263–264 (1999). In that case, the Board found that employees would reasonably understand a rule stating that "company business and documents are confidential" as limiting the dissemination of proprietary information, rather than limiting employees' ability to discuss wages and working conditions. (*Id.* at 263.) See also *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 4 (Aug. 26, 2016) (Same). Therefore, I find

compelled disclosure that would certainly tend to chill the exercise of Sec. 7 rights. See *Casino San Pablo*, 361 NLRB 1350, 1353 fn. 6 (2014) (Same).

Respondent's Confidentiality Rule lawful and not in violation of Section 8(a)(1) of the Act.

*F. The No Personal Use Rule*

The sixth rule reads:

- Never using Wynn property for personal use.

Respondent points out that the General Counsel put forth no evidence in support of her argument that this rule is unlawfully overbroad. (GC Br. at 37.) I agree and find that Respondent has a separate rule addressing employees' internet, intranet, and email use of Respondent's property that is inapplicable to get lumped into this rule. In addition, I further find in agreement with Respondent that it is a luxury resort and a reasonable interpretation of this rule is that employees should not help themselves to food items intended for guest consumption or take advantage of any of Respondent's other personal property not already covered by other rules. Therefore, I find Respondent's No Personal Use rule lawful and not in violation of Section 8(a)(1) of the Act.

*G. The Honesty Rule*

The seventh rule reads:

4. Being honest, which includes but is not limited to:

- Reporting any suspicious or improper activity to a manager or security officer.

Respondent also points out that the General Counsel put forth no evidence in support of her argument that this rule is unlawfully overbroad. (GC Br. at 39.) I agree with Respondent that it has put forward its reasonable business justification that this rule is necessary as hotels, casinos and guests, including celebrities, are more and more targets of danger and mischief and reminding employees to be vigilant to report suspicious and improper activity while at Respondent is a lawful rule and does not restrict or prohibit an employee's Section 7 rights. (R. Br. at 51–52.) Therefore, I find Respondent's Honesty Rule lawful and not in violation of Section 8(a)(1) of the Act.

*H. The Failure to Obey Rules or Handbook Violation Rule*

Finally, the last challenged rule in Respondent's handbook reads:

7. Failure to display proper conduct and abide by these standards may result in disciplinary action up to and including termination.

The General Counsel argues that since many of the challenged rules referenced above are unlawfully overbroad, "this statement constitutes a threat of discipline for engaging in any protected behavior" banned by an unlawful rule and, thus, this statement violates Section 8(a)(1) of the Act. (GC Br. at 39.) I find that the questioned rule is mere boilerplate handbook language common to most employer's handbooks and is not unlawful as written and it does not constitute an unlawful threat of discipline.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By suspending and issuing a second written warning letter to employee Keli P. May because of her protected concerted

activities involving her mentioning to her fellow employee that she had still not received her earned wages after giving Respondent management notice of this underpayment more than 2 weeks in advance with consistent follow up, the Respondent violated Section 8(a)(1) of the Act.

3. By maintaining an employee handbook with rules that state that Respecting others, which includes but is not limited to:

- Displaying appropriate behavior at work, on Wynn [Respondent] business, or on property. Never engaging in misconduct on or off-duty that (as determined by Wynn [Respondent]) materially and adversely affects job performance or tends to bring discredit to Wynn. Promoting and respecting the diversity of the Wynn workforce by avoiding any form of discrimination or harassment, including degrading comments or offensive language;
- and refraining from inappropriate conduct or horseplay.
- Striving for excellence in job performance, which includes but is not limited to never taking photographs in the public "front-of-house" area.
- Never using personal communications devices such as beepers, cellular telephones and personal data assistance ("PDAs"), for incoming and outgoing messaging or calls while on duty, unless prior authorization is obtained from a department manager.
- Except for off duty or pre-authorized use of personal communications devices for incoming and outgoing messaging or calls only, never using any device for audio, video or data recording/transmission, such as video and digital cameras, camera and recording components of cellular telephones/PDAs and digital recorders, at any time while on company property or while performing job duties off-company property, unless prior authorization is obtained from a department manager for a company business purpose.

Being honest, which includes but is not limited to:

- Refraining from any activity in photographing or recording (either by audio or video means) others in the work environment, including coworkers, managers, guests, customers, or vendors, unless specific authorization has been given in advance by all individuals subject to the intended photography and/or recording activity or management has otherwise pre-authorized the activity for company business purposes.

Know and follow all Wynn policies and procedures, which include but are not limited to

- Only using the facilities for the property you are scheduled to work, with the exception of the employee dining area [EDR].
- When scheduled to work at Wynn you must park in the employee parking garage and utilize the back of the house area that pertains to and is exclusive to the property at which you are working with to and is exclusive to the property at which you are working with the exception of the employee dining area. All other exceptions to this rule can only be made with specific

management authorization and/or written accompanying documentation.

- Logos may not be used for any purpose aside from those for which they are intended.”

Respondent has engaged in unfair labor practices affecting commerce within the meaning of 8(a)(1) of the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not unlawfully issue Respondent employee Kanie Kastroll a written warning in response to her conduct on February 2, 2015, as alleged in the complaint.

#### REMEDIES

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must cease and desist such practices and take certain affirmative action designed to effectuate the policies of the Act. In a typical case involving unlawful workplace rules, the promulgator of the rules is ordered to rescind the unlawful provisions and post an appropriate notice.

Specifically, having concluded that the Respondent is responsible for the unlawful suspension and second written warning of employee Keli P. May, Respondent must make May whole, with interest, for any loss of earnings and other benefits or seniority she may have suffered as a result of the unfair labor practice against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, the Respondent shall compensate May for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). The Respondent shall also be required to expunge from its files any and all references to the suspension and second written warning, and to notify May in writing that this has been done and that the suspension and second written warning will not be used against her in any way. The Respondent shall also post the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended.<sup>10</sup>

#### ORDER

The Respondent, Wynn Las Vegas, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the following unlawful Employee Handbook rules that state that: “Respecting others, which includes but is not limited to:

- Displaying appropriate behavior at work, on Wynn [Respondent] business, or on property. Never engaging in misconduct on or off-duty that (as determined

by Wynn [Respondent]) materially and adversely affects job performance or tends to bring discredit to Wynn. Promoting and respecting the diversity of the Wynn workforce by avoiding any form of discrimination or harassment, including degrading comments or offensive language;

- and refraining from inappropriate conduct or horseplay.
- Striving for excellence in job performance, which includes but is not limited to never taking photographs in the public "front-of-house" area.
- Never using personal communications devices such as beepers, cellular telephones and personal data assistance ("PDAs"), for incoming and outgoing messaging or calls while on duty, unless prior authorization is obtained from a department manager.
- Except for off duty or pre-authorized use of personal communications devices for incoming and outgoing messaging or calls only, never using any device for audio, video or data recording/transmission, such as video and digital cameras, camera and recording components of cellular telephones/PDAs and digital recorders, at any time while on company property or while performing job duties off-company property, unless prior authorization is obtained from a department manager for a company business purpose.

Being honest, which includes but is not limited to:

- Refraining from any activity in photographing or recording (either by audio or video means) others in the work environment, including coworkers, managers, guests, customers, or vendors, unless specific authorization has been given in advance by all individuals subject to the intended photography and/or recording activity or management has otherwise pre-authorized the activity for company business purposes.

Know and follow all Wynn policies and procedures, which include but are not limited to

- Only using the facilities for the property you are scheduled to work, with the exception of the employee dining area [EDR].
- When scheduled to work at Wynn you must park in the employee parking garage and utilize the back of the house area that pertains to and is exclusive to the property at which you are working with to and is exclusive to the property at which you are working with the exception of the employee dining area. All other exceptions to this rule can only be made with specific management authorization and/or written accompanying documentation.
- Logos may not be used for any purpose aside from those for which they are intended.” Respondent has engaged in unfair labor practices affecting commerce within the meaning of 8(a)(1) of the Act.”

(b) Unlawfully suspending and issuing a written warning to

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

or otherwise unlawfully treating employees because they engage in protected concerted activities and mention to coworkers that they have not received payment of earned wages and that management has been asked to correct this nonpayment but has not corrected the problem for more than 2 weeks; and

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the following provisions located in Respondent's Employee Handbook:

"Respecting others, which includes but is not limited to:

- Displaying appropriate behavior at work, on Wynn [Respondent] business, or on property. Never engaging in misconduct on or off-duty that (as determined by Wynn [Respondent]) materially and adversely affects job performance or tends to bring discredit to Wynn. Promoting and respecting the diversity of the Wynn workforce by avoiding any form of discrimination or harassment, including degrading comments or offensive language;
- and refraining from inappropriate conduct or horseplay.
- Striving for excellence in job performance, which includes but is not limited to never taking photographs in the public "front-of-house" area.
- Never using personal communications devices such as beepers, cellular telephones and personal data assistance ("PDAs"), for incoming and outgoing messaging or calls while on duty, unless prior authorization is obtained from a department manager.
- Except for off duty or pre-authorized use of personal communications devices for incoming and outgoing messaging or calls only, never using any device for audio, video or data recording/transmission, such as video and digital cameras, camera and recording components of cellular telephones/PDAs and digital recorders, at any time while on company property or while performing job duties off-company property, unless prior authorization is obtained from a department manager for a company business purpose.

Being honest, which includes but is not limited to:

- Refraining from any activity in photographing or recording (either by audio or video means) others in the work environment, including coworkers, managers, guests, customers, or vendors, unless specific authorization has been given in advance by all individuals subject to the intended photography and/or recording activity or management has otherwise pre-authorized the activity for company business purposes.

Know and follow all Wynn policies and procedures, which include but are not limited to

- Only using the facilities for the property you are

scheduled to work, with the exception of the employee dining area [EDR].

- When scheduled to work at Wynn you must park in the employee parking garage and utilize the back of the house area that pertains to and is exclusive to the property at which you are working with to and is exclusive to the property at which you are working with the exception of the employee dining area. All other exceptions to this rule can only be made with specific management authorization and/or written accompanying documentation.
- Logos may not be used for any purpose aside from those for which they are intended,"

and remove such rules from any and all employee publications or documents to which it is a party.

(b) Within 14 days from the date of this Order, the Respondent shall publish on its WIRE intranet and furnish in writing to all employees with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

(c) Make employee Keli P. May whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the remedy section of this decision.

(d) Compensate employee Keli P. May for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate report to the Social Security Administration so that when backpay is paid to May, it will be allocated to the appropriate calendar quarters.

(e) Within 14 days from the date of this Order, remove from its files any reference to the suspension and written warning, and within 3 days thereafter, notify employee May in writing that this has been done and that neither the suspension nor the written warning will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days from the date of this order, post at its facilities in and around Las Vegas, Nevada, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall also be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 12, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 26, 2016

APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

YOU HAVE THE RIGHT to discuss wages, hours, and working conditions with other employees and

WE WILL NOT do anything to interfere with your exercise of that right.

WE WILL NOT maintain the following rules in our Code of Personal Conduct, or anywhere else, that can be construed to prohibit you from talking to each other about your wages, hours, and other terms and conditions of employment, or otherwise restrict you from engaging in protected activities:

At Pages 1-6

: "Respecting others, which includes but is not limited to:

- Displaying appropriate behavior at work, on Wynn [Respondent] business, or on property. Never engaging in misconduct on or off-duty that (as determined by Wynn [Respondent]) materially and adversely affects job performance or tends to bring discredit to Wynn. Promoting and respecting the diversity of the Wynn workforce by avoiding any form of discrimination or harassment, including degrading comments or offensive language;

- and refraining from inappropriate conduct or horse-play.
- Striving for excellence in job performance, which includes but is not limited to never taking photographs in the public "front-of-house" area.
- Never using personal communications devices such as beepers, cellular telephones and personal data assistance ("PDAs"), for incoming and outgoing messaging or calls while on duty, unless prior authorization is obtained from a department manager.
- Except for off duty or pre-authorized use of personal communications devices for incoming and outgoing messaging or calls only, never using any device for audio, video or data recording/transmission, such as video and digital cameras, camera and recording components of cellular telephones/PDAs and digital recorders, at any time while on company property or while performing job duties off-company property, unless prior authorization is obtained from a department manager for a company business purpose.

Being honest, which includes but is not limited to:

- Refraining from any activity in photographing or recording (either by audio or video means) others in the work environment, including coworkers, managers, guests, customers, or vendors, unless specific authorization has been given in advance by all individuals subject to the intended photography and/or recording activity or management has otherwise pre-authorized the activity for company business purposes.

Know and follow all Wynn policies and procedures, which include but are not limited to

- Only using the facilities for the property you are scheduled to work, with the exception of the employee dining area [EDR].
- When scheduled to work at Wynn you must park in the employee parking garage and utilize the back of the house area that pertains to and is exclusive to the property at which you are working with to and is exclusive to the property at which you are working with the exception of the employee dining area. All other exceptions to this rule can only be made with specific management authorization and/or written accompanying documentation.
- Logos may not be used for any purpose aside from those for which they are intended,"

WE WILL NOT suspend employees or issue employees written warnings because they exercise their right to discuss wages, hours and working conditions with other employees.

WE WILL NOT discipline you because of your protected concerted activities.

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

WE WILL rescind the Code of Personal Conduct rules set forth above the rules set forth above, and either WE WILL (1) furnish all current employees with inserts for our Code of Personal Conduct that (a) advise that the overly-broad provisions or requirements have been rescinded, or (b) provide language of the lawful

provisions or requirements; or (2) publish and distribute revised Code of Personal Conduct that (a) do not contain the overly-broad provisions or requirements, or (b) provide language of the lawful provisions or requirements.

WE WILL, within 14 days, remove from our files any and all records of the June 19, 2015 suspension and the June 26, 2015 second written warning issued to KELI P. MAY (MAY), and

WE WILL, within 3 days thereafter, notify MAY in writing that we have taken these actions and that the materials removed will not be used as a basis for any future personnel action against her or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against her.

WE WILL make whole KELI P. MAY for any wages and other benefits she lost because we issued her a suspension on June 19, 2015.

WYNN LAS VEGAS, LLC

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/28-CA-155984](http://www.nlrb.gov/case/28-CA-155984) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

