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Annual Legal Update

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Academic Collective Bargaining Under Siege:
Implications for a Public Good

Hunter College

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Annual Legal Update

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Changes at the NLRB

This was another year of an activist NLRB issuing decisions and issuing rules that continue to tilt the labor relations bar in favor of labor. Much of that work was done during 2011 while the Board carried a pro-labor Democratic majority and will be discussed below. However, near the end of 2011, it looked as though the NLRB would be unable to function to any great degree going forward into 2012 and that the period of time for controversial decision-making had ended. Long time Board member Wilma Liebman (D) left the Board in August 2011. Craig Becker (D) served out his recess appointment and left the Board in December, 2011. That seemed to leave just Mark Pearce (D) and Brian Hayes (R) as the only two members of the Board. Because of that, it looked as though no further major rulings would be forthcoming from the Board. This was due to the fact that, in a 5-4 ruling issued on June 17, 2010, the Supreme Court had held that a two-member National Labor Relations Board lacked authority to issue rulings. *New Process Steel, L.P. v. NLRB,* -- US --, 130 S.Ct. 2635 (2010)

However, in early January, 2012, President Obama recess appointed two Democrats and a Republican to serve as members of the Board, thus restoring the Board to full strength. Obama appointed Sharon Block (D) and Richard Griffin (D) as Board members along with lawyer Terrence Flynn (R), who had been previously nominated in early 2011 but not confirmed. While there was outcry from the Republicans, claiming that the Senate was not really in recess, the Board has continued to move forward into 2012 with a full complement of members and a 3-2 Democrat majority.

Prior to his appointment, Member Griffin was serving as General Counsel of the International Union of Operating Engineers (IUOE). Member Block served a Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor prior to her appointment and before that, worked with Senator Edward M. Kennedy as Senior Labor and Employment Counsel. Member Flynn had served as Member Hayes' Chief Counsel and before that was a practicing management labor lawyer.

Rule Making

1. Posting of Employee Rights under NLRA

Two significant rule making developments by the Board dominated the news in the latter part of 2011. First, on August 30, 2011, the Board issued a Final Rule that would require employers, as of November 14, 2011, to notify employees through a formal workplace posting of their rights under the National Labor Relations Act. Private sector employers covered by the Act would be required to post the employee rights notice where other workplace notices are typically posted, or, on employer web sites for those employers who typically communicate workplace rules in such a manner. The deadline for posting was later extended to January 31, 2012.

However, legal challenges to the posting requirement were filed by the National Association of Manufacturers in the U.S. District Court for the District of Columbia and by the Chamber of Commerce in the United States District Court for South Carolina. Such challenges questioned the statutory authority of the Board to require such postings through rule making. At a December 19, 2011 hearing in the District of Columbia proceeding, District Judge Jackson told NLRB lawyers that the legal issues "deserve more time" than the January 31 deadline.

Thus, the Board further extended the deadline for posting until April 30, 2012. In a statement announcing the new effective date of April 30, the NLRB said "postponing the effective date of the rule would facilitate the resolution of the legal challenges that have been filed with respect to the rule."

On March 2, 2012, the U.S. District Court for the District of Columbia did issue its ruling upholding the Board's regulation on employer posting. *Nat'l Association of Manufacturers. v. NLRB*, D.D.C., No. 11-cv-1629, (3/2/12). Justice Jackson held that the Board was acting pursuant to its rulemaking authority and that it was not acting arbitrarily or capriciously in requiring employers subject to its jurisdiction to post the notice of employee rights. The Court found that the Board provided a reasonable explanation for why its notice posting rule was necessary to carry out the policies of the statute, namely that employees must know their rights under the law in order for them to be able to fully exercise those rights. The Court agreed that requiring employers to post notices of employee rights is a reasonable means of raising employee awareness of their rights.

However, the Court ruled that two portions of the Board's regulation would not be upheld. First, Judge Jackson concluded that the NLRB exceeded its statutory authority in promulgating a provision that would treat ***any*** failure to post the required notice as an unfair labor practice under the Act. The Board had argued that failure to post would be an unlawful "interference" with employee rights under Section 8 (a) (1) of the Act. The Court disagreed, and concluded that interference required an act of obstruction and not a mere unwillingness to help. Moreover, uunder the free speech proviso of Section 8 (c), which all employers enjoy, it was clear that Congress did not intend to find employers guilty of Section 8 (a) (1) by the "mere failure to provide information" to employees, in this case, the failure to provide the notice information. The Court did underline, however, that nothing in its decision prevented the Board from finding that a failure to post could constitute an unfair labor practice ***in any individual case*** brought before it. The Board simply could not make a blanket advance determination that a failure to post always constitutes an unfair labor practice. Such determinations would have to be made on a case by case basis.

Second, the Court held that a provision tolling the NLRA's statute of limitations in any case where an employer failed to post the notice was inconsistent with the language of the statute. The Board did not have the authority to promulgate a provision that would treat any failure to post as an unfair labor practice as a toll of the six (6) month statute of limitations for filing charges in any future unfair labor practice action at a job

https://thekeep.eiu.edu/jcba/vol0/iss7/28
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site where the notice was not posted. The Court noted that Congress mandated a short time period for filing charges and that equitable tolling was a defense granted "only in extraordinary and carefully circumscribed instances." The Court noted the Board's unquestionable right to apply equitable tolling in appropriate cases but refused to support the blanket tolling concept that the Board had advanced.

A number of the plaintiffs have already filed a Notice of Appeal of the District Court's ruling and have asked the Court to enjoin NLRB enforcement of the rule pending resolution of the appeal. Additionally, a separate case brought by the United States Chamber of Commerce remains pending in South Carolina, where a hearing was held on February 6, 2012, to consider cross motions for summary judgment.

2. Election Rules

The posting requirement generated much heat- and litigation- but the more consequential rule making involved the Board's streamlining of the representation process, an agenda item that Democrat Board members had pushed for some time.

Thus, in June 2011, the Board Chair at the time, Wilma Liebman, along with members Craig Becker and Mark Pearce proposed a variety of changes that they said would expedite union elections. There were public meetings on the proposed rules and over 65,000 comments from the public. Republican Board member Brian Hayes vociferously opposed the new rules, claiming they were unnecessary and that the Board majority was rushing to get the rule done before Members Liebman and Becker left the Board.

At a public meeting at the end of November, the new Board Chair Pearce offered a proposed resolution for the then-three member Board to adopt six elements of the original proposal. Pearce and Becker voted in favor; Hayes opposed.

In late December, 2011, the Board ultimately issued a new rule that made seven changes in NLRB procedures for representation case:

1. Amended board regulations to state that the purpose of pre-election hearings is to determine whether a question concerning union representation exists that should be resolved in a secret ballot election
2. NLRB hearing officers were given authority to limit the presentation of evidence in such a hearing to genuine issues of fact material to whether a question of representation exists.
3. Post hearing briefs would no longer be a matter of right but only could be filed with the permission of the hearing officer
4. The right to seek Board review of the regional director's pre-election rulings was eliminated; such issues could only be review post-election
5. Eliminated language in the regulations that recommended that the regional director not schedule balloting within 25 days of directing an election.

6. Appeal of a pre-election ruling would only granted under “extraordinary” circumstances
7. Amended board rules to make NLRB review of post-election disputes discretionary

These rules are under legal challenge right now in the case of *Chamber of Commerce and Coalition for a Democratic Workplace v. NLRB*, Case no. 11-2262, USDC for District of Columbia. The challenge rests on several grounds:

- Only two members of the Board voted on the new regulations
- The new regulations place power in the hands of the hearing officers to exclude all evidence on fundamental issues such as who is eligible to vote contrary to the Act, thus depriving the Regional Director and the Board from ruling on such matters
- The new regulations deprive the parties of pre-election review of unit decisions by the Regional Director contrary to Section 3 (b) of the Act which allows for Board review of RD actions
- The new regulations attempt to establish “quickie elections,” thus depriving employees of their fullest freedoms under the Act to exercise their rights
- The new regulations were promulgated in violation of the Administrative Procedure Act and were arbitrarily and capriciously issued.

The matter is pending as of this writing.

If upheld, it remains to be seen how much these new rules influence individual union drives at particular employer settings. Certainly, the NLRB’s march towards breathtakingly fast elections will continue in the foreseeable future. To what extent hearing officers allow evidence on unit issues prior to the elections versus putting them aside for post-election determination is unknown. The regulation that indicates that only issues that must be litigated are those relating to whether or not a “question of representation” does not provide a model of precision guidance to unions and employers at this stage.

It is fair to say, however, that it is very likely that many employees will be voting in elections with a lack of clarity as to who is in and who is out. Indeed, on one of the most sensitive statutory issues – who is a supervisor? – it is likely many elections will proceed without any final determination. This will affect voter sentiment, as well as making it very confusing as to whether the conduct of such individuals can be attributed to the employer.

In the end, the question of “what’s broken?” still looms over these changes. For indeed, the General Counsel’s own summary of 2011 cases at the Board issued in early March 2012 reveals two important findings:

- 91.7% of all initial elections in 2011 were conducted within 56 days of the filing of the petition.

- Initial elections in union representation elections were conducted in a median of 38 days from the filing of the petition.

These figures were under the prior regulations and show a reasonable processing period on issues of such consequence. The Board, in pushing for the expedited election rules, never set forth a compelling case as to why these reasonable time lines had to be shortened even further. And, since despite their democratic nature, unions do not have to “stand” for re-election, the Board’s regulations will force employees in many situations to make the most consequential and largely irreversible decision of their workplace life in but a handful of days.

Appropriate Units

If the Board did what it could to expedite elections from a procedural point of view in 2011, it also issued one of the most important decisions in the area of appropriate bargaining units, a decision that will undoubtedly have a ripple effect on many cases in the future.

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), the Board overruled *Park Manor Care Center,* 305 NLRB 872 (1991). Both cases dealt with bargaining units in the non-acute health care field. However, the scope of the *Specialty Healthcare* case goes well beyond the health care industry, as the decision sets forth new rules for determining appropriate bargaining units in all industries.

By way of background, in the 1980s, the Board engaged in rulemaking in establishing presumptively appropriate bargaining units in acute health care facilities. With *Specialty Healthcare*, the Board turned to long term care facilities, such as nursing homes. But rather than engage in rulemaking as it did with acute health care facilities, the Board chose to deal with that non-acute care sector by decisional law.

The narrow issue in *Specialty Healthcare* centered on whether a single unit limited to certified nursing assistants at one facility was appropriate, or, as the employer contended, the only appropriate unit was a larger unit of all nonprofessional employees at that facility. In a rare move, however, the Board invited briefs from the public, over the dissent of Member Hayes, who expressed concern that then-members Liebman, Becker and Pearce intended to use the case to overrule precedent or establish broadly applicable rules concerning determination of bargaining units.

While arising out of the health field, the original call for briefs last year raised larger questions as to whether the Board was going to establish a different standard for assessing community of interest in all unit cases. Business groups, including the U.S. Chamber of Commerce, argued that NLRB should not depart from its traditional community of interest approach in favor of a standard that would allow a union to seek certification among any unit of employees performing the same work at the same facility ***without regard*** to whether there are ***other employees*** sharing a community of interest with the workers sought by a union. A case by case approach remains the preferred approach.[1]

But in *Specialty Healthcare, supra*, the Board did exactly what Members Hayes thought they would do. While the case focused on the nursing home employees, the broad principles laid out in that case will affect every representation case going forward. The Board essentially held that when employees or a union petition for an election in a unit of employees who are readily identifiable as a group, and the Board finds that the employees in the group share a community of interest with each other, the Board will find the unit appropriate, despite a contention that the employees in the unit could be placed in a larger unit which would also be appropriate – or even more appropriate – ***unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit***

The Board began its analysis by noting that it "looks first to the unit sought by petitioner, and if it is an appropriate unit, the Board's inquiry ends." *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 (2010). The Board added that the petitioner's desire concerning the unit is always a relevant consideration and, while Section 9 (c) 5 of the Act provides that "the extent to which the employees have organized shall not be controlling," the extent of organization can certainly be a factor in unit determinations, citing *NLRB v. Metropolitan Life*, 380 U.S. 438, 442 (1965).

In making the determination of whether the proposed unit is an appropriate unit, the Board's focus is on whether there is a community of interest among the employees. The Board examines:

> Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment and are separately supervised. *United Operations, Inc.* 338 NLRB 123 (2002); Accord: *Agi Processor Co. v. NLRB*, 514 F.3d 1, 8 (D.C.Cir. 2008)(to determine if a commonality of interest exists, the Board typically looks at the similarity of wages, benefits, skills, duties, working conditions, and supervision of employees.)

After concluding, in the case at hand, that the certified nursing assistants were a clearly identifiable group and share a community of interest, "we come to the question of what

[1] And indeed that had been the approach for non-acute facilities ever since *Park Manor Care Center*, 305 N.L.R.B. 872, (1991), where the Board held that in nonacute health care facilities it preferred to take a pragmatic or empirical approach to unit determinations that could include consideration of recurring factual patterns as well as traditional "community of interest factors." The *Park Manor* board said "after various units have been litigated in a number of individual facilities, and after records have been developed and a number of cases decided from these records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate."

showing is required to demonstrate that a proposed unit consisting of employees readily identifiable as a group who share a community of interest is nevertheless ***not*** an appropriate unit because the smallest appropriate unit contains additional employees. (357 NLRB No. 83, at p. 10)

Here the Board wrote that:

> It cannot be that the mere fact that they [the CNAs} also share a community of interest with additional employees renders the smaller unit inappropriate. Stated in terms directly relevant to this case, the "Board has held that the appropriateness of an overall unit does not establish that a smaller unit is inappropriate." *Montgomery Ward & Co.,* 150 NLRB 598, 601 (1964).

The Board stated that a "heightened showing" is necessary to demonstrate that a proposed unit is inappropriate because it does not include additional employees. While acknowledging that past decisions were not always clear about what type of showing is necessary when a unit is being challenged as an inappropriate fragment of a larger grouping, the Board laid out its essential principle in this case:

> We therefore take this opportunity to make clear that, when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills or similar factors) and the Board finds that the employees in the group share a community of interests after considering traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, ***unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned unit.*** 357 NLRB No. 83, at pp. 12-13. (emphasis added)

The Board then tried to give some examples of when a proposed unit might fail under such circumstances. A petitioner, for example, cannot "fracture" a unit, by seeking, in this case, some CNAs but not others. In that case, there would be no "rational basis" for including some CNAs but excluding others. Or if only night shift CNAs were sought, or only CNAs who worked on one floor to the exclusion of others, then the unit would be similarly fractured.

In dissent, Member Hayes led with the following:

> Make no mistake. Today's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction. My colleagues' opinion stunningly sweeps far more broadly even than suggested by the questions posed in the notice and invitation to file briefs to which I previously dissented.

. * * * * * * * *

> This is perhaps the most glaring example in cases decided recently of my colleagues initiating a purposed empirical inquiry into the effects of extant precedent, only to end by overruling that precedent in the absence of any factual justification, for the purely ideological purpose of reversing the decades-old decline in union density in the private American workforce.

Hayes ultimately takes dead aim on the new "overwhelming community of interest test," arguing that such a test has no role in initial unit determinations. Citing a rejection of this test by the Fourth Circuit in an earlier case, it is noted that "by presuming the union-proposed unit proper unless there is 'an overwhelming community of interest" with excluded employees, the Board effectively according controlling weight to the extent of union organization. This is because "the union will propose the unit it has organized." *NLRB v. Lundy Packing Co*., 68 F. 3d 1577, 1581 (4th Cir. 1995)

> Further citing *Newton-Wellesley Hospital*, 250 NLRB 409 (1980), Hayes wrote:
>
> …in the traditional community of interest test, the Board never addresses solely and in isolation, the question whether the employees in the unit sought to have interests in common with one another. Numerous groups of employees can fairly be said to possess employment conditions or interests in common. Our inquiry – though perhaps not articulated in every cases- necessarily proceeds to a further determination whether the interests of the group sought or ***sufficiently distinct*** from those other employees to warrant the establishment of a separate unit.

Hayes underlines that this decision has very real practical effect on labor relations.

> This is not an abstract debate over legal hokum. The difference between the *Park Manor* test that should be imposed to determine the appropriateness of the petitioned-for CNA unit and the "overwhelming community of interest" test that my colleagues impose has vast practical ramifications….. the test obviously encourages unions to engage in incremental organizing in the smallest units possible. In the present case, it seems quite clear that, if petitioned for, under the majority's test, there could be at least separate appropriate units found for RNs, LPNs, CNAs, cooks, dietary aides, business clericals and residential activity assistants. In *Park Manor*, there could have been separate units for RNs, LPNs, kitchen employees, laundry employees, housekeepers, activity assistants, maintenance employees, office clericals and guard. ***This would represent an extraordinary fragmentation of the workforce for collective bargaining purposes, a situation that cannot lend itself to the labor relations stability to which my colleagues so often dedicate their efforts.***

The scope of this decision was not lost on the management bar or by Republicans. Thus, House Bill H.R. 3094, the Workforce Democracy and Fairness Act, was filed and cleared committee in November. That bill, among many other things, would reverse the effects of

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Specialty Healthcare by establishing in the statute a lengthy eight factor test of whether employees share a sufficient community of interest to be grouped in a single unit and would limit the "overwhelming community of interest" test to cases involving "proposed accretions to an existing unit."[2]

Following a union victory in this case, the employer engaged in a technical refusal to bargain and may be appealing the unit decision to the circuit court of appeals. *Specialty Healthcare* 357 NLRB No. 174 (December 31, 2011)

Specialty Healthcare spawned the decision in *DTG Operations, Inc*. 357 NLRB No. 175 (1/6/12). In that case, rental service agents constituted an appropriate unit without including other employees who work with them at the same location. Members Pearce and Becker rejected a regional director's decision that a wall to wall unit was required. There was no "overwhelming community of interest" sufficient to deem the smaller unit inappropriate.

In that case, there was a petition for representation filed for 31 rental service agents and lead rental service agents employed by DTG at the Denver airport. DTG argued that the smallest appropriate unit would be a wall to wall unit, including all 109 employees at the facility, including courtesy bus drivers, vehicle shuttlers, return agents, service agents, parking lot agents, and exit booth agents, mechanics, staff assistants and a building maintenance tech.

In looking at the evidence, the Board majority noted that, while all 109 employees wear uniforms, RSAs (rental service agents) wore "classier" uniforms. RSAs work on 24 hour schedules while most other jobs were staffed for only part of the day. RSAs did interact with lot agents and staff assistants, and many in the group besides RSAs interact with the public. The Board underlined that the RSAs worked under an incentive pay plan which gave them more pay for selling upgrades and additional products to customers and that they do work separately from the other employees. The Board found that there was no "overwhelming community of interest" with other employees such that the RSAs could not have a unit of their own.

Member Hayes predictably dissented. After reiterating his views on *Specialty Healthcare*, he added the futility of opposing such small units in the future.

> The larger truth is that it is difficult to imagine a multiclassification, multifunction workplace where the jobs of all workers are nevertheless so homogeneous that such distinctions cannot be drawn. As long as a union does not make the mistake of petitioning for a unit that consists of only part of a group of employees in a

[2] That test is used in accretion cases on the theory that, in order to take away the right of such accreted employees to vote for union representation and merely add them to a pre-existing unit, there must indeed be "an overwhelming community of interest" to do so.

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particular classification, department or function, i.e. a so called fractured unit, it will be impossible for a party to prove that an overwhelming community of interest exists with excluded employees. Board review of the scope of the unit has now been rendered largely irrelevant. It is the union's choice, and the likelihood is that most unions will choose to organize incrementally, petitioning for units of the smallest scale possible. The days of traditional all-inclusive production and maintenance units, technical units, or service and maintenance units – much less wall to wall units- are numbered. I adhere to the previously expressed view that giving the Board's imprimatur to this balkanization represents an abdication of our responsibility under Section 9 of the Act and may well disrupt labor relations stability by requiring constant process of bargaining for each micro-unit as well as pitting the narrow interests of employees in one such unit against those in other units. 357 NLRB N0. 175, at page 9.

In another case that cites *Specialty Health Care*, the Board did find an "overwhelming" community of interest situation existed. In *Odwalla, Inc.* 357 NLRB No. 132 (December, 2011), the Board ruled that certain merchandisers at Odwalla's plant in California should not have been excluded from a unit because they did indeed share an "overwhelming" community of interest with other plant employees.

Odwalla produces and distributes fruit bars and juice drinks throughout the country. The Company's San Leandro, CA manufacturing facility consisted of sales representatives and delivery drivers, warehouse associates and cooler technicians. The Union filed a petition for an election and wanted to exclude certain merchandisers from the unit. The election was conducted with such merchandisers voting under challenge.

The Board, in applying *Specialty Health Care*, found that there was no rational basis for excluding the merchandisers. The proposed unit without such personnel was not based on classification exclusivity or organizational sense; was not based on supervisory lines; was not based on work location or actual time spent at the plant; was not based on compensation lines or any other factor of consequence. Thus, the Board ruled that the "Employer has carried its burden of proving that the merchandisers share an overwhelming community of interest with the employees in the recommended unit because none of the traditional bases for drawing unit boundaries used by the Board supports excluding the merchandisers while including all the remaining employees."

Voluntary Recognition Doctrine

As predicted last year, the Board issued a decision in *Lamons Gasket Co*., 357 NLRB No.72 (August 26, 2011), in which it overruled the decision in *Dana Corporation*, 351 NLRB 434 (2007).

In *Dana*, the Board had established a 45 day window period after an employer voluntarily recognized a union during which employees could file a decertification

https://thekeep.eiu.edu/jcba/vol0/iss7/28
DOI: 10.58188/1941-8043.1079

petition. It further required employers to post a Board notice informing employees of their right to seek such an election within 45 days to oust the voluntarily recognized unit.

In *Lamons Gasket, supra,* the Board refused to uphold this rule and held that decertification petitions could not be filed that quickly. Instead, the Board ruled that a voluntarily recognized union is entitled to a reasonable period of bargaining of no less than six months and no more than one year after the parties' first bargaining session.

Successor Bar Doctrine

In *UGL-UNICCO Service Co,* 357 NLRB No, 76 (August 26, 2011), the majority reversed the 2002 decision *MV Transportation* and reinstated the successor bar doctrine. The "successor bar" will apply in those situations where a successor has abided by the legal obligations to recognize an incumbent union, but where the predecessor's contract has not been adopted. In such cases, the union is entitled to a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be raised.

The "reasonable period" will be six months where the successor has expressly adopted the existing terms and conditions of employment as the starting point for negotiations, without making unilateral changes. In other cases, where the employer is making unilateral initial terms of employment, the reasonable period will be deemed one year.

Unenforced, but overly broad employer policies and work rules void election

In *Jury's Boston Hotel,* 356 NLRB No. 114, (March 28, 2011), the Board decided to set aside a decertification election the union lost by one vote on the grounds that the employee handbook contained several rules (solicitation, distribution, loitering and clothing standards) which the Board considered overly broad and unlawful despite the fact that there was no evidence that the rules were even enforced against legally protected activity during the period leading up to the election. The union had been aware of the rules for several years prior to the election yet waited until the election loss to raise the issue.

Member Hayes dissented, noting that the hearing officer had been correct in dismissing the objections. Hayes wrote:

> He [the hearing officer] also correctly concluded that the analysis of the Union's objections is controlled by *Delta Brands, Inc.*, 344 NLRB 252 (2005), and *Safeway, Inc.,* 338 NLRB 525 (2002), notwithstanding my colleagues' unavailing attempts to distinguish and diminish that precedent. In sum, the totality of circumstances related to the maintenance of these rules shows that (1) they were

> not promulgated in response to union activity; (2) they were not enforced against anyone engaged in union activity; (3) the Employer assured employees before and during the election period that nothing in the handbook was meant to interfere with their rights under the Act; (4) the incumbent Union was on the scene and available to advise employees with respect to these rights; (5) there is evidence that employees may have violated the rules without consequence; and (6) the evidence weighs heavily in favor of finding that the rules' potential chilling effects on Section 7 rights did not have that affect on any employee. I readily acknowledge that the closeness of the election is a factor to be considered in assessing the merits of the objections, but this factor alone cannot be controlling.

Individual Employee Agreements Cannot Bar Class Action Participation

In *D.R. Horton, Inc.*, 357 NLRB No.184, 2012 WL 36274 (January 3, 2012), the NLRB found that employees cannot be required to sign agreements that prohibit them from filing class actions concerning their conditions of employment, through arbitration, the courts, or the NLRB.

The employer, a homebuilder, had required employees to sign an agreement called a "mutual arbitration agreement" as a condition of employment. The agreement stated that in the event of an employment dispute, the arbitrator chosen to hear the action would be prohibited from considering any class or collective actions. After an employee with an FLSA dispute stated he was going to invoke arbitration on behalf of himself and others over being misclassified, the company told him he could not do so on behalf of others. The employee then filed an unfair labor practice charge with the NLRB claiming, inter alia, that the agreement had had the effect of denying employee access to the NLRB for collective relief.

> Employees who join together to bring employment-related claims on a class-wide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.

The company was required to rescind the agreement or else revise it to make it clear that employees were not barred from pursuing class or collective actions in all forums, including the NLRB, and that they retain the right to file charges with the Board..

https://thekeep.eiu.edu/jcba/vol0/iss7/28
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Access Cases

Handbilling by off-duty contractor employees on primary employer's property

In *New York, New York Hotel and Casino,* 356 NLRB No. 119 (March 25, 2011) the Board ruled that the employer violated the Act by prohibiting an on-site food contractor's off-duty employees from distributing handbills in support of union organizing in public, non-work areas of the owner's property. The Board first determined that employees of a contractor which operated restaurants and a food court in the hotel and casino were employees statutorily protected under the NLRA. Because those employees were regularly employed on the casino owner's property, the Board adopted an "access standard" for them. The Board said:

> Our decision is a relatively narrow one. We address only the situation where, as here, a property owner seeks to exclude, from non-working areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business, who seek to engage in organizational handbilling directed at potential customers of the employer and the property owner.
>
> We conclude that the property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reasons, including but not limited to, the need to maintain production and discipline…
>
> In adopting this test, we decline to condition access to the property on a showing by the off-duty employees… that they lack a reasonable alternative means, however, defined, of communicating with their intended audiences.

In dissent, Member Hayes wrote that the decision artificially equates section 7 rights of a contractor's employees with those of the property owner's employees and does not pay sufficient attention to the property owner's rights. He would have found that the property owner acted unlawfully in excluding the handbillers from the sidewalk area outside its main entrance but that it was within its rights to expel them from the entrance to the restaurants inside the facility.

Following this decision, the Board issued *Nova Southeastern University,* 357 NLRB No. 74 (August 26, 2011). The central question presented in that case was whether the University violated section 8 (a)(1) of the Act by prohibiting employees of its maintenance contractor, UNICCO, from engaging in organizational handbilling on the University's campus. The Board, following the *New York, New York* decision, said yes.

In *Nova,* an off duty employee of a contractor, regularly employed on the property in work integral to the University's business, engaged in handbilling in non-work areas (the campus parking lot) open to the public on the owner's property as part of an organizing campaign among the contractor's employees. After he had been handing out the leaflets for ten minutes, he was stopped by the University's public safety officer who cited the University's no solicitation rules, noting that no soliciting is allowed on campus without administration approval. The employee was given a written warning by his manager.

The Board held that the employee involved was exercising section 7 rights. The University had argued that it had a right to ensure security on its open campus and maintain its no-solicitation rule for non-employees. Simply put, the UNICCO employee was not a University employee and thus should be subject to the same restrictions as other non-employees. The Board, however, found critical differences between the UNICCO employee and all other non-employees.

> Nova invited UNICCO and its employees onto its campus to perform campus maintenance and does not prohibit the employees from entering campus before the start of their shifts or require that the employees leave the campus immediately after their shifts. As the judge specifically found, what was proscribed here was the distribution of literature not trespassing or unauthorized entry. Nova failed to show or even persuasively explain why the campus would be less safe if the UNICCO employees, while on the campus but off duty distributed union flyers to fellow employees.
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> * * * * * * * * * *
>
> Considering the importance of McGonigle's interest in exercising his fundamental right to distribute handbills to coworkers for organizational activities at the very threshold of his workplace, and the utter lack of evidence connecting Nova's asserted interests with a prohibition on such handbilling by UNICCO employees, we conclude that Nova violated Section 8(a)(1) when public safety officer Neely ordered McGonigle to stop handbilling.

The Board noted that handbilling was a core Section 7 right and that the distribution of flyers was part of a union campaign for representation. Further, the handbilling was taking place in an exterior non-work area at the location on campus where the employee was most likely to encounter other employees of the contractor, and the employee was off-duty at the time.

Bargainable Topics

Withholding pay increases

In *Arc Bridges Inc. v. NLRB,* (D.C. Cir., No. 10-1360, December 9, 2011), the U.S. Court of Appeals for the District of Columbia set aside an NLRB ruling that an employer violated the Act when it did not implement an across-the-board wage increase for both union and non-union employees.

https://thekeep.eiu.edu/jcba/vol0/iss7/28
DOI: 10.58188/1941-8043.1079

Arc Bridges had annually granted across the board increases for several of the years prior to the unionization of some of its workforce in 2007. While the employer was bargaining with the newly certified union in 2007, it provided pay increases to its non-union employees but not to its union employees. The company, which had planned to give out the raises, feared that the significant disparity between the 3% raise it was planning and the union's much larger demand would provoke a strike. The company was also concerned that it would have nothing to bargain with if it gave out the 3% it had budgeted, and there was also concern that the union may view any such raise as a unilateral action in violation of the law.

While the NLRB ruled the employer violated the Act by withholding the raise, the D.C. Circuit said that the across the board increases were not a term or condition of employment. Such raises were provided totally at the employer's discretion, with no underlying objective criteria. They were given out based on management's assessments of the economy and the company's budget and finances. Moreover, such increases were not granted in three of the five years before 2007.

In overruling the Board's decision, the Court distinguished its own decision in *Daily News of Los Angeles v. NLRB,* 73 F. 3d. 406, (D.C. Cir., 1996), because in that case, it found annual raises to be a term or condition of employment because "the merit-based criteria for determining if there would be any raises were fixed." In the *Arc Bridges* case, the Court explained that the employer did not use any criteria to decide whether or not to give the raise and instead maintained its discretion to decide whether to provide raises based on financial feasibility. The Court also underlined the NLRB's "large evidentiary hole" because the past practice was sketchy, with no raises between 2002-04 and across the board raises only be granted six times in 15 years. The Board had argued that the two year experience of annual raises was sufficient to create a practice based on the precedent of *Kurdziel Iron of Wauseon, Inc.* 327 NLRB 155 (1998). However, as the Court noted, in the *Kurdziel* case, the employer had only been operational for two years. Thus, "while two consecutive years of wage increases might be enough to establish a term of employment when that span constitutes 100% of the record evidence, it will not suffice when the employer's history dates back further."

Ceasing Dues Check off after Contract Expiration

Last year, we discussed *Hacienda Resort Hotel & Casino,* 355 NLRB No. 154 (2010). In that case, the Board dismissed an unfair labor practice complaint that dealt with the unilateral cessation of dues check off following the expiration of a collective bargaining agreement. While the right of the employer to unilaterally cease such check off following contract expiration has been understood for decades,[3] it had been revisited in this case and the Ninth Circuit, in dealing with an earlier appeal, had instructed the Board to articulate a rationale as to why the dues check off issue was in a separate category from other terms and conditions of employment and thus could be exempt from

[3] *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615, 621 (3d Cir. 1963),

the unilateral change doctrine articulated in *NLRB v. Katz* 369 U.S. 736 (1962). Under that doctrine, most contractual terms and conditions of employment must be maintained, as a matter of law, after contract expiration as part of the status quo.

Upon remand, however, there were only four sitting members of the Board (Member Becker had to recuse himself because of prior associations with the parties) and the four of them deadlocked on the issue. Because of this even split, the Board had to dismiss the complaint. However, the two opposing camps expressed their contrary views on the subject.

Chairman Liebman and Pearce would have changed past policy on this issue. They wrote:

> We concur in the dismissal of the complaint. We write separately to express our substantial doubts about the validity of *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963), and its progeny, particularly as applied in right-to-work states, where the collective-bargaining agreement contains no union-security clause. As explained more fully in the dissenting opinion in *Hacienda I*, the Board has never provided an adequate statutory or policy justification for the holding in *Bethlehem Steel* excluding dues-check off from the unilateral change doctrine articulated in *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Further, even assuming that *Bethlehem Steel* was correctly decided, the Board has never provided a reasoned analysis for applying the holding in *Bethlehem Steel* in a right-to-work context where dues check off could not lawfully be linked with union security arrangements.

On the other hand, Members Hayes and Schaumber would uphold the case law that was established fifty years earlier and allow an employer to cease dues check off after the expiration of the contract. They wrote:

> Unlike our colleagues, however, we respectfully maintain that application of the Board rule regarding post-contract expiration of the dues check off obligation is warranted for important legal, policy and equitable reasons….
> There is a major distinction to be made between terms and conditions subject to the *Katz* rule and the exceptions to that rule. The exceptions, including check off, are uniquely of a contractual nature. In other words, provisions relating to wages, pension and welfare benefits, hours, working conditions, and numerous other mandatory bargaining subjects typically appear in a collective-bargaining agreement, but those aspects of employment can exist from the commencement of a bargaining relationship. The obligation to maintain them does not arise with or depend on the existence of a contract. On the other hand, the obligation to check off dues, refrain from strikes or lockouts, and submit grievances to arbitration cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound.

https://thekeep.eiu.edu/jcba/vol0/iss7/28
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In light of the deadlock and the fact that it is a tradition of the Board not to overrule precedent without a three member majority, existing precedent had to be followed in this case, leading to the dismissal of the complaint.

The union petitioned for appellate review. On September 13, 2011, the Ninth Circuit ended the 15 year history of this case, ruling that the expiration of a collective bargaining agreement did not give a group of Nevada employers the right to stop honoring employees' voluntary checkoff authorizations. *Local Joint Executive Board of Las Vegas v. NLRB, No.* 10-72981, (9th Cir., 2011). Given the length of time the case has been active, the Court, still not satisfied with the Board's reasoning, said, "because the Board was unable to provide a reasoned explanation for the rule [that an employer can cease checking off dues at the expiration of the contract], we are forced to interpret the statute as if the Board had not spoken at all."

The Court first distinguished the difference between dues checkoff to enforce a union security clause and dues checkoff in a right to work state.

> Where a union security agreement is present, as in *Bethlehem Steel,* automatic dues checkoff is forced upon all employees whether they wish to be members of the union or not. This arrangement serves to keep the union funded even though individual workers might otherwise choose to enjoy the benefits of a union-negotiated CBA without paying union dues. In a right to work state, on the other hand, dues are deducted from an employee's pay check only if the employee specifically requests the employer to do so. Dues checkoff is thus not a benefit to the union forced upon employees, but rather it is a benefit to those employees who choose to be part of the union and also choose checkoff.
>
> This distinction is crucial. In *Bethlehem Steel,* the dues checkoff arrangement was compelled under the terms of the CBA just as the employees' membership in the union had been compelled pursuant to the union security agreement in the CBA. In this case, however, union membership was not a condition of employment, and each employee whose dues were being checked off signed a request that the employers deduct dues from their paychecks and submit dues to the Union. Thus, unlike *Bethlehem Steel,* where the unilateral cessation of dues checkoff merely terminated a contractual arrangement that individual employees and employers alike were compelled to accept, the unilateral cessation of checkoff by the employers in this case stripped employees of a contractual right that they had expressly exercised by requesting dues checkoff.

The Board itself had noted in other cases that "the exception…permitting unilateral abandonment of union security and checkoff arrangements after contract expiration is based on the fact, noted in *Bethlehem Steel, that* "the acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the NLRA." *Indiana & Michigan Electric Co.,*284 NLRB 53, 55 (1987).

> In other words, if union security provisions are limited by statute to the duration of an existing CBA, dues checkoff provisions that implement the union security provisions are limited in the same manner. *Bethlehem Steel*, 136 NLRB at 1502.

But in contrast, the Court wrote: "Where the dues checkoff provisions do not implement union security, however, but instead exist as a free-standing independent convenience to willingly participating employees, the reasoning of *Bethlehem Steel* lose its force," the Court said. In a right to work state, where dues checkoff does not exist to implement a union security clause, "dues checkoff is akin to any other terms of employment that is a mandatory subject of bargaining." Thus, the Court concluded:

> Accordingly, we conclude that in a right to work state, where dues checkoff does not exist to implement union security, dues checkoff is akin to any other term of employment that is a mandatory subject of bargaining. Because each affected employee individually requested dues checkoff, the employer's actions in this case were an unlawful termination of a bargaining benefit to employees, not merely the cessation of a provision that automatically terminated along with the CBA and union security. The employers' unilateral termination of dues checkoff in this case was thus "in effect a refusal to negotiate… which reflected a cast of mind against reaching an agreement." In ceasing dues checkoff without bargaining to impasse, the employers therefore violated section 8 (a) (5) of the NLRA.

Graduate Teaching Assistants

In *New York University*, (Case No. 2-RC-23481, June 16, 2011), the Regional Director for Region Two dismissed a petition for representation filed by the Graduate Student Organizing Committee/United Auto Workers seeking to represent certain graduate students.

The procedural history of the case started with the filing of the Petition itself on May 3, 2010. NYU filed a Motion to Dismiss based on *Brown University,* 342 NLRB 483 (2004). On June 7, an Order Dismissing the Petition was issued. On June 21, 2010, the Petitioner filed a request for review with the Board arguing that Brown should be reversed.

On October 25, 2010, the Board reversed the dismissal and reinstated the petition and remanded the case for a full hearing. *New York University*, 356 NLRB 7 (2010) However, the Board majority of Members Becker and Pearce did state that there are "compelling reasons" to reconsider the *Brown University* decision. The Board noted that those reasons included: 1) the contention by the Petitioner that the *Brown* case was based on policy considerations extrinsic to labor law and thus not properly considered in determining whether graduate students are employees; 2) that the Petitioner offered to submit evidence of prior collective bargaining experience in higher education and expert testimony demonstrating that, even giving weight to the factors cited in *Brown*, the graduate students are appropriately classified as employees; and 3) that the *Brown*

https://thekeep.eiu.edu/jcba/vol0/iss7/28
DOI: 10.58188/1941-8043.1079

decision was incompatible with Supreme Court rulings on the definition of an employee under the Act.

Member Hayes dissented, noting that the Petitioner made no offer or claim that there were any facts at all that would distinguish the individuals sought by its petition with those found not to be statutory employees in *Brown*. The request, Hayes noted, "does nothing more than ask that a Board, with changed membership, view precisely the same evidence and argument considered by a prior Board but reach an opposite result. This is not a proper basis for reconsideration."

The regional director, acting upon the remand, issued his decision on June 16, 2011. In it, he noted that "although the record describing the recent treatment of graduate students as employees suggests that the relationship between graduate students and the University is both academic and economic, I am bound by the conclusion in *Brown* that all graduate students are excluded from the coverage of the Act." (p. 6).

General Counsel Memos on Social Media Unfair Labor Practice Cases

General Counsel's Memorandum OM 11-74, issued in August of 2011, was the first report from the General Counsel's office on emerging issues triggered by today's extensive use of social media and a review of fourteen cases that were decided by the General Counsel upon a request for advice from a regional director. In it, the GC discusses a variety of social media cases and how Advice ruled.

A second memo, Memorandum OM-12-31, issued on January 24, 2012 supplemented the first Memo with additional cases.

The first Memorandum can be found on the NLRB web site at:
https://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases

As reported on the web site with regard to this first Memo:

> In four cases involving employees' use of Facebook, the Division [of Advice] found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow employees. In five other cases involving Facebook or Twitter posts, the Division found that the activity was not protected.
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> In one case, it was determined that a union engaged in unlawful coercive conduct when it videotaped interviews with employees at a nonunion jobsite about their immigration status and posted an edited version on YouTube and the Local Union's Facebook page.
>
> In five cases, some provisions of employers' social media policies were found to be unlawfully overly-broad. A final case involved an employer's lawful policy restricting its employees' contact with the media

One example of a Facebook posting that was not deemed protected involved an employee who responded to his co-workers' postings by asserting that the Assistant Manager at a retail store was a "super mega puta" because she had chewed him out about misplacing and mispricing merchandise. The employee was disciplined after the Assistant Manager learned of the posting. Even though some workers responded with postings of support, the Division concluded his conduct was not protected.

> We concluded that the employee's Facebook postings were an expression of an individual gripe and were not concerted… They contained no language suggesting the employee sought to initiate or induce his coworkers to group action; rather they expressed only his frustration regarding his individual dispute with his Assistant Manager.

In another case, a bartender had complained about his employer's tipping policy, specifically that waitresses do not have to share their tips with bartenders. The bartender had a conversation with a relative one night on Facebook and, in response to an inquiry about how his job was going, he posted that he hadn't had a raise in five years; complained about the tipping policy; that the customers were all "rednecks," and that he hoped they choked on glass as they drove home drunk. He did not discuss his posting with any coworker. He was ultimately fired for his posting.

> The Board's test for concerted activity is whether activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." We found no evidence of concerted activity here. Although the employee's Facebook posting addressed his terms and conditions of employment, he did not discuss the posting with his coworkers and none of them responded to his posts. There had been no employee meetings or any attempt to initiate group action concerning the tipping policy or raises.

By contrast, in another case, an employer – a nonprofit social services provider -- was found to have unlawfully discharged five employees who had posted Facebook comments relating to allegations of poor job performance previously expressed by one of their co-workers- a domestic violence advocate. The advocate had begun complaining to another coworker that clients did not want to seek services from the employer, and in another posting, she criticized work done by other employees. The coworker then complained to other workers about what she considered to be bullying behavior by the advocate, resulting in a series of posts on Facebook over the situation. Postings were placed on Facebook by five employees; all five were fired.

The Division had no problem finding that they were fired for engaging in protected activity.

> We decided that the Facebook discussion here was a textbook example of concerted activity, even though it transpired on a social network platform. The discussion was initiated by one co worker in an appeal to her co workers for assistance. Through Facebook, she surveyed her coworkers on the issue of job

https://thekeep.eiu.edu/jcba/vol0/iss7/28
DOI: 10.58188/1941-8043.1079

> performance to prepare for an anticipated meeting with the executive director. The resulting conversation among co workers about job performance and staffing level issues was therefore concerted activity.
>
> We next found that the discharged employees were engaged in protected activity…. Finally, we held that the discharged employees did not lose the Act's protection. Although there was swearing and/or sarcasm in a few of the posts, the conversation was objectively quite innocuous. We found that the postings were not "opprobrious' under the *Atlantic Steel Co.* test, 245 NLRB 814, 816.

On this latter point, it should be noted that otherwise concerted activity can lose its protected status under the Act if it is "opprobrious" conduct. In *Atlantic Steel, supra*, cited by the Division, the Board held that there are four factors to consider in deciding whether otherwise concerted activity by an employee loses it protection: (1) the place of the discussion; (2) the discussion's subject matter; (3) the nature of the outburst on behalf of the employee; (4) whether the outburst was provoked by the employer's unfair labor practices. These four criteria were designed to permit "some latitude for impulsive conduct by employees during protected concerted activity, while acknowledging the employer's legitimate need to maintain order." *Plaza Auto Center, Inc*., 355 NLRB No. 85, p. 2 (2010). Comments that might otherwise be protected will lose the Act's protection if, for example, they are "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Center*, 350 NLRB 203, 204 (2007) enfd 519 F. 3d 373. (7th Cir., 2008)

In another case cited by the Division of Advice involving a written Facebook policy, the Division found the policy overly broad in violation of Section 8 (a)(1). In this case, the hospital involved issued a social media, blogging and social networking policy. Rule 4 of the policy prohibited employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations of privacy or confidentiality of any person or entity. Rule 5 prohibited any communication or post that constitutes embarrassment, harassment, or defamation of the hospital or any hospital employee, officer, staff member, board member. Rule 6 contained a similar prohibition against statements that lack truthfulness or that might damage the reputation or goodwill of the hospital, its staff or employees.

The Division found the policy problematic on several levels. First, one could read Rule 4 as overly vague as to what constitutes "confidentiality," and thus it could be construed to limit employees' discussions about wages and other terms and conditions of employment. Rules 5 and 6 were deemed overly broad, allowing an interpretation that any criticism of the employer's labor or employment policies was prohibited.

The second Memorandum can also be found on the NLRB web site at: https://www.nlrb.gov/news/acting-general-counsel-issues-second-social-media-report. As mentioned on the Board's web site, the second report underlines principles reiterated in the first memo and reveals two broad propositions for guidance:

- *Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.*
- *An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.*

Several cases within the Memo include:

Case No. 1. In one case reported in the second Memo, the charging party worked as an operator for in-bound calls for a collection agency. The agency at one point transferred her to out-bound calls instead. The employee came home and began posting on Facebook, using expletives and saying that the employer had messed up and that she was done being a good employee. She was "friends" with 10 co-workers including her direct supervisor. A number of her friends agreed with her and supported her. But the next day she was called into the office and fired for her posts.

The employer had maintained a rule that stated that employees were prohibited from "[m]aking disparaging comments about the company through any media, including online blogs, other electronic media or through the media."

The Division of Advice began by noting:

> An employer violates Section 8(a)(1) through the maintenance of a work rule if that 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). The Board uses a two step inquiry to determine if a work rule would have such an effect. *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2004). First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that:(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.

Under these guidelines, the GC found the employer's rule overly broad and illegal

> …because it would reasonably be construed to restrict Section 7 activity, such as statements that the Employer is, for example, not treating employees fairly or paying them sufficiently. Further, the rule contained no limiting language that would clarify to employees that the rule does not restrict Section 7 rights.

Next, the GC considered whether the employee's conduct. Noting that an employee's action are "concerted when an employee acts "with or on the authority of other employees and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985),cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers*

II),281 NLRB 882 (1986), affd. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Meyers II*,281 NLRB at 887. Using this guidance, the GC concluded that the charging party's posts were indeed concerted, protected activity because a number of co-workers responded that action should be taken against the employer and in support of the discharged employee's situation. In this case the initial Facebook posting and the discussion it generated about working conditions fell within the definition of concerted activity.

It was also found that the termination was directly as a result of her posts and because of the foment her statements has caused in leading other employees to complain about working conditions. In addition, it was found that the termination was unlawful because it was pursuant to an overly broad employer rule about non-disparagement. There was no evidence that the employee had been discharged for actually interfering with the work of others or with employer's operations, but merely because her post violated the non-disparagement rule.

Case No. 2 An employee's posting about being reprimanded by her supervisor and expressing the view that the employer did not appreciate its employees and posting an expletive with the name of the store was seen as merely a personal gripe and not concerted activity.

> The Charging Party's first status update was because she was frustrated about an interaction she had had with her supervisor. The Charging Party had no particular audience in mind when she made that post, the post contained no language suggesting that she sought to initiate or induce coworkers to engage in group action, and the post did not grow out of a prior discussion about terms and conditions of employment with her coworkers. Moreover, there is no evidence that she was seeking to induce or prepare for group action or to solicit group support for her individual complaint. Although one of her coworkers offered her sympathy and indicated some general dissatisfaction with her job, she did not engage in any extended discussion with the Charging Party over working conditions or indicate any interest in taking action with the Charging Party.

Thus, the discharge was not unlawful. However, the employer then issued a new social media policy indicating that employees should not identify themselves as employees of the employer when they post "unless there was a legitimate business need to do so or when discussing terms and conditions of employment in an appropriate manner." Since there was no guidance as to what "appropriate manner" meant, and since employees might construe the policy to prohibit any criticism of the employer's labor relations, the GC considered the rule overly broad. Even though the employer had also posted in the same policy a general statement of the employees' rights to engage in protected concerted activity and their right to form and support labor organizations, employees "could not reasonably be expected to know that this language encompasses discussions the Employer deems "inappropriate."

Case No. 3 The GC found that an employer's social media policy that prohibited posts that could hurt the employer's reputation "or interfere with the Employer's mission or unprofessional/inappropriate communication regarding members of the Employer's community" was overly broad. However, an employee, a phlebotomist, who was fired for posting an obscenity-laced criticism of her co-workers and the employer was expressing a personal gripe; did not seek to engage her fellow workers in job action; did not cite common work issues and was not seeking to induce workers to do anything. And thus, she was not engaged in concerted activity.

Case No. 4 The social media policy challenged in this case had several elements. The first was to prohibit employees from disclosing or communicating information of confidential, sensitive, or non-public nature about the company to anyone outside the company without prior permission. The GC considered this rule overly broad in that employees may believe they could not share wage and other working condition information with outside parties. Second, the policy prohibited employees from making any representation about the company to the media, blogs, voice mail or other media without prior approval.

In another provision of the policy, the Employer required that social networking site communications be made "in an honest, professional, and appropriate manner, without defamatory or inflammatory comments regarding the employer and its subsidiaries, and their shareholders, officers, employees, customers, suppliers, contractors, and patients." This provision was also deemed overly broad, in that an employee could reasonably construe broad terms, such as "professional" and "appropriate," to prohibit them from communicating on social networking sites with other employees or with third parties about protected concerns.

Another provision required employees who are posting on social media sites needed employee permission before they could identify themselves as employees of the employer and that they had to state in their posts that their comments were their own personal beliefs and not those of the company.

Case No. 5 An employer's social media policy was deemed overly broad but the employer was able to cure the defects with a revision. The Employer's original social media policy prohibited discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites. But a year later, the Employer replaced that policy with one that prohibited the use of social media to post or display comments about coworkers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.

While the original policy, with its use of words like "defamatory" and "harassing" was deemed overly broad, GC found the amended policy was lawful.

https://thekeep.eiu.edu/jcba/vol0/iss7/28
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> The Board has indicated that a rule's context provides the key to the "reasonableness" of a particular construction. In this regard, the Board has found that a rule forbidding "statements which are slanderous or detrimental to the company" that appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage" would not be reasonably understood to restrict Section 7 activity. *Tradesmen International*, 338 NLRB 460, 460-62 (2002).

While there is a minimal amount of case law on the topic, a recent decision by an administrative law judge deals with the consequences of an employee hitting the "like" button on Facebook in response to a posted comment about working conditions.
In *Three D LLC d/b/a Triple Play Sports*, NLRB ALJ, No. 34-CA-12915, 1/3/12, the administrative law judge had to determine whether the Act protected an employee whose only involvement in an online employee discussion of payroll tax withholding was to click the "Like" button on a Facebook page. ALJ Lauren Esposito found that the employee was engaged in concerted activity because hitting the "like" button expressed approval of another employee complaints about payroll tax mismanagement and made what the ALJ called "a meaningful contribution to the discussion." Esposito wrote that "[t]he Board has never parsed the participation of individual employees in otherwise concerted conversations, or deemed the protections of Section 7 to be contingent upon their level of engagement or enthusiasm." Using the "Like" button on Facebook showed the employee "stood by the other commentators," Esposito concluded. "[I]n the context of the Facebook conversation," the one-word communication was enough to be concerted activity, the ALJ found.[4]

It is hard to generalize about these cases, since so many are fact specific, but some concepts are clear. Certainly language in a social media policy that simply states that employees cannot make "disparaging" comments about the employer will be deemed illegal as an overly broad restriction on Section 7 rights. However, proper drafting of these policies might allow for such a restriction if it is linked to clearly illegal commentary, such as harassing of employees on the basis of a protected class.

Policies that broadly prohibit the disclosure of confidential information may be deemed illegal since it may be construed to prohibit employees from discussing wages and working conditions with others within and outside the organization. However, a limited confidentiality clause will survive scrutiny if it is tailored to protect proprietary information or, in a hospital setting, for example, patient care information. One would assume in a higher ed setting the disclosure of confidential student information can be prohibited.

As noted above, situations where employees must affirmatively disavow on Facebook pages that their comments are their personal opinions can be problematic. Vague terms to restrict conduct, like "inappropriate" or "disrespectful," can be deemed *Cn*construed to limit an employee's rights under Section 7 can certainly help employers.

[4] BNA, Daily Labor Report, Feb.28, 2012

But such a statement by itself will not automatically save otherwise objectionable and vague policy language.

What lies ahead will undoubtedly be Board cases that deal with social media policies and actions taken under those policies. While the principles guiding these cases are not new, the application of the case law to emerging technology will be fascinating to watch.

Discipline for Violating Illegal Rule or Policy

In *Continental Group, Inc.*, 357 NLRB No. 39 (August, 2011), the NLRB clarified its 2004 decision in *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enfd. 414 F. 3d 1249 (10th Cir., 2005), under which the Board reiterated its long standing view that discipline imposed pursuant to an unlawfully broad rule is unlawful. In *Continental*, however, the Board panel (Liebman, Becker and Hayes) noted that "notwithstanding the longevity of this principle," the Board had never set forth a rationale for the principle nor a description of its scope. While noting that a workplace rule may violate the Act for any number of reasons, the Board explained that its clarifications only applied to "cases involving discipline imposed pursuant to an unlawfully overbroad rule," that is, "when the rule "restricts or prohibits some protected, in addition to unprotected, activity." [5]

The Board noted the *Double Eagle* rule has been justified in cases based on several reasons. First, there are ample cases holding that the existence of an overly broad rule violates the Act based on its potential chilling effect on employees' exercise of their Section 7 rights. The mere maintenance of such a rule tends to inhibit employees in the exercise of their rights by convincing them to refrain from doing so rather than risk discipline.

A second justification for the *Double Eagle* rule is the principle that, in the absence of a *valid* employer rule prohibiting the employee conduct at issue, the conduct maintains its protected status.

> This rationale begins with the premise that the Act grants to employees a statutory right to self-organization, including the right to engage in or refrain from solicitation and discussions of terms and conditions of employment. These rights, however, are not absolute and must be balanced against an employer's right to maintain production and discipline.
>
> *****************
>
> Notwithstanding the existence of authority lawfully to restrict employees' Section 7 activities, however, if an employer fails to exercise that authority -either by failing to promulgate a lawful rule or by promulgating an invalid rule- the

[5] As opposed to cases where a rule is facially unlawful; or promulgated for discriminatory reasons; or enforced in a discriminatory fashion.

https://thekeep.eiu.edu/jcba/vol0/iss7/28
DOI: 10.58188/1941-8043.1079

employee activity that *could* otherwise be prohibited retains its protected character. *Trico Industries*, 283 NLRB 848 (1987)

In looking at these two principles, the Board indicated that when an employee engages in activity that is clearly protected by Section 7 of the NLRA --such as solicitation or distribution on behalf of a union or protected concerted activity-- "both of the above described justifications for the *Double Eagle* rule apply."

However, where an employee's activity is not protected by Section 7, disciplining an employee for such conduct does not have the same chilling effect on other employees that using an overbroad rule to punish Section 7 activity would have. "Accordingly," the board said, "we conclude that the rule does not apply, and it is not unlawful for an employer to discipline an employee pursuant to an overbroad rule, in *situations in which the employee's conduct is not similar to conduct protected by the Act."*

In the case at hand, the employer had maintained an overly broad rule about off-duty employees coming onto the premises. The company received reports that employee Gonzalez had been seen loitering around the company off hours and sleeping in a common area of the building and living out of his car outside the building. The company gave him a written warning for "frequenting the property" while off duty and "loitering on the property" on his vacation days.

The Board said that Continental disciplined Gonzalez pursuant to an unlawful rule, but that did not make the disciplinary action unlawful. Finding "[t]he conduct for which Gonzalez was disciplined—sleeping on the Respondents's premises and living out of his car in the Respondent's parking lot—was not protected concerted activity," the board said the employee's conduct "was wholly distinct from activity that falls within the ambit of Section 7."

Stating that "application of the *Double Eagle* rule to conduct of this sort does not materially advance the policies on which the rule is premised," Liebman and Becker reversed the finding of illegal discipline. Hayes concurred in the decision that the warning to Gonzalez was not unlawful because the employee's conduct was "clearly unprotected," but said he found no need to consider application of the *Double Eagle* rule in other cases.

NLRB Jurisdiction over Religious Institutions

In *Saint Xavier University and the St.Xavier University Adjunct Faculty Organization, IEA-NEA*. (Case 13-RC-22025), the regional director ruled that it was appropriate to assert jurisdiction over the Catholic institution and order an election among its adjunct faculty. In reviewing this issue, it is first necessary to understand the seminal case on the Board's jurisdiction over religious institutions, namely, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In that case, the Supreme Court read the National Labor Relations Act in light of the First Amendment and held that the Board did not have jurisdiction over church-operated schools. The Court held that for the Board to order collective bargaining for a religious school would inevitably lead the Board into "an examination of the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at 502. Because of such an entanglement into the religious beliefs of such entities, jurisdiction was not appropriate.

In the wake of that case, the NLRB created a framework for its own analysis of such cases that would look to whether or not a school has a "substantial religious character" to determine if it was exempt from jurisdiction. *Livingstone College,* 286 NLRB 1308, 1309. (1987).[6]

In the St. Xavier University case, the regional director applied that standard here. First, he noted that assertion of jurisdiction over colleges and universities would not create the risks contemplated by the Supreme Court's decision in *Catholic Bishop.* In examining these cases, the Board would look to see whether the institution had a "substantial religious character." In the case at bar, the regional director noted:

> …the evidence establishes that the Employer functions as a secular educational institution or university. In making this finding I have considered the Employer's affiliation with the Sisters of Mercy through the Conference for Mercy Higher Education and CMHE's role as the religious sponsor for 16 universities and colleges in the United States, including the Employer. However, CMHE is not involved in the administration of the university in a manner that creates a significant risk of constitutional infringement.
>
> One factor supporting my finding that the exercise of jurisdiction is appropriate in this case is the Employer's adherence to the doctrine that encourages the University's faculty to function free of any religious requirements or constraints. The Employer follows *Ex Corde*, which is the Catholic Church's guiding

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[6] However, in *University of Great Falls v. NLRB,* 278 F.3d 1335 (D.C. Cir., 2002) the U.S Court of Appeals for the D.C. Circuit held that the Board's approach was exactly the kind of "intrusive inquiry" that *Catholic Bishop* sought to avoid. Instead, the Court fashioned its own three part test.

1. Does the school "hold itself out" as providing a religious educational environment?
2. Is the school organized as a non-profit?
3. Is the school "affiliated with, or owned, operated or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion."

The Court saw this as a "bright line" test that would avoid delving into the depth or motive of religious beliefs or doctrinal matters. The Board, however, has not adopted this standard.

https://thekeep.eiu.edu/jcba/vol0/iss7/28
DOI: 10.58188/1941-8043.1079

document for universities to promote academic freedom. Under this document, faculty are left unfettered with regard to imbuing or inculcating - 10 students and curriculum with Church doctrine or religion. *Livingstone College* at 1308-1310 (1987) (jurisdiction proper where faculty not required to conform to church doctrine and neither students nor faculty required to engage in worship); *St. Joseph's College*, supra at 68 (declining to exercise jurisdiction where faculty required to promote Church objectives and prohibited from inculcating positions contrary to those of the Church and Bishop had authority to terminate faculty deemed unharmonious with Church). ….Similarly, there is no evidence that the University would discipline or fire faculty if they did not hold to Catholic values. A faculty member's religious values, or lack thereof, play no role in their hiring or retention at the University and are not a subject of their evaluations or suitability for promotion.

The Employer's articles of incorporation, mission statement, and the various publications and events sponsored by the University reflect the Employer's history as a Catholic institution established by the Sisters of Mercy and its continued affiliation with that religious order through CMHE. However, the mission and purpose of the University is to educate men and women irrespective of their religious beliefs. Although the University requires students to take two courses from its Department of Religious Studies as part of its core curriculum, there is no requirement for students to take courses that involve the study of the Catholic faith.

There are also no other religious requirements imposed by the Employer on either faculty or students. CMHE has the sole power to amend the articles of incorporation; to amend certain bylaws; to approve changes to the employer's mission statement; to amend certain bylaws; to approve changes to the employer's mission statement; to approve nominees to the board of trustees; to approve finalists for the position of president, to sell, lease or dispose of property worth over 10 million dollars; and to merge, consolidate or dissolve the University. However, the Employer's day to day operations are governed by its board of trustees in conjunction with the University's president. At least four members of this board must be Sisters of Mercy and the majority of the board's members should be Catholic. Unlike the Mercy institute in *St. Joseph's*, there is no requirement that the remaining trustees must be members of the Sisters of Mercy. Compare *Jewish Day School of Greater Washington, Inc.*, 283 NLRB 757 (1987)(where entire board of governors was Jewish and required to be "active in community affairs, including the United Jewish Appeal and the Board of Jewish Education").

The Employer is not dependent on the Sisters of Mercy or CMHE for its funding. More than 90% of the Employer's revenue is derived from student tuition revenue and housing payments. The remainder of the Employer's funding is derived from a saloon it owns, fundraising activity, and donations.

> The Employer recently received a $5 million loan from the Sisters of Mercy. The Order also agreed to temporarily defer interest payments on that loan and to permit the Employer to tap into its endowment fund to meet its current financial obligations. This loan and the release of the endowment fund money was in response to an emergency situation, so that the Employer could meet its payroll and forestall some of the banks it uses from calling in their lines of credit. The Order's response to the Employer's financial emergency falls short of establishing that the Employer is dependent on the Order for its funding. This finding is buttressed by the fact that the Employer obtains traditional sources of credit to cover its expenses and that it currently owes $51 to $52 million dollars to its banks.

In a similar vein, *Manhattan College*, (Case no. 2-RC-23543) also remains in the pipeline, as the College challenges the earlier finding of the Regional Director that jurisdiction over that religious institution was appropriate in a case involving the organization of the adjunct faculty. In that case, the Regional Director found that the primary purpose of Manhattan is secular and not the propagation of a religious faith. The RD indicated that the College had asserted that it had no intention of imposing "Church affiliation and religious observance as a condition for hiring or admission, to set quotas based on religious affiliations, to require loyalty oaths, attendance at religious services, or courses in Catholic theology." There was a commitment to a continued relationship with the Christian Brothers but the College also affirmed its commitment to academic freedom and to institutional autonomy.

The RD found that the role of adjunct faculty did not involve propagating religious faith in any way, and "[b]ecause adjunct faculty are not required to advance a religious mission in any way, exercising jurisdiction over the College will not have any 'potential effects' leading to unconstitutional entanglement.

The Regional Director disagreed with the College's argument that concluding that the college is not a church operated school within the meaning of *Catholic Bishop* based on factors that its religious activities are not compulsory and its educational activities do not include indoctrination is "a view of religious that the Board cannot endorse without imposing its own definition of approved faith in clear violation of the First Amendment." The Regional Director said that such inquiries were part and parcel of examining the case in light of *Catholic Bishop*.

> The purpose of considering whether indoctrination, proselytizing or in the Supreme Court's terminology, "propagation of a religious faith," is part of a school's purpose is because rules requiring faculty to propagate faith would require bargaining over such rules and their disciplinary consequences and, further, would require the Board to scrutinize an employer's defense to unfair labor practice charges based on asserted enforcement of faith-based rules.

https://thekeep.eiu.edu/jcba/vol0/iss7/28
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The General Counsel of Seventh Day Adventist, the Association of Christian Schools International, the Association of Catholic Colleges and Universities, the Lasallian Association of College and University Presidents and the Association of Jesuit Colleges and Universities have now filed amicus briefs with the NLRB asking it to reverse the decision of the Regional Director in finding jurisdiction. The College and amici further asked the Board to utilize the broader standard of *University of Great Falls v. NLRB*, 278 F. 3d 1335 (D.C. Cir. 2002)[7] and *Carroll College Inc. v. NLRB*, 558 F.3d 568 (DC. Cir.2008). The AFL-CIO filed an amicus brief in support of the Regional Director's decision.

Supreme Court Recognizes "Ministerial Exception" to Discrimination Laws

In *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, U.S. No. 10-553, 1/11/12), the Supreme Court ruled that the First Amendment's establishment and free exercise clauses create a "ministerial exception" that bars a discriminatory termination lawsuit brought against a religious organization by a former elementary school teacher who is a Lutheran "commissioned minister,"reversing a Sixth Circuit Court of Appeals decision that employee Cheryl Perich's had a retaliatory termination claim under the Americans with Disabilities Act against the church. By imposing an unwanted minister on a religious group, the government would interfere with the group's internal governance and remove its control over selecting individuals to personify its beliefs, the Supreme Court said. It found that federal appeals courts have "uniformly recognized" the existence of a ministerial exception. The decision was unanimous.

Perich had been a minister for Hosanna-Tabor. The church held her out as a minister by giving her a formal title, that title reflected the formal process of commissioning she underwent, and her job duties indicated her role in carrying out the church's mission,

Hosanna-Tabor, which belongs to the Lutheran Church-Missouri Synod, operated a Redford, Mich., school that offered a "Christ-centered education" to younger students. Hosanna-Tabor hired Perich in 1999 as a "lay" teacher under the synod's categorization, meaning that she was not required to be trained by the synod or to be Lutheran and was subject to renewable one-year contracts.

[7] The Regional Director specifically declined to use the D.C. Circuit standard.

Lay teachers were hired only when there were no available "called" teachers—those regarded by the synod as having been called to their vocation by God through a congregation. To be eligible to receive a call, a teacher can complete a "colloquy" program, including eight theological study courses, at a Lutheran college or university. A called teacher obtains the formal title "Minister of Religion, Commissioned." Hosanna-Tabor could rescind a call only for cause and by a supermajority vote of the congregation. Perich completed her colloquy during her first year of employment with Hosanna-Tabor, and she accepted its request for her to become a called teacher. In addition to teaching numerous secular subjects, she taught a religion class four days a week, led students in daily prayer, and attended a weekly schoolwide chapel service.

In June 2004, Perich became ill from narcolepsy, and she began the 2004-2005 school year on disability leave. The school contracted with a lay teacher to replace Perich for the remainder of the school year. Perich refused to resign even though the school told her that it no longer had a position for her.

Perich arrived at the school on Feb. 22, 2005, the first day she was medically cleared to return to work. She refused the school principal's request for her to leave until she obtained written documentation that she had reported to work. Later, the principal called her at home and said she would probably be fired. She countered that she had talked with an attorney and intended to assert her legal rights.

The school board chairman then sent Perich a letter citing her "insubordination and disruptive behavior" and the damage she had done to her "working relationship" with the school by "threatening to take legal action" as grounds for her discharge. On April 10, 2005, Hosanna-Tabor's congregation voted to rescind Perich's call. The next day, she received a letter of termination.

Perich filed a charge with the Equal Employment Opportunity Commission, which went on to sue Hosanna-Tabor, claiming that it fired Perich in retaliation for threatening to bring an ADA lawsuit. Hosanna-Tabor argued that Perich was a minister and was fired for a religious reason, involving the synod's view that Christians should resolve their disputes within the church.

In light of the historical background against which the First Amendment came into being, Roberts said, the establishment clause prevents the government from appointing ministers, while the free exercise clause bars it from interfering with religious organizations' freedom to pick their own ministers. He said the two religion clauses provide the roots for the ministerial exception, which keeps the government from "intrud[ing] upon more than a mere employment decision."

"By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments," Roberts said. "According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions," he said.

DOI: 10.58188/1941-8043.1079

EEOC and Perich contended that there is no basis for a special rule for ministers in the First Amendment's two religion clauses. They said religious organizations could successfully defend against employment discrimination claims in certain circumstances by invoking their First Amendment right to freedom of association.

But the view that the two religion clauses do nothing to define a religious group's freedom to choose its ministers is “remarkable” and ultimately “untenable,” Roberts said. He found that religious and secular groups both enjoy the right to free association and that the First Amendment gives “special solicitude” to the rights of religious organizations.

The ministerial exception applies to Perich, Roberts found. He said the exception covers more than the head of a religious congregation alone, although he declined to set a “rigid formula” for determining when an employee amounts to a minister.

Hosanna-Tabor held Perich out as a minister and gave her the title “Minister of Religion, Commissioned,” and this title reflected the religious training and formal commissioning process she undertook, Roberts found. He said Perich held herself out as a minister by accepting the formal call to religious service, among other things. Considering her actions in conducting religious instruction and leading students in prayer, she played an “important role in transmitting the Lutheran faith to the next generation.”

In finding that the ministerial exception did not cover Perich, the Sixth Circuit erred by considering her title to be irrelevant, giving excess weight to the fact that lay teachers at Hosanna-Tabor performed the same religious duties as Perich did, and relying on her performance of secular duties, Roberts added.

“The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her,” Roberts concluded. “Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.”

Deferral Issues

On January 20, 2012, the Office of the General Counsel issued Memorandum GC 12—01 to all Regional Directors in which the GC states “we will be seeking to have the Board change existing policy and no longer routinely defer Section 8(a)(1) and (3) cases where arbitration will not be completed within a year.”

> While deferral serves the policy goal of promoting collective bargaining by holding the parties to their own agreement, the Board’s deferral policy has not given appropriate consideration to the practical effect a serious delay can have on another primary policy goal of the Act: to protect employees’ Section 7 rights. For this reason, we are asking the Board to revise the *Collyer* deferral policy to

ensure that the Board's statutory duty to prevent and remedy unfair labor practices is not thwarted by cases bogged down by a significant arbitration backlog.

New Casehandling Guidelines for Cases on *Collyer* Deferral (From the GC Memo)

Under the current procedure outlined in Section 10118 of the Casehandling Manual, the Regions generally defer a charge to the parties' contractual grievance procedure upon a determination of arguable merit. In Section 8(a)(1) and (3) cases, the Region must take affidavits from the Charging Party and from all witnesses within his or her control before making an arguable-merit determination.[8] Once a case is deferred, every ninety days the Region ascertains from the parties the status of the arbitral proceedings, and determines whether the parties are meeting their obligation to process the case and what action, if any, should be taken.[9] If there is no response from the parties, the Region will dismiss the charge.

Under this system there is no safeguard against a case being held in deferral status indefinitely, even for years, so long as the arbitration procedure remains functional. The current system does not adequately ensure preservation of the evidence necessary to properly prosecute the charge or mitigate the enforcement problems that often arise after a prolonged delay. Consequently, the current *Collyer* deferral procedure does not ensure that statutory rights are effectively protected.

Given the evidentiary and enforcement problems that can arise in as little as a year after a charge is filed, we have concluded that casehandling procedures need to be modified for cases that have been or are likely to be deferred for over a year.

Section 8(a)(1) and (3) Cases

In Section 8(a)(1) and (3) cases, as part of its investigation of the Charging Party's evidence, the Region should discover whether the grievance arbitration will be completed in less than a year. If this appears likely, then the charge should be deferred. If, however, the issue will not complete arbitration in under a year, the Regional Director should determine whether deferral is appropriate, especially considering the problems occasioned by such a delay, outlined above. In making this determination, the Region should consult with all of the parties, including any individual discriminatees.

If the Regional Director determines that the deferral would unduly disadvantage the Charging Party or otherwise frustrate the Board's ability to enforce the Act,

8 GC Memorandum 11-05 at 10.

9 NLRB, *supra* note 37, § 10118.5.

https://thekeep.eiu.edu/jcba/vol0/iss7/28
DOI: 10.58188/1941-8043.1079

then the Region should proceed with a full investigation and reach a merit determination. If the charge is found meritorious, then the Region should submit the case to Advice. If the Regional Director determines that there is a good reason to defer the charge despite the significant delay, for instance if all the parties involved would still prefer arbitration, the Region should contact Advice before placing the charge in deferral status.

The Region should continue to conduct quarterly reviews of Section 8(a)(1) and (3) cases deferred under this new policy, as well as those already deferred as of the date of this memorandum. However, at the fourth ninety-day review, i.e. after the charge has been deferred for one year, the Region should send a "show cause" letter to all parties, including the Union, any individual Charging Party, and the Employer, seeking an explanation of why, given the length of the deferral period, deferral should not be revoked and a full investigation made.[10] Unless the Regional Director is satisfied that there is a good reason to continue deferral, for instance if arbitration is imminent, the Region should make a full investigation of the charge, arrive at a merit determination, and submit the charge, if meritorious, to Advice. If the charge is nonmeritorious, the Region should dismiss it, absent withdrawal. If the Charging Party does not respond to the show-cause letter, the Region should not dismiss for failure to prosecute without contacting the Charging Party and any individual discriminatees to ensure they understand that the case is subject to dismissal absent some response.

<u>Section 8(a)(5) Cases</u>

Because Section 8(a)(5) charges usually turn on a matter of contract interpretation often better left to an arbitrator's skill and expertise,[11] the Region should continue to defer these cases as before. However, some Section 8(a)(5) charges can implicate individual Section 7 rights or have as serious an economic impact on the Charging Parties as a Section 8(a)(1) and (3) charge. Thus, after such a charge has been in deferral status for over a year, or if such a charge is very likely to be deferred for over a year, and the Regional Director, at his or her discretion, determines that to defer such a charge would frustrate the Board's remedial authority, then the Region may conduct a full investigation and submit the case to Advice.

To summarize, we will now argue that in order to prevent remedial failure resulting from a deferral of over one year, Section 8(a)(1) and (3) charges forecast to be or actually deferred for over a year should not be deferred to arbitration.

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[10] *See* Collyer *and* Dubo *Deferral Survey*, OM Memorandum 09-06 dated Oct. 7, 2008) (instructing the Regions to send "show cause" letters in all deferred cases pending more than twelve months). If a case has been deferred for over a year or undergone more than four quarterly reviews as of the date of this memorandum, the show cause letters should be issued at the next quarterly review of that case.

[11] *See supra* text accompanying notes 9–12.

And in more limited circumstances, we may also take the position that deferral of Section 8(a)(5) cases for more than a year is inappropriate. The Regions should take the following steps to implement this new policy.

Section 8(a)(1) and (3) Cases

- Conduct Charging Party investigation, make arguable-merit determination, and determine whether arbitration is likely to be completed in less than a year.

- If arbitration is likely to be completed in less than a year:

    - Defer and conduct quarterly reviews.
    - At the fourth quarterly review (in new and currently pending cases in deferral status), send "show cause" letters to all parties seeking an explanation of why deferral should not be revoked.
    - If the Charging Party does not respond, contact the Charging Party and any individual discriminatees before dismissing for failure to prosecute.
    - If there is insufficient reason to continue deferral, conduct a full investigation; if the charge is meritorious, submit the case to Advice; if the charge is nonmeritorious, dismiss absent withdrawal.
    - If there is good reason to continue deferral, contact Advice.

- If arbitration is not likely to be completed in less than a year:

    - Determine, in consultation with all parties, including any individual discriminatees, whether deferral is inappropriate because the delay is likely to frustrate the Board's remedial ability or unduly disadvantage the Charging Party.
    - If deferral is deemed inappropriate, conduct a full investigation and, if the charge is meritorious, submit the case to Advice.
    - If deferral is considered appropriate despite the delay, contact Advice.

Section 8(a)(5) Cases

- Make deferral decisions and conduct quarterly reviews, as under existing policy.

- If arbitration is not likely to be or has not been completed within a year, and the case implicates individuals' statutory rights or involves serious economic harm to the Charging Party, the Region may at its discretion conduct a full investigation and submit the case to Advice in the same manner as Section 8(a)(1) and (3) cases.

https://thekeep.eiu.edu/jcba/vol0/iss7/28
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