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

Advice Memorandum

DATE: May 10, 2018

TO: William B. Cowen, Regional Director
Region 21

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

SUBJECT: Norwalk Meadows Nursing Center, LP
Case 21-CA-193447

530-6050-0120-0000
530-6050-3395-0000
530-6067-4001-9800

The Region submitted this case for advice as to whether Norwalk Meadows Nursing Center, LP ("the Employer") violated Section 8(a)(5) and (1) by refusing to bargain with SEIU Local 2015 ("the Union") over disciplinary warnings issued to bargaining-unit employees following the Union's victory in a Board-supervised representation election, but prior to the Union's certification. We conclude that the Employer violated the Act by refusing to engage in post-implementation bargaining with the Union, upon written request, over the disciplinary warnings in question.

FACTS

On November 17, 2016, the Union received a majority of the votes cast in a Board-supervised representation election among a unit of nursing assistants and other service employees at the Employer's facility in Norwalk, California. The Employer filed objections to the conduct of the election, which it voluntarily withdrew several months later prior to an evidentiary hearing. The Board certified the Union as exclusive bargaining representative on July 24, 2017. The present case involves actions taken by the Employer in the period after the date of the election but before the date of certification, and specifically its subsequent refusal to engage in post-implementation bargaining over those actions.

In the months following the election, the Employer issued various disciplinary warnings to two bargaining-unit employees. In (b) (6), (b) (7)(C) 2016 and (b) (6), (b) (7)(C) 2017, the Employer disciplined a (b) (6), (b) (7)(C) with an in-service meeting and a written warning regarding alleged tardiness issues. The Employer issued a verbal warning to the same (b) (6), (b) (7)(C) in (b) (6), (b) (7)(C) 2016 regarding an alleged failure to follow patient isolation protocols. In (b) (6), (b) (7)(C) 2017, the Employer issued a final warning to the (b) (6), (b) (7)(C) regarding allegedly leaving patients unattended, and cautioned that "further disciplinary action" was possible "up to [and] including termination." All

of these forms of disciplinary actions, including in-service meetings and "verbal" warnings, are documented in writing and remain in employees' personnel files.

Similarly, on (b) (6), (b) (7)(C) 2016, the Employer disciplined a receptionist—who, like the nursing assistant above, is a member of the bargaining unit represented by the Union—with an in-service meeting for allegedly failing to place name badges outside patients' rooms. In (b) (6), (b) (7)(C) 2016, the Employer issued the same (b) (6), (b) (7)(C) a final warning for various alleged misconduct such as failing to perform work duties and exhibiting a "lack of motivation or sense of urgency." In (b) (6), (b) (7)(C) 2017, the (b) (6), (b) (7)(C) was given a verbal warning for allegedly failing to prevent visitors from tripping on a rug in the lobby, and a second final warning for allegedly failing to show proper attitude or customer service to a family touring the facility. The second final warning indicated the possibility of moving the (b) (6), (b) (7)(C) to another department or issuing "additional disciplinary action up to and including termination." Also in (b) (6), (b) (7)(C) 2017, the receptionist was given a formal "notice of employee reprimand" for allegedly failing to attend to a patient who set off an alarm.[1]

In connection with these disciplinary actions, the Union sent an email to the Employer on January 23, 2017, requesting "to bargain over any changes to conditions of employment, including. . . any and all disciplinary action[s]." The Union copied one of the two disciplined employees on its email to the Employer, and the letter was sent after or contemporaneously with all of the disciplinary actions described above. The Employer did not directly respond to this letter, but in February 2017 the Employer's administrator told a representative of the Union not to contact the Employer because the Union had not been certified. The Union renewed its request to bargain—specifically referencing an additional matter, which is no longer at issue in the present request for advice, involving the above nursing assistant—by letter dated February 27, 2017. On March 1, 2017, the Employer responded with a letter stating that the Union was not the employees' exclusive bargaining representative, and that the Employer's election objections were still pending. As noted, the Union was ultimately certified in July 2017. As of February 2018, the parties have engaged in two bargaining sessions, but there is no indication that they have bargained over the contested disciplinary warnings issued to unit employees prior to the Union's certification. To the contrary, counsel for the Employer has taken the position that it is under no obligation to bargain over the pre-certification disciplinary actions in question. The Employer has not argued that it lacked adequate notice that the Union was requesting to engage in post-implementation bargaining over the disciplinary

[1] The Union also alleged these disciplines as violations of Section 8(a)(3) and (1), arguing that the Employer is inconsistently and discriminatorily applying/enforcing its policies because of employees' Union activity. The Region determined that there was insufficient evidence to sustain the 8(a)(3) and (1) allegations and dismissed those elements of the charge. The Office of Appeals sustained the dismissal.

warnings (in addition to seeking pre-discipline bargaining), and the Employer has continued to refuse to engage in such post-implementation bargaining.

ACTION

We conclude that the Employer violated Section 8(a)(5) and (1) by unlawfully refusing to engage in post-implementation bargaining with the Union, upon written request, over disciplinary actions taken against bargaining-unit employees following the November 2016 election. In so concluding, we note that the present request for advice involves the Union's desire to bargain over disciplinary warnings after their issuance, and that it does not involve any allegation that the Employer had a duty to engage in pre-implementation bargaining.

It is well established that Section 8(a)(5) requires parties to bargain in good faith, upon request, regarding mandatory subjects of bargaining.[2] Managerial decisions that "are almost exclusively an aspect of the relationship between employer and employee" clearly constitute mandatory subjects.[3] This includes individual disciplinary actions, which are "unquestionably a mandatory subject of bargaining."[4] Here, the disciplinary actions taken by the Employer involved written reprimands, which are kept on file, and some of which by their terms threaten reassignment, suspension, or termination for subsequent infractions.[5] The Union expressly

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[2] *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5 (Dec. 15, 2017).

[3] *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (internal quotation marks omitted).

[4] *Fresno Bee*, 337 NLRB 1161, 1186-87 (2002) (affirming duty to bargain upon request following issuance of individual disciplinary actions), *overruled on other grounds*, *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. at 8 (Aug. 26, 2016). As noted, the only question presented in this request for advice is whether the Employer had a post-implementation duty to bargain with the Union upon request, and thus the Board's decision in *Total Security Management* regarding pre-implementation notice and bargaining for major disciplinary actions is not implicated. *See* 364 NLRB No. 106, slip op. at 12 n.21 (noting that the obligation to engage in post-implementation bargaining "already exist[ed] under current law").

[5] *See, e.g.*, *Amoco Chemicals Corp.*, 211 NLRB 618, 618 n.2 (1974) (finding that written warnings "affect[] employees' working conditions," insofar as they may become a permanent part of an employee's personnel file), *enforced in relevant part*, 529 F.2d 427, 431 (5th Cir. 1976); *U.S. Fibers*, Cases 10-CA-121231 et al., Advice Memorandum dated Feb. 16, 2017, at 6-9; *see also, e.g.*, *Fortuna Enters., LP v. NLRB*, 665 F.3d 1295, 1303 (D.C. Cir. 2011) (confirming, in context of Section 8(a)(3), that

requested to bargain with the Employer over "any and all disciplinary action[s]," and the Employer has not argued that it lacked adequate notice that the Union was, at least in part, requesting post-implementation bargaining over the disciplinary actions in question.[6] As a result, we conclude that the disciplinary actions in question constitute mandatory subjects of bargaining, and that the Employer had a statutory duty to engage in post-implementation bargaining following the Union's request, absent some "exception" to that fundamental rule.[7]

We find no such exception in the present case. Although the disciplinary actions in question were issued prior to the Union's formal certification, the Board has consistently held that after a union has won an election, the employer is immediately bound to bargain with the union about terms and conditions of employment, even though objections have been filed by the employer and no certification has issued.[8] As of the date of an ultimately valid union victory, an employer is on notice that the union represents a majority of employees in the bargaining unit,[9] and subsequent

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disciplinary warnings constitute a "term or condition of employment," as such phrase is similarly used in Section 8(d)).

[6] *See, e.g.*, *Al Landers Dump Truck*, 192 NLRB 207, 208 (1971) (rejecting argument that union's request to bargain was invalid because it was too broad, noting that a"valid request to bargain need not be made in any particular form, or in haec verba, so long as the request clearly indicates a desire to negotiate").

[7] *Raytheon Network*, 365 NLRB No. 161, slip op. at 5 n.11. The Board recently clarified its interpretation regarding which actions constitute unilateral "'change[s]' within the meaning of [*NLRB v. Katz*, 369 U.S. 736 (1962)]," thereby triggering a *pre-implementation* duty to provide notice and bargain to impasse. *Raytheon Network*, 365 NLRB No. 161, slip op. at 13, 16. The question here is not whether the Employer's disciplinary actions constituted "unilateral changes" within the meaning of *Katz*, but instead whether they involved an issue that is a mandatory subject of bargaining such that the Employer had a *post-implementation* duty to bargain.

[8] *Adair Standish Corp.*, 290 NLRB 317, 329 (1988), *enforced in relevant part*, 912 F.2d 854, 863 (6th Cir. 1990); *see, e.g.*, *Catholic Medical Center of Brooklyn & Queens, Inc.*, 236 NLRB 497, 497 n.1, 500 (1978) (measuring "date on which the Union became the employees' exclusive representative" as date of election victory, notwithstanding fact that objections to election "were unresolved for many months thereafter"), *remanded on other grounds*, 589 F.2d 1166 (2d Cir. 1978).

[9] *Laney & Duke Storage Warehouse Co.*, 151 NLRB 248, 266-67 (1965), *enforced in relevant part*, 369 F.2d 859, 866, 869 (5th Cir. 1966); *cf. NLRB v. Gissel Packing Co.*,

refusals to bargain over mandatory subjects have the effect of "bypassing, undercutting, and undermining the union's status . . . in the event a certification is issued."[10] Measuring the employer's bargaining obligation from the date of the election also avoids incentivizing unnecessary delay.[11] Such considerations are particularly relevant here, where the Employer was able to delay certification by several months before withdrawing its objections without ever testing them at an evidentiary hearing.

The Board has also recognized that, *pending* a union's certification, an employer's refusal to bargain is not yet enforceable as a violation of Section 8(a)(5), absent evidence of bad faith.[12] Once the union is certified, however, the employer has lost its gamble in challenging the majority status of the union, and any pre-certification refusals to bargain over mandatory subjects mature into enforceable violations of Section 8(a)(5).[13] In other words, the employer's statutory duty to bargain over mandatory subjects "relates back" to the date that the union's majority status was

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395 U.S. 575, 595-97 (1969) (holding that Board certification is not strictly required to establish majority status under the Act).

[10] *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701, 703 (1974), *remanded on other grounds*, 512 F.2d 684 (8th Cir. 1975).

[11] *Overnite Transportation Co.*, 335 NLRB 372, 373 (2001); *see Livingston Pipe & Tube, Inc. v. NLRB*, 987 F.2d 422, 428 (7th Cir. 1993); *Fugazy Cont'l Corp. v. NLRB*, 725 F.2d 1416, 1421 (D.C. Cir. 1984) (recognizing that, if duty did not attach on date of election, "employers could easily postpone their obligation to bargain for months or years . . . by filing spurious objections to the election," and that "[t]he Board has properly avoided this unacceptable result").

[12] *See, e.g.*, *Lovejoy Industries*, 309 NLRB 1085, 1104 (1992) (noting that "the duty to bargain, although not enforceable until certification by the Board, relates back and attaches as of the date of the election once the certification issues").

[13] *See UFCW v. NLRB*, 519 F.3d 490, 496 (D.C. Cir. 2008) (discussing the Board's "relation-back doctrine" and noting that "[a]n employer therefore can commit an unfair labor practice by ignoring lawful bargaining demands during the period between election and certification"); *accord Contemporary Cars, Inc. v. NLRB*, 814 F.3d 859, 876-77 (7th Cir. 2016); *Laney & Duke*, 369 F.2d at 869 ("If an employer refuses to bargain on the ground the election which preceded the certification was invalid, it does so at its own risk.").

established in the election.[14] Indeed, the Board has specifically indicated that an employer violates Section 8(a)(5) by refusing a union's request to engage in post-implementation bargaining over individual disciplinary actions, regardless of whether or not the underlying disciplinary actions occurred prior to the union's certification.[15]

Here, the Employer plainly refused to bargain over disciplinary actions following the Union's written request in January 2017. Once the Union was certified, the Employer's refusals became violations of Section 8(a)(5) relating back to the dates of the Union's requests. Furthermore, here the Employer has refused to *ever* bargain

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[14] *Lovejoy Industries*, 309 NLRB at 1104; *cf. Howard Plating Industries, Inc.*, 230 NLRB 178, 179 (1977) (denying motion for summary judgment filed prior to union's certification in case where employer did not persist in refusing to bargain once certification issued, but reaffirming, at the same time, that "an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation"). To the extent that *Howard Plating* can be read to suggest that an employer's pre-certification refusal to bargain can never violate the Act, that is inconsistent with other language in the decision as well as a large body of subsequent caselaw finding 8(a)(5) violations based upon an employer's conduct in the pre-certification period. *See, e.g.*, *Alta Vista Regional Hospital*, 357 NLRB 326, 326, 327 (2011) (finding 8(a)(5) violation where employer made unilateral changes and refused to provide information upon the union's request while its objections to the election were pending), *enforced*, 697 F.3d 1181 (D.C. Cir. 2012); *Wal-Mart Stores, Inc.*, 348 NLRB 274, 275, 290 (2006) (finding unlawful refusal to bargain over effects of pre-certification decision to restructure operations), *enforced sub nom. UFCW v. NLRB*, 519 F.3d at 497; *Adair Standish Corp.*, 290 NLRB at 319, 329 (employer's unilateral change in attendance policy and unilateral layoffs during pre-certification period violated Section 8(a)(5)); *Sevakis Industries, Inc.*, 238 NLRB 309, 313 (1978) (finding violation where employer unilaterally changed work rules and refused to bargain with union prior to certification), *enforced*, 652 F.2d 600 (6th Cir. 1980); *Catholic Medical Center of Brooklyn & Queens, Inc.*, 236 NLRB at 497, 500 (finding violation where employer refused to bargain with union and refused to provide presumptively relevant information during pre-certification period); *Sundstrand Heat Transfer, Inc.*, 221 NLRB 544, 544-46 (1975) (finding unlawful refusal to bargain over effects of pre-certification economic layoffs), *enforcement denied in part*, 538 F.2d 1257 (7th Cir. 1976).

[15] *Timsco, Inc.*, 279 NLRB 1121, 1121-22 & n.4 (1986) (finding, in case predating the Board's adoption of a pre-implementation notice and bargaining requirement, that question of whether probationary employee's discharge occurred before or after certification was immaterial with respect to establishing employer's duty to bargain in response to union request), *enforced*, 819 F.2d 1173, 1180 (D.C. Cir. 1987).

over the mandatory subjects at issue, and has failed to comply with its statutory duty more than sixteen months after the Union became the majority representative of the employees, and more than eight months after the Union was certified. As such, the precise date on which the Employer's refusal became unlawful would not materially affect the remedy in this particular case.[16]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer has violated Section 8(a)(5) and (1) by failing and refusing to engage in post-implementation bargaining with the Union over the disciplinary warnings issued to employees after the Union secured majority status in the November 2016 election.

/s/
J.L.S.

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[16] *See, e.g.*, *E.A. Sween Co.*, 356 NLRB 109, 110 n.5 (2010), *enforced*, 640 F.3d 781 (7th Cir. 2011).