

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

Advice Memorandum

DATE: March 19, 2014

TO: Rhonda P. Ley, Regional Director
Region 3

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

SUBJECT: TLC Health Network d/b/a Lake Shore Health 512-5036 -6720-7200
Case 03-CA-113937 512-5081-7000
 512-5082
 524-3325-4500

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and (4) when it discharged a statutory Section 2(11) supervisor for voting in a Board-supervised election. We conclude that since the Charging Party's supervisory status was unclear before the election, and the only way the Charging Party had to obtain a Board resolution of her supervisory status was to vote in the election, her discharge for casting that vote impeded access to the Board's processes and interfered with the Section 7 rights of employees. Accordingly, the Region should issue a Section 8(a)(1) and (4) complaint, absent settlement.

FACTS

The Employer operates an acute-care hospital and skilled nursing facility. On July 18, the Union filed three petitions, seeking to represent a unit of technical employees, a unit of professional employees, and a service and maintenance unit. A stipulated election agreement between the parties, approved on August 6, included employees in the Employer's Nutritional Services department, such as cooks and dietary aides, in the proposed service and maintenance unit. An election was scheduled for August 29.

On August 7, the Employer's Director of Nutritional Services held a meeting with the Employer's dietary supervisors, including the Charging Party, in which he stated that the dietary supervisors were not eligible to vote in the upcoming election. The Director further asked for the dietary supervisors' support in opposing the Union. The Charging Party refused that request. The Director immediately dismissed the other attendees and spoke privately with the Charging Party, who stated that she believed she was eligible to vote. The Director disputed this and referred her to the Employer's HR department.

The Charging Party said that in the weeks immediately preceding the election she was informed by several Union representatives that she should be eligible to vote. The Charging Party primarily performed traditional unit work, and Union representatives likened her job duties to that of a leadperson rather than a supervisor. These representatives further informed the Charging Party that her vote would be subject to challenge, and her eligibility to vote would be resolved after the election. The Employer did not file a pre-election challenge to the Charging Party's eligibility to vote in the election.

On August 29, the Charging Party entered the polling place and cast a ballot. The ballot was challenged by the Board agent, as she did not appear on the list of eligible voters. On her way into the polling place, the Charging Party passed signs posted by the Employer prohibiting "managers" from entering the polling place during the election. The Charging Party stated that she saw the sign but did not think it applied to her. At the conclusion of the election, the parties agreed to exclude the Charging Party's vote after the Employer produced a number of disciplines she had signed. The Union won the election by a 52-33 margin.

On August 30, the Employer's Director of Employee and Labor Relations summoned the Charging Party to a meeting with her and the Director of Nutritional Services. The Director of Employee and Labor Relations asked the Charging Party if she had been informed by the Director of Nutritional Services that she was ineligible to vote. The Charging Party confirmed that she had been so informed, but stated that she did not believe the Director. The Charging Party confirmed that she had the ability to discipline and evaluate employees. The Employer's Director of Employee and Labor Relations then told the Charging Party that she was discharged because she had jeopardized the election by casting a ballot.

The Region has determined that the Charging Party is a statutory supervisor.

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Sections 8(a)(1) and (4) by discharging the Charging Party for casting her vote in a Board-supervised election, where her status as a supervisor was unclear and the only way to have that status determined by the Board was for her to vote subject to challenge.

Despite the fact that the employee rights enumerated in Section 7 of the Act and protected by Section 8(a)(1) are generally not available to Section 2(11) supervisors,¹ the Board has held that supervisors are protected under Section 8(a)(4).² The Board and the courts have liberally construed the provisions of Section 8(a)(4), recognizing that “if the Board is to perform its statutory function ... its procedures must be kept open to individuals who wish to initiate... proceedings, and protection must be accorded to individuals who participate in such proceedings.”³ In *General Services*, the Board found an 8(a)(4) violation based on the employer’s refusal to rehire a supervisor because of a charge he previously filed against the employer alleging that he was discharged because of his union activity, even though the Board ultimately determined in that prior proceeding that he was a supervisor.⁴ The Board reasoned that a contrary holding would be “tantamount” to giving up its authority to determine supervisory status to the employer.⁵ In essence, to permit an employer to retaliate against individuals who seek a Board determination of the applicability of the Act would have the effect of giving the employer rather than the Board the authority to control access to the Board’s processes. Thus, while Section 8(a)(4) is limited on its face to employees who have filed charges or testified, Section 8(a)(4)'s protections apply as well to supervisors.⁶

¹ See *General Nutrition Center, Inc.*, 221 NLRB 850, 858 (1975) (“...Section 7 does not extend to supervisors.”)

² See, e.g., *General Services, Inc.*, 229 NLRB 940, 941-943 (1977) (supervisor who files Section 8(a)(3) charge is an “employee” within the meaning of Section 8(a)(4) for the purposes of processing his charge), enf. denied mem. 575 F.2d 298 (5th Cir. 1978); *General Nutrition Center, Inc.*, 221 NLRB at 858 (1975) (employer violated Section 8(a)(4) by discharging supervisor for participating in the filing of a charge and relaying of information to the Board relevant to that charge). See also *SNE Enterprises, Inc.*, 347 NLRB at 497 (collecting cases holding that supervisors are protected under Section 8(a)(4)).

³ *General Services, Inc.*, 229 NLRB at 941.

⁴ *Id.*

⁵ *Id.* at 941-942.

⁶ *Id.* (citations omitted). See also *FedEx Home Delivery*, Cases 4-CA-33672 & 34189, Advice Memorandum dated May 18, 2006 at 4-8 (authorizing Section 8(a)(1) and (4) complaint based on constructive termination of relationship with joint employer/supervisor for testifying at Board representation proceeding); *Turner Transfer*, Case 5-CA-25703, Advice Memorandum dated Apr. 11, 1996 at 2-3 (finding

Moreover, the scope of Section 8(a)(4) is not limited to the filing of a formal charge and the giving of formal testimony but extends also to the investigative stages of the Board's proceedings.⁷ Thus, Section 8(a)(4) protects employees who provide information to the Board in order to assist other employees.⁸ As the Supreme Court has noted, Congress adopted Section 8(a)(4) to insure that “*all* persons” will “be completely free from coercion” against providing information to the Board.⁹ This “complete freedom is necessary” because “the Board does not initiate its own proceedings” and enforcement of the Act is entirely dependent upon individuals filing charges and petitions and providing evidence.¹⁰

Applying these principles here, we conclude that the Employer violated Section 8(a)(4) by discharging the Charging Party for in effect invoking the Board's processes to determine her supervisory status. By casting her vote, the Charging Party was in part attempting to initiate Board proceedings to determine her supervisory status, in the absence of any other avenue of resolving her status. The pre-election stipulation did not determine the Charging Party's supervisory status and no pre-election hearing was held in this matter. Significantly, questions concerning the supervisory status of health care workers are a common occurrence that often require a Board determination.¹¹ Allowing the Employer to terminate this employee because she sought a Board determination of her Section 2(11) supervisory status by voting in a Board-supervised election would be comparable to discharging her for giving testimony in a Board proceeding; it would permit the Employer to subvert Board processes and impede access to the Board in violation of Section 8(a)(4).¹²

Section 8(a)(1) and (4) complaint warranted because employer constructively discharged independent contractor after he testified in a representation case).

⁷ *NLRB v. Scrivener*, 405 U.S. 117, 121-125 (1972) (affidavit given to field examiner).

⁸ *Metro Networks*, 336 NLRB 63, 66-67 (2001) (nonassistance and nondisclosure provisions in severance agreement violated Sections 8(a)(1) and (4) by prohibiting employee from cooperating with Board in investigation and litigation of others' unfair labor practice charges).

⁹ *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967) (emphasis added), quoted in *Metro Networks*, 336 NLRB at 66.

¹⁰ *NLRB v. Scrivener*, 405 U.S. at 122 (citations omitted).

¹¹ See e.g., *Oak Park Nursing Care Center*, 351 NLRB 27, 28-29 (2007).

¹² *General Services*, 229 NLRB at 942.

The Charging Party's discharge also violates Section 8(a)(1). The Board ruled in *Parker-Robb Chevrolet* that although in most circumstances an employer may discharge a supervisor for engaging in union or concerted activity without violating the Act, discipline of a supervisor violates Section 8(a)(1) where it interferes with employees' exercise of Section 7 rights, e.g., when an employer discharges a supervisor for testifying against an employer's interests in a Board or grievance proceeding, for refusing to commit an unfair labor practice, or for failing to prevent unionization.¹³ In these circumstances, the Board finds a violation not to protect the supervisor but to protect the employees' exercise of Section 7 rights.¹⁴ Under the rationale of *Parker-Robb*, the Board repeatedly has found that an employer violates Section 8(a)(1) by disciplining supervisors for participating in Board proceedings.¹⁵ Here, the Charging Party's discharge would have the effect of discouraging employees, whose supervisory status is unclear, from participating in a Board election.

Accordingly, a Section 8(a)(4) and (1) complaint should issue, absent settlement.

/s/
B.J.K.

H:ADV.03-CA-113937.Response2.TLCHealth (b) (6), (b) (7)

¹³ 262 NLRB 402, 402-03 (1982), review denied sub nom. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

¹⁴ *Id.* at 403.

¹⁵ See e.g., *SNE Enterprises, Inc.*, 347 NLRB 472, 498-99 (2006), enfd. 257 Fed. Appx. 642 (4th Cir. 2007) (employer violated Section 8(a)(1) by discharging supervisor for testifying adversely to its interests at election objection hearing); *H.H. Robertson Co.*, 263 NLRB 1344, 1345 & n. 5 (1982) (employer violated Section 8(a)(1) by constructively discharging a Section 2(11) foreman for revealing the existence of an unfair labor practice to employees, providing related information to the Board, and assisting employees in utilizing the Board's processes); *Orkin Exterminating Co.*, 270 NLRB 404, & n.5 (1984) (employer violated Section 8(a)(1) by constructively discharging supervisor because he intended to testify in unfair labor practice proceeding).