NLRB NEWS: CONNECTICUT

NLRB REGION 34

January 2012

Seventh Edition

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In This Issue:

****BREAKING NEWS****

President Obama announces three recess appointments to fill Board vacancies

On January 3, 2012, the Board dropped to two members (Mark Pearce and Brian Hayes) with the expiration of the term of Member Craig Becker. The next day, President Obama announced his intention to recess appoint the following three individuals to serve as members of the Board, thereby enabling the Board to continue operating as normal. The new Board members were subsequently sworn-in on January 9, 2012.

Sharon Block, currently serving as Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor. Between 2006 and 2009, Ms. Block was Senior Labor and Employment Counsel for the Senate HELP Committee. Ms. Block previously served at the Board as senior attorney to Chairman Robert Battista from 2003 to 2006 and as an attorney in the appellate court branch from 1996 to 2003. She received a B.A. in History from Columbia University and a J.D. from Georgetown University Law Center.

Terence F. Flynn, currently serving as Chief Counsel to Board Member Brian Hayes, previously served as Chief Counsel to former Board Member Peter Schaumber. From 1996 to 2003, Mr. Flynn was Counsel in the Labor and Employment Group of Crowell & Moring, LLP. He holds a B.A. degree from University of Maryland, College Park and a J.D. from Washington & Lee University School of Law.

Richard Griffin, currently serving as General Counsel for International Union of Operating Engineers (IUOE). He also serves on the board of directors for the AFL-CIO Lawyers Coordinating Committee, a position he has held since 1994. From 1981 to 1983, he served as a Counsel to NLRB Board Members. Mr. Griffin holds a B.A. from Yale University and a J.D. from Northeastern University School of Law.

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Contact the Region:

There is always an information officer available between 8:30 am and 5:00 pm at the Hartford Regional office, by phone at (860) 240-3522 or in person at 450 Main St. in Hartford, to answer general workplace related inquiries or to discuss a specific workplace problem or question. The information officer can offer information about the NLRA and advice as to whether it appears to be appropriate to file an unfair labor practice charge or a petition. If filing a charge or petition appears to be appropriate, the information officer will assist you in completing the charge or petition form.

Information is also available on the Board's website at www.nlrb.gov, which has a link to the Hartford Regional Office webpage featuring newsletters, news releases and local cases and decisions.

WE ARE AT YOUR SERVICE

For assistance in filing a charge or a petition,
Call the Regional Office at
(860) 240-3522 and ask for the information officer.
The information officer will discuss the situation and assist you in filling out a charge or petition. Information is available during office hours, Monday to Friday, 8:30 a.m. to 5:00 p.m., or at
www.nlrb.gov

ESTAMOS A SU SERVICIO

Para asistencia de someter una carga o petición
Llame la oficial de información en oficina regional a
(860) 240-3522.
La oficial de información discutirá su situación y le ayudará si desee Someter una carga o petición. Información esta dispuesta a usted mientras las horas de servicio - lunes a viernes, 8:30 a.m. to 5:00 p.m, o
www.nlrb.gov

Region 34 Professional Staff Roster

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How to File an Unfair Labor Practice (ULP) Charge:

- Anyone may file a ULP charge with the NLRB by submitting a charge form to any Regional Office. The form identifies the parties to the charge and includes a brief statement of the basis for the charge, and must be signed by the charging party.
- Forms are available on the NLRB website, or may be obtained from any NLRB regional office. The Hartford Regional Office has information officers available to assist with the filing of charges.
- You must file the charge within 6 months of the unfair labor practice.

When a Charge is Filed:

- The NLRB Regional Office will investigate. The charging party is responsible for promptly presenting evidence in support of the charge, which usually consists of a sworn statement and documentation of key events.
- The Region will ask the charged party to present a response to the charge, and will further investigate the charge to establish all facts.
- After a full investigation, the Region will determine whether or not the charge has merit.

*****MORE BREAKING NEWS*****

Board adopts amendments to election case procedures and extends the date for implementation of its Employee Rights Notice Posting Rule

The Board has adopted a final rule amending its election case procedures to reduce unnecessary litigation and delays. The rule was published in the Federal Register on December 22, 2011 and is due to take effect on April 30, 2012. A complete copy of the rule, as published in the Federal Register, can be accessed at the Board's website, nlrb.gov.

The rule is primarily focused on procedures followed by the Board in the minority of cases in which parties can't agree on issues such as whether the employees covered by the election petition are an appropriate voting group. In such cases, the matter goes to a hearing in a regional office and the Board's Regional Director decides the question and sets the election.

Going forward, the regional hearings will be expressly limited to issues relevant to the question of whether an election should be conducted. The hearing officer will have the authority to limit testimony to relevant issues, and to decide whether or not to accept post-hearing briefs. All appeals of regional director decisions to the Board will be consolidated into a single post-election request for review. Parties can currently appeal regional director decisions to the Board at multiple stages in the process. In addition, the rule makes all Board review of Regional Directors' decisions discretionary, leaving more final decisions in the hands of career civil servants with long experience supervising elections.

The amendments to the election case procedures in the new rule were drawn from a more comprehensive proposal put forward by the Board in June. More than 65,000 comments were submitted following publication of the broader proposal in the Federal Register. In a discussion introducing the new rule, the Board majority explained that it was holding for further deliberation parts of that proposal that had generated the most debate while moving ahead with parts considered relatively "less controversial."

The Board has also postponed the effective date of its employee rights notice-posting rule at the request of the federal court in Washington, DC hearing a legal challenge regarding the rule. The Board's ruling states that it has determined that postponing the effective date of the rule would facilitate the resolution of the legal challenges that have been filed with respect to the rule. The new implementation date is April 30, 2012.

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After the Region Makes a ULP Determination:

- If the Region determines that a charge has no merit—that the charged party has not violated the Act—it will dismiss the charge after giving the charging party the opportunity to withdraw. The charging party has the right to appeal a dismissal.
- If the Region determines that a charge has merit—that the charged party has violated the Act—it will attempt to settle the case. Unless there is a settlement, the Region will proceed to trial to obtain a finding of a violation and an order directing the charged party to undertake remedial actions. The charged party has appeal rights, including a right to a hearing, with a final decision subject to the Federal Circuit Court of Appeals.

Regional Office Unfair Labor Practice News

Judge orders Triple Play Sports Bar to reinstate workers fired for Facebook comments

An NLRB Administrative Law Judge (ALJ) ordered that two employees of the Triple Play Sports Bar in Watertown, Connecticut be reinstated and awarded backpay because they were unlawfully discharged following a discussion about the Bar's owners on a former employees' Facebook page. The Employer intends to appeal that decision.

Prior to the Facebook discussion, several employees had complained to the Employer concerning its State tax withholding procedures, which had caused employees to owe taxes when they filed their State tax returns. When a former employee posted a similar complaint on her Facebook page, which included derogatory comments about the Bar's owners, several current employees joined in the discussion. One of the discharged employees commented "I owe too. Such an asshole", and the other discharged employee simply clicked "like" under the former employee's initial comment. Subsequent to the Facebook discussion, the Employer scheduled an employee meeting to discuss the State tax withholding issue.

The ALJ held that both discharges violated Section 8(a)(1) of the Act because the Facebook discussion about the tax withholding issue was both protected and concerted, and nothing that the discharged employees said or did in the course of that discussion caused them to lose the protection of the Act. In reaching this conclusion, the ALJ rejected the Employer's claim that both employees were discharged for legitimate work-related reasons, noting that such reasons were "utterly unsubstantiated by the record", and also that one of the Employer's owners admitted that the meetings with each employee that led to their discharges was precipitated by the Facebook discussion.

The ALJ further held that the Employer violated Section 8(a)(1) by threatening to sue the discharged employees for defamation if they did not retract their Facebook comments; by questioning employees about their Facebook comments; by threatening to discharge employees because of their Facebook comments; and by informing employees they were discharged as a result of their Facebook comments. However, the ALJ also held that the Employer's "Internet/Blogging Policy" did not violate the Act because the prohibition on "inappropriate discussions" is permissible under existing Board law.

Hartford Field Attorneys Claire Sellers and Jennifer Dease litigated the case for the Hartford Regional Office.

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How to File a Representation Petition:

An NLRB Information Officer can assist you in completing a petition form. If you complete the petition yourself, keep in mind these helpful tips:

- Prepare your petition on our website at: www.nlrb.gov (filing instructions detailed).
- Know the job titles used by the Employer and the employee shift schedules.
- Provide the Region with authorization/membership cards (or other proof of interest) signed and dated by at least 30 percent of the employees in the petitioned-for unit.
- Be prepared for a hearing by knowing: (1) the employer's operations; (2) the community of interests of various employee job categories; and (3) who the "supervisors" are. Hearings are typically held within 10 days from date of filing.
- Be prepared for the election to be conducted within 42 days from the date of filing.

Hot Off the Presses . . . Recent NLRB Decisions

In a case involving the appropriate remedy for extensive bargaining violations, the Board in ***Camelot Terrace,*** 357 NLRB No. 161 (12/30/11) ordered the Respondents to reimburse the Charging Party Union for its negotiation expenses incurred as a result of the Respondents' bad-faith bargaining and related violations of Section 8(a)(5) of the Act. The Board found that the Respondents' aggravated unlawful conduct at and away from the bargaining table, including restricting the dates and length of bargaining sessions, canceling and shortening sessions, reneging on tentative agreements without good cause, refusing to bargain over economic subjects, refusing to furnish relevant information, and making unilateral changes in terms and conditions of employment, infected the core of the bargaining process and directly caused the Union to waste considerable resources on protracted and futile negotiations. The Board further ordered Respondents to reimburse the General Counsel and the Union for expenses incurred in the investigation, preparation, and litigation of the unfair labor practice charges filed against the Respondents based on their abrogation of settlement agreements pertaining to earlier charges, defiance of their obligation to bargain, refusal to resolve the later charges short of trial, and knowing presentation of transparently non-meritorious defenses and perjurious testimony. Relying on its inherent authority to preserve the integrity of its processes, the Board found that the Respondents demonstrated bad faith not only in their underlying unlawful conduct, but also in their wanton misuse of legal processes in support of their unlawful objectives. Member Hayes dissented with respect to the reimbursement of litigation expenses.

In a case involving the status of employees as independent contractors, the Board in ***Lancaster Symphony Orchestra***, 357 NLRB No. 152 (12/27/11), found that musicians playing for symphony orchestras in Pennsylvania, Massachusetts and Texas are employees, not independent contractors, and therefore are eligible to vote on whether they want union representation. For that reason, the Board reversed the Regional Director's decision to dismiss an election petition and sent the case back to the region for further action. The Board majority (Pearce and Becker) examined numerous factors and found they weighed heavily in favor of employee status. For instance, although musicians have some control over their work by choosing whether or not to bid on programs, "once they are selected to work in relation to a particular program, the musicians' control over their work time ends." The Board noted that orchestra management sets work hours, payment schedules, dress codes and standards for behavior, among other things. The Board also found that the musicians do not enjoy entrepreneurial opportunity or suffer risk because their fees are set and cannot be negotiated. In dissent, Member Hayes found the same factors to weigh strongly in favor of finding the musicians to be independent contractors.

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Region 34 Representation Statistics - FY 2011:

- Representation elections were conducted in 38 cases.
- 92% of elections were achieved by way of an election agreement between the parties.
- 97.5% of elections were held within 56 days from the filing of the petition.
- Initial elections were conducted in a median of 39 days from the filing of the petition.

Region 34 Unfair Labor Practice Statistics - FY 2011:

- 410 unfair labor practice charges were filed.
- 42% of the charges were found by the Hartford Regional Office to be meritorious.
- 100% of the meritorious cases were settled prior to hearing.
- 100% of litigated cases that were decided in FY11 were won before an administrative law judge or the NLRB.

More Red-Hot NLRB Decisions

In a case involving the appropriateness of a proposed bargaining unit, a Board majority (Pearce and Becker) in ***Northrop Grumman Shipbuilding, Inc.***, 357 NLRB No. 163 (12/30/11) affirmed the Regional Director's finding that a departmental unit of radiological technical employees was appropriate for bargaining. Applying the principles set forth in its recent decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, *357 NLRB No. 83* (2011), the Board concluded that the employees were "readily identifiable as a group." The Board further found that the Employer failed to establish that the other technical employees it sought to include in the unit shared an overwhelming community of interest with the radiological employees. The Board further found that even under the traditional community of interest test, a departmental unit of radiological technical employees constituted "a functionally distinct grouping with a sufficiently distinct community of interest as to warrant a separate unit appropriate for the purposes of collective bargaining." Member Hayes dissented, finding that under longstanding Board precedent predating *Specialty Healthcare*, the departmental unit was not appropriate.

In a case involving the issue of contractual waiver, a Board majority (Becker and Hayes) in ***Omaha-World Herald*** , 357 NLRB No. 156 (12/29/11) found that the Employer did not violate Section 8(a)(5) when, during the term of the parties' contract, it froze accrual of benefits in its pension plan. The Board explained that, under a combination of factors, the Union waived its right to bargain over changes to the Employer's pension plan during the term of the parties' contract. Chairman Pearce dissented, finding that the factors identified by the majority, even considered in combination, were insufficient to meet the Board's "clear and unmistakable" waiver standard. A separate Board majority (Pearce and Becker) found that the Employer violated Section 8(a)(5) when, after the parties' contract had expired, it ceased matching contributions to employee 401(k) plan accounts. Rejecting the Employer's argument that the Union also waived its right to bargain over this change, the majority explained that, under Board law, "the waiver of a parties' right to bargain does not outlive the contract that contains it." Member Hayes dissented, finding that the Union waived its right to bargain over this change because 401(k) plan documents clearly reserved the Employer's right to make the change. Member Hayes reasoned that just as plan benefits enjoyed by employees survive the contract's expiration, so too must the Employer's ability to exercise its corresponding rights under the 401(k) plan.