THE NATIONAL LABOR RELATIONS BOARD

Region 18 HOT DISH

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HOT DISH EDITOR:

PAMELA SCOTT,

SUPERVISORY ATTORNEY

From the Director's Chair

I am often been asked questions about the size and structure of the Agency. The Agency's field operation is comprised of 32 Regional Offices, three Subregional Offices and 17 Resident Offices. Each Regional Office is headed by a Regional Director who is responsible for the management of the office and any attached Subregional or Resident Offices and for the investigation and initial determination of the merits of unfair labor practice cases and representation cases. The Regional Director is also responsible for resolving through settlement or litigation the unfair labor practice charges found to warrant further proceedings, and for the conduct of representation elections.

If you have not yet discovered the NLRB's public web site (www.nlrb.gov), it is worth a visit. A vast amount of information about Agency practice and procedure is now readily available online.

Regional Director
Bob Chester

REGIONAL PERFORMANCE

Region 18 excelled in our overall performance again in FY08. We processed 419 ULP charges, slightly more than last fiscal year and 104 R-case petitions, one fewer than last fiscal year. We prevailed in whole or significant part in all of the ALJ and Board decisions that issued in FY08, giving us a 100% litigation success rate. We secured 196 settlements. We ran our elections in a median of 38 days and conducted 98.6% of all of our elections within 56 days. We collected in excess of $1.5 Million in back pay and reimbursements. We processed many factually and legally difficult cases.

NATIONAL PERFORMANCE

As the data below reflects, the record of performance achieved by the staffs of the Headquarters and Regional Offices of the General Counsel in Fiscal Year 2008 based on preliminary statistical reports, was once again outstanding.

Of special note in FY 2008:

* 95.1% of all initial elections 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.
*A 96.87% settlement rate was achieved in the Regional Offices in meritorious ULP cases.
*The Regional Offices won 90.8% of Board and Administrative Law Judge unfair labor practice decisions in whole or in part in FY 2008.
*A total of $70,001,594 was recovered on behalf of employees as backpay or reimbursement of fees, dues, and fines, with 1,564 employees offered reinstatement.
*The Agency reached all three of its overarching goals, closing 83.50% of all representation cases within 100 days (target 80%), 68.10% of all unfair labor practice cases within 120 days (target 68%), and 75.22% of all meritorious unfair labor practice cases within 365 days (target 75%). The target for each overarching goal was higher than in FY 2007.
*Agency representatives participated in over 525 outreach events during FY 2008.
*In FY 2008, Agency R case intake increased by 2.3%, Agency C case intake increased by 1.6%, and overall case intake was up by 1.7%.

Insights from Iowa

Des Moines Resident Office Affected by the '08 Floods

By Chip Chermak, Field Examiner

"The next day, civic-minded Field Examiner Robert Reid gave up part of his Saturday to pitch in and lay sandbags..."

As I am sure anyone who is reading this article already knows, 2008 has been a particularly hard year for weather in Iowa. We had record snowfall totals this past winter that made travel very difficult. The respite we enjoyed during the spring did not last, as the State of Iowa suffered terribly from record floods in June. We again were in the center of many national weather stories. If you lived in Iowa in June 2008 and were not affected in one way or other by these floods, you were definitely in the minority. When the floods were at their worst, Governor Chet Culver had to declare 86 of the 99 Iowa counties to be disaster areas. This declaration covered roughly 45,000 square miles and almost 700 Iowa cities and towns. *Source: Iowa Homeland Security and Emergency Management Division*

Iowa's capital city of Des Moines did not go unscathed during these floods. As water levels rose in the downtown area on June 12 and 13, 2008, employees working out of the Des Moines Resident Office only had to walk two blocks to the Des Moines River to witness the rising water level for themselves. Unfortunately, the flood waters rose to such a high level that by the afternoon of June 13, 2008, Mayor Frank Cownie asked for downtown businesses and residents to voluntarily evacuate the area. Some of the businesses and county government buildings along the river suffered flood damage as waters overcame them. As the flood waters were now only a city block away, Resident Officer David Garza promptly complied with the city's voluntary evacuation request and released resident office employees to go home until the dangers presented by the flood waters could be more accurately assessed by city officials.

The next day, civic-minded Field Examiner Robert Reid gave up part of his Saturday to pitch in and lay sandbags at Union Park in Des Moines. The Birdland neighborhood, which includes Union park, was one of the hardest hit areas in Des Moines that weekend.

Fortunately, Des Moines had learned hard lessons from the downtown flooding disaster it suffered in 1993, and as a result, had implemented a number of measures to handle future flood waters. With the exception of the Birdland neighborhood, the Des Moines levees held without further damage to the downtown area to everyone's great relief. The voluntary evacuation was lifted over the ensuing weekend and everyone, including the employees of the Des Moines Resident Office, were able to return to work on the following Monday, June 16, 2008.

Other cities in Iowa were not so fortunate. After witnessing the disaster that occurred in Cedar Rapids, Iowa that weekend, Field Examiner Charles Chermak arrived for work on June 16, 2008 ready to ascertain the impact of the flood on his two representation elections that were scheduled to occur in that same area. For one representation case, the voting location was shut down because it was completely under water. The employees for this representation case needed to be assigned a new voting location. By working with the parties involved, a new voting location was soon established and the Des Moines Resident Office was able to keep the election on track without further incident. The tremendous damage suffered in Cedar Rapids and other areas of Iowa, however, is still today being cleaned up and addressed by emergency disaster workers.

We're on the Web! www.nlrb.gov

"Give Board Affidavits? NO WAY!!"

By Florence Brammer, Field Attorney

That is the response of many charged parties when asked to participate in a ULP investigation by providing in-person, Board agent-taken, sworn affidavits. The reason almost invariably given for declining to participate? "The Region is just going to use them as fodder for cross-exam."

This reaction to being asked for charged party affidavits is based on a pre-investigation assumption that the charge will be found to have merit and that the Region will issue complaint and litigate. Obviously, only the charged party is in a position to know with certainty if a charge has merit. But more often, what motivates decisions by charged parties and their representatives to say "no way" to affidavits is a perception that the affidavits are being solicited by the Region with the ulterior motive to use the affidavits for litigation rather than for deliberation on the merits of the case.

"The Region has no desire, motivation or incentive to litigate non-merit cases."

Nothing could be further from the truth, as confirmed by a recent series of cases before the Region which are "Exhibit A" for why charged parties *should* agree to – or at least start considering on a case-by-case basis – giving affidavits in ULP investigations.

Over the past several years, the Region has received multiple charges against "Employer X," alleging a virtual catalog of ULPs, including multiple disciplines and terminations. Many of the allegations have been found to have merit: some settled with full remedies, including backpay and reinstatement; others have been the subject of costly and time-consuming litigation. More termination and discipline charges against Employer X were filed in 2008, some involving the very same employees who were reinstated as a result of previous charges.

At first glance, it reasonably appeared to all involved – the Region, the Union, the employees and Employer X – that the new allegations could well be headed down the same path as the prior cases, with at least the issuance of a complaint, if not litigation. Yet, breaking with its previous "no-affidavits" tradition, Employer X agreed to provide in-person, Board-taken affidavits. The result: the new charges were dismissed in their entirety, as a direct result of the testimony and documents provided by Employer X through the affidavit process.

The Region has no desire, motivation or incentive to litigate non-merit cases. In fact, it is the expressed goal of the Region *not* to do so, for both pragmatic and administrative reasons. So, the next time you or your client is faced with a ULP charge, at least *think* about saying "okay" when your friendly Board agent contacts you to request affidavits.

Outreach Activities in Region 18

Under General Counsel Ronald Meisburg, the Agency is making a special effort to reach community groups with information about the NLRB. Members of the Region's staff are available to make presentations before any group, such as classroom groups, the staff of a legal services clinic or a service agency, as well as those members of the public that they serve, to describe what the Act's protections cover, how the Region investigates and resolves unfair labor practice charges, or any NLRB topic of interest. To arrange for a speaker and to discuss possible topics, please do not hesitate to call Supervisory Attorney Pamela Scott at (612) 348-1788.

Representatives from eight different agencies, including the NLRB, at Cold Spring Minnesota "Know Your Rights" Forum, August 9, 2008.

Duty of Discriminatees to Mitigate Losses

by Robert Chester, Regional Director

Within the past year, the Board issued a number of decisions that have significantly increased the obligations of discriminatees to mitigate losses they incur as a result of unlawful discrimination against them. On September 11, 2007, the Board issued a decision in *Grosvenor Orlando Associates, LTD.,d/b/a The Grosvenor Resort, and its general partners Grosvenor Properties, Ltd., Donald E. Werby and Robert K. Werbe,* 350 NLRB No. 86. In its decision, the Board found "that reasonably diligent discriminatees should have begun searching for interim work at least at some time within the initial 2-week period after the unlawful action against them. Thus, discriminatees will lose backpay if they delay their search for work more than **2 weeks** after their termination, layoff or refusal to hire. This tolling of backpay for failure to look for work in a timely manner does not permanently preclude the accrual of backpay. Rather, backpay will begin to accrue when a reasonably diligent search for work begins.

In reviewing this decision, it is important to remember that if backpay or other reimbursement is due as part of the remedy for an unfair labor practice — for instance, an unlawful discharge or refusal to hire — the Board requires discriminatees to mitigate (offset) the backpay by beginning to look for another job in the same or similar line of work promptly. If discriminatees are unable to establish that they actively sought to mitigate damages, they may face the risk of having whatever money is owed reduced. The need for discriminatees to maintain careful records of their efforts to obtain interim employment was also underscored by the Board's decision in *St. George Warehouse*, 351 NLRB No. 42 (2007). There, the Board articulated that once a respondent produces evidence that there were substantially equivalent jobs in the geographic area available to discriminatees, the burden of showing that work was unavailable shifts from the respondent that unlawfully fired the employee to the unlawfully discharged employee and the General Counsel.

Both cases underscore the need for discriminatees to begin a search for work immediately following the discrimination against them and to keep careful records of when and where they sought employment in the event respondents challenge the amount of backpay they are due on the ground that the discriminatees did not diligently seek to mitigate their damages.

Call the Information Officer for more information: (612) 348-1757

INVESTIGATIVE SUBPOENAS: QUESTIONS AND ANSWERS

By Robert Chester, Regional Director

I am often asked questions about the use of investigative subpoenas. Such subpoenas are used, in both Representation and Unfair Labor Practice cases, where it is determined that doing so is necessary to ascertain the facts on which to base an administrative decision on the merits of a case. Investigative subpoenas are issued to parties and third party witnesses when the Regional Director believes additional evidence is needed to make an informed judgment on the merits of a case, including compliance issues. Only the Regional Director, on behalf of the General Counsel, has the right to issue investigative subpoenas. In other words, a party to a case does not have the right to issue such a subpoena. Issuance of investigative subpoenas occurs when necessary evidence is not provided voluntarily following a request.

There are two types of investigative subpoenas:

1. Subpoenas *ad testificandum* compel testimony by affidavit, by oral testimony under oath before a court reporter or by response to written interrogatories.

2. Subpoenas *duces tecum* compel the production of documents relevant to the charge under investigation.

Parties are given a reasonable period of time to comply with an investigative subpoena. What is reasonable depends on a number of factors, including the type and number of documents sought, the parties' history in cooperating with investigations, and the nature of the issues presented in the charge. 14 days is generally considered a reasonable period. Our experience has been that most parties comply with subpoenas in a timely fashion. Although some have filed motions to quash with the Board, to date, the Board has consistently denied such requests. If a party refuses to comply with a subpoena, the Region will seek enforcement of the subpoena in the applicable US District Court. In the one case the Region had to litigate , the court immediately enforced the subpoena and compelled the witness to give sworn testimony immediately while he was in the court room.