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

DATE: October 14, 2014

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: Washington River Protection Solutions
Case 19-CA-125339

530-6001
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The Region submitted this case for advice on whether, under the principles discussed in *Alan Ritchey*,[1] the Employer had a Section 8(a)(5) obligation to bargain with the Union prior to issuing discretionary discipline to an employee during a contract-hiatus period. We conclude that it would not be appropriate to apply the *Alan Ritchey* pre-discretionary discipline bargaining obligation rationale here because the parties were operating under a discipline system that resulted from collective-bargaining and there is no evidence that the Employer made a unilateral change to that discretionary discipline system or to the parties' grievance-arbitration procedure. Thus, the Region should dismiss the Section 8(a)(5) allegation, absent withdrawal.

FACTS

Background

Washington River Protection Solutions (Employer) performs cleanup work at the Hanford Nuclear Reservation in Hanford, Washington pursuant to a contract with the United States Department of Energy. Immediately upon commencing that contractual relationship, on October 1, 2008, the Employer recognized the Hanford Atomic Metal Trades Council (Union) and agreed to the terms of the Union's collective-bargaining agreement with the predecessor employer. That contract was effective by its terms from approximately October 1, 2008 through late 2012, and the

[1] 359 NLRB No. 40 (Dec. 14, 2012). The *Alan Ritchey* decision was issued by a panel that, under *Noel Canning*, was not properly constituted. It is the General Counsel's position that *Alan Ritchey* was soundly reasoned and that the Board should adopt the *Alan Ritchey* rationale as its own.

parties extended it until February 2, 2013.[2] The parties signed a new collective-bargaining agreement in January 2014.

Various provisions of the contract that expired on February 2 gave the Employer the authority to promulgate work rules and to discipline and discharge employees for just cause. Pursuant to those contractual rights, at all material times, the Employer has maintained a written discipline policy that generally requires progressive discipline. The policy allows the Employer to skip steps in the progressive-discipline process, however, for certain enumerated acts of "extremely serious misconduct" and permits immediate discharge for those offenses. The first enumerated item on the list of extremely serious misconduct is conduct in "[d]eliberate disregard of safety rules or safety procedures," which "includes conduct demonstrating reckless indifference or disregard for safety rules or procedures, including willful action or inaction resulting in injury to personnel or damage to property or equipment or the environment."

The expired contract also contained a grievance provision that required a pre-grievance oral discussion followed by a formal two-step grievance procedure. Step 1 begins with a written grievance submitted to the Union steward and is followed by a meeting within ten days among the Union steward, the appropriate manager, and a Labor Relations Representative. The manager must give a reply within five days of such meeting. If the grievance is not settled at Step 1, then the grievant must schedule a Council Grievance Committee meeting within ten days after receiving the Step 1 answer. Step 2 requires the Council Grievance Committee to meet with the Employer to discuss the grievance. The Employer must deliver its answer to the Council within ten days after completing discussions of the grievance.

The Discharge of the Electrician

The Electrician is a journeyman electrician who worked at the Hanford facility for approximately eighteen years prior to his discharge on October 16. On October 8, the Electrician and his coworker went to a storage shed to retrieve fluorescent light bulbs and discovered a pile of unknown white powder[3] on the storage shed's floor. Pursuant to the Employer's safety protocol, the Electrician and his coworker informed the Employer's Industrial Hygiene Department about the powder, and the department sent a technician to test it. The testing process required the technician to sometimes bend down over the powder. During the testing, the Electrician repeatedly questioned the technician about her credentials, her ability to properly test the

[2] All dates hereinafter are in 2013 unless otherwise indicated.

[3] The white powder most likely came from broken fluorescent bulbs. Florescent light bulbs, including some of the older bulbs being removed at the Employer's facility, can contain unsafe mercury levels.

powder, and whether her equipment had been properly calibrated. At some point while the technician was bent down to test the powder, the Electrician kicked up some powder, making it airborne. The Employer's investigation concluded that the Electrician told the technician "there, breathe that in," although the Electrician denies making such a comment.

Later that day, the Employer called the Electrician to a manager's office, where the Employer handed him his suspension notice, and thereafter held an investigatory interview with two Union representatives present. Over the next week, pursuant to its written policies and procedures, the Employer investigated the incident and determined that the Electrician most likely acted intentionally and maliciously and/or with reckless disregard for safety when he kicked up the powder. The Employer classified that action as "extremely serious misconduct," which permitted it to deviate from the progressive discipline policy and to discharge the Electrician rather than giving him a lesser form of discipline. The Employer terminated his employment on October 16. The Employer did not bargain with the Union prior to his suspension or discharge.

The Union filed a grievance over the Electrician's discharge pursuant to the grievance procedure contained in the parties' expired contract. At Step 2, the final stage of the grievance procedure, the Union asked the Employer many questions but did not provide the Employer with any new evidence regarding the incident or exculpatory statements from the Electrician or witnesses. The Employer denied the grievance at the final stage. Its detailed written explanation for its decision noted that the Electrician's action was contrary to what he had learned about minimizing exposure to hazards during the past five annual safety trainings that the Employer required all employees to attend. An additional aggravating factor, which the Electrician's coworker confirmed during the investigation, was that his conduct toward the technician was harassing and confrontational.

The Union requested arbitration, but the Employer refused to arbitrate the grievance because the parties' contract, including the arbitration provision, had expired.[4] There is no evidence that the Employer unilaterally changed the grievance procedure contained in the expired contract. Further, the Region has determined that the Employer did not unilaterally change the discipline policy and has not submitted that issue for advice.

[4] The Union does not argue that the Electrician's grievance arose during the period of the expired contract, and there is no evidence to suggest otherwise. The parties have no agreement to arbitrate grievances arising during a contract hiatus period.

ACTION

We conclude that it would not be appropriate to apply the *Alan Ritchey* pre-discretionary discipline bargaining obligation rationale here because the parties were operating under a discipline system that resulted from collective-bargaining and there is no evidence that the Employer made a unilateral change to that discretionary discipline system or to the parties' grievance-arbitration procedure.

In *Alan Ritchey*, the Board held that discretionary discipline is a mandatory subject of bargaining under *NLRB v. Katz*.[5] The Board reiterated the premise that, like other mandatory subjects of bargaining, discretionary employer discipline may alter employees' terms and conditions of employment.[6] The Board considered long-standing Board and court precedent holding that an employer has *both* a duty to maintain an existing policy governing terms and conditions of employment *and* a duty to bargain over certain discretionary decisions when applying that existing policy.[7] Thus, when a union has not yet attained an initial bargaining agreement or an interim grievance procedure that addresses discipline, an employer that previously exercised unlimited discretion when imposing employee discipline must, absent exigent circumstances, give the union notice and an opportunity to bargain over the discretionary aspects of that decision before implementing a disciplinary action having an immediate impact on tenure, status, or earnings.[8]

The requirement that bargaining over the imposition of certain discipline pursuant to a discretionary discipline policy must generally occur *prior* to imposing the discipline has two primary policy rationales. First, the Board explained, requiring bargaining prior to imposing discipline precludes the "harm caused to the union's effectiveness" that would likely result if the bargaining occurred after discipline was imposed, and therefore prevents the employer from undermining a newly-certified union.[9] Second, requiring bargaining prior to imposing discipline permits the union to present additional evidence and arguments, including extenuating circumstances, for why the employer should give the employee a lesser form of punishment, and

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[5] 369 U.S. 736 (1962).

[6] *See Alan Ritchey*, 359 NLRB No. 40, slip op. at 4-6.

[7] *See id.*, slip op. at 5 (citing, among other authorities, *NLRB v. Katz*, 369 U.S. at 736; *Washoe Medical Center*, 337 NLRB 202 (2001); *Oneita Knitting Mills*, 205 NLRB 500 (1973)).

[8] *See Alan Ritchey,* 359 NLRB No. 40, slip op. at 8, 9 n.20.

[9] *See id.*, slip op. at 4.

therefore will often lead to a "more accurate understanding of the facts, a more even-handed and uniform application of rules and conduct, and…a better and fairer result…."[10]

Although the Board in *Alan Ritchey* specifically addressed an employer's duty to bargain in a situation where a newly-certified union had not yet attained an initial contract and the parties had not reached lawful impasse, Advice recently concluded in *Arlington Metals Corporation* that the same rationale should apply where an employer lawfully implements a disciplinary system after impasse but refuses to arbitrate a grievance regarding discipline imposed pursuant to that system on the basis that the parties do not have a binding grievance-arbitration provision.[11] Advice so concluded because an employer's unilaterally-implemented terms and conditions of employment do not satisfy *Alan Ritchey*'s requirement of a "*binding agreement*" to resolve disputes,[12] and are instead simply the new terms and conditions of employment and status quo from which the parties must continue to bargain. Therefore, where an employer unilaterally implements a disciplinary system, which provides the employer with discretion to discipline, pursuant to a lawful impasse, an employer is still obligated to bargain prior to any imposition of discipline issued pursuant to the discretionary provisions of that unilaterally-implemented policy.[13]

However, once the parties have negotiated and agreed upon a discipline policy pursuant to a collective-bargaining agreement—even one that allows for broad employer discretion—the employer's imposition of discipline under that policy does not represent the same threat to the bargaining relationship and should not be analyzed under the *Alan Ritchey* framework. This is because when an employer issues discipline in accordance with a collectively-bargained policy, the union has already had the opportunity to weigh in on the matter, and therefore the exercise of discretion within the confines of a negotiated term or the parties' past practice is not a unilateral change. In those circumstances, the collectively-bargained discipline system constitutes the pre-disciplinary bargaining required under *Alan Ritchey*, and the employer's continued application of those policies is not a unilateral change in employees' terms and conditions of employment. Thus, in such cases, the Board

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[10] *See id.,* slip op. at 8.

[11] Case 13-CA-119043, Advice Memorandum dated May 20, 2014, at pp. 3-5, citing *Alan Ritchey,* 359 NLRB No. 40, slip op. at 4 n.20.

[12] *Alan Ritchey*, 359 NLRB No. 40, slip op. at 2 (emphasis added).

[13] *Arlington Metals Corporation*, Case 13-CA-119043, at p. 4, citing *Alan Ritchey*, 359 NLRB No. 40, slip op. at 8.

typically considers only whether the employer's actions indicate a departure from the existing policy or practice, which would constitute an unlawful unilateral change.[14]

Applying those principles here, we conclude that the Employer did not violate Section 8(a)(5) when it continued to apply the collectively-bargained discipline policy during the contract hiatus and, pursuant to the discretionary provisions of that policy, determined that discharge was an appropriate sanction for the Electrician's misconduct. Indeed, the Region has determined, and we agree, that there is no evidence to suggest that the Employer deviated from its application of the discipline policy in a manner that would constitute an unlawful unilateral change to that policy. There is also no evidence that the Employer engaged in any other unlawful conduct such as unilaterally changing the parties' grievance procedure. Indeed, unlike the situation presented in *Alan Ritchey* and *Arlington Metals*, the parties here had an established bargaining relationship and the Union filed a grievance over the Electrician's discharge, which the parties processed through the final stage in the grievance process. Therefore, we conclude that the grievance procedure from the expired collective-bargaining agreement is the functional equivalent of the agreed-upon interim procedure for resolving differences between the parties that was described in *Alan Ritchey*.

Moreover, at each stage of the grievance procedure, the Union had the opportunity to present additional evidence and arguments, including extenuating circumstances, for why the Employer should give the Electrician a lesser form of punishment. After these grievance discussions concluded, the Employer rejected the Union's grievance and explained why it determined the Electrician's discharge was appropriate and why the Union had not convinced it that the Electrician's discharge should be reduced to a lesser punishment. Although the parties were between contracts, this would not tend to undermine the Union's representational status.

We conclude that the Employer's conduct was lawful notwithstanding that it refused the Union's request to arbitrate its grievance over the Electrician's discharge. Initially, under extant Board law, an employer does not violate the Act by refusing to

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[14] *See, e.g.*, *Toledo Blade Co.*, 343 NLRB 385, 387-88 (2004) (holding that an employer violated Section 8(a)(5) when it unilaterally replaced its progressive discipline policy with a case-by-case policy). *Cf. St. Jude Care Center*, Case 32-CA-062630, Advice Memorandum dated June 6, 2012 (finding, pre-*Alan Ritchey*, that employer's failure to bargain prior to discharging employees under existing collectively-bargained discipline system during contract hiatus period was lawful; "[w]hen an employer issues discipline in accordance with a collectively-bargained policy, the union has already had the opportunity to weigh in on the matter and the exercise of discretion within the confines of a negotiated term or the parties' past practice is not a unilateral change.").

arbitrate a grievance that did not arise during the term of the expired contract since arbitration cannot be imposed on a party absent agreement.[15] And here, the contract containing the arbitration provision had expired. Under these circumstances, we conclude that the absence of binding arbitration does not render the Employer's conduct unlawful.

Accordingly, the Region should dismiss the Section 8(a)(5) allegation, absent withdrawal.

/s/
B.J.K.

[15] *See, e.g., Indiana & Michigan Electric Co.*, 284 NLRB 53, 55 (1987) (employer unlawfully changed grievance procedure, without bargaining to impasse, after agreement expired); *Bethlehem Steel Co.*, 136 NLRB 1500, 1503 (1962) (unilateral abandonment of contractual grievance procedure after contract expired violated Section 8(a)(5)), *enforced in pertinent part*, 320 F.2d 615 (3d Cir. 1963).