Newly Organized Employer Must Bargain Over Discretionary Employee Discipline Pre-First Contract, NLRB Rules

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Prior to entering into a first contract, an employer has a statutory obligation to bargain with the union that represents its employees before imposing discretionary "serious discipline" (such as suspension, demotion, or discharge) on any of those employees, the National Labor Relations Board again has held. *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (Aug. 26, 2016).

Discretionary discipline, like pay rates and benefits, is a term and condition of employment, the NLRB explained, and, thus, a mandatory subject of bargaining. The Board also held bargaining is required about less serious degrees of discipline, such as oral or written warnings, but may occur after the discipline is imposed.

The NLRB similarly had held in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), that an employer must provide notice and an opportunity to bargain before imposing certain types of discipline, including discharge, on employees represented by a union but are not yet covered by a collective-bargaining agreement. However, that and other Board decisions were invalidated by the U.S. Supreme Court's *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), because the Board's composition included two individuals whose appointments violated the United States Constitution.

Background

In *Total Security Management Illinois 1*, the parties stipulated to the following facts:

- The union was certified as the exclusive representative of a bargaining unit that included security guards Jason Mack, Winston Jennings, and Nequan Smith.
- The company discharged Mack, Jennings, and Smith.
- The company exercised discretion in discharging each of the employees; it did not apply any uniform policy or practice regarding discipline for their asserted misconduct.
- The company did not provide the union notice or an opportunity to bargain over any of the discharges before implementing them.
- At the time of the discharges, the company and the union had not reached an initial collective-bargaining agreement or another binding agreement governing discipline.
- At the time of the discharges, the company did not have a reasonable, good-faith belief that any of the three employees' continued presence on the job presented a serious, imminent danger to its business or personnel or that any of them engaged in unlawful conduct, posed a significant risk of exposing the company to legal liability for their conduct, or threatened safety, health, or security in or outside the workplace.

Terms and Conditions of Employment

According to the Board, all discipline affects employees' terms and conditions of employment: the "imposition of discipline on individual employees alters their terms or conditions of employment and implicates the duty to bargain if it is not controlled by pre-existing, nondiscretionary employer policies or practices ...." Further, it explained, because serious disciplinary action (such as suspension, demotion, and discharge) "plainly have an inevitable and immediate impact on employees' tenure, status, or earnings," bargaining must occur before "these sanctions are imposed ... because of the harm caused to the union's effectiveness as the employees' representative if bargaining is postponed."

On the other hand, the Board held, less serious discipline, such as "most warnings, corrective actions, counselings, and the like will not require pre-imposition bargaining, assuming they do not automatically result in more serious discipline, based on an employer's progressive disciplinary system, that itself would require such bargaining."

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Responding to arguments that the obligation to bargain might delay imposition of discipline, the Board noted the pre-imposition bargaining obligation exists only with respect to serious discipline and "attaches only with regard to the discretionary aspects...." The Board also observed that the employer's bargaining obligation is limited to "simply ... provid[ing] the union with ... sufficient advance notice ... to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion." The Board also recognized the employer's obligation, if timely requested by the union, to provide the union with relevant information about the discretionary aspects of the employer's disciplinary policy.

A beneficial aspect (to employers) of the inconvenience of the bargaining-over-discipline obligation, according to the Board, is that "permitting the employee to address the proposed discipline through his or her representative in bargaining is likely to lead to a more accurate understanding of the facts, a more even-handed and uniform application of rules of conduct, often a better and fairer result, and a result the employee is more able to accept."

Limited Bargaining Obligation

Employers are not required to bargain to agreement or impasse, the Board held. If agreement is not reached, the employer may discipline the employee and continue bargaining with the union to agreement or impasse.

Further, the employer need not bargain over the aspects of its disciplinary decision that are controlled by nondiscretionary elements of existing policies and procedures. The less discretion an employer exercises, the less bargaining is required of the employer. However, the employer must continue to bargain concerning the discipline, including the possibility of rescinding it, until it reaches agreement with the union or impasse.

"Exigent Circumstances"

"Exigent circumstances" is an exception to the Board's bargaining-about-discipline rule. An employer can impose serious discipline unilaterally where "exigent circumstances" exists — where an employer "has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel."

The Board declined to define the scope of exigent circumstances, adopting a case-by-case review rule. However, it noted that exigent circumstances "would surely encompass situations where (for example) the employer reasonably and in good faith believes that an employee has engaged in unlawful conduct that poses a significant risk of exposing the employer to legal liability for the employee's conduct, or threatens safety, health, or security in or outside the workplace."

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Despite this decision, employers and unions in the midst of first contract bargaining may continue to agree on the employer's unilateral right to impose discipline or on a procedure for bargaining over discipline that is less cumbersome than that imposed by the Board.

Employers should consult with labor counsel to determine whether and how their particular organizations are affected by *Total Security Management Illinois 1.*