Legal Update Article

NLRB Overrules 2016 Precedent, Eliminates Pre-Contract Obligation to Bargain Over Discipline

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Labor Relations

Reversing a four-year-old decision on the standard for employee discipline in advance of a first contract that many employers found onerous, the National Labor Relations Board (NLRB) has overruled *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016). *800 River Road Operating Company, LLC d/b/a Care One at New Milford* 369 NLRB No. 109 (June 23, 2020) (*Care One*).

The 2016 decision held that where employees are newly represented by a union, but a first collective bargaining agreement had yet to be negotiated, an employer was obligated to collectively bargain with the union regarding discretionary "serious discipline" (such as suspension, demotion, or discharge) it intended to impose. In *Care One*, the NLRB held that an employer does *not* have an obligation to bargain over discipline (even where the employer exercises discretion in imparting it) if it is given in accordance with an established disciplinary policy or practice.

The unanimous decision will be applied retroactively to all cases pending before the NLRB.

Total Security

*Under Total Security, a*n employer's failure to bargain about serious discipline violated the National Labor Relations Act (NLRA) if the employer exercised any discretion (even where that exercise was consistent with an existing disciplinary policy or practice) when determining whether and how to discipline an employee. *Total Security* allowed a limited exception where the disciplined employee's "continued presence on the job presents a serious, imminent danger to the employer's business or personnel," with a significant burden of proof on the employer.

Total Security was founded on the concept that when discretion was exercised in the imposition of serious discipline, a material change had occurred in an employee's terms and conditions of employment, and thus, bargaining was required before making the change. The decision caused some employers (pursuant to a suggestion in the decision) to attempt to negotiate an interim grievance procedure (while bargaining about the overall contract) that gave them the opportunity to lawfully impose discipline without first bargaining with the union, and the union a means for challenging that discipline. However, as the NLRB noted in *Care One*, this *Total Security* "safe harbor" was "illusory": the union would have to consent to bargaining over such an interim agreement, and "it is difficult to understand why a union intent on maximizing its advantage in collective bargaining would ever consent to negotiate an interim disciplinary agreement ...."

The usual remedy for a violation included reinstatement and backpay for the unlawfully disciplined employee, unless the employer could prove the discipline was imposed "for cause" as that phrase, contained in the NLRA, has been applied by the NLRB. ("No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was

suspended or discharged for cause.")

Care One

In *Care One*, the employer suspended three employees and discharged another pursuant to its existing disciplinary policy. It did so without giving the union that represented the employees prior notice or an opportunity to bargain. The Administrative Law Judge (ALJ) found the suspensions and discharge constituted serious discipline under *Total Security.* Therefore, the employer was obligated to give the union notice and an opportunity to bargain before it disciplined the employees. Because the employer had not done so, the ALJ decided the employer had violated the NLRA.

In the usual case, the ALJ's decision would have constituted a victory for the NLRB's General Counsel (GC). However, GC Peter Robb indicated after he took office that one of his goals was to secure a reversal of *Total Security*. Memorandum GC 18-02, Mandatory Submissions to Advice, December 1, 2017. Thus, the GC (and the employer) appealed the ALJ's decision to the NLRB, requesting that the NLRB overrule *Total Security.*

The NLRB did so, extensively criticizing *Total Security* for having "shredded long-standing principles governing the duty to bargain" and its bargaining obligation as "cumbersome and confusing."

The NLRB rejected the notion that acting in accordance with an existing disciplinary policy or practice could constitute a unilateral change, even where discretion was exercised, unless the employer materially deviated from the policy or practice. The NLRB noted that, in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), it had "recognized that discretionary aspects of a policy or practice are as much a part of the status quo as the non-discretionary aspects." Thus, every action that "involve[s] any discretion" does not constitutes a change, "regardless of what an employer has done in the past ...."

The NLRB further held:

> [T]he correct analysis ... must focus on whether an employer's individual disciplinary action is similar in kind and degree to what the employer did in the past within the structure of established policy or practice .... As such, in order to maintain the status quo, an employer must continue to make decisions materially consistent with its established policy or practice, including its use of discretion, after the certification or recognition of a union.

Takeaway

As long as the discipline a newly unionized employer imposes prior to the negotiation of a first collective bargaining agreement is consistent with what it has done in the past, the employer will not have an obligation to give the union that represents its employees notice and an opportunity to bargain about the discipline.

If you have any questions about the *Care One* or the NLRB, feel free to contact a Jackson Lewis attorney.

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