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

Advice Memorandum

DATE: March 18, 2005

TO : Celeste Mattina, Regional Director
Region 2

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

SUBJECT: New York University Medical Center
Case 2-CA-36642

This case was submitted for advice as to whether the Region should issue a Section 8(a)(5) complaint regarding the Employer's failure to provide relevant information to the Union and, if so, should argue in the alternative that the dispute should be deferred to the parties' upcoming arbitration proceeding.

We conclude that the Region should issue a complaint, absent settlement, and should not in this case argue that the Board should reconsider its policy of nondeferral of information violations.

The facts of this case do not appear to be in dispute. The Union represents security officers at the Employer's medical center. Employee Flores was discharged (after receiving several lesser disciplines) for abusing sick leave. The Union made several information requests, after the first grievance was filed regarding a written warning, including a request for all attendance logs the Employer had maintained during the past two years and all disciplinary write-ups regarding sick leave. The Union contends that other employees may have used more sick leave than Flores and not been disciplined.

The Employer supplied some of the information requested by the Union (e.g., documents regarding its sick leave policy and regarding disciplinary write-ups for a particular individual who had similar sick leave issues), but refused to supply the remaining information requested, asserting in general terms that the request was "overly burdensome."

Flores' grievances, culminating in his grievance over the discharge, will be arbitrated in a single proceeding that is scheduled for hearing on March 24, 2005. In preparation for that proceeding, the Union has issued a subpoena for "all documents in relation to sick days, emergency vacation days, and requests for the same for all unit employees."

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer's failure to provide the requested information violated Section 8(a)(5) of the Act. [*FOIA Exemption 5*

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It is well settled that an employer must provide a union with requested information "if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' collective bargaining representative."[1] In particular, information necessary for processing grievances must be provided, upon request.[2] It is clear that attendance logs and disciplinary write-ups regarding use of sick leave are relevant to Flores' grievances alleging disparate treatment for overuse of sick leave.

Under current law, the Board will not defer to a grievance-arbitration process a charge alleging a refusal to provide information.[3] Although the General Counsel has argued, in some cases, that the Board should reconsider this policy,[4] and some Board members have expressed a

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[1] Eazor Express, 271 NLRB 495, 496 (1984), quoting Associated General Contractors of California, 242 NLRB 891, 893 (1979), enfd. 633 F.2d 766 (9th Cir. 1980), cert. den. 452 U.S. 915 (1981).

[2] NLRB v. Acme Industrial Co., 385 U.S. 432 (1967). See, e.g., Eazor Express, supra; Bickerstaff Clay Products, 266 NLRB 983, 985 (1983); The Fafnir Bearing Co., 146 NLRB 1582, 1584-85 (1964), enfd. 362 F.2d 716 (2d Cir. 1966).

[3] United Technologies, 274 NLRB 504 (1985); Postal Service, 302 NLRB 918 (1991). See also Shaw's Supermarkets, 339 NLRB No. 108 (2003)(no deferral of charge alleging refusal to provide information relevant to whether the union should seek judicial enforcement of arbitration award).

[4] See Ball Foster Glass Container Co., 25-CA-27377, Advice Memorandum dated August 16, 2001; Laidlaw Children's Services, 20-CA-31565, Advice Memorandum dated April 30, 2004; Trane, a Business of American Standard Companies, 22-CA-26178, Advice Memorandum dated May 20, 2004.

willingness to do so under certain circumstances,[5] we would not argue that the dispute in this case should be deferred to the arbitration proceeding. As in other cases where the General Counsel has argued in favor of deferral, the parties have a long-standing collective bargaining relationship, there is an agreement that provides for binding and final arbitration, and the dispute is already before the arbitrator, who presumably will rule on the Employer's compliance with a subpoena issued by the Union for similar information. However, there is no bona fide dispute over the producibility of the requested documents, which clearly are relevant and must be provided under statutory principles. Nor is there any contractual provision regarding the disclosure of information to the union, which an arbitrator would be particularly well-suited to interpret. Finally, the Union sought this information early in the grievance process, and the Employer has consistently refused to make it available despite its obvious relevance and usefulness to the Union in pursuing its grievances. Had the Union had this information earlier in the process, the matter might have been resolved without the need for arbitration. In all these circumstances, and where the Employer is not even arguing in favor of deferral, we would not find deferral to be appropriate notwithstanding the fact that the arbitration has now been scheduled and a subpoena for similar information has issued.

Accordingly, the Region should issue complaint, absent settlement.

B.J.K

[5] See WSNCH North, Inc., 344 NLRB No. 3 (January 21, 2005); Pacific Bell Telephone Co. d/b/a SBC California, 344 NLRB No. 11, n. 3 (February 4, 2005).