

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

Advice Memorandum

DATE: August 9, 2007

TO : Martha Kinard, Regional Director
Region 16

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

SUBJECT: Advocacy, Inc. 530-8081-4300
Case 16-CA-25477

This case was submitted for advice as to whether the Employer's withdrawal of recognition violated Section 8(a)(5) where the Employer asserts it was privileged to withdraw recognition because of a "disabling conflict of interest." The Employer maintains that the Local Union's (Local 6182, "the Local") affiliation with the Communication Workers (CWA) creates a conflict of interest because another CWA local (CWA Local 6186, "TSEU" or "Sister Local") represents employees whose interests are diametrically opposed to the Employer's mission.

We conclude that the Local's relationship with its Sister Local, through common affiliation with the CWA, does not create a disabling conflict of interest and, therefore, the Employer was not privileged to withdraw recognition.

FACTS

The federal government provides funding to the states to establish a system to protect and advocate for the rights of persons with mental illness and developmental disabilities (Protection and Advocacy Services, "P&As").¹ Every state has a designated P&A that is charged with the duties of monitoring, investigating and remedying adverse conditions in both private and public facilities for the disabled. P&As are instrumental in the "de-institutionalization movement," which is a national effort to allow disabled persons to leave state institutions and live in the community, if they wish and are able to do so. P&As also assist the disabled by giving them access to inclusive educational programs, financial entitlements, accessible housing and productive work opportunities. P&As

¹ See 42 U.S.C. Sec. 10801-1085 (the Protection and Advocacy for Mentally Ill Individuals Act, or "PAMII Act"); *Id.* Sec. 15041-15045 (the Developmental Disabilities Assistance And Bill of Rights Act, or "DD Act")

work to prevent and remedy abuse and neglect and provide legally based advocacy services for the disabled.

The Employer (Advocacy, Inc. or AI), is the designated Protection and Advocacy agency (P&A) for disabled persons in the State of Texas. AI provides advocacy services throughout Texas. It has regional offices in Austin, Dallas, Houston, San Antonio, Lubbock, and El Paso, Texas and satellite offices in McAllen, Corpus Christi, Laredo, Wichita Falls, Longview and Fort Worth, Texas.

On July 27, 1988, the Regional Director of Region 16 certified the Communications Workers of America, AFL-CIO as the exclusive bargaining representative of all professional and non-professional AI employees. The CWA formed CWA Local 6182 to be the employees representative. AI and CWA Local 6182 ("the Local") then entered into successive collective-bargaining agreements, the most recent of which has an effective date of from June 1, 2004 through May 31, 2007. The most recent contracts, including the latest contract, have been negotiated by the Local with no participation by the National Union. The National has neither recommended nor approved the Local's proposals. Although the National Union does provide bargaining advice to other locals, it has not provided such assistance to Local 6182; Local 6182 pays a lower percentage of per capita dues to the National because of its high degree of autonomy.

The Lubbock State School (LSS) in Lubbock, Texas, is a residential treatment facility for persons with developmental disabilities and is owned/operated by the Texas Department of Aging and Disability Services (DADS). AI Advocate Mike Mayfield has regularly visited LSS to service the residents of that facility. On December 11, 2006, the U.S. Department of Justice, Civil Rights Division (DOJ) issued a letter to Texas Governor Rick Perry after it conducted an 18-month investigation of the LSS under the Civil Rights of Institutional Persons Act (CRIPA), 42 U.S.C. Section 1997. The DOJ determined that LSS "substantially departs from accepted professional standards of care in that the facility fails to: (1) provide adequate health care (including nursing services, psychiatric services, general medical care, pharmacy services, dental care, and occupational and physical therapy, and physical and nutritional management); (2) protect residents from harm; (3) provide adequate behavioral services, freedom from unnecessary or inappropriate restraint and habilitation; and (4) provide services to qualified individuals with disabilities in the most integrated setting appropriate to their needs."

AI took swift action after it received the DOJ report. AI was concerned because Advocate Mike Mayfield, who regularly visited LSS, did not make AI aware of the conditions there. AI talked to its Lubbock field office and Mayfield, who reported that the Lubbock field office had contacted the LSS superintendent and that remedial measures would be taken. AI also sent a management-led team comprised of supervisors and bargaining unit employees to conduct visits to the LSS and the state schools located in Denton, Brenham and Lufkin. The management teams' visits to the facilities led to significantly increased reports of problems warranting the opening of intake cases. The management-led teams also reported that the state school administration and personnel were hindering their review efforts by hovering nearby when an AI employee was talking to a resident, by repeatedly asking for identification of AI employees, and by denying access to records after residents had provided releases.

During a management-led team visit to the Denton State School, AI Supervisor Jeff Tate found a copy of a flyer entitled "2007 Legislative Agenda." The 2007 Legislative Agenda contained the logo "CWA-TSEU" and identified the Union as Texas State Employees Union, CWA Local 6186. Among the listed goals of the Legislative Agenda were: "allocate full funding for adequate staffing and services" and "stop all plans for closure or privatization of any state school, hospital or center." One of AI's stated goals is a mandatory closure plan for all state schools. On March 5, 2007,² AI told the Union that these facts created a conflict and gave the Union 72 hours to resolve the conflict or face withdrawal of recognition.

Shortly thereafter, the Union filed this charge. AI defended against the charge by asserting that the Local's relationship with its Sister Local created a "disabling conflict of interest" in that "TSEU's legislative agenda places it directly at odds with AI's mandate to advocate for the placement of disabled persons in the community (if appropriate) and to close state schools, while TSEU's stated interest is to keep the state schools open." On March 9, AI officially notified employees that it had withdrawn recognition from the Union because of this alleged conflict.

ACTION

We conclude that the Local's relationship with its Sister Local through its affiliation with the National Union does not create a disabling conflict and, therefore, that the Employer's withdrawal of recognition violated

² All dates hereinafter are in 2007.

Section 8(a)(5) of the Act. Accordingly, complaint should issue, absent settlement.

In Bausch & Lomb Optical Co.,³ the Board recognized that, where a bargaining representative had a disabling conflict of interest, the employer would be privileged to refuse to bargain with it without running afoul of Section 8(a)(5) of the Act. There, the union representing the employer's employees had established and operated a company to engage in the same business and locality as the employer, thus becoming one of its direct competitors. The Board held that the employer would not be required to bargain with the union due to the "innate danger" to the collective bargaining process from the union's "special interest."⁴ Thus, the union's transformation into a business rival:

[D]rastically change[d] the climate at the bargaining table from one where there would be reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest to one in which, at best, intensified distrust of the [u]nion's motives would be engendered.⁵

The Board emphasized that good faith bargaining requires that a bargaining representative owe complete and undivided loyalty to the party it represents.⁶ Otherwise, unions might make bad faith demands during negotiations in order to drive the employer out of business, and would thereby deprive employees of their jobs.⁷ Where a union has a "disabling conflict of interest," the Board does not require the employer to determine whether each union demand was made in good faith.⁸ Rather, the latent danger that the union would misuse its position, even if as yet unrealized, made "fair dealing with the [employer] inherently

³ 108 NLRB 1555, 1561 (1954); See also Alanis Airport Services, 316 NLRB 1233, 1233 (1995).

⁴ Id. at 1559.

⁵ Id. at 1561.

⁶ Id. at 1559 (citing Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)).

⁷ Id. at 1560.

⁸ Id. at 1561.

impossible," and privileged the employer to refuse to bargain with the union.⁹

In addition to conflicts of interest arising out of a union's status as a business competitor, the Board has recognized a few other factual scenarios that can create a disabling conflict: a union's representation of employees of both a general contractor and a subcontractor (where there is an "overt act" demonstrating that the union is acting at cross-purposes to the employees of the subcontractor),¹⁰ and a union's permitting supervisors to act as union officials.¹¹ The party seeking to establish a disabling conflict of interest bears a heavy evidentiary burden.¹²

Here, the Employer asserts that the TSEU's legislative agenda, i.e., preventing the closing of state institutions, directly conflicts with the Employer's mission of closing the state schools, and that such a conflict of interest privileges its withdrawal of recognition. While the stated conflict may exist, the record fails to reveal that the Local supports or otherwise has any binding obligation to support its Sister Local's legislative agenda, i.e., preventing the closing of state schools.¹³ Furthermore, although the National Union may support TSEU's agenda, this would not present an "innate danger" to the bargaining relationship because Local 6182 is completely autonomous from the National in its bargaining relationship with the Employer; the National Union neither suggests nor approves

⁹ Id. at 1562.

¹⁰ See, Catalytic Industrial Maintenance Co., 209 NLRB 641 (1974) (union may not represent employees of both general contractor and subcontractor where union had committed an "overt act," i.e., had advanced a proposal to the general contractor that seriously jeopardized the sub-contract, which showed it was acting at cross-purposes with its duty to represent the subcontractor's employees.); Valley West Welding Co., 265 NLRB 1597 (1982) (same).

¹¹ See, United Mine Workers, 192 NLRB 1022 (1971); Los Alamitos Medical Center, 287 NLRB 415 (1987) (disabling conflict where supervisors served as union officers).

¹² CMT, Inc., 333 NLRB 1307 (2001).

¹³ We conclude that CWA constitutional provisions that require local unions to support a "pro-Union" agenda are too vague and general to bind the Local to its Sister Local's specific legislative agenda.

bargaining proposals and appears to have no involvement whatever in the bargaining process.¹⁴ The Board has rejected the notion that a conflict of interest may exist based solely on the fraternal nature of union membership.¹⁵ Moreover, given the fact that Local 6182 represents only the Employer's employees, it would be highly unlikely that it would work in bargaining at cross-purposes to the interests of those employees, and therefore to its own interests.

In addition, although the Employer asserts that a conflict of interest is demonstrated by the increase in case intake by its management-led teams, there is no basis to conclude that the poor performance of unit employees was due to employees' reluctance to report on "fellow union members." The discrepancy in the level of case intake between unit employees and the management-led teams could have been the result of: (1) greater aggressiveness of the management teams in pursuing the intake process, (2) employee biases based on an empathetic relationship with the state employees by virtue of years of close oversight, and/or (3) simple poor performance by unmotivated, poorly trained, or inadequately supervised employees. The Employer's assertion that the unit employees' alleged poor performance is related to their membership in the Union is pure speculation and insufficient to meet its burden of establishing a disabling conflict of interest. We conclude, therefore, that the alleged conflict of interest would not privilege the Employer's withdrawal of recognition.¹⁶

¹⁴ See, NLRB v. David Buttrick Co., 399 F.2d 505, 507 (1968) (approving Board's finding of no "proximate danger" to the bargaining process, in part, because International's power to control local was remote.)

¹⁵ In Guardian Armored Assets, LLC, 337 NLRB 556 (2002) the Board considered whether a union was disqualified from representing private guards when the same union represented public police officers. It was suggested that the public officers may not perform their duties correctly "out of loyalty to their union brethren." *Id.* The Board held that such conflicts were not inevitable and "the Act was not intended to address conflicts of this type." *Id.*

¹⁶ The Employer presented a letter from a disability rights advocate wherein it was asserted that the Administration on Developmental Disabilities (ADD) within the Department of Health and Human Services, the federal agency that oversees the P&As, has ruled that union representation of P&A employees by a union that also represents institutional employees is an inappropriate conflict of interest.

Assuming the absence of a disabling conflict of interest under Bausch & Lomb, the Employer nevertheless would justify its withdrawal of recognition based on the Texas Bar's Disciplinary Rules, which require the disclosure of even a potential of conflict of interest to a potential client.¹⁷ The Employer provided a law professor in ethics who testified that he believes that the employees' membership in Local 6182, affiliated with the same national union to which the TSEU local is affiliated, represents just such a potential conflict that must be disclosed to potential clients.¹⁸ He further testified that while a client may waive such a conflict of interest, the residents here may be incompetent to do so and may not have guardians who can waive the conflict on their behalf. The professor estimates that to secure appropriate waivers through professional and/or judicial procedures for 200 residents would cost about \$600,000,¹⁹ which could effectively preclude the Employer from being able to carry out its advocacy mission.

However, neither ADD nor the disability rights advocate has been able to specifically identify any such ruling. Cf. Electrical Workers Local 48 (Kingston Constructors), 332 NLRB 1492, 1501 (2000) (giving deference, as a matter of comity, to the Department of Labor's interpretation of the Davis Bacon Act).

¹⁷ Section 1.06(b)(2) of the Texas Disciplinary Rules forbids the representation of a person if the representation "reasonably appears to be or become adversely limited by the lawyer's . . . responsibilities to a third person or by the lawyer's own interests" unless the lawyer "reasonably believes the representation will not be materially affected" and "each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences" Attorneys and paralegals employed by the Employer must comply with the Texas Bar's Disciplinary Rules.

¹⁸ The professor was only giving his opinion and did not cite any authority that would support that opinion. We were unable to find any Texas case discussing a conflict of interest based on membership in fraternal organizations. The Texas Bar ethics office would not discuss these issues with lawyers not licensed in Texas, and therefore we are unable to confirm or reject the expert's opinion. [FOIA Exemptions 2 and 5

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¹⁹ The average cost of an evaluation would be about \$3000.

We reject this argument. Initially, we note that this defense was newly asserted after the filing of this charge and was not the stated reason for the withdrawal of recognition. Further, the existence of this asserted potential conflict does not prevent the Employer from representing state school clients, but merely requires disclosure of this conflict to the client who may then decide to waive it. While the Employer asserts that clients may be unable to waive this conflict without costly professional and/or judicial proceedings, it presents no evidence as to how many individuals would be in this position, and there is no reason to presume the legal incompetence of state school residents who have thus far been considered competent to direct their own legal representation.

Accordingly, since the Employer has failed to present evidence of a disabling conflict of interest which would privilege its withdrawal of recognition, and has otherwise failed to justify its withdrawal of recognition, complaint should issue, absent settlement.

B.J.K.