

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

Advice Memorandum

DATE: March 19, 2008

TO : Rochelle Kentov, Regional Director
Region 12

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

SUBJECT: Brookdale Senior Living, Inc. d/b/a The Nursing Center at
Freedom Village, The Inn at Freedom Village
and Freedom Village Retirement Center 530-6050-5075
Case 12-CA-25457 530-6067-4077

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) by unilaterally ceasing to deduct and remit dues during the term of the collective-bargaining agreement from: (1) employees whose dues check-off authorizations were allegedly missing from the Employer's files; (2) employees whose dues check-off authorizations were signed but undated; and (3) probationary employees who had executed authorizations.

We conclude that the Region should issue a Section 8(a)(5) complaint, absent settlement, alleging that the Employer unlawfully refused to deduct and remit dues with respect to all three categories of employees.¹

On January 31, 2006, American Retirement Corp. ("the Employer"), a successor employer, entered into a collective

¹ We agree with the Region's determination that deferral to arbitration is inappropriate in this case because the parties no longer have a collective-bargaining relationship. Under Collyer Insulated Wire, 192 NLRB 837, 842 (1971) and United Technologies Corp., 268 NLRB 557, 558 (1984), deferral is only appropriate where, *inter alia*, the dispute arises "within the confines of a long and productive collective-bargaining relationship." In Avery Dennison, 330 NLRB 389, 391 (1999), the Board found that deferral was not appropriate in part because the employer had unlawfully withdrawn recognition and there was no longer a productive collective-bargaining relationship. Noting that there was "no Board precedent" for deferring "in the absence of a current collective-bargaining relationship[.]" the Board pointed out that the "principle underlying deferral" - to enhance bargaining relationships by relying upon the agreed-upon dispute resolution mechanism -- "loses its force" when such a relationship no longer exists. 330 NLRB at 391.

bargaining agreement with Local 1199, SEIU, Florida Healthcare Union ("the Union") covering three facilities -- a skilled nursing home, an assisted living facility, and an independent living facility. The agreement was effective from June 1, 2006 through October 15, 2007. Under that agreement, the Employer recognized the Union as the collective bargaining representative of two separate units: a unit of approximately 334 employees that included all employees (known as "Associates"), excluding supervisors, confidential employees, and part-time employees; and a unit of approximately twelve non-supervisory guards. Under Article III(d), the Employer agreed to check off and remit union dues "[p]rovided the Employer has been furnished a duly signed and properly executed written authorization form[.]"

In February, 2007,² the Employer began informing the Union that it would not deduct dues for designated individuals. By letter dated February 23, the Employer stated that it would not honor check-off authorizations submitted for probationary employees. Through a series of letters in March, the Employer notified the Union that it would cease deducting dues for named employees whose authorizations were either missing from its files or undated. Then, on April 11, the Employer notified the Union that it had refunded dues totaling \$19,524.97 to ten named employees. The Employer demanded that the Union reimburse the Employer this amount, pursuant to a contract provision that required the Union to indemnify the Employer for "all suits, claims, demands or liabilities" that arose out of the Employer's compliance with the dues check-off clause.

The Employer subsequently withdrew recognition from the Union upon the expiration of the contract, based upon disaffection petitions signed by a majority of the employees in each unit. The Region has determined that the Employer's conduct regarding dues check-off with respect to this small group of employees did not taint the otherwise lawful withdrawal of recognition.

A. The "Missing" Authorizations

The Employer claimed that it was missing dues check-off authorizations for two employees, ceased deducting dues for those employees, and refunded to them dues paid over the course of several years, including the period when they worked for the predecessor employer.

² All dates are in 2007 unless otherwise indicated.

The Union provided the Region with signed and dated check-off authorizations for these two employees.³ The Employer and its predecessor deducted dues from their paychecks for several years, something neither would have done had they not received check-off authorizations. And, there is no evidence that either employee ever objected to the dues deductions. Under these circumstances, we agree with the Region that the Employer violated Section 8(a)(5) by unilaterally ceasing to deduct and remit dues for these employees.⁴

B. The Undated Authorizations

The Employer also violated Section 8(a)(5) by ceasing to deduct and remit dues for those employees whose check-off authorizations were undated. The contract language requiring "a duly signed and properly executed written authorization form" is ambiguous as to whether those forms must be dated. The Employer and its predecessor had a past practice of honoring undated authorizations and, with a single exception, these employees did not attempt to revoke their check-off authorizations or otherwise object to check-off.⁵ Moreover, there is no bargaining history concerning the contractual language of "properly executed" checkoff authorizations. In these circumstances, we conclude that the Employer has no reasonable argument that it was privileged under the Agreement to discontinue employees' dues deductions.

The Employer also contends that the authorizations must be dated so that it can ascertain the window period for revocation. However, the Board has held that an employer may reasonably construe the period of

³ Although one of these employees now disputes that the signature on her authorization is hers and also disputes that she knows the individual who witnessed that signature, it appears to be her signature and the Employer has not demonstrated otherwise.

⁴ See generally Public Service Co., 312 NLRB 459, 468 (1993) (employer violated Section 8(a)(5) by failing to honor dues check-off authorizations of three temporary employees who should have been included in the bargaining unit). See also Cherry Hill Textiles, 309 NLRB 268, 269 (1992), enfd. mem. 7 F.3d 221 (2d Cir. 1993) (it was reasonable to infer that authorizations existed where the employer had deducted dues).

⁵ One employee unsuccessfully tried to revoke dues check-off in May, 2004 but made no further attempts.

irrevocability for undated cards based upon the dates the cards were received.⁶ Therefore, the fact that the cards were undated does not render them invalid.⁷

C. The Probationary Employees' Authorizations

The parties' collective bargaining agreement expressly covers the probationary employees. Thus, Article V(d) provides that, "[d]uring the probationary period, Associates shall be covered by the terms and conditions of this contract, unless otherwise specified." In several instances, probationary employees are specifically exempted from coverage, as in the provisions governing bumping rights, leave under the Family and Medical Leave Act, and insurance. There is no such exclusion in the dues check-off clause. Since the probationary employees clearly are part of the bargaining unit and covered by the contract, including the dues check-off provision, the Employer violated Section 8(a)(5) by refusing to deduct and remit dues for probationary employees without obtaining the Union's consent.⁸

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by: (1) unilaterally ceasing to deduct and remit dues for those employees whose check-off authorizations were allegedly missing but produced by the Union; (2) unilaterally ceasing to deduct and remit dues for those employees whose check-off authorizations were undated; and (3) refusing to deduct and remit dues for the probationary employees who executed authorizations. [*FOIA Exemptions 2 and 5*

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⁶ See Miller Brewing Co., 193 NLRB 528, 528 (1971) (employer acted reasonably and in good faith and did not violate Section 8(a)(2) by using the date of receipt of the check-off cards as the anniversary date and, on that basis, not honoring revocation requests).

⁷ We further note the Employer rejected cards even where the only part of the date that was missing was the calendar year, so that it could easily have calculated the window period for revocation from the month and day on the card itself.

⁸ See Oklahoma Fixture Co., 331 NLRB 1116, 1122 (2000), *enfd. en banc* 332 F.3d 1284 (10th Cir. 1284) (respondent violated Section 8(a)(5) by ceasing to deduct union fees for probationary employees who were part of the bargaining unit and were covered by the collective-bargaining agreement).

[*FOIA Exemptions 2 and 5*, continued
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B.J.K.