

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

Advice Memorandum

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DATE: May 18, 2011

TO : Rochelle Kentov, Regional Director
Region 12

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

SUBJECT: Coral Gables Hospital
Case 12-CA-26789

The Region resubmitted this case for advice pursuant to the Charging Party's request for reconsideration. The charge alleges that the Employer violated Section 8(a)(5) by banning Union representatives from its facility, where the Union had a right of access pursuant to the parties' extant collective-bargaining agreement. We adhere to our initial conclusion that the Region should dismiss the charge, absent withdrawal, as it would not effectuate the purposes and policies of the Act to proceed.

FACTS

The Union, SEIU Healthcare Florida, represents two bargaining units of the Employer's employees. At the time of the events described below, both units were covered by a single collective-bargaining agreement that was due to expire on September 30, 2010. Article Two of the agreement permits the Union to enter the Employer's facility "at reasonable times for the purpose of observing whether this Agreement is being adhered to, and to check on complaints of bargaining unit employees, and to engage in committee work." The agreement also gives the Union access to the facility to conduct a monthly meeting of the general membership.

In the spring of 2010, the Union made a concerted effort to increase its on-site visits with the Employer's bargaining unit employees. The Union asserts that it increased the frequency of visits because of employee concerns about anticipated market adjustments that were required under the extant contract, upcoming negotiations, current working conditions, and because the Union had received complaints from employees that they were not adequately being serviced. For all these reasons, the Union hired additional personnel to service the unit,

specifically, by visiting with them at the hospital to speak with them about terms and conditions of employment.

On June 4, 2010, an employee filed two petitions to decertify the Union from representing the Employer's two bargaining units. Pursuant to a stipulated election agreement, the Region scheduled an election for July 16.

In the meantime, the Employer was aware of the Union's more frequent visits with employees at the hospital and suspected that the Union was abusing its contractual right of access to meet with employees and campaign against the decertification vote. The Employer's suspicions came to a head on the morning of July 8. Early that morning, the Employer's human resources manager arrived at the hospital and learned that two Union representatives were still on site from having visited with employees throughout the night. Two more representatives arrived that morning to conduct a previously scheduled general membership meeting. That same morning, the Employer's attorney also happened to arrive at the hospital for prescheduled business. The human resources manager complained to the attorney about the Union's constant presence at the hospital and voiced her suspicion that they were there for purposes other than those privileged by the collective-bargaining agreement.

The attorney confronted the Union representatives and, though there are conflicting versions of exactly who said what, it is undisputed that the confrontation became quite heated. It is also undisputed that the Employer's attorney told the Union representatives that they were abusing their contractual privileges and had to leave the premises. The Employer claims, and the Union disputes, that a Union representative, who had been temporarily transferred from his permanent post in New York just two weeks prior, physically threatened the Employer's attorney. The Employer's attorney forced him and another Union representative to leave, though it permitted the other two to stay and conduct the Union's membership meeting.

Later that day, the Employer sent a letter informing the Union that, effective immediately, it was denying Union representatives access privileges to the hospital until the Union provided assurances that it would not violate the hospital's policies. The letter further stated that the Union representative from New York was barred indefinitely from the hospital.

Two days later, on July 10, the Employer's and Union's attorneys discussed the events of July 8 in an attempt to resolve the dispute. The Employer agreed to restore the Union's contractual access privileges, though it maintained that the representative from New York would remain barred from the hospital. There is no evidence that that representative ever again attempted to enter the facility and, within days of these events, he returned to his permanent post in New York.

The Union filed this charge on July 12. The Union did not request to proceed with the decertification election but, because the charge was filed so close to the election date, the Region conducted the election on July 16, as scheduled, and impounded the ballots.

The Union contends that the Employer unilaterally modified the Union's contractual access privileges in violation of Section 8(a)(5). The Union claims that the denial of access impeded its ability to perform its duties as the employees' bargaining representative during the critical period right before the election, and created an impression in the minds of employees that selection of the Union as bargaining representative was meaningless. The Union has offered general hearsay evidence that unspecified employees complained about the Union's absence from the facility, and that they were waiting for information from Union representatives, but that the Union was not responsive and was not providing the increased services it promised earlier that year.

ACTION

We adhere to our initial conclusion that, although there is arguably merit to the Section 8(a)(5) allegation, the Region should dismiss the charge, absent withdrawal, as it would not effectuate the purposes and policies of the Act to proceed.

There is insufficient evidence that this arguable violation had any impact on the Employer's bargaining unit employees. Thus, it is undisputed that, on the day of the confrontation over Union access to the hospital, the Employer permitted two Union representatives to remain in the facility and conduct their previously scheduled general membership meeting. It is also undisputed that the general

ban on access that was imposed on July 8 was lifted on July 10. Although the Employer stated that it would still not allow a certain Union representative to enter the hospital, there is no evidence that he ever attempted to gain access to the hospital and, in fact, he had only been assigned to service the Employer's employees two weeks prior to the confrontation and he returned to his permanent post shortly thereafter. Therefore, it is doubtful that the Employer's actions had any impact on employees' perception of the Union.

Although the Union contends that employees complained about the Union's two-day absence from the hospital, it presented only general hearsay evidence and, though given the opportunity, failed to present any direct evidence of the employees who complained, to whom, and when.

In sum, given the short duration of the Employer's arguably unlawful denial of access, and the absence of evidence that the violation had any impact on employees, we conclude that it would not effectuate the purposes and policies of the Act to issue complaint here. Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.