

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

## Advice Memorandum

DATE: May 27, 2011

TO: Karen P. Fernbach, Acting Regional Director  
Region 2

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

SUBJECT: Douglas Elliman Property Management and  
Chelsea Commonwealth LLC  
Case 2-CA-39178

The Region submitted this Section 8(a)(1) and (3) case for advice as to whether, under the General Counsel's proposed new standards, it should defer to an arbitral award upholding the Charging Party's termination.<sup>1</sup> We conclude that this case would not be an appropriate vehicle to argue for the adoption of the proposed new deferral standards because the arbitral award is not clearly repugnant to the Act, and the Region should defer to that award.

Briefly, the Employer notified the Charging Party that it was eliminating his position as the superintendant of a residential building managed by the Employer and that, consequently, he would be terminated. He then filed a Section 8(a)(1) and (3) charge alleging that the Employer had discharged him for engaging in union activity. Specifically, he claimed that the Employer discharged him because he complained about hazardous working conditions and the Employer's failure to pay employees holiday pay.

The Region deferred the charge to arbitration pursuant to Collyer.<sup>2</sup> On March 14, 2010, the Arbitrator issued his Opinion and Award, upholding the Charging Party's termination. The Arbitrator considered three issues: (1) was the Charging Party's termination a discharge or layoff; (2) if his termination was a discharge, did the Employer have just cause under the collective-bargaining agreement; and (3) with respect to the NLRB charge, was the termination discriminatory, based on the Charging Party's disability or union activity. The Arbitrator concluded first that the Charging Party's termination was a layoff,

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<sup>1</sup> See "Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases," GC Memorandum 11-05, dated January 20, 2011.

<sup>2</sup> Collyer Insulated Wire, 192 NLRB 837 (1971).

properly effected under the contract. He found that the evidence supported the Employer's position that a decrease in building occupancy levels resulted in a decrease in work and provided a legitimate business reason for the elimination of the superintendant position. He further found that the asserted business reason was not a pretext for a discriminatory termination. In light of these findings, the just cause issue was moot. Finally, with regard to the pending unfair labor practice charge, the Arbitrator expressly concluded that the Charging Party's termination was not based on his disability or union activity.

Under the General Counsel's proposed new standards for deferral in Section 8(a)(1) and (3) cases, the party urging deferral must demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing, the Board should defer unless the award is clearly repugnant to the Act.<sup>3</sup>

We agree with the Region that this would not be an appropriate vehicle to urge adoption of the proposed new standards. Here, the parties presented the statutory issue to the Arbitrator, and while he may not have enunciated the applicable statutory principles, he implicitly applied them. Thus, he concluded that the Employer terminated the Charging Party for a legitimate business reason and that this was not a pretext for a discriminatory decision. We also agree with the Region that the Arbitrator's decision is not clearly repugnant and instead is susceptible to an interpretation consistent with the Act.<sup>4</sup>

Accordingly, the Region should defer to the arbitral award and dismiss the instant charge, absent withdrawal.

B.J.K.

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<sup>3</sup> GC Memorandum 11-05 at 6-7.

<sup>4</sup> See Olin Corp., 268 NLRB 573, 574 (1984). Indeed, given that the Region's investigation also found no basis for the Charging Party's allegation that he was discriminatorily discharged, this case would have been more appropriately dismissed rather than deferred.