

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

Advice Memorandum

DATE: December 12, 2012

TO: William A. Baudler, Regional Director
Region 32

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

SUBJECT: California Autism Foundation, Inc.
Cases 32-CA-080038 and 32-CA-080235

530-6050-2575
530-6050-3395
530-6067-4011-6200
530-6067-4055-8500
530-8049

The Region submitted these cases for advice regarding whether the Employer violated Section 8(a)(5) of the Act by refusing to engage in pre-disciplinary bargaining with the newly-certified Union over the terminations of two employees. We agree with the Region that the Employer did not violate Section 8(a)(5) by failing to provide the Union with notice and an opportunity to bargain prior to terminating these two employees because the Employer acted consistently with its past practice established prior to the Union's certification.

California Autism Foundation, Inc. ("Employer") is a Richmond, California-based organization that provides support, training, and residential care services for persons with autism and other developmental disabilities. Service Employees International Union, Local 1021 ("Union") was certified November 30, 2011, as the exclusive representative of the Employer's non-professional employees, and the parties are still bargaining for a first contract. On January 9, 2012, the Union demanded that the Employer refrain from making any changes to terms and conditions of employment—including issuing employee warnings, counselings, disciplines, or terminations—without first affording the Union notice and an opportunity to bargain.

The Employer maintains an employee handbook, which predates the Union's certification. That handbook lists a variety of prohibited conduct that could result in disciplinary action, and specifies that the Employer "in its discretion may proceed to any form of discipline directly if such discipline is considered warranted" and that "[t]here is no express or implied obligation to impose discipline in any particular order or progression."

After the Union's January 9 bargaining demand, the Employer terminated two employees without providing the Union prior notice and an opportunity to bargain. Employee A was terminated after allegations that she verbally abused a consumer were substantiated through an investigation by the California Department of Social Services Community Care Licensing Division, a state agency that monitors the Employer's operations. Prior to the Union's certification, the Employer's consistent practice with respect to allegations that an employee verbally abused a consumer was to terminate the accused employee if the verbal abuse allegation was substantiated by a state agency investigation. Employee B was terminated after the Employer confirmed that he left a consumer behind when returning from a field trip. Prior to the Union's certification, the Employer's consistent practice was to terminate drivers who left a consumer behind when returning to the facility from a field trip.

Employee discipline is a mandatory subject of bargaining, and any alteration of a disciplinary system is also a mandatory subject of bargaining.¹ Thus, the Board has indicated that an employer that previously has exercised unlimited discretion when imposing employee discipline will be required to bargain with a newly certified union over the imposition of discipline.² However, an employer does not have a duty to bargain prior to the imposition of discipline if it continues to issue discipline within the parameters of a preexisting disciplinary system that relies upon objective standards and criteria circumscribing its discretion.³

Here, initially, we agree with the Region that the Union had an outstanding demand to bargain over the imposition of employee discipline. We also agree that while the employee handbook declares that the Employer has broad discretion to determine the appropriate level of employee discipline, the evidence indicates that the Employer has consistently applied objective standards for the type of employee conduct involved here. Specifically, the Employer has a consistent past practice of terminating: (1) employees alleged to have verbally abused consumers when a state agency substantiates the verbal abuse allegations, and (2) drivers who leave consumers behind when returning from a field trip. Since the Employer

¹ *Fresno Bee*, 337 NLRB 1161, 1186 (2002).

² See *Alan Ritchey, Inc.*, 354 NLRB No. 79, slip op. at 4 n.12 (2009) (two-member decision) (noting that the Board has not yet decided how much employer discretion is required before a duty to bargain attaches). See also, generally, *NLRB v. Katz*, 369 U.S. 736, 746 (1962) (employer must bargain with union over merit increases which were "in no sense automatic, but were informed by a large measure of discretion").

³ *Fresno Bee*, 337 NLRB at 1186-87; *Alan Ritchey*, 354 NLRB No. 79, slip op. at 4.

consistently terminated all employees who engaged in this type of misconduct, it has not made a change in its disciplinary system and had no duty to engage in pre-disciplinary bargaining with respect to Employees A and B.

Accordingly, the Region should dismiss the charges, absent withdrawal.

/s/
B.J.K.