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UNITE HERE Local 1 (Stefani's Pier Front, Inc. d/b/a Crystal Garden) and Eileen Chapa. Case 13-CB-096888

February 12, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND SCHIFFER

On July 12, 2013, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed exceptions, a supporting brief, and a reply brief. The Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.¹

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. February 12, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹ We agree with the judge, for the reasons he states, that the Respondent Union satisfied the requirements of *Philadelphia Sheraton Corp.*, 136 NLRB 888 (1962), *enfd. sub nom. NLRB v. Hotel Employees Local 568*, 320 F.2d 254 (3d Cir. 1963). Moreover, as the judge also found, the Charging Party willfully and deliberately determined not to satisfy her dues obligations to the Union. This conduct would have excused any failure by the Union to fully comply with the *Philadelphia Sheraton* requirements. *I.B.I. Security*, 292 NLRB 648, 649 (1989).

Christina B. Hill, Esq., for the Acting General Counsel.
Kristin L. Martin, Esq., of San Francisco, California, for the Respondent-Union.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on May 23, 2013, in Chicago, Illinois, pursuant to a complaint and notice of hearing in the subject case (the complaint) issued on March 15, 2013, by the Regional Director for Region 13 of the National Labor Relations Board (the Board). The charge was filed on January 23, 2013, by Eileen Chapa (the Charging Party or Chapa) alleging that Unite Here Local 1 (the Respondent or the Union), has engaged in certain violations of Section 8(b)(2) of the National Labor Relations Act (the Act) by causing the discharge of Chapa from her employment with Stefani's Pier Front, Inc. d/b/a Crystal Garden (the Employer or Crystal Garden). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent engaged in a violation of Section 8(b)(2) of the Act by causing the Employer to discharge Chapa without previously advising her about the consequences of nonpayment of the monetary amount in arrear of her periodic dues, the total amount owed by Chapa, a monthly breakdown of the amount owed, and how the amount was calculated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a corporation engaged in the business of hosting and catering events for consumers in Chicago, Illinois, where in the past 12 months it derived gross revenues in excess of \$500,000 and purchased and received at its facility goods valued in excess of \$5000 directly from points located outside the State of Illinois. The Respondent admits and I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Facts

At all material times, Matthew Johnson held the position of the Respondent's membership coordinator and Tara Advani served as the Union's office manager. Johnson and Advani are admitted agents of the Respondent within the meaning of Section 2(13) of the Act.

The Respondent and the Employer are signatories to a collective-bargaining agreement, the most recent of which is effective from November 1, 2010, to December 31, 2013 (GC Exh.

12), and contains a union-security clause.¹ On December 27, 2012,² pursuant to the parties' collective-bargaining agreement, Johnson, by facsimile message, requested that the Employer discharge Chapa.

Prior to commencing employment at Crystal Garden in July 1995, Chapa worked at Lino's from 1993 to 2003 where she was a member of the Respondent. Chapa executed a dues-authorization form in 1993 that authorized union dues to be deducted from her Lino's paycheck. When Lino's went out of business in 2003, union dues were no longer deducted from her paycheck.

Chapa admitted, after commencing employment with Crystal Garden, that she knew the Union represented the bargaining unit employees but she did not execute a dues-checkoff authorization form nor did she make arrangements to pay regular monthly dues directly to the Union.³ Rather, Chapa testified that she assumed dues would be taken out of her Crystal Garden paycheck, but never looked at her paystub to see if dues were deducted. The Respondent, who became the exclusive collective-bargaining representative at the Employer sometime before March 1, 2006, did not learn until April 2010 that Chapa was employed and was a member of the bargaining unit. At that time, Chapa was reinstated as a member effective March 1, 2006. Accordingly on September 15, 2010, and continuing on a monthly basis through 2010, 2011, and to September 7, the Respondent sent letters to Chapa setting forth a statement of her dues account and the total amount of back dues owed to the Union (R. Exh. 1).

By letter dated September 6 to Chapa, the Respondent provided her with a first notice of termination for dues delinquency.⁴ The letter specifically informed Chapa that her Employer must terminate her if the back dues were not paid. Additionally, the letter provided Chapa with the opportunity to work out a payment plan to satisfy the delinquency if it was executed on or before September 27 (GC Exh. 2).

By letter dated September 13 to Chapa, the Respondent provided a second notice of termination for dues delinquency, and further made Chapa aware of the opportunity to work out a payment plan to satisfy the dues arrearage. Attached to the

¹ Sec. 3 (Union Security and Employee Hiring) states in pertinent part that as a condition of continued employment, all present employees covered by the agreement who are members in good standing on the date of the execution thereof shall remain members in good standing. The failure of any employee to become a member of the Union at such required times shall obligate the Employer, upon written notice from the Union to such effect and with proper documentation, and to further effect that union membership was available to such employee on the same terms and conditions generally available to other members to forthwith discharge such employee. Further, the failure of any employee to maintain his union membership in good standing as required herein shall, upon written notice to the Company to such effect, obligate the Employer to forthwith discharge such employee.

² All dates are in 2012, unless otherwise indicated.

³ Chapa's obligation to pay union dues when jointly employed at Lino's and Crystal Garden between 1995 and 2003 was to pay one set of dues since she was working in two union shops.

⁴ Attached to the letter was a summary with the total amount owed by Chapa, a monthly breakdown, and how the amount was calculated.

letter was a summary of the total amount owed, a monthly breakdown, and how the amount was calculated (R. Exh. 3).

On September 17, Chapa telephoned the Union and spoke with Johnson regarding the September 13 dues delinquency letter. Johnson informed Chapa that the Union had sent a number of letters to her home address about the dues delinquency, and had made a decision to enforce the union-security clause provision of the collective-bargaining agreement (R. Exh. 4). Chapa requested to speak to a specific union officer but Johnson told her that the officer was on vacation. Ultimately, Johnson transferred Chapa to Advani. During their telephone conversation, Chapa admitted that she was aware of her obligation to pay union dues as a condition of her employment with Crystal Garden, and suggested that a payment plan could be worked out to satisfy the dues delinquency (R. Exh. 5).

By letter dated September 20 to Chapa, the Respondent provided her a final written notice of termination for dues delinquency. The letter informed Chapa of the total amount owed, a monthly breakdown for the delinquency, and how it was calculated (GC Exh. 3).

On September 27, Chapa went to the Union's office and executed a payment plan to satisfy her dues delinquency.⁵ She also wrote a check to the Union for the first of three installments due in the amount of \$1,002.37 (GC Exh. 4). While Chapa was in the office on that day, she requested a copy of the current collective-bargaining agreement. Johnson printed a copy for her and also provided Chapa a copy of the executed payment plan, and a list of frequently asked questions (FAQ) about the union payment plan (R. Exhs. 7 and 8).⁶

On October 5, Chapa executed a checkoff authorization form that provided union dues would commence being deducted from her Crystal Garden paycheck effective October 12 (GC Exh. 5).

By letter dated October 31, the Union informed Chapa that she has defaulted on her payment plan obligation in the amount of \$1,002.37 by not paying the second installment that was due on that date, but would grant her an extension of time until November 12 to make the payment. The Union informed Chapa that if the payment is not received by that date, the Union will instruct Crystal Garden to terminate her employment for not complying with the union-security provision in the collective-bargaining agreement (R. Exh. 10). Additionally, Chapa was informed that a copy of the letter has been sent to Crystal Garden.

⁵ The payment plan stated in pertinent part that I understand and agree that if I don't comply with the terms of the plan I shall have no further rights under this plan, and that Local 1 can and will instruct my Employer to terminate me for failure to meet my financial obligations to Local 1.

⁶ The FAQ informed Chapa that the best way to keep from getting behind in your dues obligation is to authorize your Employer to deduct dues from your paycheck and that the first payment under the plan is due when you sign the pay plan agreement. The second payment is due by the end of the following month, and the third payment is due by the end of the month after that. Lastly, the FAQ informed Chapa that her current dues are not included in the payment plan, they are a separate payment.

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By letter dated November 1 to Chapa, the Union provided her a statement of her dues account showing a balance due of \$2,493.63 (GC Exh. 11).

By letter dated November 7 to Chapa, the Union informed her that it decided to revise its payment plan policy for employees with dues delinquencies over \$1000, and it would now offer a 6-month payment plan. The letter further informed Chapa that although she defaulted on her 3-month payment plan, the Union would give her 6 months to satisfy the remaining delinquency. Chapa was instructed to be at the union office on November 12 to enter into the payment plan agreement or be prepared to pay the entire balance due of \$2,004.74. Otherwise, the Union would instruct Crystal Garden to terminate her (GC Exh. 6).

Chapa went to the union office on November 12 and met with Johnson. She executed the payment plan agreement and made an initial payment of \$334.12. Chapa acknowledged that the new payment plan superseded the September 27 payment plan. The November 12 payment plan confirmed that if Chapa did not comply with the terms of the plan, the Union can and will instruct the Employer to terminate her for failure to meet the union-security provision under the collective-bargaining agreement (R. Exhs. 11 and 12; GC Exh. 7).⁷

By letter dated November 19 to Chapa, the Union informed her that the second payment of \$344.12 was due on November 30, and the third installment was due on December 31 (GC Exh. 8).⁸

On November 30 (Friday), Chapa went to the union office and wrote a check in the amount of \$344.12. She requested that the check not be deposited until December 3 (Monday), and Johnson gave assurances that it would not be deposited until that date. On December 3, the check was deposited in the union bank account.

By letter dated December 4 to Chapa, the Respondent provided her with a statement of her dues account (GC Exh. 14). It showed that the balance due on her delinquency was \$1,819.32.

On or about December 10, Chapa received a letter from the bank notifying her that a number of checks that were written on the account including the check to the Union for \$344.12 were not paid due to insufficient funds. Chapa did not contact the Union about this situation nor did she make any attempt to rectify the matter by writing another check to cover the dues delinquency.

On or about December 12, the Respondent became aware that Chapa's check dated November 30 in the amount of \$344.12 was not paid by the bank due to insufficient funds in her account (GC Exh. 9).

On December 13, Johnson placed a telephone call to Chapa's residence that was answered by a gentleman. Johnson did not

discern the identity of the individual but left a message with him to have Chapa return the call. The gentleman informed Johnson that he would give Chapa the message.

On December 14, Johnson placed a second telephone call to Chapa's residence but no one answered the telephone and he had no recollection whether he left a voice mail message. Chapa asserts that no one in her household informed her that Johnson had telephoned the residence at any time in December 2012.

By letter dated December 17 to Chapa, the Respondent notified her that the payment made on November 30 that was deposited on December 3 was not paid by the bank due to insufficient funds in the account (GC Exh. 9). The letter further stated that you have defaulted on your payment plan to pay your overdue financial obligations. As the plan provides, in the absence of paying the entire remaining amount of \$1,670.61 by December 27, the Union will instruct your employer to terminate you for not complying with the union-security provision in the collective-bargaining agreement.⁹

Chapa testified that she did not receive the December 17 letter until December 29. Johnson testified that the December 17 letter was processed in the same manner as all previous correspondence that was sent and received by Chapa regarding her dues delinquency, and was deposited in the US mail by an employee of the Union.

On December 27, Chapa received a telephone call from a Crystal Garden supervisor who informed her that the Employer had been requested by the Union to terminate her for not complying with the union-security provision in the collective-bargaining agreement. Accordingly, the Employer terminated Chapa on December 27.

B. Discussion

The law applicable to labor organizations' obligations to represented employees in the context of seeking or obtaining an employee's discharge for failure to meet union-security requirements has been in effect for many years.

The Board's seminal case on the issue is *Hotel & Restaurant Employees Local 568 (Philadelphia Sheraton Corp)*, 136 NLRB 888 (1962), *enfd.* 320 F.2d 254 (3d Cir. 1963), holding that a union seeking to enforce a union-security provision against a represented employee has a fiduciary duty to deal with the individual.

The Board, in *Teamsters Local 150 (Delta Lines)*, 242 NLRB 454, 454-455 (1979), stated,

The General Counsel alleged that Respondent's conduct in securing the employee's discharge violated Section 8(b)(1)(A) and Section 8(b)(2) of the Act because Respondent did not afford the employee a reasonable opportunity to comply with the contractual security provisions, and did not inform the employee of the amount he owed, the method used to compute the amount, and the manner

⁷ R. Exh. 11 informed Chapa of the total amount of the dues delinquency, a monthly breakdown of the amount, and how it was calculated.

⁸ The second payment, in accordance with the November 6-month payment plan should have been \$334.12. Record testimony confirmed that the \$344.12 amount was a typographical error. Attached to the November 19 letter was the total amount of back dues owed, a monthly breakdown of the amount, and how it was calculated.

⁹ Attached to December 17 letter was a chart depicting the total amount of dues owed, a monthly breakdown of the amount owed, and how it was calculated.

in which he could satisfy his obligation before it sought the discharge.¹⁰

Likewise, in *Coopers NIU (Blue Grass)*, 299 NLRB 720, 721 (1990), the Board specifically held:

[w]hen a union seeks to enforce the union-security provision of a contract against unit employees, it has a fiduciary duty to fully inform the employee of his dues obligation before taking any action to effect his discharge. Specifically, the union has to give the employee, at minimum, reasonable notice of the delinquency, including a statement of the precise amount and months for which dues are owed and of the method used to compute the amount, tell the employee when to make the required payment, and explain to the employee that failure to pay will result in discharge.

The Respondent argues that the protections provided in *Philadelphia Sheraton*, supra. were never intended to be so rigidly applied as to permit a recalcitrant employee to profit from his or her own dereliction in complying with the obligations of ignorance or inadvertence but will do so only as a matter of conscious choice. The Respondent further asserts, in accordance with *Western Publishing Co.*, 263 NLRB 1110, 1113 (1982), that when it is shown that an employee willfully and deliberately sought to evade his or her union-security obligations, the Board will excuse a union's failure to fully comply with the notice requirements.

The Acting General Counsel recognizes the Board's decisional underpinnings creating the Respondent's "free rider" affirmative defense to allegations of union mishandling of a union-security discharge, but argues that the facts of the instant case do not support its application herein. Indeed, the Acting General Counsel notes cases similar to the Board's holding in *Grassetto USA Construction, Inc.*, 313 NLRB 674, 677 (1994), that negligence or inattention on the part of the employee will not relieve the union of its fiduciary obligation. The union must show that an employee willfully and deliberately attempted to avoid union-security obligations before the Board will excuse the union's failure to fully comply with the notice requirements.

The Acting General Counsel specifically argues in paragraph 5(c) of the complaint that the Respondent caused the Employer to discharge Chapa without previously advising the employee about the consequences of nonpayment of the monetary amount in arrear of her periodic dues, the total amount owed by Chapa, a monthly breakdown of the amount owed, and how the amount was calculated.

Based on the record testimony, I note that Chapa was not naïve about the obligation to pay periodic dues while working in a union environment. Indeed, prior to her employment with Crystal Garden, Chapa worked at Lino's in which the Respondent represented the bargaining unit employees and executed a checkoff authorization form to have union dues deducted di-

rectly from her paycheck. I am hard pressed to believe Chapa's assertion that for the years after the 2003 closing of Lino's she did not know that union dues were not being taken out of her Crystal Garden paycheck. It is inconceivable to me that an employee does not review their paystub to ensure that he or she is paid correctly including the itemized deductions that are subtracted to reach the net payment.

Chapa admitted that during her employment at Crystal Garden, she knew the Union represented the bargaining unit employees. Chapa also admitted during her September 17 telephone conversation with Advani that she was aware of her dues obligation to the Union as a condition of continued employment. Although Chapa testified that early in her employment with Crystal Garden she inquired of a supervisor whether there was a checkoff procedure to pay dues and was informed nothing of that nature existed, the record confirms that Chapa did not verify this information with the Union nor did she contact the Union directly to commence the procedure to self-pay her dues.

The Acting General Counsel principally rests its case on the fact that Chapa did not receive the December 17 written official notification from the Union of her dues delinquency and intention to terminate her on December 27, until December 29, 2 days after she was actually terminated. I reject this position for the following reasons.

It must be noted that the December 17 letter was mailed to the same address in which Chapa previously received the Union's multiple letters advising her of her dues delinquency and providing her an opportunity on repeated occasions to enter into a payment plan to satisfy her dues obligations. As admitted by Chapa, prior union correspondence regarding the dues delinquency issue was received at her residence 2-3 business days after being mailed. Indeed, the Union followed the identical procedure on every occasion when sending correspondence to Chapa by depositing it in the US mails. Thus, I am circumspect that Chapa did not receive the December 17 letter until December 29, 12 days after it was mailed. While I note that the Union did not conclusively establish that Chapa neither received the December 17 letter prior to her discharge nor received the telephone message left by Johnson on December 13 with someone in her household, I do not find this dispositive. *United Metaltronics Local 995 (Pharmaseal Laboratories, Inc.)*, 254 NLRB 601,606 (1981).

Rather, record evidence establishes that the Union bent over backwards to accommodate Chapa with her dues delinquency issues. In this regard, the Union notified Chapa on a continuing and regular basis regarding the delinquency including the total amount owed, a monthly breakdown, and how it was calculated. It also repeatedly warned Chapa that in the absence of resolving her dues obligations, the Employer would be requested to terminate her employment for failing to adhere to the union-security provision of the collective-bargaining agreement. Moreover, in both the September 27 and November 12 payment plans that Chapa executed, she acknowledged and agreed that noncompliance with its terms and conditions enabled the Union

¹⁰ The Board has long held that these obligations must be satisfied before a discharge may be sought for failing to comply with the contractual union-security provisions of a collective-bargaining agreement. See *Teamsters Local 122 (August A. Busch & Co. of Mass, Inc.)*, 203 NLRB 1041 (1973).

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to notify Crystal Garden to terminate her employment for failure to meet her financial obligations to the Respondent.¹¹

Finally, and critical to my determination that Chapa willfully and deliberately determined not to satisfy her dues obligations with the Union is her admission that on December 10 the bank notified her that the dues check written on November 30 and deposited by the Union on December 3, was not paid due to insufficient funds in the account. Such an admission 17 days prior to her termination combined without any affirmative action by Chapa in contacting the Union in an effort to work out an accommodation forecloses any argument that mere negligence or inattention contributed to her determination not to satisfy the back dues obligation. Chapa made a conscious choice, after Lino's closed in 2003, not to pay union dues despite recognizing and admitting in this proceeding that as a condition of her continued employment at Crystal Garden the payment of those dues was mandatory.

I find, based on the particular circumstances of this case, that the Union made numerous good-faith efforts to assist Chapa in meeting her dues obligations while regularly providing written documentation as to the total amount of back dues owed, a monthly breakdown of that amount, and how it was calculated. Thus, the requirements of *Philadelphia Sheraton* have been satisfied in this case. *I.B.I. Security, Inc.* 292 NLRB 648, 649

¹¹ I note that a copy of the December 17 letter was scanned and served on the Employer by email. The Acting General Counsel did not present any evidence that Crystal Garden did not receive the letter in the regular course of business prior to Chapa's termination on December 27.

(1989), and *Teamsters Local 630 (Ralph's Grocery Co.)*, 209 NLRB 117, 125 (1974).

For all of the above reasons, I find that the Respondent did not violate Section 8(b)(2) of the Act.¹²

CONCLUSIONS OF LAW

1. Crystal Garden is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(b)(2) of the Act when it caused Crystal Garden to discharge Eileen Chapa.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 12, 2013

¹² While I acknowledge that Chapa had serious financial concerns ongoing in her life during this period, it does not excuse her obligation to adhere to the union-security provision in the collective-bargaining agreement, particularly noting that she made a conscious decision not to pay union dues to the Union commencing in 2003.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.