

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

DATE: March 24, 2014

TO: Karen P. Fernbach, Regional Director
Region 2

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

SUBJECT: Kaplan International Centers
Case 02-CA-110964

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The Region submitted this case for advice on whether, under the Board's decision in *Alan Ritchey, Inc.*,¹ the Employer violated Section 8(a)(5) by issuing written warnings, including final warnings, to employees without first giving the Union notice and an opportunity to bargain. We conclude that the Employer did not violate Section 8(a)(5) because none of the discipline had an inevitable and immediate impact on employees' tenure, status, or earnings.

Facts

Kaplan International Centers ("Employer") operates several English as a Second Language centers in Manhattan, New York. The Employer's ninety teachers in Manhattan are represented by the Newspaper Guild of New York, Local 31003, CWA, AFL-CIO ("Union"), which is newly certified and currently bargaining for its first contract. The parties have not agreed to an interim grievance-arbitration process while they negotiate.

The Employer uses a progressive discipline policy to deal with teachers whose evaluation scores dip below acceptable levels. In the first instance, the Employer verbally counsels the employee. If the problem reoccurs, the Employer first requires the teacher to create an action plan to improve performance, and subsequently may issue a written warning called a "Letter of Clarity." A Letter of Clarity notes that while it is the first written warning, teachers are at-will employees and failure to adequately address the issue can lead to further disciplinary action up to and including termination. If a teacher's performance does not improve after receiving a Letter of Clarity, the Employer may issue a "Final Warning" that states that "[s]hould this behavior be repeated, your employment could be terminated without further warning." The Employer retains discretion over the decision to impose discipline, and does not in every case adhere to the order of steps in the progressive discipline policy.

¹ 359 NLRB No. 40 (Dec. 14, 2012).

On July 15, 2013, the Union demanded preimposition bargaining on all Letters of Clarity and Final Warnings. The Employer refused, and the Union filed this charge on August 9, 2013. In the six months before the charge was filed the Employer issued about six Letters of Clarity and three Final Warnings without notifying the Union.²

Action

We conclude that the Employer did not violate Section 8(a)(5) by issuing written disciplinary letters to its employees without first giving the Union notice and an opportunity to bargain because there was no obligation to bargain about those letters prior to implementation. The Region should therefore dismiss the charge, absent withdrawal.

In *Alan Ritchey, Inc.*, the Board held that discretionary discipline is a mandatory subject of bargaining under *NLRB v. Katz*.³ Thus, where an employer has not yet signed a collective-bargaining agreement that addresses discipline, and where an employer's disciplinary system is discretionary, the employer must bargain with its employees' union representative over the discretionary aspects of any disciplinary action.⁴ This duty to bargain attaches with each application of discipline.

With some exceptions, an employer usually must give a union notice and an opportunity to bargain *before* implementing any changes to a mandatory subject of bargaining.⁵ In *Alan Ritchey*, the Board made a pragmatic exception to this basic rule. Because of the "unique nature of discipline and the practical needs of employers," the Board determined that not all forms of discipline require preimposition notice and opportunity to bargain.⁶ An employer only has an obligation to engage in preimposition bargaining for actions "that have an immediate impact on employees' tenure, status, or earnings, such as suspensions, demotions, and discharges."⁷ In

² The Employer has, however, given the Union notice and an opportunity to engage in preimposition bargaining over a discharge.

³ 369 U.S. 736 (1962).

⁴ 359 NLRB No. 40, slip op. at 1–7.

⁵ See *Katz*, 369 U.S. at 744–47.

⁶ 359 NLRB No. 40, slip op. at 1, 4.

⁷ *Id.* at 8. To further accommodate employers' "practical needs," the Board also held that an employer may act unilaterally in "immediate impact" disciplines if there are "exigent circumstances." Furthermore, even where an employer has a duty to engage in preimposition bargaining, the employer need not bargain to agreement or impasse before acting, so long as it does so afterward. *Id.* at 8–9.

those cases, the Board reasoned, allowing the employer to unilaterally act without first notifying the union where the impact on employees is so significant would suggest to employees that the union is ineffectual with regard to protecting employees.⁸ However, lesser sanctions that do not have an inevitable and immediate effect on wages or status “have a lesser impact on employees, viewed as of the time when action is taken.”⁹ Balancing this reduced impact with the unique nature of discipline, the Board determined that while such lesser discipline is bargainable, it would not be appropriate to require preimposition notice and opportunity to bargain.¹⁰ Consequently, the Board noted that “we expect that most warnings, corrective actions, counselings, and the like will not require preimposition bargaining, assuming they do not automatically result in additional discipline . . . that itself would require such bargaining.”¹¹

Here, the Region has determined and we agree that the Employer has reserved the right to exercise discretion in choosing whether and how severely to discipline employees, and has also reserved the right to impose discipline without progressing through each step of the progressive discipline procedure. Accordingly, we agree with the Region that the Employer is obligated to bargain with the Union over all cases of individual discipline.

We also conclude, however, that the Employer’s Letters of Clarity and Final Warnings do not have an inevitable and immediate effect on employees’ tenure, status, or earnings. Although both letters affect employees’ terms and conditions of employment, neither has any impact on employees’ wages, hours, seniority, or status. The Region suggests that the Final Warning changes an employee’s status because it is essentially a Last Chance Agreement that converts employees to “probationary employees.” Yet under the Employer’s discretionary disciplinary system, the Final Warning does not automatically lead to termination even if the employee engages in further misconduct. Moreover, the term “probationary employee” is only meaningful if there is a grievance-arbitration system from which such an employee is exempted. In an at-will setting such as here, a Final Warning does not appreciably change an employee’s status.

Accordingly, the Employer did not violate Section 8(a)(5) by refusing to engage in preimposition bargaining over Letters of Clarity and Final Warnings. The Region

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.* at 1, 4.

¹¹ *Id.* at 8.

should therefore dismiss the charge, absent withdrawal.

/s/
B.J.K.