UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

MEDIC AMBULANCE SERVICE

and **Cases 20-CA-109532**
20-CA-111325

UNITED EMERGENCY MEDICAL SERVICES WORKERS, LOCAL 4911, AFSCME, AFL-CIO

***Cecily Vix, Esq.* and *Marta I. Novoa, Esq.* for the General Counsel**
***Patrick Jordan, Esq.* for the Respondent**
***Jeffrey A. Misner* for the Charging Party**

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge: In *Alan Ritchey, Inc.,* 359 NLRB No. 40, slip op. at 1-2, 8-10 (2012), the Board held, inter alia, that during the period after a union is recognized but before a first contract or an interim grievance procedure is in place, an employer must bargain with the union before exercising its discretion to impose certain discipline such as suspension, demotion, or discharge. The holding in *Alan Ritchey* is applicable prospectively only; that is, only after the date of its issuance on December 12, 2012. Id. slip op. at 11.

The General Counsel alleges that during the interim between recognition of United Emergency Medical Services Workers, Local 4911, AFSCME, AFL-CIO (the Union) and agreement upon a first contract or an interim grievance procedure, Medic Ambulance Service (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)[1] by failure to provide notice and an opportunity to engage in preimposition bargaining about the discharge of 12 employees.[2] Although there is no dispute regarding the lack of preimposition notice, Respondent defends the allegation claiming an interim grievance procedure was in place and, in any event, the discipline did not involve the exercise of discretion. The General Counsel further alleges that one of the twelve dischargees was denied a *Weingarten* representative.[3]

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[1] 29 U.S.C. §158(a)(5) and (1).

[2] The unfair labor practice charge in Case 20-CA-109532 was filed by the Union on July 19, 2013. The charge in Case 20-CA-111325 was filed by the Union on August 13, 2013. The consolidated complaint and notice of hearing (the complaint) issued on November 19, 2013. The complaint was amended prior to hearing and further amended at hearing. Hearing was held in San Francisco on February 25, March 12 and 19, 2014.

[3] In *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 256-257 (1975), the Court held that an employee who reasonably believes that an investigatory interview will result in discipline is entitled to representation at the interview.

No collective-bargaining agreement was in effect at the time of the discharges. Nevertheless, at all times the parties honored certain of the terms of an expired collective-bargaining agreement. That agreement contained a three-step grievance and arbitration process. The parties agreed to be bound by the first two steps in the grievance process and they further agreed that there would be no right to arbitration of grievances, the third step, until a new contract was signed. Under these circumstances, I find that the first two steps of the expired contract constitute an agreed-upon interim grievance procedure. Thus I find that even though Respondent exercised discretion regarding the 12 discharges, it was not under an obligation to provide advance notice and opportunity to bargain before imposing the discipline. I further find that there was no violation of *Weingarten* rights in the March 29, 2013 interview of employee Lisa Wilson because the purpose of the meeting was solely to announce previously determined discipline.

On the entire record, including my observation of the demeanor of the witnesses,[4] and after considering the excellent briefs filed by counsel for the General Counsel[5] and counsel for the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a corporation with offices in Vallejo, California. It provides ambulance and medical transportation services. Respondent admits that it meets the Board's jurisdictional standards and further admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits that the Union is a labor organization within the meaning of Section 2(5) of the Act. Thus I find that this dispute affects commerce and that the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

II. CORPORATE AND COLLECTIVE-BARGAINING BACKGROUND

Respondent provides paramedic service, 911 emergency service, and non-emergency transport for Solano County, California. On March 16, 2012, the following unit of employees, appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act, was certified by the Board:

> All full-time and regular part-time Paramedics, EMTs, Dispatchers, and SSTs employed by Respondent working at or from its facilities in Solano County, excluding all other employees, guards and supervisors, as defined in the Act as amended.

[4] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[5] Counsel for the General Counsel's motion to correct a minor typographical error in her brief is granted.

Based on Section 9(a) of the Act, since the certification the Union has been the exclusive collective-bargaining representative of unit employees.

Prior to the Union's certification on March 16, 2012, the approximately 140-150 unit employees were represented by the National EMS Association (NEMSA). The most recent NEMSA contract was effective December 1, 2006 through November 30, 2011. Since expiration of the NEMSA contract, Respondent has generally adhered to the terms and conditions in this expired agreement. Although the parties began bargaining after the Union's certification, no agreement has been reached.

III. DISCRETIONARY ASPECT OF IMPOSITION OF DISCIPLINE

Respondent argues that its disciplinary system does not require the exercise of discretion and thus it did not violate the Act by failure to provide preimposition notice and opportunity to bargain to the Union. I find that Respondent retains discretion and may utilize discretion on a case by case basis within the broad contours of its disciplinary system. I further find that Respondent did in fact exercise discretion with regard to the 12 discharges at issue.[6]

Facts

There is no progressive disciplinary policy set forth in the expired NEMSA agreement. Respondent's employee handbook identifies "some types of conduct that are impermissible and that **may** lead to disciplinary action, possibly including immediate termination." (Emphasis added.) Various actions are cited as grounds for immediate discharge without warning. Other offenses are listed as grounds for suspension. "The second or subsequent violation of any of the rules **may** result in discharge. Such second subsequent violation need not be of the same rule originally violated." Violation of other rules will result in "appropriate disciplinary action, either in the form of a verbal warning or a written warning. The second or subsequent violation of any of these rules may lead to suspension." (Emphasis added.)

In addition to the handbook explanation, there is another level of oversight through quality assurance. These offenses are labeled QA levels 1 through 4 with level 4 being the most serious offenses. QA level 1, for example, might consist of a minor lapse in protocol compliance such as failing to put a monitor on a patient in a timely manner. Respondent's Administrator Tim Bonifay (Bonifay) explained that this level of offense would be relatively minor with no danger to the patient. QA level 2 is a more serious but non-life-threatening offense which results in a verbal warning. QA level 3 offenses usually warrant a written disciplinary action and involve a more egregious violation, perhaps administering the wrong medication or the wrong dosage of a medication. QA level 4 involves a potentially life-threatening misinterpretation or omission.

Administrator Bonifay explained that the discipline model utilized by Respondent was based on just cause. He stated,

[6] Respondent objected to amendment of the complaint at hearing to add 11 additional alleged discharges in violation of *Alan Ritchey*. I adhere to my ruling allowing amendment for the reasons set forth in Sec. VI of this decision.

> It's not strictly progressive discipline. If we felt that progressive discipline fell under just cause, that's what we would use. If we felt that there were some issues that warranted immediate terminations, then that's what would happen while the overlying or the overarching methodology would be to follow just cause.

He explained that some offenses warrant immediate termination. Minor offenses warrant something less. Respondent uses the language "up to termination," a discretionary descriptive, to refer to future actions which may be taken following a lesser disciplinary sanction.

Further, Respondent utilizes discretion on some occasions in that it determines not to discharge employees for dischargeable offenses. For example, in December 2012, an employee failed to call in or show up for his scheduled shift. His record indicated multiple incidents of absenteeism and tardiness as well as a prior suspension for a "no call/no show." Respondent asserted that these offenses provided grounds for termination but, "we desire to not terminate your employment at this time." Instead, Respondent forwarded a "non-precedent setting" disciplinary agreement to the Union instituting a final warning with six months probation and administrative relocation of the employee. The Union signed this document. Labor Representative Jeffrey Misner (Misner) characterized the document as a "last chance" agreement. Bonifay explained that the use of "non-precedent setting" disciplinary agreements originated in dealings between Respondent and NEMSA and he continued utilizing the practice when the Union began representing employees

A similar use of discretion was employed in February 2013 when an employee received a termination letter for deviation from protocol after a suspension for the same offense two months before. During the termination discussion, the employee stated she would take responsibility for her actions and asked for an opportunity to prove herself, assuring Respondent that the offense would not recur. The employee was returned to work pursuant to an agreement signed by the Union with a one-year probationary period. The parties agreed that the Union would not process a grievance regarding the discharge and that the agreement was a "non-precedent setting" disciplinary agreement.

Non-precedent setting agreements were made on other occasions. In late March 2012, an employee lost a glucometer and failed to notice its loss therefore continuing operation without the required equipment. A similar incident earlier that month had already led to suspension of the employee. Respondent noted that historically it terminated employees due to such a recurrence of a similar event. "However, due to your tenure, it is not our desire to terminate you." The Union signed the "non-precedent setting" agreement to impose a 3-shift suspension rather than a termination. Again, in late March 2012, another employee's termination for loss of equipment without timely reporting or replacing it for the remainder of the shift was converted to suspension in a non-precedential agreement with the Union.

In July 2013, a "disturbing pattern of [quality assurance] errors, work rule violations, and safety issues" warranted termination but "in lieu of termination" a final warning and extension of probation were administered. In November 2013, although Respondent has "the absolute right to terminate your employment due to the circumstances surrounding the above-referenced call, due to your longevity with [Respondent] we have decided to not pursue termination but rather remediation." This non-precedential agreement was signed by the Union after a meeting with the Union to draw the contours of a remediation plan. In late January 2014, an employee's false

claim for overtime was handled as a suspension rather than a termination because the employee had just returned from a prolonged leave of absence and was having difficulty completing work on time. In February 2014, falsification of a document by signing a patient's name in the financial responsibility section, a first time terminable offense, was converted by a non-precedential agreement waiving future "grievance and arbitration" of future violations to a suspension. The Union withdrew a pending grievance pursuant to this agreement. None of these agreements were negotiated with the Union. Misner testified that he signed them because otherwise the employees would have been terminated. Nevertheless, Respondent exercised its discretion in proposing them to the Union.

However, on another occasion, according to Bonifay, there was absolutely no discretion involved. An employee who was involved in a witnessed ambulance accident and failed to timely report the accident and was repeatedly dishonest during investigation of the accident was discharged immediately.

Bonifay testified that the conduct of employee Ryan Birch (complaint par. 8(b)) constituted a nondiscretionary discharge. "Well, some of the actions that he had, in my opinion, didn't warrant a second chance. He was completely unprofessional and unsafe." Further, Birch admitted that he lied during the ensuing investigation. Employee Lisa Wilson (complaint par. 8(a)) was given two final "last chance" warnings. One in January 2013 and another in March 2013.

Bonifay testified that the discharge of employee Katrina Burton (complaint par. 8(d)) was based on grounds for immediate termination, that is, repeated failure to follow dispatch protocol. Employee Aaron Schreieck (complaint par. 8(h)) was discharged for "one of the most egregious offenses you can have as a paramedic, refusing to respond to an emergency call," an immediately terminable offense. Employee Jen Wright (complaint par. 8(j)) made numerous dispatch errors and was repeatedly warned and suspended. Her failure to correct those errors resulted in her dismissal. Employee Erick Angulo (complaint par. 8(l)) was terminated for failure to submit proof of current and valid license. Respondent requested proof on four occasions without receiving a response from Angulo. None of these discharges involved the exercise of discretion according to Respondent.

Analysis

In *Alan Ritchey,* supra, 359 NLRB No. 40, slip op. at 1, the Board referred to discretionary discipline as that occurring "when the employer does not alter broad, preexisting standards of conduct but exercises discretion over whether and how to discipline individuals." Analogizing to the exercise of discretion in the context of a merit increase program, the Board quoted *Oneita Knitting Mills,* 205 NLRB 500 (1973):

> What is required is a maintenance of preexisting practices . . . however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

Alan Ritchey, supra, 359 NLRB No. 40, slip op. at 5.

Further, the Board noted that in the disciplinary context, discretion may exist:

> Accordingly, where an employer's disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintain the fixed aspects of the discipline system and bargain with the union over the discretionary aspects (if any), e.g., whether to impose discipline in individual cases and, if so, the type of discipline to impose. The duty to bargain is triggered before a suspension, demotion, discharge, or analogous sanction is imposed, but after imposition for lesser sanctions, such as oral or written warnings.

Alan Ritchey, supra, 359 NLRB No. 40, slip op. at 6.

It is undisputed that Respondent provided postimplementation notice for many but not all of the discharges. The grounds for the 12 discharges at issue were stealing time; dishonesty in an investigation, and violation of multiple work rules including unsafe and unprofessional conduct; dishonesty regarding the completion of timecard, insubordination to a supervisor, falsification of hours on timecard, and negligence of job duties; repeated failure to follow proper dispatch protocol; failure to properly inventory and restock inventory thus delaying provision of emergency medical treatment to patient; refusal to respond to a call for service and dishonesty to a supervisor; dishonesty and unprofessionalism; failure to respond to a 9-1-1 call; reporting for work tardy and deviating from protocol by making unauthorized stop on the way to call; incurring unnecessary and unauthorized overtime; failure to stop at the scene of an ambulance-involved accident with stable patient on board; and failure to maintain license in current and valid status.

Some of the terminated employees had received prior discipline with the admonition that future failure to adequately perform the job might result in discharge. In one case the employee's prior disciplinary notice stated that subject to the sole discretion of Respondent any further offense will result in termination.

Although discretion may not be utilized in each and every instance of discharge, it is clear that Respondent retained discretion and could utilize discretion on a case-by-case basis within the broad standards of its disciplinary system to determine whether just cause for discharge exists or, alternatively, whether the employee deserves a second chance. Respondent utilizes a range of discipline "up to termination" for offenses. As Bonifay stated, Respondent's system is not strictly progressive discipline but more akin to just cause. Although Bonifay described some of the 12 discharges as constituting immediately terminable offenses, Respondent's actions indicate that it retained discretion, even in cases of severe dereliction of duty, to give employees a non-precedent setting last chance. Thus, I find that within Respondent's system, there is the potential for utilization of discretion with regard to any dischargeable offense.

Examples of Respondent's specific implementation of its disciplinary system are also consistent with this finding. Generally, discretion was utilized in application of the disciplinary system. On numerous occasions, Respondent found that specific offenses provided grounds for termination but Respondent nevertheless made a decision not to terminate. For example, a lesser

discipline was imposed due to an employee's admission of past mistakes and a promise that the mistakes would not recur. In another instance, an employee's longevity with the company was cited as a reason for imposition of a lesser discipline than discharge even though discharge was warranted. Similarly, return from a prolonged leave of absence was the basis for a lesser discipline than discharge. The decision not to terminate for a terminable offense obviously involves the exercise of discretion.

Sometimes Respondent exercised its discretion to forego discharge in the face of dischargeable offenses. On these occasions, Respondent entered into a non-precedent setting agreement with the Union. On other occasions, Respondent opted to discharge employees for dischargeable offenses. Both of these situations indicate exercise of a degree of discretion. Indeed, in *Alan Ritchey* the Board acknowledged that "discretion is inherent – and perhaps unavoidable" in the context of discipline. Id., slip op. at 10.

On the record as a whole, I find that after carefully considering serious dischargeable offenses, Respondent exercised thoughtful analysis and discretion on a case-by-case basis and determined to either give the employee another chance or to discharge the employee. This thoughtful consideration was given to each of the 12 discharges at issue.Thus, absent an agreed-upon grievance procedure, once Respondent investigated the situation and made a decision to impose discipline but prior to implementing the discipline, Respondent was obligated to notify the Union and afford it an opportunity to bargain. Accordingly, I find that because the exercise of discretion was utilized in Respondent's actions in application of its disciplinary system to discharge the 12 employees, the duty to provide preimposition notice and an opportunity to bargain with the Union was triggered absent an agreed-upon interim grievance procedure.

IV. INTERIM GRIEVANCE PROCEDURE

Respondent claims failure to provide preimposition notice and opportunity to bargain over the 12 discharges was excused because the parties were operating pursuant to an agreed-upon interim grievance procedure, that is, two of the three-steps in the expired NEMSA contract. The General Counsel disagrees arguing that the parties did not negotiate an interim grievance procedure. The General Counsel further asserts that any interim grievance procedure must incorporate arbitration in order to provide safe harbor to an employer. In agreement with Respondent, I find that the parties agreed to utilize the first two steps of the expired NEMSA contract as an interim process and that this process, which does not contain an option for arbitration, satisfies that requirements set forth in *Alan Ritchey*.

Facts

The expired NEMSA agreement provides for three steps in its grievance and arbitration clause. At the first step, the union representative and the department or division director meet with the grievant to resolve the complaint. If no resolution occurs, the matter may proceed to step two. At step two, the operations manager becomes involved and the parties once again attempt to resolve the dispute. If step two is unsuccessful, the expired NEMSA contract provides that the Union may refer the matter to final and binding arbitration as a third and final step.

Shortly after the Union was certified, Misner met with Bonifay. Misner and Bonifay were both former NEMSA union representatives and had been acquainted for a number of years. They

and other personnel routinely referred to the parties' current status under the expired NEMSA agreement as a status quo period. According to Misner, shortly after the Union's certification, Bonifay told him that he wanted to make sure they both understood that there would be no arbitration until a new agreement was in place. In other words, there would be no recourse past a level two grievance. Misner responded that he did understand.[7] Bonifay recalled the meeting but denied making the no recourse past level two statement. Bonifay's recollection was that he and Misner discussed their service with NEMSA and various personalities in that organization. Bonifay denied that there was any substantive discussion about grievance and arbitration in the meeting.

Noting that both Misner and Bonifay were highly articulate, credible witnesses with years of professional service representing employees, I nevertheless credit Misner and find that Bonifay stated the general rule that arbitration does not survive expiration of a contract. Misner described the procedure that remained as retaining an ability to file grievances as a process which could lead to resolution of disputes as long as a third party was not needed. Misner's recollection of Bonifay's statement is in accord with the actions of the parties. The Union certainly acted according to their understanding that arbitration did not survive expiration of the NEMSA contract in that they filed grievances but did not demand arbitration of any grievance filed since their certification.

The parties began bargaining for a new agreement in the summer or fall of 2012. The Union is represented at the bargaining table by Chief Negotiator Kurt Ostrander, Labor Representative Misner, and Chief Steward Casey Vanier. Respondent's representatives include Lead Negotiator Bonifay, President Rudy Manfredi, Vice-President James Pierson, and CFO Helen Pierson. There have been 35 or 36 bargaining sessions. At the time of hearing, the parties had not reached agreement for a new contract.

However, the parties reached a tentative agreement on grievance and arbitration (G&A TA) on October 24, 2012. The G&A TA was initialed on that date by both Respondent and Union representatives. The G&A TA is not a carbon copy of the language in the expired NEMSA contract. However, both contain three steps and in both, the third step is arbitration. By its literal terms, the G&A TA does not state that it will go into effect immediately upon being tentatively agreed upon.

Misner attended the bargaining session on October 24, 2012. He testified that all tentative agreements reached were utilized to build a new memorandum of understanding between Respondent and the Union subject to ratification and implementation after negotiation was completed. Misner specifically testified that there was no agreement that the tentative agreement reached on October 24, 2012, regarding grievance and arbitration would be effective immediately or at some specific future time. This testimony was not rebutted and I credit it.

Since the Union's certification, it has filed four grievances. In October 2012, a grievance

[7] Certainly, such an understanding would be in accord with the general rule that grievance procedures must be continued post-expiration but grievances not arising under an expired collective-bargaining agreement are not subject to arbitration. *Litton Financial Printing Division v. NLRB,* 501 U.S. 190, 198 (1991). See also, *Indiana & Michigan Electric Co.,* 284 NLRB 53, 58 (1987); *Hilton-Davis Chemical Co.,* 185 NLRB 241, 242 (1970).

was filed for a written warning and suspension involving a delayed response. The parties met and the grievance was denied in November 2012. Two grievances were filed in June 2013. The parties met on these grievances in July. One of the grievances was settled and withdrawn and the other was denied. In January 2014, the Union filed a grievance regarding a discharge. It was denied as untimely.

In the absence of grievances, two potentially dischargeable actions, one in July 2013 and one in November 2013, were discussed preimposition between the Union and Respondent. In both instances, Respondent agreed to remediate rather than discharge. Another informal discussion in November 2013 resulted in discharge of an employee. On numerous other occasions, in the absence of grievances, there was no discussion between the Union and Respondent when Respondent determined it would attempt remediation rather than discharge an employee. In those instances, Respondent sent the remediation agreement to the Union for signature. In each instance, the Union signed these agreements and no grievances were filed regarding these disciplines.

Analysis

The parties agree that *Alan Ritchey* is applicable. At the hearing, Respondent claimed it had an agreed-upon interim grievance process because it never said it would not arbitrate post-expiration of the NEMSA contract and, in any event, the G&A TA took immediate effect and provided for an agreed-upon grievance and arbitration procedure. On brief, Respondent abandoned these positions and argued instead that the first two steps of the expired NEMSA contract constitute an agreed-upon interim grievance procedure.

Citing *Alan Ritchey,* Id. at slip op. at 9, fn. 20, the General Counsel argues that the parties must specifically negotiate an interim procedure "that would permit the employer to act first followed by a grievance and, potentially, arbitration. . . ." Although the General Counsel acknowledges that the parties agreed to honor the first two steps of the expired NEMSA contract grievance procedure, counsel asserts that this two-step process cannot constitute an agreed-upon interim grievance process because it was not negotiated by the parties. Rather, the NEMSA contract was negotiated with Respondent by a predecessor union. Further, the General Counsel argues that because no arbitration component is included, the two-step process does not satisfy *Alan Ritchey.*

As to the General Counsel's first argument, I find that the Union and Respondent did in fact negotiate agreement to abide by the first two steps of the grievance procedure in the expired NEMSA contract. Bonifay offered adherence to the first two steps of the grievance procedure but not to arbitration, the third step. Misner accepted this offer. Their agreement to honor the grievance procedure in the first two steps of the expired NEMSA contract was negotiated between the Union and Respondent. A meeting of the minds occurred[8] and an agreed-upon

[8] While the technical rules of contract law are not necessarily controlling in labor relations negotiations, the normal rules of offer and acceptance in contract law are applicable to determine whether an agreement was reached. *Kasser Distiller Products,* 307 NLRB 899, 903 (1992), enfd 19 F.3d 644 (3rd Cir. 1994).

interim grievance procedure was in place and was utilized by the parties.[9]

Regarding the General Counsel's second argument, I find that *Alan Ritchey* does not mandate arbitration as a component of an interim grievance procedure. In *Alan Ritchey,* it was unnecessary for the Board to determine the contours of an interim grievance procedure. Unlike the instant situation in which the parties were bound to provisions of an expired agreement, there was no agreement of any kind in place in *Alan Ritchey.* Moreover, the Board did not apply its holding to the facts in *Alan Ritchey* because application was prospective only. Nevertheless, throughout its decision, the Board referred to use of an interim grievance procedure. In its first statement regarding an interim grievance procedure, the Board did not include a reference to arbitration:

> The question [of whether an employer whose employees are represented by a union must bargain with the union *before* imposing discretionary discipline on a unit employee] will usually arise only during the period after the union has become the employees' bargaining representative, but before the parties have agreed upon a first contract, **and only if the parties have not agreed upon an interim grievance procedure.** (Slip op. at 1, emphasis added.)

The second reference to an interim grievance procedure utilizes grievance-arbitration as an example but does not mandate arbitration as a component of an interim grievance procedure:

> We now conclude that it [the established doctrine that an employer must bargain with the union over exercise of discretion regarding terms and conditions of employment] does [apply to unilateral discipline of individual employees], and that an employer must provide its employees' bargaining representative notice and the opportunity to bargain with it in good faith before exercising its discretion to impose certain discipline on individual employees, **absent a binding agreement with the union providing for a process, such as a grievance-arbitration system, to resolve such disputes.** (Slip op. at 2, emphasis added.)

The third comment regarding an interim grievance procedure is, in my view, ambiguous, at least in the context of the facts in this case:

> An employer seeking a safe harbor regarding its duty to bargain before imposing discipline may negotiate with the union **an interim grievance procedure that would permit the employer to act first followed by a grievance and, potentially, arbitration** as is typical in most complete collective-bargaining agreements. (Slip opinion at 9, fn. 20, emphasis added).

The sentence refers to negotiation of an interim grievance procedure of "grievance and, potentially, arbitration." As applied here, the sentence might be construed to mean that a safe

[9] Moreover, even had Misner not stated that he understood, in agreement with Bonifay's assertion that there would be no arbitration, the Union's conduct manifested an intention to be bound consistent with the offer and is sufficient to constitute acceptance. See, e.g., *Capitol-Husting Co. v. NLRB,* 671 F.2d 237, 243 (7th Cir. 1982).

harbor is provided by an interim grievance procedure which might potentially contain an arbitration provision. Alternatively, it could mean that a safe harbor is provided by an interim grievance procedure like those contained in most complete collective-bargaining agreements which give the Union an option to potentially exercise discretion to request arbitration. However, even if the second reading of this sentence is correct, it falls short of mandating arbitration.

Surely if the Board intended to mandate arbitration as a part of an interim grievance procedure, its decision would have clearly provided such guidance. Thus, in disagreement with the General Counsel, I find that *Alan Ritchey* does not specifically require that an interim grievance procedure contain an arbitration component. Further, I find that the two-step process agreed upon by the parties constitutes an interim grievance procedure in compliance with *Alan Ritchey*. Thus, Respondent did not violate Section 8(a)(5) and (1) of the Act by failure to provide notice and an opportunity to engage in preimposition bargaining about the discharge of 12 employees

V. WEINGARTEN RIGHTS – DISCHARGE OF LISA WILSON

Facts

The General Counsel alleges that on March 29, 2013, Respondent violated Section 8(a)(1) of the Act by denying the request of paramedic Lisa Wilson (Wilson) to be represented by the Union at an interview which she reasonably believed could result in disciplinary action against her. Both Respondent and the Union supported strong training programs regarding an employee's right to representation at an investigatory interview. In July 2012, the Union conducted a *Weingarten* campaign in which it passed out *Weingarten* cards summarizing their rights. The cards state,

> **Weingarten Rights – Request for a Steward**
>
> If you are called into a meeting with a management representative and you have reason to believe that disciplinary action against you may result, you have the right to have a steward present during this meeting. Read the statement below to the management representative, and contact your steward immediately.
>
> "If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I request that my union representative, officer or steward be present at the meeting. Without representation, I choose not to answer any questions. This is my right under a U.S. Supreme Court decision called Weingarten."

In addition to the cards, the Union also orally advised employees, telling them "if they feel that they're going to be disciplined or brought into a meeting that they should give the shop steward a call and make sure that one of us is present." Chief Shop Steward Vanier specifically recalled advising Wilson of her rights in July 2012 and as an ongoing topic at subsequent meetings.

Similarly, Administrator Bonifay, a former Union representative, trained management in

Weingarten rights and procedures and authored a company policy incorporating *Weingarten* rights. Bonifay also modified discipline forms to include an acknowledgment of waiver of *Weingarten* rights after a July 2013 incident in which an employee initially requested a union representative and then changed his mind when the meeting was reconvened in order for attendance of a union representative.

Wilson began working for Respondent in November 2007 as an EMT. She became a paramedic in February 2011. She was working two 24-hour shifts, one on Fridays and one on Sundays.

Quality Assurance Supervisor Brian Meader (Meader) runs daily random audits of calls from the previous day to ensure compliance with protocols and policies. For instance Meader sometimes monitors all calls for a heart attack, known as a STEMI (ST elevation myocardial infarction) call. His audit involves going through each call with the STEMI code to ensure compliance with protocols and policies. According to Meader, the protocols are not only company policies but they are mandated by Solono County Emergency Medical Services and must be followed without exception. On March 29, 2013,[10] his random STEMI audit revealed that on March 24, Wilson failed to "trauma activate a patient that clearly met activation criteria."

After making this discovery on March 29, Meader encountered Wilson later that day and called her into a meeting. He told Wilson that he needed to discuss a call. She followed Meader to a meeting room.

Wilson had received a prior quality assurance warning letter on January 21 and knew the drill. As she passed Paramedic Supervisor Roger Aikman, she asked him if she needed to turn in her narcotics keys, which is Respondent's policy when employees are sent home. He shrugged and did not join the meeting. According to Wilson, Administrator Bonifay and James Pierson (Pierson), Vice President of Operations, were present in the meeting room. Meader testified that only he, Wilson, and Pierson were present in the room. Meader did not recall Bonifay coming into the meeting. Bonifay denied, or alternatively, did not recall that he was at this meeting.

As to who was present in the room, I credit Wilson. Such a meeting is a more singular event for an employee and, accordingly, Wilson likely retained an accurate recollection of who was present. Meader could not recall that Bonifay was present. Pierson did not testify. For the same reason, I also credit Wilson's recollection of what was said at the meeting. Meader was a straight forward, articulate witness with an excellent understanding of quality assurance policies and procedures. However, Meader admitted that he has conducted 40-50 quality assurance meetings and his recollection of this specific meeting was very vague, according to him. For these reasons, I specifically discredit his testimony regarding what was said at the meeting.

According to Wilson, when she entered the room she said she would like a union representative if this was a disciplinary meeting. Pierson responded, according to Wilson, stating that no investigation was going to be conducted at the meeting. The investigation had already occurred. Meader testified that at no time during the meeting did Wilson request a union representative. Meader further testified that he was familiar with employee *Weingarten* rights

[10] All further dates are in 2013 unless otherwise referenced.

through company training on the subject. Pierson did not testify and Bonifay testified that he was not present. I credit Wilson and find that she requested a union representative and was told by Pierson that she did not need one because the investigation had already occurred. In making this credibility resolution, I draw an adverse inference in Respondent's failure to call Pierson as a witness.[11]

The following factual statement is based on Wilson's credited testimony. Meader handed Wilson a quality assurance discipline. It stated that Wilson had failed to follow a trauma algorithm and as result, she would be placed on a six-month full quality assurance audit to ensure that she followed all protocols and she would be required to take four hours of remedial training. The quality assurance discipline concluded that due to Wilson's quality assurance history, the matter would be forwarded to administration for further action.

After reading the document, although she was not asked to explain her actions, Wilson told Respondent's management why she had deviated from the standard trauma algorithm in this particular instance. Wilson testified, "I read the report and then responded to the statements in the letter. . . I explained my reasoning for transporting the patient to the location that I chose." When asked, "Did any manager ask you questions about that decision?" Wilson responded that Pierson and Meader told her the patient should have been transported to a trauma center. In other words, they did not question her. Discussion ensued regarding whether independent thinking or blindly following the rules was called for. Wilson initiated this stating that she, "believed that they would all be happy if I followed the chart on the trauma protocol rather than independently thinking." According to Wilson, Bonifay agreed. Wilson was told that she must adhere to the protocols. Meader also told her that she would receive additional communication from administration after the meeting.

Although no evidence of questioning of Wilson was adduced on direct examination, on cross-examination, Wilson testified that Pierson asked her a question:

> Q During the course of that meeting what do you recall Mr. Pierson saying to you?
> A I recall him asking me why I chose to transport the patient to the facility that I chose. I recall him again making the statement regarding that I in my infinite wisdom don't need to make independent decisions regarding transport of trauma patients. And I recall him sending me back to shift as I stated previously.
> Q Anything else that he said?
> A That he was done with me and to go back to work.
> Q Have you told me everything you can recall Mr. Pierson said during the course of the meeting?
> A The only other statement that I think I left out was that he made a comment that I wasn't getting it on the trauma calls. Nothing other than that.

Based on Wilson's demeanor, I credit her testimony on direct. On direct examination, Wilson appeared to be living and breathing the conversation as if she were literally reliving it.

[11] See, e.g., ***Parksite Group***, 354 NLRB 801, 804 (2009) (judge did not abuse discretion in drawing adverse inference to failure of respondent to call its manager who evaluated alleged discriminatees for rehire).

She testified sequentially to each statement made during the meeting. On cross-examination, she was asked about what a particular participant in the meeting said, that is, she was asked to make a piecemeal analysis of the conversation. It was at this point that she testified that Pierson asked why she transported the patient to a particular facility. There was no follow-up regarding Wilson's statement on cross-examination that she recalled Pierson asking why she chose to transport the patient to a particular facility.

On direct examination, Wilson testified that she explained transport immediately after reading the disciplinary letter which states, "Therefore this patient should have been taken to the closest appropriate trauma hospital." Wilson was a strong, assertive witness. Her demeanor was more consistent with explaining to management why this particular trauma patient did not fit the trauma algorithm and why transport to a different facility was thus warranted. Indeed, given Wilson's forthright demeanor during direct testimony, her rendition of the conversation indicates that it would have been difficult for management to propound a question to her after she read the quality assurance disciplinary letter and began her explanation of her actions. Thus, I specifically discredit Wilson's testimony on cross-examination that Pierson asked her a question.

After the meeting, Meader, Pierson, and Bonifay met. The purpose of their meeting was to assess Wilson's overall disciplinary situation after she had received the quality assurance discipline referred to above. They determined that given Wilson's two prior quality assurance offenses as well as the new quality assurance offense, there were adequate grounds to justify termination. However, they decided to give Wilson a "last chance" instead of termination.

By email following the meeting, Bonifay advised Wilson that her failure to follow trauma criteria on this and two prior occasions was unacceptable. The email reiterated the six-month full audit and the four hours of remedial training which had already been set out in the quality assurance letter that Wilson was given in the meeting and advised that her multiple failures to follow trauma protocol were unacceptable. The email concluded,

> However, in lieu of immediate termination for repeated protocol violations, we are hereby advising you that this is your final opportunity to be compliant with protocol in all aspects of your duties as a paramedic.
>
> To be clear: You are hereby notified that you must follow all protocols and company standards in the future. Your failure to comply with the above requirements or failure to follow appropriate protocols and/or company standards will result in the termination of your employment with Medic Ambulance.

Analysis

Weingarten, supra, holds that an employee's request for a union representative at an investigatory interview which the employee reasonably believes may result in disciplinary action is protected activity. However when the purpose of a meeting is merely informative, that is to announce discipline which has already been determined, there is no right to union representation. *Baton Rouge Water Works Co.,* 246 NLRB 995, 997 (1979)(no right to the presence of union representative at a meeting held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision).

In *Baton Rouge Water Works,* id., the Board reasoned that if an "employer has reached a final, binding decision to impose certain discipline prior to the interview based on facts and evidence obtained prior to the interview," there is no right to a *Weingarten* representative.

> [I]f the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under *Weingarten* may be applicable. Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach. In contrast, the fact that the employer and employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which the *Weingarten* protections apply. [Footnote omitted.]

Id. See also *Success Village Apartments,* 347 NLRB 1065, 1071 (2006) (*Weingarten* not violated where purpose of meeting was to impose discipline previously decided upon); *Brunswick Electric Corp.,* 308 NLRB 361, 399-400 (1992), enfd. mem. 991 F.2d 790 (4th Cir. 1993) (meeting conducted only for reading and award of discipline does not give rise to *Weingarten* right).

On March 29, after being told by Meader that he wanted to discuss a call with her, Wilson asked for a union representative. I find that Wilson reasonably believed the disciplinary action might be taken at the time she made the request. Vice President Pierson, who joined Meader and Wilson in the conference room, denied her request telling her that no investigation was going to be conducted.

Thus, according to Pierson, the stated purpose of the meeting was merely informative. In fact, Respondent did not deviate from the stated purpose. Wilson was given her third quality assurance discipline for failure to follow proper protocol. According to Wilson, she was asked no questions during this meeting. However, she argued with Meader and Pierson about the efficacy of blindly following rules versus thinking for oneself. After the meeting, Wilson received an email giving her a "last chance" instead of termination.

The General Counsel argues that the purpose of the meeting was not just to inform Wilson but to ascertain further information about the incident. Further, the General Counsel asserts that because the last chance agreement followed on the heels of the meeting, Respondent had not made a final determination at the time of the interview.

In disagreement, I find that Respondent did not stray beyond its stated informational purpose for the meeting. Respondent did not question Wilson about the incident. Rather, Wilson voluntarily defended herself after reading the quality assurance discipline. Further, there is no evidence that the meeting was used as an underpinning for the email which followed giving Wilson a "last chance." Rather, the email merely reiterated the predetermined discipline set out in the previously discussed quality assurance disciplinary letter. It warned Wilson that any further failures to follow protocol would result in her termination. Thus, the record establishes that the investigation was completed, the decision was made to issue a quality assurance

discipline, and the disciplinary notice was prepared prior to the meeting. Respondent did not explicitly or implicitly seek further information during the meeting.

Accordingly, I find that Respondent did not violated Section 8(a)(1) of the Act by refusing Wilson's request for union representation at a meeting she reasonably believed might result in disciplinary action because the purpose of the meeting was informational and the meeting was in fact conducted as informational only.

VI. AMENDMENT OF COMPLAINT AT HEARING

The original complaint alleged a single *Alan Ritchey* violation based on the underlying unfair labor practice charge in Case 20-CA-111325: "On or about April 4, 2013, [Respondent] terminated Lisa Wilson from employment . . . without affording notice or a meaningful opportunity to bargain with [the Union]." On the second day of hearing, the General Counsel moved to add 11 further *Alan Ritchey* discharge allegations based upon records made available by Respondent on the previous evening. I allowed the amendment of the complaint and further afforded Respondent a one-week recess in order to prepare its defense to the new allegations.

Paragraph 8 of the complaint, as amended at the hearing to add the 11 new *Alan Ritchey* discharge allegations, avers as follows:

a) About April 4, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Lisa Wilson from employment.
b) About June 19, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Ryan Birch from employment.
c) About July 8, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Dustin Brumfeld from employment.
d) About March 26, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Katrina Burton from employment.
e) About August 14, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Luz Daniels from employment.
f) About September 17, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Andrew Dorris from employment.
g) About December 2, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Cal Jones from employment.
h) About October 18, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Aaron Schreieck from employment.
i) About July 31, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Brandon Whitney from employment.
j) About April 8, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Jen Wright from employment.
k) About October 9, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Remy Jordan from employment.[12]
l) About August 22, 2013, Respondent, by Tim Bonifay, at its Vallejo, California facility, discharged Erick Angulo from employment.

[12] At Remy Jordan's request, his discharge was converted to a resignation.

Paragraph 9 follows paragraph 8, alleging that the discharges were a mandatory subject of bargaining and that Respondent failed to afford the Union prior notice and an opportunity to bargain regarding imposition of the discipline. The Union was notified of these discharges at the time they occurred and did not file unfair labor practice charges regarding lack of notice and opportunity to bargain. The discharges of Jones, Schreieck, and Jordan are within six months of the date of the amendment. The others fall outside the six-month 10(b) period.[13]

Even though eight of the allegations were not the subject of a timely filed unfair labor practice charge, I nevertheless find that the amendments were warranted because these allegations are "closely related" to the timely filed unfair labor practice charge in Case 20-CA-111325. In *Redd-I, Inc.,* 290 NLRB 1115, 1116 (1988), the Board held that time-barred allegations may be litigated if they are "closely related" to allegations in the original, timely-filed charge. To determine whether the time-barred allegations satisfy the "closely related" test, three factors are considered: (1) whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge, (2) whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge, and (3) whether a respondent would raise the same or similar defenses to both the timely and the untimely allegations.

It is clear that the new allegations contained in subparagraphs 8(b)-(l) are closely related to the timely filed charge in Case 20-CA-111325. The same individual, Bonifay, allegedly engaged in identical sequential activity to the activity set out in the charge. The legal theory is identical and Respondent raises the same defenses to all of these allegations. The allegations constitute a series of discharges over a period of 9 months. Thus I find that the allegations contained in subparagraphs 8(b)-(l) are closely related to the original timely filed charged.

Additionally, Respondent argues that the Union is estopped from pursuing unfair labor practice charges regarding employees Daniels, Dorris, Jones, Schreieck, Jordan, and Angulo because the Union received postimplementation notice of these discharges but did not pursue grievances for these employees.[14] Respondent claims that the interim grievance procedure constitutes the Union's sole remedy. Just as the grievance procedure provides safe haven for failure to give preimposition notice, Respondent argues it also estops the Union from seeking to impose substantial backpay obligations for these employees because Respondent has relied to its detriment on the Union's selective use of the interim two-step grievance procedure.

However, Respondent's equitable estoppel argument conflates different principles. Just cause is the foundation for determining whether an employee seeks to file a grievance and whether a union determines to process the grievance. On the other hand, the determination of

[13] Sec. 10(b) of the Act, 29 U.S.C. §160(b), provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

[14] The record reflects that the Union received postimplementation copies of the termination letters for six individuals who were subjects of the amendments. Three of the six were discharged were within six months of the date of the amendment to the complaint.

whether a union is owed notice and an opportunity to bargain depends upon the collective-bargaining relationship, whether there is an interim procedure for dispute resolution, and whether discretion is utilized in determining the disciplinary action. These issues are analyzed pursuant to *Alan Ritchey*. Finally, determination of whether a grievance process offers the sole remedy for discharge is analyzed through deferral principles. In the end, equitable estoppel does not preclude a union which has an interim grievance procedure from filing an unfair labor practice charge regarding the duty to bargain.

Finally, citing *Stagehands Referral Service, LLC,* 347 NLRB 1167, 1171 (2006), enfd after remand, 315 Fed.Appx. 318 (4th Cir. 2009), Respondent argues that it was unjust to allow amendment of the complaint due to lack of a valid excuse for delay. *Stagehands* incorporates Board Rule 102.17 which provides that the judge may allow amendment of the complaint at hearing "upon such terms as may be deemed just." In *Cab Associates,* 340 NLRB 1391, 1397 (2003), relied upon in *Stagehands,* the Board determined that three factors should be evaluated to determine whether amendment is just: (1) whether there was surprise or lack of notice; (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated.

Indeed, there was surprise and lack of notice. Initially, I ruled that the amendment would not be allowed. One and one-half days of litigation had already taken place and not a word had been mentioned regarding potential amendment to add 11 additional discharges to the complaint. All parties assumed that only one discharge was at issue.

However, on further consideration, I reversed my ruling because in my view the General Counsel offered a valid excuse for delay in seeking to amend. The General Counsel stated that it had no knowledge of the 11 additional discharges until Respondent provided the discharge documents the evening before the amendment was offered. There is no reason to doubt this assertion and, indeed, Respondent does not dispute it. Rather, for its part, Respondent claimed that it had not previously believed the discharge documents were subpoenaed because the subpoena used the term "discipline," not "discharge."[15] On further consideration, Respondent determined it should produce the documents even though the documents were for "discharge."

Thus, on reconsideration I found the General Counsel's excuse valid and the delay due, in large part, to Respondent's failure to produce the documents in a timely manner. Thereafter, the parties were given a week to prepare for litigation of the 11 additional discharges. The matter was thereafter fully litigated. I further note that administrative resources were conserved in litigation of the 11 additional discharges along with the one discharge originally at issue.

Respondent claims that the Union knew of some of these discharges shortly after they occurred and could have brought them to the General Counsel's attention during the thorough investigation of the unfair labor practice charge. Thus, Respondent asserts there could be no surprise or valid excuse for delay in adding the 11 additional discharges to the complaint. There is no evidence, however, that any other discharges came to light during the investigation of the unfair labor practice charge and, thus, I find on balance that it was just to allow amendment of the complaint.

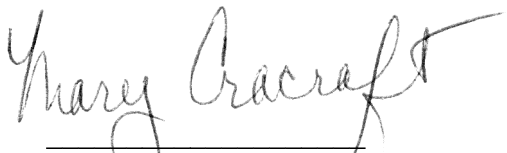
[15] The subpoena requested documents reflecting all discipline issued to employees since January 1, 2012.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[16]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 10, 2014



Mary Miller Cracraft
Administrative Law Judge

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