

***National Labor Relations Board***  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

**DATE:** August 24, 2001

**TO:** Dorothy L. Moore-Duncan, Regional Director, Region 4

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

**SUBJECT:** Hotel Employees & Restaurant Employees International Union, Case 4-CA-30061

506-2017-1700, 506-2017-2500, 506-6090-1700, 524-0133-3125, 524-8390-9600

This case was submitted for advice on whether an International Union as an employer violated Section 8(a)(1) and (3) when it terminated an employee from her position as the Pennsylvania State Legislative/Political Director after she sought the presidency of one of the International's affiliated local unions.

FACTS

Charging Party Russella began working for the Hotel Employees & Restaurant Employees International Union ("Employer") in August 1999 as its Pennsylvania State Legislative/Political Director. She has been a member of Hotel Employees & Restaurant Employees Local 274 ("Local 274"), one of six affiliated locals of the International, since 1985, having performed work in hotel and restaurant bargaining units represented by Local 274.

Russella's responsibilities as the Employer's Legislative/Political Director included lobbying for legislation that would benefit the Employer's six affiliated Pennsylvania Locals and supporting political leaders endorsed by the Locals. She also solicited local leaders' input on political issues of concern, and worked with them in forming local agendas in coordination with the Employer's agenda. Russella reported directly to the Employer's Legislative Representative, Juliano, and his assistant, Beal. Although Russella offered suggestions to Juliano and Beal, they made the final decision as to the legislation or politicians deserving support. Upon receiving instructions from Juliano and Beal, Russella would meet with local union officers to ask them to mobilize the support of their members. Russella was required to submit reports to Juliano and Beal detailing all of her activities; to obtain Juliano's or Beal's approval to spend more than \$50.00; and to receive authorization for her travel.

In November 1999, Local 274 members urged Russella to run against the Local's current President, Pat Coughlan, on a reform ticket. In March 2000, <sup>(1)</sup> Russella told Juliano that she was considering this possibility, and in May she announced to Juliano that she would run.

Near the end of November, the Reform Ticket Steering Committee, comprised of approximately 25 Local 274 members, met at Russella's house to prepare for Local 274's general membership meeting on December 4. They had a number of concerns about their rights as members, including issues such as obtaining a copy of their contract, the processing of grievances, and contract enforcement. They also questioned Local 274's handling of financial matters. Russella attempted to answer the attendees' questions, and reviewed Robert's Rules of Order with them. She advised them that when Local 274's leadership asked for "new business" at the general meeting, they should raise their concerns at that time.

Thurston Hyman, Local 274's Secretary-Treasurer, presided over the December 4 meeting. Hyman reviewed the executive board minutes, which included financial recommendations. A member asked for an itemization of these recommendations, <sup>(2)</sup> and Hyman denied her request. Hyman stated that the meeting would be held in accordance with the Local's bylaws. The member then responded that Local 274's bylaws specified that the meeting should be held in accordance with Robert's Rules of Order, which provide that financial recommendations should be itemized. The member's continued questioning appeared to annoy Hyman, who said that the member could raise the issue when new business was discussed. When Hyman later asked if there was new business, member Glasgow moved to make Local 274's financial records available for inspection by members.

(3) The motion passed after Hyman demanded that it be made in writing. (4) At that point, a member who was not a supporter of the reform ticket moved to adjourn the meeting. Hyman asked someone to second the motion, and after repeated requests, Local 274's vice president seconded the motion. A reform ticket supporter "called the question" and it was voted down. Hyman left the podium as if the meeting had adjourned, but remained in the room.

The members then elected a "committee as a whole," which chaired the meeting, passed and signed various motions, and submitted them to Hyman. The members asked why the meeting was no longer being recorded as it normally would be, and the Recording Secretary replied that the tape recorder was not working. Members asked Hyman for copies of their contract and for Local 274's bylaws. Hyman directed the vice president to retrieve copies of the contract and bylaws, and began passing them out. Other members asked about their grievances and about the itemization of financial recommendations. Another motion to adjourn the meeting was made. Some members remained at the meeting and complained to Hyman about how the meeting was run. Throughout the meeting, although she was not vocal, Russella served as an adviser to the members raising these issues.

In mid-December, Employer attorney Richard McCracken called Russella and told her that International President John Wilhelm had instructed him to ask her about the December 4 meeting. McCracken asked Russella if she had attended the meeting and asked about the events of the meeting. Russella replied that she had attended, but that she did not understand his questions. McCracken asked Russella if she encouraged people to attend the meeting, and she admitted that she did. He asked if she found the meeting to be disruptive. She described the events without stating an opinion.

On January 5, 2001, Juliano sent Russella a letter advising her that she was discharged effective January 15, 2001. The letter stated that Juliano believed she had become ineffective as the State Political Director. The letter further stated:

It is the purpose of our Department to assist the Local Unions in their political programs. We develop special expertise in the political arena, but . . . the Local Unions primarily determine the program, which we then help them to achieve. It appears that you have frequently failed to understand that role and have tended to see yourself as equal to and independent of the Local unions' elected

leadership . . . Some friction is to be expected when people are trying to accomplish difficult tasks, but they must be able to repair lapses in

collegiality . . . From what I saw of your interaction with Pat Coughlan, I attribute this to your inability to compromise with the leadership, to accept your share of responsibility for the problem or to make any real effort to work cooperatively. You are not welcomed with the largest union in the State, and your relations with others are strained.

The letter specifically cited the incidents at the December 4 meeting as a reason for the termination, stating in pertinent part:

Your difficulties with the leadership of the Pennsylvania locals took a dramatic turn downwards on December 4. At Local 274's regular . . . membership meeting, you were present and involved with a group of members who were openly antagonistic to the leadership of the local union. Among other things, this group of members engaged in conduct that disrupted the meeting. You participated in this conduct . . . It is entirely inconsistent with your responsibilities as an International Union employee, however, for you to oppose, or let it appear that you oppose, the leadership of any of the Local unions in Pennsylvania.

#### ACTION

We conclude that the charge should be dismissed, absent withdrawal, because even though Russella's candidacy for local union office constituted protected activity, the Employer discharged her because she engaged in disruptive conduct that undermined her ability to perform her job.

1) Russella was not a managerial employee.

We agree with the Region that Russella is an employee within the meaning of Section 2(3) of the Act, and not a manager. Managerial employees are defined as those who:

"formulate and effectuate management policies by expressing and making operative the decisions of their employer.' . . . [N]ormally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." (5)

In District #1, Pacific Coast District Marine Engineers Assn., (6) the Board applied this reasoning to find that a union employer's legislative director was not a managerial employee. The Board stated that:

[B]ecause union staff personnel engage in political activities, including assignments to attend meetings of COPE, or represent the union to the public, or incur expenses or pledge the union's credit in the ordinary course of staff duties, or make recommendations which may influence the union's policy or business decisions, this does not necessarily indicate that such personnel are managerial employees. Nor does the fact that the staff employee performs his functions without close supervision, and thus may exercise discretion in carrying out his work, brand the employee the executive type. (7)

Here, Russella did not take or recommend discretionary actions that effectively controlled or implemented employer policy. While Russella monitored legislation and offered suggestions to Juliano and Beal, the final decision as to which legislation or politicians to support was made by them. Russella had to submit reports to Juliano and Beal detailing all of her activities, and was required to obtain their approval to spend more than \$50.00. She also had to receive authorization for her travel. Thus, Russella's job duties were limited to promoting the employer's political agenda, and the final decisions in formulating that agenda were made by her superiors. Accordingly, like the legislative representative in District #1, Russella's legislative activities did not entail the type of discretion to formulate or effectuate management policy that would make her a managerial employee.

2) The Employer lawfully discharged Russella.

Section 7 of the Act provides that "employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Such mutual aid and protection includes the right of employees to "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," and to "engage in otherwise proper concerted activities in support of employees of employers other than their own." (8) Employees of a union have the same right as other employees to "engage in self-organization and to all the other rights provided by Section 7 of the Act." (9) Where the union employee is also a member of that union, protected activity extends to involvement in the union's internal affairs, even though the activity does not pertain to the employee's own collective-bargaining relationship with the union employer. (10) Accordingly, an employee-member of an international union engages in protected activity by running for office in the local where he is a member, and the international union violates Section 8(a)(3) and (1) if it discharges him for exercising that right. (11)

At the same time, the protection of Section 7 "is not so all-encompassing that it protects, without distinction, all activity by employees aimed at implementing its enumerated objectives." (12) Rather, the employees' right to engage in Section 7 activity must be balanced against the legitimacy of the employer's business interests which may be at stake. Thus, where employee conduct is "disloyal" to the employer, or otherwise renders the employee unfit for further service, it may justify discipline, including discharge, in spite of its connection with protected activity. (13) This reasoning applies equally when the employer is an international union. (14) Thus, while an international union may not lawfully prevent its employee from running for local office when those activities are "wholly unrelated to his duties as an employee," the union may lawfully discharge an employee if his actions undermine his ability to effectively perform his job. (15)

Applying the above principles, Russella's candidacy for local office constituted protected, concerted activity; and had the Employer discharged her for that reason, it would have violated Section 8(a)(1) and (3) of the Act. As we now show, however, the Employer discharged Russella, not because she became a candidate for office, but because, in the course of her activities in seeking office, she engaged in disruptive conduct that prevented her from effectively carrying out her job.

As the Employer's Pennsylvania State Legislative/ Political Director, Russella's responsibilities included working with the leaders of six local unions to mobilize support for the Employer's political agenda, to solicit issues of importance to the locals'

leaders, and to form a political agenda for the locals in coordination with the Employer's agenda. As the Region notes, Russella's ability to work cooperatively with the locals' leadership was critical because she fulfilled the delicate function of affording the locals input into the Employer's agenda, while mobilizing them to support the ultimate agenda as determined by the Employer.

The evidence further indicates, however, that Russella's involvement in the events of Local 274's December 4 membership meeting damaged her ability to foster the atmosphere of trust and cooperation with the locals' leadership that was necessary for her to perform her job. Russella, as their chosen candidate for President, was the head of the Reform Ticket supporters. It was those supporters who disrupted and virtually seized control of the December 4 meeting and openly embarrassed the leadership of Local 274 before the entire membership. Although Russella did not speak openly at the meeting, she clearly acted as the main adviser to the Reform Ticket supporters throughout the meeting. As the Employer stated in his discharge letter to Russella, her "difficulties with the leadership of the Pennsylvania locals took a dramatic turn downwards" at the meeting. Specifically, she was "present and involved with a group of members who were openly antagonistic to the leadership of the local union. . . . [and who] engaged in conduct that disrupted the meeting. [Russella] participated in this conduct." As the Employer concluded, it was "entirely inconsistent with [Russella's] responsibilities as an International Union employee . . . to oppose, or let it appear that [she] oppose[d], the leadership of any of the Local unions in Pennsylvania."

That the Employer discharged Russella because of her disruptive conduct at the December 4 meeting, and not her decision to run for office, is supported by the fact that the Employer took no action against Russella, or said anything to discourage her candidacy, when she first announced her decision to run in May. Rather, it was not until seven months later, after the events of the December 4 meeting, that the Employer discharged Russella, after deciding that her relationship with the locals' leadership had become too strained and contentious to enable her to perform her job. Thus, here, unlike in *Office Employees*, where the employee was discharged for "activities wholly unrelated to his duties as an employee,"<sup>(16)</sup> the Employer discharged Russella because her disruptive conduct undermined her ability to effectively perform her job.<sup>(17)</sup>

For the foregoing reasons, we conclude that the Region should dismiss the 8(a)(3) and (1) charge, absent withdrawal.

B.J.K.

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<sup>1</sup> All dates hereafter are 2000, unless otherwise indicated.

<sup>2</sup> This matter was raised at Russella's house.

<sup>3</sup> This matter was also raised at Russella's house.

<sup>4</sup> Glasgow anticipated this demand and presented Hyman with a prepared motion.

<sup>5</sup> *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980), quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

<sup>6</sup> 259 NLRB 1258, 1265 (1982), *enfd.* 723 F.2d 97 (D.C. Cir. 1983).

<sup>7</sup> *Id.* at 1266 (citations omitted).

<sup>8</sup> *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-565 (1978) (distribution of literature urging employees to oppose state's right to work statute and to support increase in federal minimum wage was protected under the "mutual aid and protection" clause of Sec. 7).

<sup>9</sup> Office Employees, 307 NLRB 264, 267 (1992), enf. denied 981 F.2d 76 (2d Cir. 1992).

<sup>10</sup> Id.; Welfare and Pension Funds, 251 NLRB 1241, fn. 2, 1246 (1980).

<sup>11</sup> Office Employees, 307 NLRB 264.

<sup>12</sup> Communications Workers Local 6360, 270 NLRB 812, 819

(1984).

<sup>13</sup> See, e.g., Jefferson Standard Broadcasting Co., 346 U.S. 464 (1953) (employer was permitted to discipline employees who had engaged in serious acts of disloyalty despite the fact that these acts were committed in connection with concerted activity); Newark Morning Ledger, 316 NLRB 1268, 1271 (1995) (shop steward's protected activity in threatening to file a large number of grievances "may lose the Act's protection, when the employer can establish that he or she acted in an insubordinate or overly disruptive manner," citing Postal Service, 268 NLRB 274 (1983)); Retail Clerks Local 770, 208 NLRB 356, 357 (1974); Butchers Local 115, 209 NLRB 806, 809 (1974).

<sup>14</sup> Butchers Local 115, 209 NLRB at 811.

<sup>15</sup> See cases, fn. 13. See also Retail Clerks Local 770, 208 NLRB at 357 (international union lawfully discharged employee-members for openly supporting the opponent of the union president, because "an employee of a union, like any other employee, has no protected right to engage in activities designed solely for the purpose of influencing or producing changes in the management hierarchy"). Accord: Butchers Local 115, 209 NLRB at 809. Compare Office Employees, 307 NLRB 264, fn.1 (distinguishing Retail Clerks on the basis that the employee in Office Employees was a member running for office in his own local union, and not seeking to influence or change the management hierarchy of his own employer).

<sup>16</sup> 307 NLRB at 264 (for example, the employer failed to support his claim that the employees' duties were incompatible with holding local office, and there was no evidence that the employee antagonized the leadership of the locals he serviced).

<sup>17</sup> We agree with the Region that the "one voice" principle, discussed in Local SEIU 254 (Brandeis University), 332 NLRB No. 103, slip op. at 8 (2000), is inapplicable to the instant situation. The "one voice" defense, which arose in a Section 8(b)(1) (A) case and involved the internal discipline of a union member, protects a "union's legitimate interest in ensuring the undivided loyalty" of union representatives in their dealings with the employer about working conditions.