



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004

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Telephone: (602)640-2160
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April 12, 2016



Re: Navopache Electric Cooperative, Inc.
Case 28-CA-118333



On April 14, 2014, you were advised that certain allegations in the above captioned charge were administratively deferred to the grievance arbitration procedures pursuant to the National Labor Relations Board's decisions in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984). On September 16, 2015, an arbitrator's decision issued in this matter. On September 22, 2015, the Union filed with the Region its request for post-arbitral review of the arbitrator's Opinion and requested that I resume the processing of the unresolved unfair labor practice allegations.

Decision to Dismiss: Based on that investigation, I have decided that further deferral to the grievance-arbitration procedures is no longer deemed warranted. I am, therefore, revoking the deferral that issued on April 14, 2014, and I have decided to dismiss your charge for the reasons discussed below.

The charge in this matter, which was filed on December 5, 2013, and amended on January 31, 2014, alleged that the Employer violated Section 8(a)(1), (3), and (5) of the Act by:

1. maintaining overly-broad and discriminatory rules including but not limited to its Director Elections Policy and its Social Media Policy;
2. issuing an employee a verbal warning for violating the overly broad and discriminatory Director Elections Policy;
3. threatening employees with unspecified reprisals;

4. removing an employee from seven-day pay out because he raised a claim under the parties' collective-bargaining agreement;
5. removing an employee from seven-day pay out because he engaged in union and other concerted activities;
6. failing and refusing to provide the International Brotherhood of Electrical Workers, Local 387, AFL-CIO (Union) with relevant and necessary requested information including, but not limited to, information related to retirement plans;
7. unilaterally implementing, among other changes, a new safety manual, a new health insurance plan, health savings accounts, a new Cell Phone Policy, a new Social Media Policy, a revised Firearms/Deadly Weapons Policy, and a revised Substance Abuse Policy; and
8. bypassing the Union and engaging in direct dealing with employees with respect to, among other terms and conditions of employment, a new health insurance plan, health savings accounts, a new Cell Phone Policy, a new Social Media Policy, a revised Firearms/Deadly Weapons Policy, and a revised Substance Abuse Policy.

On January 31, 2014, I issued a Complaint and Notice of Hearing (Complaint) alleging that the Employer violated Section 8(a)(1), (3), and (5) of the Act. On April 7, 2014, the Employer filed with the Board a Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment. On April 11, 2014, the Union requested to withdraw the allegation that the Employer failed and refused to provide it with relevant and necessary requested information including but not limited to information related to retirement plans. Also, on April 11, 2014, the Employer filed with the Board a Motion to Withdraw Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment. On April 14, 2014, I issued an Order Approving Partial Withdrawal Request, Dismissing Complaint Allegations, Deferring Remaining Charge Allegations, Withdrawing Complaint, and Vacating Notice of Hearing. On April 14, 2014, I deferred the matter under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), deferring the remaining seven allegations of the charge to the parties' grievance and arbitration procedure.

The Union pursued to arbitration two of the remaining seven allegations: (1) the allegation that the Employer maintained an overly-broad and discriminatory Director Elections Policy, and (2) the allegation that the Employer issued an employee a verbal warning for violating the overly-broad and discriminatory Director Elections Policy. With respect to the other five remaining allegations, you have informed this office generally that "several allegations were resolved by the parties," and, in any event, there is no evidence that the Union pursued arbitration of those allegations.

On May 8, 2015, the arbitration proceeding over the two allegations identified above was conducted. Both parties were represented by counsel, who presented witnesses and evidence and submitted post-hearing briefs. The proceedings appear to have been conducted in a fair and regular manner. At the outset of the hearing, the parties informed the arbitrator that she was being authorized to consider and to resolve the unfair labor practice issues which led to the deferral decision.

On September 16, 2015, the arbitrator issued an Opinion and Award (Opinion) ruling finding that the discipline of the employee pursuant to the Director Elections Policy did not violate the collective bargaining agreement and stating that she was “constrained to find that there is no contractual basis for [her], as arbitrator, to hold that [the employee’s] discipline violated the National Labor Relations Act.” On September 22, 2015, the Union filed with the Region its request for post-arbitral review of the arbitrator’s Opinion.

With respect to the two allegations that were presented to the arbitrator, namely the allegations related to the Director Elections Policy and the discipline of an employee pursuant to that policy, I find that it is inappropriate for me to defer to the arbitrator’s Opinion related to those allegations under *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), because the arbitrator did not consider the underlying unfair labor practice issues.

However, I have decided to dismiss those two allegations because I find that the Director Elections Policy, which restricts “employees, spouses of employees or cohabitants of employees [from taking an] active part, other than voting” in the election of the Employer’s board of directors, is not unlawful.

Employees do not have a Section 7 right to participate in the selection of high-ranking officials, such as the board of directors here, who have no direct impact on their employment conditions. See *Co-Op City*, 341 NLRB 255, 257 (2004). Generally, “employee efforts to affect the ultimate direction and managerial policies of the business are beyond the scope” of Section 7. *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41 (1980). For that reason, employees have no protected right to engage in activities designed solely to make changes in the management hierarchy. *Retail Clerks Union, Local 770*, 208 NLRB 356, 357 (1974). Thus, I find that the Director Elections Policy does not, on its face, interfere with, restrain, and coerce employees in the exercise of their rights under Section 7.

I further conclude that the evidence does not establish that the Employer promulgated or enforce the policy in response to Section 7 activities. Rather, it appears that the Employer created the policy out of a concern that any activities beyond simply voting would create an appearance of favoritism or retaliation regarding later acts by board members, and that such activity could also create workplace friction. Furthermore, the Employer did not enforce the policy against any employee for engaging in Section 7 activity, as Hamblin was not engaged

in Section 7 activity when he signed an acquaintance's campaign petition for a seat on the board of directors. Therefore, I find that the Employer's maintenance of the Director Elections Policy and its enforcement of that policy through the discipline of Hamblin did not violate Section 8(a) (1) of the Act, and those allegations must be dismissed.

With respect to the five other remaining allegations of the charge, based on your request for review of the arbitrator's Opinion, it appears that you are not asking me to resume processing those allegations. To the extent those allegations have been resolved by agreement of the parties, you have not requested review of any such agreements. Further, to the extent that they have not been resolved by agreement of the parties, it appears that the Union has not timely pursued arbitration of those allegations, as it is obligated to do when a charge is deferred, as explained in the deferral letter I issued on April 14, 2014. In these circumstances, the allegations must be dismissed. Based on the foregoing, I am dismissing all remaining allegations of your charge.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlr.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal **MAY NOT** be filed by fax or email. To file an appeal electronically, go to the Agency's website at www.nlr.gov, click on **E-File Documents**, enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **April 26, 2016**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than **April 25, 2016**. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

April 12, 2016

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before April 26, 2016**. The request may be filed electronically through the *E-File Documents* link on our website www.nlr.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after **April 26, 2016, even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ Cornele A. Overstreet

Cornele A. Overstreet
Regional Director

Enclosure

cc:

[REDACTED]

[REDACTED]

[REDACTED]

CAC [REDACTED]

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

Navopache Electric Cooperative, Inc.

Case Name(s).

28-CA-118333

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

(Signature)