

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

DATE: June 26, 2017

TO: Kathy Drew-King, Regional Director  
Region 29

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

SUBJECT: North Shore Ambulance and Oxygen  
Service, Inc.  
Case 29-CA-187535

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The Region submitted this case to Advice on the issue of whether, pursuant to the Board's decision in *Total Security Management*,<sup>1</sup> it is appropriate to seek backpay and reinstatement for the alleged discriminatee in this case. We conclude that the Region should seek those remedies in the consolidated unfair labor practice and compliance proceeding.

FACTS

The Employer provides emergency medical services and medical transportation to public and private hospitals and healthcare facilities throughout the New York metropolitan area. On October 28, 2016,<sup>2</sup> a representation election was held at the Employer's facility. The Union (Local 726, IUJAT) won the election 11 to 6 in a unit of all full-time and regular part-time ambulance drivers and helpers. The Regional Director denied the Employer's timely-filed objections and certified the Union on November 18. The Employer filed a request for review of that decision, which the Board denied on May 3, 2017. The parties have been bargaining but have not reached a first collective-bargaining agreement.

The alleged discriminatee had been an ambulance driver for the Employer for approximately (b) (6), (b) (7)(C) prior to (b) (6), (b) (7)(C) discharge. On (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) after the election, the alleged discriminatee was assigned to pick up a patient around (b) (6), (b) (7)(C), at the end of (b) (6), (b) (7)(C) shift.<sup>3</sup> The alleged discriminatee asserts

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<sup>1</sup> 364 NLRB No. 106 (August 26, 2016).

<sup>2</sup> All dates hereinafter are in 2016 unless otherwise noted.

<sup>3</sup> The alleged discriminatee worked from (b) (6), (b) (7)(C)

that when [REDACTED] arrived to pick up the patient, [REDACTED] went into the medical facility and saw the security guard turning off the lights and locking up the facility; [REDACTED] went further into the facility to look for the patient, and looked in the parking lot, but couldn't find anyone. [REDACTED] called dispatch on the radio several times, but there was no answer. So [REDACTED] drove the ambulance back to the station and spoke with the [REDACTED] dispatcher. The [REDACTED] dispatcher told [REDACTED] that the patient was outside, and that [REDACTED] had to go back out and get [REDACTED]. The alleged discriminatee said that [REDACTED] was about to clock out and go home. When the [REDACTED] dispatcher reiterated that the patient was waiting for [REDACTED], the alleged discriminatee said that wasn't possible and explained that [REDACTED] had waited and checked the entire building, and also outside the building, and that no one was there. The [REDACTED] dispatcher said that [REDACTED] had to go back and pick up the patient. The alleged discriminatee replied that [REDACTED] was already here (back at the Employer's facility) and needed to go home, and then went and clocked out. The [REDACTED] manager said that [REDACTED] was the boss, that the patient was still waiting for [REDACTED] and that [REDACTED] couldn't just leave now. [REDACTED] asked who would pick the patient up, and the alleged discriminatee responded that [REDACTED] didn't know but that [REDACTED] was going home, and that [REDACTED] was going to call another dispatcher.

The alleged discriminatee then called another dispatcher, with whom [REDACTED] had interacted with about transporting this same patient earlier in the day, to discuss the situation. [REDACTED] told this other dispatcher that [REDACTED] was supposed to pick up a patient that evening, and that it was the same person that [REDACTED] (this other dispatcher) had told [REDACTED] to cancel earlier that day because the patient had decided to drive [REDACTED] to the medical facility. The alleged discriminatee described [REDACTED] attempts to look for the patient and that [REDACTED] ultimately decided to go home. (The alleged discriminatee later explained to the Region that because [REDACTED] had been told earlier in the day that this patient had decided to drive [REDACTED] to the facility, [REDACTED] assumed when [REDACTED] couldn't find the patient that evening that the patient had just driven [REDACTED] home from the facility.) [REDACTED] asserts that the dispatcher told [REDACTED] during this phone call that [REDACTED] didn't do anything wrong by leaving, that [REDACTED] had the right to go home since the patient wasn't there, and that [REDACTED] would speak with Human Resources about the situation.

The next day, [REDACTED], the Employer terminated the alleged discriminatee. The disciplinary form stated that that the alleged discriminatee had refused to pick up a passenger after returning to the Employer's facility.

The Union filed the instant charge on November 3, alleging, *inter alia*, that the Employer discharged the alleged discriminatee without notifying or bargaining with the Union. During the Region's investigation, the Employer provided information on all written disciplinary actions from [REDACTED] 2015 through [REDACTED] 2017. This included evidence of two employees being disciplined for similar insubordination, including an incident in [REDACTED] 2015 where an employee refused to pick up a patient assigned to [REDACTED] and an incident in early [REDACTED] 2016 where an employee

left/did not pick up a patient and returned to the Employer's facility without authorization; neither of those employees was discharged for their insubordination. The Region ultimately dismissed an allegation that the discharge of the alleged discriminatee violated Section 8(a)(3), but concluded that the Employer violated Section 8(a)(5) by implementing the discretionary discipline/discharge without first providing the Union notice and an opportunity to bargain required under *Total Security*. The Region thereafter submitted the case for advice as to the appropriate remedy.

### ACTION

In *Total Security Management*, the Board considered whether an employer has a statutory obligation to bargain before imposing discretionary discipline on unit employees when a union has been certified or lawfully recognized but has not yet entered into a collective-bargaining agreement with the employer.<sup>4</sup> The Board held, *inter alia*, that discretionary discipline is a mandatory subject of bargaining, and therefore that employers must give unions notice and an opportunity to bargain before imposing certain serious types of disciplinary actions.<sup>5</sup>

Although the Board in *Total Security* elected to apply its holding only prospectively, it addressed the issue of whether reinstatement and backpay will be appropriate in future cases involving the unlawful imposition of discretionary discipline without bargaining.<sup>6</sup> The Board concluded that the standard remedy for an unlawful unilateral change should be granted, including reinstatement and backpay. It noted, however, that the respondent may raise as an affirmative defense in a compliance proceeding that the discipline was "for cause," as that term is used in Section 10(c) of the Act, and therefore that reinstatement and backpay are not warranted. Specifically, the Board held that:

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<sup>4</sup> 364 NLRB No. 106, slip op. at 1. We note that here, although the Union had not yet been certified at the time of the discretionary discipline at issue, the Board has held that an employer acts at its peril in refusing to bargain and making unilateral changes between the time an election is held and a certification issues. *See, e.g., Mike O'Connor Chevrolet*, 209 NLRB 701, 703-704 (1974), *enf. denied on other grounds* 512 F.2d 684 (8<sup>th</sup> Cir. 1975).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*, slip op. at 12-15.

We will construe Section 10(c) to preclude reinstatement and backpay if the respondent establishes, consistent with the allocation of proof described below, that the employee's suspension or discharge was for cause. In order to do so, the respondent must show that: (1) the employee engaged in misconduct, and (2) the misconduct was the reason for the suspension or discharge. In response, the General Counsel and the charging party may contest the respondent's showing, and may also seek to show, for example, that there are mitigating circumstances or that the respondent has not imposed similar discipline on other employees for similar misconduct. If the General Counsel and charging party make such a showing, the respondent must show that it would nevertheless have imposed the same discipline.<sup>7</sup>

The Board emphasized that the respondent bears the burden of persuasion in this analytical framework, noting that this is consistent with the allocation of the burdens of proof in a standard compliance proceeding and with the Board's established principle that the wrong-doer bears the burden of uncertainty created by its wrongful conduct.<sup>8</sup>

In this case, the Employer would be able to meet its initial burden of showing that the alleged discriminatee engaged in misconduct (insubordination) and that the misconduct was the reason for the discharge. But the Region would then have the opportunity to show that there are mitigating circumstances and/or that the Employer has not imposed similar discipline on other employees for similar misconduct. In this regard, the evidence shows two incidents involving similar misconduct of refusing to pick up a patient where the employees were not fired for their insubordination, and there does not appear to be any Employer history of discharging an employee for one incident of insubordination. In addition to this evidence of disparate treatment, there is also evidence of mitigating circumstances, including that the alleged discriminatee reasonably believed that the patient had driven (b) (6), (b) (7)(C) home, that (b) (6), (b) (7)(C) attempted to call dispatch several times before returning to the Employer's facility, and that (b) (6), (b) (7)(C) called the other dispatcher (presumably a supervisor like the (b) (6), (b) (7)(C) dispatcher) prior to leaving for the (b) (6), (b) (7)(C) and was told that (b) (6), (b) (7)(C) had done nothing wrong. So the burden would then shift back to the Employer to show that it would nevertheless have imposed the same discipline, and it has not submitted evidence that would be sufficient to meet that burden.

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<sup>7</sup> *Id.*, slip op. at 15.

<sup>8</sup> *Id.*, slip op. at 15 and n. 41.

In these circumstances, the Region should seek backpay and reinstatement in the consolidated unfair labor practice and compliance proceeding in this case.

/s/  
B.J.K.

ADV.29-CA-187535.NorthShoreAmbulance.Response (b) (6), (b) (7)