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

Advice Memorandum

DATE: October 28, 2010

TO : Frederick Calatrello, Regional Director
Region 8

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

SUBJECT: Kaiser Permanente
Case 8-CA-39002
536-2581-3328

Office and Professional Employees
International Union, Local 17
(Kaiser Permanente)
Case 8-CB-11316
536-2581-3358

These cases were submitted for advice as to whether the Union and the Employer violated Section 8(b)(1)(A) and (2) and 8(a)(3) when they applied the superseniority and seniority tie-breaking provisions of their collective-bargaining agreements to prevent one Union steward from bumping another Union steward. We conclude that the Union and the Employer did not violate the Act, as they did not discriminate on the basis of union activity and acted based on a reasonable interpretation of their agreements.

FACTS

Kaiser Permanente (the Employer) is a health care provider offering medical services at multiple locations. Office and Professional Employees International Union, Local 17 (the Union) represents employees at 13 of the Employer's facilities in northeast Ohio, including in Chapel Hill and Brooklyn Heights, Ohio.

The parties' current collective-bargaining agreement is effective from October 1, 2005 until September 30, 2010. Article XXXII of that agreement, "Layoff & Recall," states, in part:

> Union Stewards shall be deemed the most senior employees in the bargaining unit for the purposes of seniority determination in layoff for the duration of their period of service in that capacity, provided that the stewards meet the qualification requirements.

That article also establishes bumping procedures to be utilized when there has been a reduction made in the workforce. Initially, a "joint bumping committee" or "team" made up of both management and union representatives

identifies which employees will be impacted by the reduction, as well as the jobs into which they can bump. A more senior employee whose job has been eliminated can bump the least senior employee at the same facility who holds the same classification/labor grade and the same number of hours. If there are no such circumstances, the affected employee may have the option of bumping an employee at another facility. The parties' agreement makes no express provision for ties in seniority among stewards.

In October 2005, the parties entered into a Memorandum of Agreement (MOA), which provides that, for Union members,[1] ties in bargaining unit seniority dates will be resolved in favor of the employee whose social security number has the highest last four digits.

Prior to November 2009, Lynda Antal (the Charging Party) worked as an Electronic File Clerk/Scheduler/Patient Service Clerk at the Employer's Chapel Hill facility. [*FOIA Exemptions* 6 and 7(C) .] Since 2004, Antal was one of four Union stewards at the Chapel Hill facility. The four stewards all represented all of the employees at the facility.

In November 2009, Antal heard from another employee that her position would be eliminated at the Chapel Hill facility. In anticipation of that event, Antal identified another position at the Chapel Hill facility into which she would be qualified to bump, that of Patient Service Scheduling Clerk. The incumbent employee in that position, Torsha Solomon, was also a Union steward. [*FOIA Exemptions* 6 and 7(C) ,] later than Antal's date.

At a November 2009 steward training meeting, Antal raised the issue of the use of superseniority between stewards. Union business representative Donna Ramsey responded that all stewards have the same seniority, and that one steward could not bump another.

On December 4, 2009, Antal was officially told by a bumping team that her position was being eliminated. Antal said that she wished to bump into the Patient Service Scheduling Clerk position held by fellow Union steward Solomon. The Employer representative on the bumping team answered that Ramsey had already indicated that this was

---

[1] Although the agreement is phrased in terms of Union members, there is no evidence that its application has been confined only to full union members, as opposed to all members of the bargaining unit.

not an option, but called Ramsey anyway and reported that the Union was going to consult its attorney.

On December 8, 2009, Antal met with another bumping team. The Employer representative on that team also informed Antal that she could not bump into Solomon's position because Solomon was a steward. Antal then bumped into a position at the Employer's Brooklyn Heights facility and filed a grievance over not being allowed to bump Solomon.

On December 15, 2009, the Union's labor liaison, Deborah Evans, called Antal and told her that the Employer had agreed to allow Antal to bump Solomon and would contact the Union to attempt to work that out. Evans also said that Ramsey had instructed her to tell Antal to drop her grievance because it was making the Union look bad.

On January 4, 2010,[2] Antal began working at the Employer's Brooklyn Heights facility. On January 7, Employer human resources consultant Rosemary Wiggins sent Evans a letter upholding Antal's grievance, noting that "we have not had this type of situation" previously and the "contract does not explain what to do." On January 11, Ramsey sent a reply letter to the Employer withdrawing Antal's grievance because it had been filed in error. Ramsey stated that the two stewards were in the "same superseniority boat and the reasonable tie-breaker in the MOA was used." Antal thereafter filed an internal Union appeal over the withdrawal of her grievance.

On January 25, Antal met with the Union's president, Ramsey, another Union business representative, Evans, and the Union's attorney. At the meeting, Ramsey stated that a steward could bump a steward, but that the parties had used the seniority tie-breaking provision to break the two stewards' equal superseniority and Antal had lost. On March 9, the Union had a hearing on Antal's appeal. On March 29, the Union denied Antal's appeal in a letter that stated, in part, that allowing her to bump the other steward would have violated the collective-bargaining agreement and the October 2005 MOA.

Antal filed the charges in the instant cases on June 8 and June 25. The charge against the Union alleges that the Union breached its duty of fair representation and violated Section 8(b)(1)(A) and 8(b)(2) by: (1) maintaining and enforcing the collective-bargaining agreement's superseniority clause that caused the Employer to

---

[2] All subsequent dates are in 2010.

discriminate against its employees, including denying bumping rights to Antal; (2) failing and refusing to process Antal's grievance concerning her bumping rights; and (3) causing the Employer to discriminate against Antal and other employees by maintaining and enforcing the superseniority clause. The charge against the Employer alleges that the Employer violated Section 8(a)(3) by: (1) maintaining and enforcing the collective-bargaining agreement's superseniority clause; and (2) discriminating against Antal by failing and refusing to allow her to bump into Solomon's position. Antal has not alleged that either the Union or the Employer acted based on any animus against her, to particularly favor Solomon as an individual over Antal, or because of any other considerations aside from sincerely held interpretations of the parties' collective-bargaining agreements. And the Region's investigation has not discovered any evidence of an improper motive. Rather, Antal asserts that the Union and the Employer were required to resolve the matter based on the two stewards' actual seniority dates. The parties have no past practices relevant to determining when one steward can bump another or any prior interpretations of their agreements in similar circumstances.

ACTION

We conclude that the Union and the Employer did not violate the Act, as they did not discriminate on the basis of union activity and acted based on a reasonable interpretation of their agreements.

It is well settled that a contractual provision giving union stewards superseniority over employees who do not hold union office in layoff and recall is presumptively lawful, but that a contractual provision giving union stewards superseniority over employees who do not hold union office in circumstances that go beyond layoff and recall is presumptively unlawful, subject to rebuttal by a showing that the superseniority is justified by a legitimate statutory purpose.[3] The heightened scrutiny given to such contractual provisions is expressly based on the Board's recognition that a grant of superseniority to union officials over employees who do not hold union office "thereby unlawfully encourages union activism and discriminates with respect to on-the-job benefits against employees who in the exercise of their rights under Section 7 of the Act prefer to refrain from such activity."[4] The

---

[3] Dairylea Cooperative, Inc., 219 NLRB 656, 658 (1975), enfd. 531 F.2d 1162 (2nd Cir. 1976).

[4] Id., 219 NLRB at 657.

inherent tendency of union officials' superseniority to discriminate against employees who refrain from union activism is justified only when it is counterbalanced by representational services provided to the entire bargaining unit by the recipients of the superseniority.[5]

Where superseniority is at issue between two union stewards, however, no similar considerations apply because the only employees affected by the application of superseniority are all union officials; there is no danger of discrimination against employees who refrain from union activity. Accordingly, we conclude, the heightened scrutiny of the Dairylea standard is not applicable. Rather, in cases such as are presented here, the only issue for the employees and union is one of general contract interpretation: how to allocate the benefit set forth in the contractual provisions. The lawfullness of a union's resolution of such a question is governed by the union's ordinary duty of fair representation.

Under that test, the Board and the courts have recognized that unions must be allowed a "wide range of reasonableness" in serving their members, but must act in "good faith, with honesty of purpose, and free from reliance on impermissible considerations" in the exercise of that discretion.[6] Thus, a union does not breach its duty of fair representation when it acts pursuant to a reasonable interpretation of the collective-bargaining agreement, even if there are other reasonable interpretations the union could have adopted.[7] In evaluating a union's interpretation of a collective-bargaining agreement, it is not necessary to determine whether the union chose the more "meritorious" position. Rather, the union has satisfied its duty of fair representation if its choice is reasonable, not contrary to the face of the contract, and not inconsistent with past

---

[5] See, e.g., Gulton Electro-Voice, Inc., 266 NLRB 406, 409 (1983), enfd. 727 F.2d 1184 (D.C.Cir. 1984).

[6] Transit Union Division 822, 305 NLRB 946, 949 (1991), and cases cited therein.

[7] Id., 305 NLRB at 949, citing Steelworkers Local 7748 (Eaton Corp.), 246 NLRB 12 (1979); PPG Industries, 229 NLRB 713 (1977), enf. denied 579 F.2d 1057 (7th Cir. 1978); Ohio Valley District Council (Cincinnati Fixtures), 226 NLRB 1032, 1033 (1976).

practice.[8] Indeed, even with regard to the otherwise suspect application of superseniority for union stewards over employees who hold no union office, the Board has stated that, once a union has shown sufficient evidence to justify its application of the superseniority clause, "the fact that there might be other approaches is irrelevant."[9]

In the instant cases, the Union was presented with three reasonable interpretations of the parties' agreements, namely that: (1) the language of the Layoff & Recall Article, i.e., that "Union Stewards shall be deemed the most senior employees in the bargaining unit," means that no steward can be bumped, even by another steward, as each steward is deemed "the most senior employee[ ] in the bargaining unit"; (2) the language of the Layoff & Recall Article means that stewards are tied in seniority as "the most senior employees in the bargaining unit," and therefore the tie should be resolved under the provisions of the October 2005 MOA resolving ties in seniority dates in favor of the employee whose social security number has the highest last four digits; and (3) while stewards as a group are "the most senior employees in the bargaining unit," actual seniority should govern bumping within the group of stewards themselves. The Union's business representative, Ramsey, initially chose the first, the Union later adopted the second, apparently after consultation with its attorney and consideration of the MOA, and Antal asserts the third.

We conclude that each of these interpretations is well within the wide range of reasonableness accorded unions in the administration of a contract, particularly as the Union and the Employer have no past practices in this regard or any prior interpretations of their agreements in similar circumstances. Moreover, Antal has not alleged that the Union acted based on any animus against her, to particularly favor Solomon as an individual over Antal, or because of any other considerations aside from sincerely held interpretations of the parties' collective-bargaining agreements. And the Region's investigation has not discovered any evidence of an improper motive. No matter what position the Union took, one of the two stewards would be disadvantaged, and there was no clear basis for choosing one interpretation over the others. Therefore, in these circumstances, we conclude that the Union acted lawfully in

---

[8] See, e.g., United Steel Workers of America (Miami Copper Co., 190 NLRB 43, 43 (1971); Washington-Baltimore Newspaper Guild, Local 35 (CWA), 239 NLRB 1321, 1322 (1979).

[9] Goodyear Tire & Rubber Co., 322 NLRB 1007, 1008 (1997).

asserting the position that Antal could not bump Solomon and withdrawing her grievance on that basis.[10] Given our conclusion that the Union and the Employer's interpretations of the parties' agreements did not discriminate against employees who refrain from union activity, the Union did not violate Section 8(b)(2) in asserting its position to the Employer, and the Employer did not violate Section 8(a)(3) in agreeing to the Union's position.

Accordingly, the Region should dismiss the charges in the instant cases, absent withdrawal.

B.J.K.

---

[10] The fact that the Union changed its position from one reasonable interpretation of the parties' agreements to another does not itself indicate that it acted improperly. See, e.g., Humphrey v. Moore, 375 U.S. 335, 348-49 (1964) (union did not breach its duty of fair representation when it resolved a seniority dispute in favor of one group of employees over another, even though the union originally gave one group of employees inaccurate advice and changed its position after receiving new information).