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Hit the Reset Button: NLRB restores precedent on bargaining obligations for discretionary discipline

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On June 23, the National Labor Relations Board issued a decision in ***Care One at New Milford***, finding that employers have no statutory obligation to bargain before instituting discretionary employee discipline that is consistent with an employer's past policy or practice. The decision is a hefty loss for organized labor, many of a series issued by the current Board. NLRB Chairman John F. Ring wrote the decision, joined by the other two Members, Marvin E. Kaplan and William J. Emanuel. All three are Republicans.

The decision overruled a 2016 decision to the contrary by the Obama-era Board, ***Total Security Management Illinois 1, LLC***.

The case

In 2012, the Board certified the Service Employees International Union as the exclusive bargaining representative of non-professional employees at the Care One rehabilitation and nursing care facility. The employer challenged the certification, which was eventually upheld in 2017 by the U.S. Court of Appeals for the District of Columbia Circuit. While the challenge was pending, the employer consistently maintained a disciplinary policy that stated the following:

> Disciplinary Action
>
> If your conduct is unsatisfactory, your Supervisor may provide guidance and support to help you make the necessary corrections. The Center has developed a disciplinary action process that focuses upon early correction of misconduct, with the total responsibility for resolving the issues and concerns in your hands. Your Supervisor is there to provide support and coaching.
>
> The following highlights a list of actions that the Center may use while administering discipline. Please note that these are

guidelines only, and are not intended to imply a series of "steps" that will be followed in all instances. Any of the disciplinary actions described below, including termination, may be initiated at any stage of the process depending on the nature of the specific inappropriate behavior, conduct, or performance and other relevant factors.

- √ Verbal or Written Warning
- √ Suspension or Suspension Pending Further Investigation
- √ Final Written Warning
- √ Termination of Employment

In late 2016 and early 2017, the employer suspended three employees and terminated one other, pursuant to the policy and without bargaining with the SEIU. At the time, contract negotiations were ongoing, and the employer informed the SEIU about the discipline during a bargaining session. The Union later filed a charge alleging a violation of Section 8(a)(5) of the National Labor Relations Act for failure to bargain over the disciplinary actions taken against the employees.

The main question before the Board in *Care One* was whether to follow T*otal Security Management*. In that case, the Democratic majority on the Board imposed a new statutory obligation on employers when a collective bargaining *relationship* commenced. In essence, when the employee was represented by a union but *was not yet covered by a collective bargaining agreement*, the employer was required to provide the union with notice and opportunity to bargain about discretionary elements of its existing disciplinary policy before it could impose discipline.

In overruling Total Security Management, Chairman Ring said that *Total Security Management's* pre-disciplinary bargaining obligation (1) conflicted with Board precedent and the U.S. Supreme Court decision in ***NLRB v. Weingarten, Inc.***; (2) misconstrued the unilateral change doctrine described in the Supreme Court's decision in ***NLRB v. Katz***; and (3) imposed a complicated and unwieldy bargaining requirement that did not mesh with general bargaining law and statutory practices. The conflict with *Weingarten* and misinterpretation of *Katz* were crucial to the current Board's ruling.

In *Weingarten*, the Supreme Court held that a bargaining-unit employee has the right to request a union representative when the employee reasonably believes that an interview could result in discipline. The Court made it clear that that it was "'not giving the Union any particular rights with respect to pre-disciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations.'" Similarly, in *Katz*, the Supreme Court held that, upon commencement of a *bargaining relationship*, but with no agreement in place, employers of union-represented employees are required to maintain the *status quo*. In other words, they must refrain from making material changes regarding any terms or conditions of employment that would be mandatory subjects of bargaining, unless notice and an opportunity to bargain is provided to the union.

In *Care One*, the current Board also focused on the many practical problems with an employer's implementation of *Total Security Management*. The rule would consistently "interfere with legitimate employer prerogatives" by delaying disciplinary action, according to the Board. The Board also took issue with the requirement that an employer bargain after the decision to institute discipline had already been made, but before the discipline had

actually been imposed. The Board found that this requirement unnecessarily interfered with an employer's ability to manage its workforce.

Going forward

The *Care One* decision is certainly welcome and timely news for employers who may be engaged in initial contract negotiations during the COVID-19 pandemic and the reopening process. The decision provides some degree of certainty for employers who follow their policies or past practices when imposing discretionary discipline. Nonetheless, employers should always use caution in taking disciplinary action against employees during initial contract negotiations. During this phase, employer actions are under intense scrutiny from unions that are trying to flex their muscles with employees and employers alike.

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