Hospital's Second Bite at the Apple Violated Unionized Employees' Rights for Open Positions Between Facilities

Labor & Employment Law Update

By Heather Bailey on September 29, 2015

Last week, the National Labor Relations Board ("NLRB") – although divided – affirmed that Southcoast Hospitals Group violated unionized workers' rights under Section 8(a)(3) and (1) of the National Labor Relations Act when the hospital created an open position hiring and transfer policy that gave unrepresented workers preference over unionized employees at the non-unionized hospitals.

Southcoast, located in Massachusetts, was comprised of 3 hospitals and 20 ancillary locations. The unionized employees made up 215 of the 550 employees who worked at one of the three hospitals, Tobey. The employees, unionized or not, were allowed to cross-pollinate between the three hospitals for open positions. Since 1996, the parties' collective bargaining agreement gave unionized employees the leg up when it came to hiring and transferring to open positions at Tobey and were to be given the "most senior qualified" preference for these positions. Somewhere around 1997-98, the hospital tried to negotiate and change this language to the "best qualified" which would have put the unrepresented employees at the same advantage as the unionized workers. This, of course, was rejected by the Union.

In 1999, the hospital decided to unilaterally change its written human resources policy to the following:

- Upon application, regular status employees who are beyond the introductionary [sic] period will be given first consideration for job postings providing the regular status employee's qualifications substantially equal the qualifications of external candidates. Employees in a union will be considered internal candidates if the collective bargaining contract provides reciprocal opportunity to employees who are not members of the union for open positions at the unionized site. Temporary and per diem status employees will be considered prior to external applicants . . . . Employees in a union whose collective-bargaining contract does not provide reciprocal opportunity to employees who are not members of the union will be considered external candidates.

The hospital defended its actions by stating 1) it was trying to head off unrepresented employee complaints of being shut out of represented employee positions (yet, the hospital did not bring one complaining employee or applicant forward) and 2) it was trying to "level the playing field" for the unrepresented employees at the other two hospitals to that of the unionized employees at Tobey. However, the underlying judge noted that the union employees only comprised of 215 of the 550 positions. Thus, the unionized employees were discriminated against and hindered in job advancement for being in the union because the unrepresented employees now had a much higher disproportionate amount of open positions that they were getting preferential treatment for over the unionized employees.

Ultimately, the NLRB agreed that neither of the reasons gave the hospital a "legitimate and substantial business justification" to thwart the unionized employees' Section 7 NLRA rights that would outweigh the impact this HR policy had against unionized employees who had collectively bargained for rights at their hospital. Among other edicts of back pay and tax consequences and the requirement to reconsider passed over unionized employees for the positions at the non-unionized hospitals, the hospital was ordered to rescind its HR policy and notify all of the employees of same.

Practice Tips: NLRB scrutiny of employer policies is at an all-time high. Any employment policy or practice that makes a distinction between employees based on union member status must be scrutinized for any potential (or actual) adverse effect on the union members and potential (or actual) advantage provided to the non-union employees. If the change is going to give the unionized employees less rights, less opportunities, etc., it is better to be creative and think of a different approach (or get the union's blessing before making the change). Whenever going against a collective bargaining agreement, it is best to run the change by your labor counsel first.

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