

REGION 3 OUTREACH

MARCH 2016



REGIONAL DIRECTOR'S CORNER

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Well 2016 is off to an interesting start. Region 3 continues actively pursuing the General Counsel's Section 10(j) initiative and is still embroiled in the litigation of *Wingate of Dutchess, Inc.*, 03-CA-140576, where the Administrative Law Judge issued a lengthy decision finding that the Respondent engaged in hallmark unfair labor practices, unlawfully terminated a union supporter and found that a Gissel bargaining order was appropriate to remedy the Respondent's attempts to "nip in the bud" the organizing campaign initiated by 1199 SEIU United Healthcare Workers East by interfering with the exercise of employees' Section 7 rights. In addition to the Section 10 (j) initiative, the Region has been gaining experience in the processing of cases under the representation rules that went into effect in April 2015. Thus far, our experience has been that we have reached more election agreements, conducted fewer representation hearings, are conducting elections in a shorter period of time from filing of the petition, but the outcome of elections remain about the same as before the new rules, with the nation-wide results demonstrating that the union is successful approximately 64.4% of the time.

I am pleased to announce we are piloting a new Alternative Dispute Resolution (ADR) program in an effort to enhance our success in resolving disputes without the need for litigation. Generally we settle approximately 90% of cases we have found to have merit. However,



we have found that often those settlements are agreed to immediately before litigation takes place and after much time, effort and resources have been dedicated to preparing for litigation. Therefore, Region 3 is piloting a pre-complaint ADR program in conjunction with FMCS, to see if we can settle cases in which the Region has determined there is merit, but before issuance of a complaint. In a select number of cases identified by the Regional Office and with the agreement of FMCS that the case is appropriate for ADR, and where we have been unable to resolve the dispute but the parties are willing to enter into additional discussions, a mediator will attempt to resolve the dispute to the satisfaction of all the parties. Participation in the program will be voluntary. A similar program is being piloted in Region 13 (Chicago) for post-complaint cases. I urge all of you to support the program and even if your case is not one selected for the program, I encourage you to work with us to timely settle your cases. Litigation is a costly exercise for all involved and we are most interested in trying to obtain meaningful settlements in a timely way without unnecessary expense for anyone. I am always willing to meet with parties in attempts to resolve pending matters. Feel free to contact me if you think I can be of assistance.

REGION 3'S EXPERIENCE WITH THE NEW REPRESENTATION CASE RULES

Most readers are aware that on April 14, 2015 the Board's revised representation case rules went into effect. Agency-wide statistics have been generated and disseminated to the public. The first version of these unofficial national statistics included a comparison to the same period in 2014, mid-April to near the end of the fiscal year on September 30. In summary, the preliminary data reveals that the number of petitions filed with the Agency from mid-April to mid or late- September increased from 1,221 in 2014 to 1,272 in 2015. During the periods in question, election agreements were reached in 94% of the cases in which an election was scheduled in 2015 versus 92% in 2014. Unions won 65% of the elections that were held from mid-April to mid-September, 2015 in contrast to the 64% win rate in 2014. The median number of days between filing of a petition and the election date changed from 38 in 2014 to 23 days for the same period in 2015.

Region 3's experience is different from, but not significantly inconsistent with, the Agency's. Between April 14 and September 30, 2015, 43 petitions were filed in Region 3. One hundred percent of the elections that were scheduled pursuant to these petitions resulted from election agreements. The only pre-election hearing Region 3 conducted for a petition filed during this period dealt with an

election bar issue, and the petition was dismissed. Unions won 63% of the elections held pursuant to these petitions and the median number of days between filing and the election for this period was 27.5.

An examination of the same five and a half months in 2014 makes it difficult to draw conclusions about the impact of the rule changes. During that period, Region 3 received 47 petitions. Approximately 90% of the elections resulting from those petitions were held pursuant to election agreements and the two cases in which agreements were not reached would have required a hearing even under the revised rules. The median number of days from the filing of a petition to election was 41.5. Interestingly, unions won 85% of the elections held pursuant to petitions filed in Region 3 during the last half of fiscal year 2014.

The picture for the period from October 1, 2014 until April 13, 2015, the portion of the fiscal year that preceded the revised rules, is slightly different. During that period, Region 3 docketed 51 petitions. The election agreement rate exceeded

95% and the only case that did not produce an election agreement would still have gone to hearing under the new rules. The average election was held 39 days after the petition was filed and unions won about 59% of Region 3's elections in the first half of fiscal year 2015.

Behind the numbers, Region 3's experience suggests that parties have had little trouble adapting to the new procedures. Employee petitioners, sometimes with the assistance of Regional personnel, have consistently managed to file and serve their petitions properly. Parties have timely and properly submitted the statements of positions and voter lists. As noted earlier, to date, we conducted only one hearing under the new rules in fiscal year 2015 and have not confronted any circumstance in which we even contemplated deferring individual eligibility issues to the post-election process or precluding litigation on an issue because of deficiencies in the statement of position. In addition, we have not had to address any post-election challenge or objection matters since the new rules took effect.

ALJ ISSUES BARGAINING ORDER

On November 16, 2015, Administrative Law Judge Mark Carissimi issued a decision ordering [Wingate of Dutches, Inc.](#) (Wingate) to recognize and bargain with 1199 SEIU United Healthcare Workers East (Union) following an unsuccessful organizing campaign at their Fishkill, New York skilled nursing facility.

The Judge found that Wingate engaged in a series of serious unfair labor practices prior to the election in order to discourage support of the union, including threatening employees, interrogating employees about support for the union, and engaging in surveillance. The Judge also ordered Wingate to reinstate and provide back-

pay to an unlawfully terminated employee.

Due to the severity of the unfair labor practices over a sustained period, Judge Carissimi agreed with the Office of the General Counsel that a *Gissel* bargaining order was warranted, requiring Wingate to recognize and bargain with the Union as the employees' representative. A bargaining order can be ordered in cases where it is determined that a rerun election cannot be freely and fairly conducted due to the nature of unfair labor practices, such as employer threats and illegal employee discharge. The case is currently pending before the Board on exceptions.

SUCCESSOR ORDERED TO RECOGNIZE AND BARGAIN WITH UNION

On September 21, 2015, Administrative Law Judge Robert A. Ringler issued a decision in Riccelli Enterprises, Inc., Case 03-CA-130137 finding violations of Section 8(a)(1), (3), and (5) of the Act. The case involves Riccelli's acquisition of the Northern Group, a company that produced concrete and provided trucking and hauling services. Northern employed a unit of 18 operators and mechanics in Fulton, New York represented by the International Union of Operating Engineers, Local 158-C (Union). The primary issue in the case was Riccelli's refusal to recognize and bargain with the Union as the collective bargaining representative of the unit as a successor to Northern

Group.

The ALJ found that Riccelli was a successor employer that forfeited its right to set initial terms and conditions of employment for the unit when it told employees it would operate non-union and also by actively misleading employees into believing that they would be retained without any changes to their terms and conditions of employment. In making his successorship finding, the ALJ rejected Riccelli's argument that the unit was no longer an appropriate unit.

The ALJ concluded that Riccelli violated Section 8(a)(1), (3) and (5) of

the Act by: telling employees that it intended to operate as a non-union company and that raises could not be granted because of the Union; refusing to recognize and bargain with the Union; unilaterally restructuring its workforce; unilaterally changing terms and conditions of employment, including health insurance benefits without first bargaining to a good-faith impasse; refusing to provide the Union with certain requested information; and discharging certain of its employees for engaging in union and/or other protected activities.

REGION 3 CASE ESTABLISHES NEW BOARD LAW FOR WEINGARTEN VIOLATION

In E.I DuPont de Nemours & Co., Inc., 362 NLRB No. 98 (2015) (Case 03-CA-090637), the Region received a full win on the merits and established new Board law in the process. The Region alleged that DuPont violated Section 8(a)(1) of the Act by denying an employee's request for union representation during an investigatory interview. The Region advanced a novel theory that the employee was entitled to backpay and reinstatement in addition to the traditional cease-and-desist order and a notice posting Weingarten remedy

because Respondent, in part, terminated the employee as a result of conduct he engaged in (alleged dishonesty) during the unlawful interview. The ALJ found that Respondent's actions violated Section 8(a)(1) of the Act, but refused to grant backpay or reinstatement. The Region appealed the ALJ's decision on the remedy to the Board. In its May 29, 2015 decision, the Board, in agreement with the theory advanced by the Region, determined that, in a Weingarten setting a make whole remedy is indeed appropriate when "(1) an employer, in

discharging an employee, relies at least in part on an employee's misconduct during an unlawful interview; and (2) the employer is unable to show that it would have discharged the employee absent that purported misconduct. " The Board remanded the matter back to the ALJ to determine whether the employee's conduct during the unlawful interview played a part in its decision to terminate him.

CIRCUMSTANTIAL EVIDENCE OF ANIMUS

The Board issued a favorable decision recently in Columbia Memorial, 362 NLRB No. 154 (2015). The Board affirmed the ALJs finding that Columbia Memorial violated Section 8(a)(1) and (3) of the Act by disciplining and suspending an employee because she engaged in union activity. The decision contains an interest-

ing discussion of the tests utilized in finding 8(a)(3) and (1) violation, and a discussion of the "strong circumstantial evidence of animus" in the case, including the hospital's handling of the investigation of the discriminatee's conduct and its failure to demonstrate that it had ever investigated or disciplined any other

employee for an access-card or sign-in policy violations. The Board also found that the hospital's ethics policy was overly broad and further that Respondent violated Section 8(a)(5) by failing to provide information requested by the union.

Learn More: Visit Us Online!

The NLRB website, www.nlr.gov, contains a great deal of additional information about the protections of the Act, Board policies and procedures, and how to contact the nearest Regional Office.

Region 3 Has its Own Web Page

You can now access link the Region 03 Web Page through the NLRB website, www.nlr.gov using the find your Regional Office link. Or use the link provided in this article.

On the Region 03 Web Page you

can find upcoming events that are planned in Region 3 as well as recent outreach activities and Regional Office news.



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Albany, NY 12207

Contact the Region:

There is always an information officer available at an NLRB Regional Office to answer general inquiries or to discuss a specific workplace problem or question. The information officer can offer information about the Act and advice as to whether it appears to be appropriate to file an unfair labor practice charge. If filing a charge does appear to be appropriate, the information officer can assist in completing the charge form.

The information officer at Region 3 may be reached by telephone at:

1-866-667-6572

(Toll free)

or

716-551-4931 (Buffalo)

518-431-4155 (Albany)

WELCOME ABOARD!



Eric Duryea recently joined Region 3 as a Field Attorney in the Buffalo office.

Eric previously worked for the Board for five years in Washington, D.C. in Enforcement Litigation, Appellate Court Branch. He received his J.D. from the University of Virginia, after which he clerked in the U.S. District Court for the Eastern District of Kentucky. He also holds an M.A. in English Literature and Modern Studies from the University of Virginia and a B.A. in Philosophy (*magna cum laude*) from Brandeis University.

Para información en Español llame al:

1-866-667-6572

(Toll free)

TOLL FREE NUMBER:

The Agency also has a toll free telephone number that offers a general description of the Agency's mission, referrals to other related agencies and access to an Information Officer based upon the caller's telephone number. A Spanish language option is also available. Toll free access is available by dialing:

(TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

Caroline Wolkoff also joined Region 3 as a Field Attorney in the Buffalo office. She received her J.D. (*with honors*) from the University of Connecticut School of Law and her B.A. in English Language and Literature (*with honors*) from Yale University. After law school, she worked as a litigation associate in the New York office of Dickstein Shapiro, LLP and later as a law clerk to the Honorable Mark A. Barnett at the Court of International Trade in New York, New York.

