

LABOR AND EMPLOYMENT

NEW NLRB G.C. PLOTS ACTIVIST COURSE

by David J. Houston

The General Counsel of the National Labor Relations Board serves important policy-making and prosecutorial decision-making roles. While the "GC" acts independently of the adjudicative "Board" arm of the agency, both, in a sense, determine the direction of labor-relations law affecting unionized and non-unionized private sector workers in our economy.

Richard Griffin, Jr. was nominated by President Obama in August of this year and confirmed in October to a four-year term as General Counsel. His career began when he served on the legal staffs of various members of the Board, after which he held leadership roles in and served as the General Counsel of the International Union of Operating Engineers.

Two comments by G.C. Griffin at a presentation to the Cornell School of Industrial Relations on Friday December 13, 2013, are we believe, telltale indicators to future prosecutorial actions of the G.C.'s office and therefore, a reasonable predictor of the direction of near-term future NLRB rulings.

- **Register Guard Email Rule Likely to be "Reconsidered."** The Register-Guard newspaper of Eugene Oregon has a 146-year history as a liberal democratic publication – one of the earliest to object to Sen. Joseph McCarthy's cold-war interrogation of a member of the press. In 2007, the paper had a work rule prohibiting the use of its internal email system for any "non-job-related solicitation()." An employee who was also the union president used the email system to communicate with fellow employees on union-related matters. She was disciplined, and filed an unfair labor practice charge.

By a 3-2 vote, the then-Bush-appointed majority of the Board held that the paper could lawfully *prohibit* its employees from union-related communications despite a record that showed that the paper *allowed* other "non-job-related" email use by its workers. Importantly, *had the Board ruled differently*, employees would essentially have free rein to communicate on union business, including soliciting other employees to join or form a union, *using the employer's own email system*.

G.C. Griffin, while stating that he "did not come to this job with any preconceived agenda," has nevertheless indicated an intention to prosecute the next employer who maintains or enforces a similar rule. In his Friday comments at Cornell, he stated "If the appropriate facts present themselves, I would be urging the Board to revisit *Register-Guard*."

Accordingly, any employer – whether unionized or not – that maintains or enforces a rule prohibiting non-business use of its email system appears vulnerable to "test case" prosecution.

- **Specialty Healthcare "Clearly Identifiable Group" Unit Rule to be Institutionalized.** It is of course easier for a labor organization to convince a small, perhaps disgruntled, group of workers to organize into a union than, for example, all manufacturing workers in a factory. And, a small unit may be difficult or costly for the employer to manage, and necessarily gives the labor organization a "foot in the door" to organize other workers.

The Board departed from prior law that avoided such "unit fragmentation" in *Specialty Healthcare*, where in 2011 it ruled that as long as interested workers were in a "clearly identifiable group," they had a statutory right to be recognized as their own unit. A dissenting Board member wrote that the *Specialty Healthcare* standard makes it "virtually impossible" for an employer to contend successfully that a particular proposed unit is too discrete. Applying *Specialty Healthcare*, for example, the Board has ordered recognition of a bargaining unit consisting of women's shoe sales employees who work on the second and fifth floors of the flagship Neiman Marcus store in Manhattan, N.Y.

General Counsel Griffin in his December 13 remarks announced his plan to institutionalize this rule by issuing a "Guidance Memorandum" on the topic. While nominally intended, as the title suggests, to "guide" interested parties in areas where Board rulings may be imprecise, a Guidance Memo is a recognized directive to NLRB Regional Offices governing application of those underlying rulings – in other words, the Memorandum sets policy on the subject. Since the Board does not have to "approve" a "G.C. Memo," its promulgation is assured.

Based on the experience under *Specialty Healthcare* so far, expect unions to "pick and choose" amongst workers and aggressively pursue organizing opportunities presented by this new organizing strategy created by the NLRB.

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