

STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

TEAMSTERS, CHAUFFEURS, WAREHOUSE-)
MEN & HELPERS, AND PROFESSIONAL,)
CLERICAL, PUBLIC AND MISCELLANEOUS)
EMPLOYEES, LOCAL UNION NO. 533,)

ITEM NO. 246

CASE NO. A1-045459
AND A1-045460

Complainant,

-vs-

DECISION

HUMBOLDT GENERAL HOSPITAL,

Respondent.

For Complainant: Michael E. Langton, Esq.
LANGTON & KILBURN

For Respondent: David S. Allen, Esq.
JACKSON, LEWIS, SCHNITZLER & KRUPMAN

For EMRB: Salvatore C. Gugino, Chairman
Tamara Barengo, Vice Chairman
Howard Ecker, Board Member

STATEMENT

On October 2, 1989, Complainant, Teamsters, Chauffeurs, Warehousemen & Helpers, and Professional, Clerical, Public and Miscellaneous Employees, Local Union No. 533 ("Union") brought this complaint against Humboldt General Hospital ("Hospital") alleging a prohibited practice under NRS 288.270 for disciplining an employee, Mr. Larry Burg, because of his union organizing related activities. On November 6, 1989, the Union brought a second complaint against the Hospital for terminating Mr. Burg. The complaints were consolidated into a single case.

The Hospital contends Burg was terminated for good-

1 faith, business-related reasons and further contends the Local
2 Government Employee-Management Relations Board ("Board")
3 no jurisdiction on the matter because the Hospital is under
4 exclusive jurisdiction of the National Labor Relations Board
5 ("NLRB"). The Hospital requested the Board hold the matter in
6 abeyance pending an NLRB determination on the jurisdiction
7 question.

8 On January 24, 1990, the NLRB Region 32 Director
9 dismissed the Hospital's petition for certification under the
10 National Labor Relations Act.

11 On February 9, 1990, the Board conducted a hearing on
12 the matter in Reno, Nevada. The following issues were
13 presented for determination:

14 1. Whether or not the Hospital is a local government
15 employer under the jurisdiction of the Board pursuant to NRS
16 288.060.

17 2. Whether or not the Hospital discharged Mr. Burg in
18 violation of NRS 288.270(1) because of his union-related
19 activities.

20 The Board reviewed the papers and pleadings on file,
21 took the testimony of witnesses for the parties, examined
22 evidence and heard arguments by the parties and their counsel.
23 From all the above, the Board has concluded, based on due
24 deliberation, that the Hospital has engaged in prohibited
25 practices in violation of NRS 288.270(1).

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II

SUFFICIENT EVIDENCE IS ESTABLISHED
TO FIND THAT PROTECTED ACTIVITY WAS
A MOTIVATING FACTOR IN THE TERMINATION.

The Board is very concerned with the chilling effect the termination of an employee engaged in union organizing may have on the rights of employees. NRS 288.270 provides in part:

1. It is a prohibited practice for a local government employer or its designated representative willfully to:

(a) Interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter.

(b) Dominate, interfere or assist in the formation or administration of any employee organization.

(c) Discriminate in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization.

This Board outlined the legal standards governing an employer's discriminatory conduct in Valdemar Arredondo, et. al. v. Clark County School District, et. al., Item No. 102, Case No. A1-045337 (April 22, 1981) citing the U.S. Supreme Court decision National Labor Relations Board v. Great Dane Trailers, 388 U.S. 26, 34; 87 S.Ct. 1792, 1798, 18 Lawyers Edition 2nd 1027, 1032 (1967):

"First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second,

1 if the adverse effect of the discriminatory
2 conduct on employee rights is "comparatively
3 slight" antiunion motivation must be proved to
4 sustain the charge IF the employer has come
5 forward with evidence of legitimate and
6 substantial business justifications for the
7 conduct. Thus, in either situation, once it has
8 been proved that the employer engaged in
9 discriminatory conduct which could have adversely
10 affected employee rights to SOME extent, the
11 burden is upon the employer to establish that he
12 was motivated by legitimate objectives since proof
13 of motivation is most accessible to him."
14 (italics in original)

15 In a more recent decision of Transportation Management
16 Corp., the U.S. Supreme Court supported the framework for
17 allocating burden of proof established in the Wright Line
18 case. Under Wright Line, the union must establish that
19 protected employee conduct was a motivating factor in the
20 decision to terminate; the burden then shifts to the employer
21 to prove it would have taken the same action regardless of the
22 employee's protected activity. NLRB v. Transportation
23 Management Corp., 462 U.S. 393, 113 LRRM 2857 (1983); NLRB v.
24 Wright Line, 662 F.2d 899, 108 LRRM 2513 (CA 1981) cert
25 denied, 455 U.S. 989, 109 LRRM 2779 (1982).

26 The Board believes in the instant case that there is
27 evidence sufficient on its face to establish that Larry Burg's
28 involvement in various protected activities was a motivating
factor in his termination.

Initially, the Hospital stipulated at the hearing to the
following:

That Burg had good technical skills as an
x-ray technician;

That there was union organizing at the

1 hospital at the time of Burg's discharge; and

2 That the Hospital knew that Burg was involved
3 in the union organizing. (T at 19)

4 The Board further believes that the disciplinary actions
5 by the Hospital could not help but be inherently destructive
6 to employees' right to freely organize. The proximity of
7 Burg's known protected union-related activity to the
8 disciplinary actions he suffered by the Hospital most
9 certainly had a chilling effect on the other employees:

10 On September 7, 1989, Burg was reported to the Hospital
11 administrator to have solicited union membership during break
12 time in the cafeteria. Two days later he received a written
13 reprimand for that protected activity alleging that the
14 employee he was talking to was not on a break.

15 On September 15, 1989, the Union requested recognition
16 from the Hospital as exclusive representative per NRS 288.160.
17 The same day, Burg was sought out by his supervisor for a
18 second union soliciting activity and, further, insisted Burg
19 could not have Union representation at discipline meetings.

20 On September 19, 1989, Burg filed a complaint for
21 discrimination with the Nevada Equal Employment Opportunity
22 Commission ("EEOC") and on October 2, 1989, Burg filed a
23 complaint with the Employee-Management Relations Board
24 ("EMRB") for discriminatory treatment. One week later Mr.
25 Burg received a severe penalty of a one-day suspension for
26 drawing the attention of two food service employees to an
27 off-color cartoon posted in the cafeteria. Retaliation for .
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1 appeal to an agency is an unfair labor practice. (See in that
2 regard: NLRB v. Ford Motor Co., 683 F.2d 156, 110 LRRM 3202
3 (CA 6 1982) and American Steel Works, 263 NLRB 826, 111 LRRM
4 1136 (1982)). Further, the Hospital changed its reasoning for
5 the one-day suspension after it had been administered. Such a
6 change is viewed as evidence of discrimination motivated by
7 anti-union animus. Coca-Cola Bottling Co., 232 NLRB 794, 97
8 LRRM 1290 (1977).

9 On October 25, 1989, Burg brought a Union
10 representative to a discipline meeting. The following day he
11 was terminated for "insubordination, violation of company
12 rules and unprofessionalism".

13 Further evidence presented by both parties shows that
14 Burg had committed similar "offenses" without suffering
15 disciplinary action during his three-year employment prior to
16 September 7, 1989.

17 In view of the timing of the discipline administered on
18 Larry Burg in relation to his protected activity and the
19 disparity of that discipline, the Board finds good and
20 sufficient evidence to reasonably conclude that protected
21 union-related activity was a motivating factor in the
22 Hospital's decision to discharge Larry Burg on October 26,
23 1989.

24 III

25 THE HOSPITAL FAILED TO ESTABLISH
26 GOOD-FAITH, BUSINESS-RELATED REASON
27 FOR BURG'S TERMINATION.

28 In view of the prima facie case established by the

1 Union, the Board turns to the affirmative defense by the
2 Hospital that Burg was terminated for good and business
3 related reasons.

4 The record reflects substantial documentation presented
5 by the Hospital in this regard. The Board notes, however, that
6 fifteen (15) of the documents presented were secret
7 "Statements of Concern" about Burg's behavior written by
8 supervisors and employees, but never seen by Burg until after
9 his termination. Additionally, four (4) "Employee
10 Disciplinary Reports" were entered as evidence of Burg's
11 improper conduct but, again, never seen by Burg until after
12 his termination. The acting hospital administrator testified
13 that much of the documentation for Burg's termination was
14 added to his file after his termination. (T at 78, 136, 138)
15 The Board gives little credence to documented evidence in a
16 disciplinary matter which was not given to the employee until
17 after the discipline.

18 Among the credible evidence presented by the Hospital
19 were six (6) exhibits and much testimony showing that Burg
20 stepped into the emergency room on June 9, 1989 during a
21 critical situation and that his interruption could have
22 endangered a patient's life. For that serious offense, Burg
23 received a one-day suspension. The Board notes that after his
24 union organizing activity became known, he received the same
25 penalty, a one-day suspension, for a momentary indiscretion of
26 pointing out an off-color cartoon to other employees in the
27 cafeteria.

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1 The Hospital also presented evidence of incidents of
2 Burg's improper behavior during his three years of employment
3 prior to September 7, 1989. With the exception of the June 9,
4 1989 emergency room incident, the only item which could be
5 considered discipline during that period was a February 16,
6 1989 memo calling for better communication with the hospital
7 staff (Respondent Exhibit "11"). The Board views the
8 Hospital's lack of disciplinary measures during this period as
9 an indication of tolerance of Burg's behavior.

10 For the period of Burg's known protected activity
11 beginning on September 7, 1989 to his termination on October
12 26, 1989, the Hospital provided further document of incidents
13 which allegedly, as a whole, led to Burg's termination.

14 Burg received two (2) written reprimands for soliciting
15 union membership. The Board recognizes membership promotion
16 as a protected activity, but not as an unrestricted right to
17 interrupt the workplace. The Board, however, did not find
18 sufficient evidence that Burg's conduct interrupted the
19 employees' work.

20 Burg was given a written warning for riding in an
21 ambulance so that he could assist the driver in unloading a
22 patient, but testimony from the nurse on duty supported Burg's
23 understanding that he had approval for the activity.

24 Further evidence provided by the Hospital included an
25 Employee Discipline Report dated October 20, 1989 (Respondent
26 Exhibit "31") calling for Burg's dismissal because he had
27 submitted timecards for pay on two "call-backs" in one night,
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1 but was only required to work during one of the two
2 call-backs. This, according to testimony and documented
3 evidence, was a violation of Hospital rules. The Board notes
4 that the Fair Labor Standards Act requires pay for call-backs
5 regardless of work performed. Discipline for violation of an
6 invalid rule is inappropriate.

7 On October 25, 1989 at 4:30 p.m., the day before Burg
8 was terminated, he brought a Union representative with him to
9 a previously scheduled meeting on discipline. The meeting was
10 cancelled by the Hospital administrator because of the Union
11 representative's presence (Respondent Exhibit "34"). The
12 Hospital administrators believed that Burg had no right to
13 representation because the Hospital was non-union (T at 104).
14 The Hospital further argues that Burg's insistence on
15 representation was a violation of Hospital rules and further
16 good reason for termination. The Board finds the argument
17 unconvincing.

18 In its 1975 Weingarten decision, the U.S. Supreme Court
19 ruled that employee insistence upon union representation at an
20 employer's investigatory interview, which the employee
21 reasonably believes might result in disciplinary action
22 against him, is a protected concerted activity. Accordingly,
23 the disciplinary or discharging of an employee for refusal to
24 cooperate in such an interview without union representation is
25 an unfair labor practice. NLRB v. Weingarten, Inc., 420 U.S.
26 251, 88 LRRM 2689 (1975).

27 The Board carefully considered argument by the Hospit.
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1 that the NLRB has recently reversed its 1982 Materials
2 Research decision which extended Weingarten rights in
3 non-union settings. See: Sears, Roebuck & Co., 274 NLRB 230
4 (1985) and E.I. Dupont De Nemours and Walter J. Slaughter, 289
5 NLRB (1988). Materials Research Corp., 262 NLRB 1010, 1021
6 (1982).

7 The Board, however, believes that ITT Lighting Fixtures
8 is more on point where the Sixth Circuit Court held that
9 Weingarten rights applied in the situation where the union had
10 been approved by a vote of the employees, but certification
11 was pending. In the instant case, the Union had been
12 authorized by a majority of the employees, had petitioned for
13 recognition from the Hospital and had made an appeal to the
14 Board for determination a month before the October 25
15 discipline meeting. Under circumstances surrounding the
16 discipline meeting, Burg had a right to insist on representa-
17 tion. ITT Lighting Fixtures, Division of TTT Corp. v. NLRB,
18 719 F.2d 851, 114 LRRM 2777 (CA 6 1983).

19 Based on all of the above, the Board does not believe
20 the Hospital had good and business-related reason for Burg's
21 termination. Except for Burg's engagement in various
22 protected activity, he would not have been terminated on
23 October 26, 1989. (See in this regard: Mt. Healthy City
24 School District Board of Education v. Doyle, 429 U.S. 274
25 (1977).)

26 The Board therefore concludes that the Hospital has
27 committed a prohibited practice pursuant to NRS 288.270.

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FINDINGS OF FACT

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2 1. That Complainant, Teamsters, Chauffer
3 Warehousemen & Helpers, and Professional, Clerical, Public and
4 Miscellaneous Employees, Local Union No. 533, is a local
5 government employee organization authorized to be the
6 exclusive representative by a majority of non-professional
7 employees at Humboldt General Hospital.

8 2. That Respondent, Humboldt General Hospital, is a
9 district hospital and a local government employer.

10 3. That Mr. Larry Burg was terminated on October 26,
11 1989 by the Hospital after three and one-half years of
12 employment as an x-ray technician.

13 4. That Burg had good technical skills as an x-ray
14 technician.

15 5. That some Hospital employees, including Burg, were
16 engaged in union organizing activity at the Hospital for some
17 five months prior to Burg's termination.

18 6. That the Hospital knew of Burg's involvement in the
19 union organizing activity on or about September 7, 1989.

20 7. That during the period of Burg's employment from
21 May, 1986 to September 7, 1989, the Hospital had thirteen
22 reported incidents of Burg's alleged inappropriate behavior
23 and one disciplinary action. From September 7, 1989 to
24 October 26, 1989 there were seven such alleged incidents by
25 Burg and seven disciplinary actions by the Hospital.

26 9. That after September 7, 1989, Burg was disciplined
27 twice for union membership soliciting.

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1. That the Union Complaint be, and the same hereby is, upheld;

2. That the Hospital shall cease and desist, and in the future, refrain from engaging in the prohibited practice set forth in this Complaint;

3. That the Hospital shall, within twenty (20) days of the date of this Order, reinstate Larry Burg to his former position with back pay less wages received and unemployment compensation received since his termination;

4. That the Hospital shall publicly post a copy of this Decision on the employees' bulletin board at the Hospital for a period of sixty (60) days; and

5. That each party shall bear its own costs and attorney fees in this matter.

DATED this 11th day of June, 1990.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By *Salvatore C. Gugino*
SALVATORE C. GUGINO, Chairman

By *Tamara Barenco*
TAMARA BARENGO, Vice Chairman

By *Howard Ecker*
HOWARD ECKER, Member