

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

NOVA SOUTHEASTERN UNIVERSITY

and

CASES: 12-CA-25114
12-CA-25290
12-CA-25298

LOCAL 11, SERVICE EMPLOYEES
INTERNATIONAL UNION

**RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S
AND CHARGING PARTY'S CROSS-EXCEPTIONS TO THE
DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

In response to the cross-exceptions filed by the Counsel for the General Counsel and the Charging Party, Nova responds that it should not be required to post any notice electronically and that the discipline to McGonigle for leaving his work area was not a violation of the Act. Accordingly, the cross-exceptions should be rejected.

I. ELECTRONIC POSTING NOT REQUIRED

In arguing that Nova should be required to post the Notice to Employees on its website, the Counsel for the General Counsel cites *National Grid USA Service Co.*, 181 LRRM 1254, 348 NLRB No. 88, slip op. (2006). The standard outlined in *National Grid* is that a modification to the standard notice posting will be considered where the General Counsel “(1) adduces evidence at an unfair labor practice hearing demonstrating that a respondent customarily communicates with its employees electronically, and (2) proposes such a modification to the Judge in the unfair labor practice proceeding.” *Id.* at 1254. Nova should not be required to post the Notice to Employees on its website because, as was found in the *National Grid* decision, “there is no record evidence that the Respondent customarily communicates with its employees electronically.” *Id.*; see also *Nordstrom Inc.*, 180 LRRM 1028, 1029, 347 NLRB No. 28 (2006) (“Because the General Counsel

and the Charging Party presented no supporting evidence at the underlying unfair labor practice hearing to indicate that the Respondent customarily communicates with its employees through an intranet, we deny the Charging Party's further request for intranet posting of the Board's notice to employees.")

The Charging Party states that Nova "maintained its unlawful policy on its website," and should therefore be required to post the notice electronically. (C.P. Cross Exceptions, p. 2). More specifically, the Counsel for the General Counsel noted that Nova's public safety has a web page which contains a link to the Campus Safety and Traffic Handbook, including photos that shows how public safety performs their duties. (G.C. Cross Exceptions, p. 4). However, the existence of a policy on a website does not equate with "customarily communicat[ing] with its employees electronically." *Nordstrom Inc.*, 180 LRRM at 1030, n. 5. No evidence was offered at the hearing regarding regular electronic communication with employees (or more importantly to the instant case, employees of contractors), and the personal opinions of the Counsel for the General Counsel or the Charging Party, to the contrary do not suffice. *Cf. Marriot Corp.*, 145 LRRM 1261, 1262, 313 NLRB 896 (1994) (holding that appearance of employee handbook's broad applicability did not substitute for proof, denying request for notice posting at other locations). The Counsel for the General Counsel has the burden to put forward record evidence supporting her case. *See Wright Line*, 251 NLRB 1083 (1980). The Counsel for the General Counsel's leap from the existence of a link on a web page to the conclusion that Nova regularly communicates with its employees (or the employees of contractors) electronically fails to meet this burden and should not be credited.

Thus, if a notice posting is required where employee notices are customarily posted, Nova should not be required to post said notice electronically. *See Nordstrom, Inc.*, 180 LRRM at 1029

(stating that the Board's standard Order requiring notice posting has never been interpreted and applied to require electronic posting) (citation omitted).

II. UNICCO'S DISCIPLINE TO MCGONIGLE FOR LEAVING WORK AREA NOT A VIOLATION BY NOVA

In her cross-exceptions, the Counsel for the General Counsel cites *E.M. Krovitz, Inc.*, 238 NLRB 82 (1978) for the proposition that a brief work stoppage to discuss an employment grievance is protected activity. However, the instant facts are dissimilar from *Krovitz* in that the respondent in *Krovitz* terminated all of his employees after they were found discussing overtime and refused to work until a meeting was held to address the issue. *See id.* at 83. On the other hand, McGonigle was issued a verbal warning for leaving his work area without permission after clocking in.

McGonigle was not a Nova employee, but instead worked for UNICCO. Rather than reporting to work or at least informing his UNICCO supervisor of what he was doing, McGonigle decided to go visit Nova. McGonigle received a verbal warning from UNICCO for leaving his work area without permission. (See G.C. Ex. 31).

Furthermore, reasoning that a brief work stoppage is protected in this case undercuts the contention supporting the General Counsel and the Charging Party's main argument: that McGonigle was engaged in protected activity in non-working areas on non-working time. Clearly, McGonigle was on working time after he clocked in and went to Public Safety to complain. McGonigle was being paid to paint, but was instead traveling back and forth to the Public Safety building and arguing with Nova staff regarding his right to distribute leaflets. (Tr. 108). Whether or not McGonigle's complaints were protected activity, UNICCO was within its right to discipline its employee for clocking in, but not working, without permission. Furthermore, Nova should not be liable for any alleged violations by UNICCO.

III. CONCLUSION

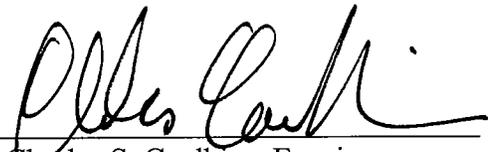
Nova was not responsible to McGonigle for any discipline he received from UNICCO. Further, the verbal warning issued by UNICCO to McGonigle for leaving his work area without permission while clocked in was valid discipline and not a violation of the Act. In addition, neither the Counsel for the General Counsel nor the Charging Party demonstrated at the hearing that Nova regularly communicates electronically with its employees, or the employees of its contractors, and thus, Nova should not be required to make any notice posting electronically.

Date: June 11, 2009

Respectfully submitted,

FISHER & PHILLIPS LLP
450 East Las Olas Boulevard
Suite 800
Fort Lauderdale, Florida 33301
Telephone: (954) 525-4800
Facsimile: (954) 525-8739

By: _____



Charles S. Caulkins, Esquire
(Fla. Bar No. 0461946)
David M. Gobeo, Esquire
(Fla. Bar No. 0016565)

*Attorneys For Nova Southeastern
University*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of this RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S AND CHARGING PARTY'S CROSS-EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE has been electronically filed with the Board, and copies served on Suzy Kucera, National Labor Relations Board, Federal Building, 51 SW 1st Avenue, Room 1320, Miami, Florida, 33130-1608, and Katchen Locke, Esquire, Associate General Counsel, SEIU International, 101 Avenue of the Americas, 19th Floor, Office of the General Counsel, New York, New York 10013 by Electronic Mail.



Charles S. Caulkins

Date: June 11, 2009