

How Northwestern University Has Reacted to the NLRB's Decision and What May Happen

4/10/2014

Practices: Employment, Labor & Benefits

[Editor's Note: Alan is both a graduate of Northwestern University and a former hearing officer and prosecuting attorney in Chicago's regional office of the NLRB.]

After the Regional Director of the NLRB ruled that certain student-athletes at Northwestern University are employees, April 25 has been designated as the date for the election. Although CAPA needed only 30% of the student-athletes to petition for an election, CAPA must obtain affirmative votes from 50% + 1 of the student-athletes who vote in the election before CAPA may represent them as a union. The NLRB will conduct the election at Northwestern and, while Northwestern appeals the Regional Director's Order, the NLRB will impound the ballots without counting them until the NLRB in Washington, D.C. decides the appeal. The NLRB consists of five members appointed by the President with the advice and consent of the Senate. Commentators believe that there are three Democrats and two Republicans on the current NLRB. Its members serve for varying lengths of time.

In the meantime, the *Chicago Tribune* is reporting on the campaign Northwestern is conducting. During a campaign, Northwestern has "free speech" rights under the NLRA to express its opinion about unions, to state facts about unions and unionization and to share with the student-athletes experiences about unions. However, Northwestern may not engage in conduct that interferes with the election and may not interfere with, restrain or coerce the employees. If Northwestern interferes with the conduct of the election, the NLRB will order a second election. If Northwestern interferes with, restrains or coerces the employees, Northwestern will have engaged in an unfair labor practice.

According to the *Chicago Tribune*, Coach Patrick Fitzgerald told the student-athletes that they do not need a third party to represent them. Usually such a statement is a lawful opinion. Also according to the *Tribune*, Northwestern has given the student-athletes special helmets and iPads that contain the playbook and other items. A grant of benefits during an election campaign may be interference, unless these benefits were planned before a union files a petition. Interestingly, the *Tribune* reported that Northwestern had planned these benefits before CAPA filed the petition.

If CAPA loses the election, it must wait one year before trying again to represent the student-athletes. If CAPA wins the election, Northwestern can "appeal" a second time. This appeal occurs after the NLRB certifies CAPA as the collective bargaining representative of the student-athletes. Northwestern then has the legal obligation

to recognize and bargain with CAPA for a collective bargaining agreement covering the student-athletes. However, Northwestern has the option of refusing to recognize and bargain with CAPA. CAPA may then file a unfair labor practice charge against Northwestern. Northwestern will argue that the student-athletes are not employees and the NLRB in Washington, D. C. will determine whether the student-athletes are employees. By the time the case is appealed this second time, a different set of NLRB Board members may decide the case.

However, if the NLRB decides a second time that the student-athletes are employees, the NLRB will rule that Northwestern failed and refused to recognize and bargain with CAPA. Northwestern can then appeal the NLRB's Order to the Seventh Circuit Federal Court of Appeals. The Seventh Circuit sits in Chicago and consists of judges appointed for life by a number of presidents up through President Obama, both Republican and Democratic appointees. Depending upon which judges hear the appeal, Northwestern may well win or lose its case. Therefore, Northwestern's lawyers may well have told Northwestern that it will lose the case at the NLRB but may ultimately win at the Seventh Circuit. In the meantime, Northwestern will not need to recognize and bargain with CAPA. Stay tuned for what may be a long, drawn-out fight over several football seasons.