

**OFFICE OF THE GENERAL COUNSEL**  
**Division of Operations-Management**

**MEMORANDUM OM 17-14**

**February 14, 2017**

**TO:** Regional Directors, Officers-in-Charge,  
and Resident Officers

**FROM:** Beth Tursell, Associate to the General Counsel

**SUBJECT:** Case Processing Guidelines for Cases Arising under *Total Security Management*, 364 NLRB No. 106 (Aug. 26, 2016)

In *Total Security Management*, the Board held that discretionary discipline is a mandatory subject of bargaining and therefore employers may not impose certain types of discipline, such as suspension, demotion, and discharge, unilaterally. *Total Security* reaffirmed in substantial part the analysis of *Alan Ritchey, Inc.*, 359 NLRB 395 (2012), which had been invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). In addition, in *Total Security*, which the Board held will apply only prospectively, the Board addressed the issue of whether reinstatement and backpay will be appropriate in future cases involving the unlawful imposition of discretionary discipline without bargaining.

The Board concluded that the standard remedy for an unlawful unilateral change should be granted, including reinstatement and backpay. However, the Respondent may raise as an affirmative defense in a compliance proceeding that the discipline was "for cause," as that term is used in Section 10(c) of the Act, and therefore that reinstatement and backpay are not warranted. Specifically, the Board held that:

We will construe Section 10(c) to preclude reinstatement and backpay if the respondent establishes, consistent with the allocation of proof described below, that the employee's suspension or discharge was for cause. In order to do so, the respondent must show that: (1) the employee engaged in misconduct, and (2) the misconduct was the reason for the suspension or discharge. In response, the General Counsel and the charging party may contest the respondent's showing, and may also seek to show, for example, that there are mitigating circumstances or that the respondent has not imposed similar discipline on other employees for similar misconduct. If the General Counsel and charging party make such a showing, the respondent must show that it would nevertheless have imposed the same discipline.

Additionally, the Board emphasized that at compliance the respondent bears the burden of persuasion of demonstrating that reinstatement and backpay are not warranted, which is consistent with the allocation of burdens of proof in a standard compliance proceeding.

Compliance proceedings generally involve facts that occurred after an unfair labor practice was committed. However, litigating the issue of a make whole remedy in cases arising under *Total Security* requires the consideration of facts that occurred prior to the actual imposition of discipline – a necessary element of establishing a violation. Waiting until after the issuance of a Board order to initiate compliance proceedings to litigate the make whole remedy unduly prolongs the compliance process. In order to expedite the processing of these cases, we have concluded that this compliance issue should be litigated in the underlying unfair labor practice proceeding. Accordingly, Regions should consolidate the compliance proceeding with the underlying unfair labor practice proceeding, and issue a consolidated complaint and compliance specification proceeding in these cases (see Sec. 102.54(b) of the Board’s Rules and Regulations). This memorandum will outline the basic actions required of the Regional Office in investigating and disposing of cases arising under *Total Security*.

### **Basic action requirements of the Regions**

#### **I. The initial investigation by the Region**

Upon the timely filing of a charge alleging that Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally imposing discretionary discipline on employees without prior notice to or bargaining with the employees’ collective-bargaining representative, the Region should conduct a complete investigation to determine whether the evidence supports a violation. The investigation should include evidence from the discriminatee and charged party regarding backpay information so as to establish potential monetary liability, and any “for cause” evidence the charged party may want to present.<sup>1</sup> If the charged party arguably met its burden of showing that the discipline was “for cause,” the Region should investigate whether there are mitigating circumstances and whether the charged party has imposed similar discipline on other employees for similar misconduct.

#### **II. Regional determination and submission to Advice**

In cases where the Region has determined that there was an unlawful failure to bargain but the charged party has arguably met its burden of showing that the discipline was “for cause,” the Region should submit a brief memorandum setting forth the facts of the case and a recommended course of action to the Division of Advice. A copy of the memo should also be sent to the Compliance Unit at [ComplianceUnit@nlr.gov](mailto:ComplianceUnit@nlr.gov) and the Region’s AGC and DAGC. If the Region concludes that the charged party has not met its burden of showing that the discipline was “for cause,” the Region need not contact Advice and should issue the compliance specification along with the complaint.

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<sup>1</sup> “For cause” evidence should be requested of the charged parties in the Region’s request for evidence letter.

### III. Backpay period

The Board's decision in *Total Security* makes clear that employers must provide notice and opportunity to bargain over certain discretionary discipline before it is imposed. The decision in *Total Security* requires both providing notice and an opportunity to bargain, *Total Security Management*, 364 NLRB No. 106 (slip op. at 8), as well as bargaining over the discretionary discipline. Id. at 9; 12, n.29.

There will be different kinds of violations under *Total Security*. For example, an employer that fails to provide notice and opportunity to bargain, then imposes discretionary discipline and fails to bargain thereafter commits a violation. An employer that fails to provide notice and opportunity to bargain, imposes discipline, but proceeds to bargain to impasse thereafter, also commits a violation, albeit one with a different remedial scope. An employer that provides notice and some opportunity to bargain before discipline, but then refuses to bargain to agreement or impasse after the discipline is imposed, commits yet another kind of violation. In addition to the different kinds of violations that might be committed, there may be situations that affect the amount of backpay owed, e.g., where an employer temporarily reinstates an employee while bargaining.

Upon a determination that the charged party committed a *Total Security* violation, absent settlement, Regions should consolidate the compliance proceeding with the underlying unfair labor practice proceeding, and issue a consolidated complaint and compliance specification. In view of the various kinds of violations and appropriate backpay periods that may be found under *Total Security*, the Region should contact the Compliance Unit if it has questions as to how to calculate the backpay period.

If you have any questions regarding this memorandum, please contact your AGC, Deputy, or the Compliance Unit at [ComplianceUnit@nrlb.gov](mailto:ComplianceUnit@nrlb.gov). Thank you for your continued efforts to accomplish this important General Counsel initiative.

/s/

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cc: NLRBU

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