

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 22, 2016

TO: Peter Sung Ohr, Regional Director
Region 13

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Northwestern University
Case 13-CA-157467

The Region seeks advice as to whether certain rules in the Northwestern University's Football Handbook were unlawfully overbroad in violation of Section 8(a)(1) of the Act and, if so, whether Northwestern University (the "Employer") properly repudiated them.

We conclude that the relevant Football Handbook rules were unlawful until they were modified in response to the instant charge.¹ However, we further conclude that it would not effectuate the policies and purposes of the NLRA to issue complaint in this case because the Employer, although still maintaining that athletic scholarship football players are not employees under the NLRA, modified the rules to bring them into compliance with the NLRA and sent the scholarship football players a notice of the corrections, which sets forth the rights of employees under the NLRA. The Region should therefore dismiss the charge, absent withdrawal.

I. The Unlawful Football Handbook Rules

The pertinent provisions of the Employer's handbook are outlined below. In each instance, we found that the rule violated Section 8(a)(1), however, the Employer's revised language as noted below corrected the unlawful aspects of the rules.

¹ We assume, for purposes of this memorandum, that Northwestern's scholarship football players are statutory employees.

A. Social Media Policy

The Employer's Social Media policy provided, in relevant part:²

[W]e are concerned about... ~~protecting the image and reputation of Northwestern University and its Department of Athletics and Recreation. . . .~~

Publicly posted information on social networking websites can be seen ~~may be regularly monitored by any person with a smart phone or internet access, including individuals a number of sources within Northwestern University (e.g., Athletics Department, Student Affairs, University Police). . . .~~

Northwestern student-athletes should be very careful when using online social networking sites and keep in mind that sanctions may be imposed if these sites are used improperly or depict ~~inappropriate, embarrassing~~ **harassing, unlawful** or dangerous behaviors **such as full or partial nudity (of yourself or another), sex, racial or sexual epithets, underage drinking, drugs, weapons or firearms, hazing, harassment, unlawful activity or any content that violates Northwestern University, Athletics Department or student-athlete codes of conduct and/or state or federal laws.**

....

Do not post any information, photos or other items online that **contain full or partial nudity (of yourself or another), sex, racial or sexual epithets, underage drinking, drugs, weapons or firearms, hazing, harassment or unlawful activity** ~~could embarrass you, your family, your team, the Athletics Department or Northwestern University.~~

....

Examples of inappropriate or offensive behaviors posted on social networking sites may include....Photos meant to **harass, bully or** demean the individuals included in the photo **by offensive reference to their race, sex, disability, age, national origin, religion or any other status protected by law or Northwestern University policy.**

We conclude that certain provisions of the Social Media Policy would reasonably be construed as prohibiting Section 7 activity. In response to the charge in this case,

² The stricken text of the rules cited hereinafter represents the Employer's deletions and the bold text represents the Employer's additions to the rules.

the Employer corrected this rule by eliminating the unlawful provisions, and thus the corrected language is lawful as written.³

B. Sports Medicine & Player Policy Communication Rule

The Sports Medicine & Player Policy Communication Rule provided, in relevant part:

- ~~1. Confidential: Never discuss any aspects of the team, the physical condition of any players, planned strategies, etc. with anyone. The team is a family and what takes place on the field, in meetings or in the locker room stays within this family.~~

Protecting Personal Health Information: Based on privacy considerations associated with medical conditions and the need to ensure that teams with whom we compete do not obtain medical information about our student-athletes, you should not reveal the medical conditions or injuries to persons outside the Northwestern University football team and staff. This restriction does not apply to information that is generally known and available to the public, nor does it prohibit student athletes from discussing general medical issues and concerns with third parties provided that such discussions do not identify the physical or medical condition or injury of specific or named student athletes.

- ~~2. Keep our information private.~~

The stricken original provisions of the Sports Medicine & Player Policy Communication Rule would reasonably be construed to prohibit Section 7 activity, including discussions about vital health and safety issues. The Employer's modification of the rule is lawful as written. The modified rule provides in part that the provision does not prohibit football players from "discussing general medical issues and concerns with third parties provided that such discussions do not identify the physical or medical condition or injury of specific or named student athletes." That modification struck the proper balance of maintaining players' confidentiality and protecting football team information while at the same time allowing players to speak out on a no-names basis about vital health and safety issues impacting themselves, their teammates, and fellow collegiate football players.

³ Our conclusion is limited to the allegedly unlawful social media policy itself, not to the codes of conduct referenced within the social media policy, which we did not examine.

C. Student-Athlete Rights and Responsibilities (Dispute Resolution Procedure)

The Dispute Resolution Procedure provided, in relevant part:

Within the intercollegiate athletic program, all decisions directly related to the playing field are the province of the head coach, and all decisions are final. In the event a student-athlete has a complaint or grievance concerning personal rights and relationships to the athletic program, the following procedure may be used:

1. The student-athlete should discuss the issue with Cody Cejda.⁴
2. If the issue is not resolved, the student-athlete and captain(s), if applicable, meet with the head coach.
3. If the issue continues to be unresolved, the student-athlete meets with the Senior Associate Athletic Director for Intercollegiate Services. At this point, the student-athlete may bring another person to the meeting as an observer. A written summary of the meeting will be prepared and submitted to the Athletics Director and the student-athlete. The student-athlete may also appeal directly to the Athletics Director.
4. The Faculty Committee on Athletics and Recreation (CAR) is the next and usually final step. CAR's decision may be appealed to the President of Northwestern University, Morton O. Shapiro.

We conclude that this rule would reasonably be construed as prohibiting Section 7 activity by prohibiting discussions with fellow players and third parties concerning workplace grievances.

The Employer eliminated this rule from the handbook.

D. Athletic Communications for Student Athletes Rule

The Athletic Communications for Student Athletes Rule provided, in relevant part:

THINGS TO REMEMBER DURING AN INTERVIEW

⁴ Cody Cejda is the Northwestern University Director of Football Operations. See <http://www.nusports.com/mobile/staff.aspx?staff=99> (last visited ____).

**** PLEASE NOTE: **As responsible student athletes, you may directly speak with members of the media if you choose to do so.** ~~You should never agree to an interview unless the interview has been arranged by the athletic communications office. All media request for interviews with student athletes must be made through athletic communications.~~ If you are contacted directly by the media (this includes *The Daily Northwestern* or any other student media outlet), **you have the option of referring the media representative you should politely, but firmly, redirect the reporter to the athletic communications office for a response or to personally speak with the media representative. Please be aware that we will never give out your cell phone number to the media.** This protects your privacy ~~and as well as~~ avoids interruptions of your time. ****

In dealing with the media, you should be aware of and consider the following:

....

- ~~• Be positive when talking about your teammates, coaches and team. Share credit for your success by talking about the contributions of~~ **Praise your teammates and use their names. Remember that Every great running back needs a good offensive line. Every high scorer needs teammates who can pass the ball. Talking about the great work of others shows you have confidence in your own role and the value of your own contributions, so you're not afraid of letting someone else have their moment of glory, too. Avoid the negatives, as they breed discontent and trouble.**

The Athletic Communication for Student Athletes Rule would reasonably be construed as prohibiting Section 7 activity. The Employer modified the rule to clarify that student athletes may choose to speak directly to the media and have “the option of referring the media representative to the athletic communications office” or players could choose to speak with that representative themselves. Accordingly, the current rule is lawful as written.

II. The Employer Did Not Adequately Repudiate the Unlawful Rules; However, We Conclude It Would Not Effectuate the Policies and Purposes of the NLRA to Issue Complaint In This Case

Although the Employer has revised the Football Handbook in an attempt to remedy the unlawful provisions, we conclude, and the Employer has conceded, that these revisions alone do not adequately repudiate the unlawful handbook rules under

the Board's *Passavant* standard.⁵ Nevertheless, we have determined that it would not effectuate the policies and purposes of the NLRA to issue complaint in this case.

Section 10142.4 of the Board's ULP Casehandling Manual provides that a charged party may take remedial action in some cases "without being willing to enter into a written settlement agreement or to acknowledge by a posted notice that the action is being taken pursuant to settlement of a charge." Specifically, pursuant to Section 10142.4(b), "[i]f the action taken is a full or substantial remedy in fact, if there is no history of prior similar practices by the same charged party and if there is no likelihood of recurrence, the charge may be dismissed on the ground that effectuation of the purposes of the Act does not warrant further proceedings."

In accordance with Section 10142.4 of the Board's Casehandling Manual, we conclude that it would not effectuate the policies and purposes of the NLRA to issue complaint in this case. The Employer has modified the unlawful rules to bring them into compliance with the NLRA and sent its football players a notice of the corrections, which sets forth the rights of employees under the NLRA. In addition, the Employer has no history of prior similar unfair labor practices and there is no reason to believe the same unlawful rules would be re-implemented.

Accordingly, the Region should dismiss the charge, absent withdrawal.⁶

/s/
B.J.K.

⁵ *Passavant Memorial Area Hosp.*, 237 NLRB 138 (1978).

⁶ The charge in this case was also filed against the National Collegiate Athletic Association ("NCAA") as an alleged joint employer of Northwestern's scholarship football players. Given our conclusion that it would not effectuate the policies and purposes of the NLRA to issue complaint in this case, and to therefore dismiss the charge against Northwestern, the charge should also be dismissed against the NCAA.