

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 19-05

March 26, 2019

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

FROM: Peter B. Robb, General Counsel

SUBJECT: General Counsel's Clarification Regarding Section 8(b)(1)(A) Duty of Fair
Representation Charges

Since the issuance of GC 19-01, which clarified the General Counsel's position regarding certain cases alleging union violations of the duty of fair representation under Section 8(b)(1)(A) of the Act, a number of additional issues have been presented. This guidance responds to those questions.

GC 19-01 provided guidance for Regions when a union asserts "mere negligence" as a defense. In circumstances where a union has lost track or forgotten about a grievance, "mere negligence" ordinarily will not excuse the union unless it can show that it was following a reasonable tracking system or reasonable procedures for handling grievances. Similarly, when a union is accused of failing to communicate the status of a grievance or respond to inquiries by the charging party, the union must have a reasonable explanation for the failure to communicate. Otherwise in both circumstances, such conduct is not considered "mere negligence," but constitutes arbitrary conduct and therefore violates Section 8(b)(1)(A). There is no requirement that a union have a specific tracking system or procedures for handling grievances. Having some kind of tracking system and procedures is a possible defense for failing to properly handle a grievance or to inform a grievant about its status.

Since GC 19-01 issued, questions have been raised as to whether the memorandum's case handling instructions apply to union decisions as to *whether* to pursue a grievance and the extent to which Regions need to analyze unions' justifications for not pursuing a grievance. GC 19-01 did *not* alter the analysis concerning a union's decision whether or not to pursue a grievance violated the duty of fair representation.

Rather, GC 19-01 is consistent with past treatment of the duty of fair representation, including in GC 79-55, "Section 8(b)(1)(A) Cases Involving A Union's Duty of Fair Representation," issued July 9, 1979. In GC 79-55, former General Counsel John Irving described four categories of circumstances in which a union will be considered to have breached its duty of fair representation. These categories include: 1) situations where the union's actions are attributable to improper motive (i.e. discrimination) or fraud, 2) when the union's conduct is wholly arbitrary and cannot be reasonably explained, 3) gross negligence constituting a reckless disregard of the interests of unit employees, and 4) situations in which a union does not act reasonably after deciding to pursue an employee's grievance. With respect to this last category, former General Counsel Irving noted that unions are afforded a "wide range of reasonableness" in representing the bargaining unit. See *Ford Motor Co. v. Hoffman*, 345 U.S. 330, 338 (1954). Once a union decides to process a grievance, the union is not precluded from thereafter entering into a settlement acquiescing to the employer's position, or even dropping the grievance. The union may consider the costs of further processing a grievance and accept less than that which the employee seeks as a settlement, or, if the union uncovers

evidence undermining the employee's case, the union may also reassess the grievance or withdraw it. This same "wide range of reasonableness" approach should apply to initial decisions regarding whether to pursue a grievance.

Thus, consistent with GC 79-55, I find that labor policy is not served by requiring a union to present a detailed defense of its decision to not pursue a grievance, or its decision to abandon a grievance, as long as the union is acting reasonably. See *e.g.*, *Vaca v. Sipes*, 386 U.S. 171, 191 (1967) (explaining that while union is allowed a wide range of reasonableness, a violation will be found if the union acted in a perfunctory manner that was so far outside the wide range of reasonableness that it was wholly irrational); *Pacific Maritime Ass'n*, 321 NLRB 822, 823 (1996) (union did not violate its duty of fair representation when it utilized its established grievance review procedures in denying the grievance and there was no evidence of discrimination or bad faith). Therefore, Regions need not look behind a union's assertion of a reasonable decision not to pursue grievances unless there is evidence that those decisions were made in bad faith or involved gross negligence, or where there could be no reasonable basis for the union's decision.

If you have any questions about any given case, please contact your AGC or Deputy AGC in the Division of Operations-Management.

P.B.R.