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

DATE: October 22, 2018

TO: Leticia Peña, Regional Director
Region 27

FROM: Jayme Sophir, Associate General Counsel
Division of Advice

SUBJECT: Sheet Metal Workers International Association, Local 312 (Schoppe Co., Inc.)
Case 27-CB-215546

536-2581-0180-0000
536-2581-3384-0000
536-2581-6700-0000

This case was submitted for advice as to whether the Union breached its duty of fair representation by failing to process the Charging Party's grievance without a rational basis. We conclude that complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(1)(A) by handling the Charging Party's grievance in an arbitrary manner, as well as willfully misleading the Grievant about the status of [redacted] claim.

## FACTS

The Charging Party has worked for the Employer as a [redacted], and been a member of the Union, for about twelve years. The parties' grievance procedure provides that grievances must be raised within thirty days following the occurrence giving rise to the grievance by either the Union or the Employer; notably, individual employees do not have the right to submit a grievance on their own behalf. The grievance at issue in this case was the first time the Charging Party ever sought assistance from the Union.

In late 2016, the Charging Party was diagnosed with the [redacted]. The Employer permitted [redacted] to continue working through [redacted] 2017.[1] In [redacted], the Charging Party opted for a voluntary lay off, so that [redacted] could focus on resolving [redacted] health issues. Several months later, on [redacted], the Charging Party informed [redacted] supervisor that [redacted] wanted to return to work. The supervisor told [redacted] that [redacted] could not return to work without a doctor's note certifying that [redacted] was no longer contagious. After the Charging Party's doctor stated that [redacted] could not verify that the Charging Party was not contagious, the Charging Party reached out to the Union.

[1] All remaining dates are in 2017 unless otherwise indicated.

On October 2, the Charging Party called the Union hall and asked the administrative assistant how to file a grievance. [redacted] replied that [redacted] needed to speak with the [redacted], who was currently unavailable. [redacted] took note of [redacted] call and stated that the [redacted] would call [redacted] back. After the [redacted] failed to call [redacted] back later that day, the Charging Party subsequently called the Union hall on October 3, 10, and 12. None of these follow-up calls succeeded in connecting with the [redacted], however, and the Charging Party was forced to leave messages with an administrative assistant or the [redacted] voicemail. Sometime between October and mid-November, the Union's [redacted] contacted the Charging Party and discussed potential job opportunities with other companies.[2] During this call, the Charging Party inquired about the status of [redacted] grievance. The [redacted] replied that [redacted] had heard about the grievance and, while [redacted] did not know the status of it, [redacted] assured the Charging Party that the [redacted] was taking care of it.

After several weeks passed without hearing from the [redacted] or anyone else from the Union, the Charging Party filed a discrimination charge against the Employer with the Utah State Labor Commission on or about [redacted]. Shortly thereafter, on November 17, the [redacted] called the Charging Party, stated that [redacted] had heard about the state claim, and told [redacted] that [redacted] should have contacted the Union and let them take care of it. The Charging Party told [redacted] wanted to file a grievance, and the [redacted] said they would just wait and see what the State did.[3] Notably, the [redacted] did not mention that the Charging Party's grievance had become untimely on [redacted], nearly a month prior to their November 17 conversation.

On February 18, 2018, the Charging Party contacted the Union's International office and left a message regarding [redacted] grievance. An International Union Representative called the Charging Party back on February 21, and left a message stating that [redacted] had spoken with the [redacted] and advised [redacted] to take another look at the Charging Party's case. The International Union Representative added that the Charging Party should expect to hear back from the [redacted] soon. Notwithstanding the International Union Representative's involvement, the [redacted] never called the Charging Party back. The [redacted] stated that [redacted] did not revisit the Charging Party's grievance because [redacted] felt the

---

[2] The Charging Party followed-up on these leads and was told that the companies were not hiring.

[3] As of the date of the Region's Request for Advice, the Charging Party's charge with the Utah State Labor Commission was still being investigated.

Charging Party never contacted [redacted] to file a grievance and the thirty-day period for filing the grievance was long expired.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Union's repeated nonaction and willful misleading of the Charging Party regarding [redacted] grievance constituted a breach of its duty of fair representation in violation of Section 8(b)(1)(A).

It is well established that a union, as an exclusive bargaining representative, has a statutory obligation to represent the interests of its members fairly, impartially, and in good faith, insuring that all employees are free from unfair, invidious treatment, hostility, discrimination, arbitrariness, or capriciousness.[4] It is equally well settled that this duty of fair representation applies to a union's processing of grievances.[5] As such, a union's handling of a grievance constitutes a breach of its duty of fair representation when it acts in bad faith, discriminatorily, or, as alleged in the case at hand, in an arbitrary manner.[6] In determining whether a union's action, or inaction, is unlawfully arbitrary, the Board's analysis extends beyond the alleged act of negligence to include the totality of circumstances surrounding the grievance.[7] While a union is allowed a wide range of reasonableness and it is not required to process every grievance it receives from its members, 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.[8]

---

[4] *See Teamsters Local 814 (Beth Israel Medical)*, 281 NLRB 1130, 1146 (*quoting* seminal case, *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), and summarizing legal foundation of a union's duty of fair representation).

[5] *Office Employees Local 2*, 268 NLRB 1353, 1358 (1984), *enforced sub. nom. Eichelberger v. NLRB*, 765 F.2d 851 (9th Cir. 1985).

[6] *Beth Israel Medical*, 281 NLRB at 1146.

[7] *Office Employees*, 268 NLRB at 1354-56 (reversing ALJD finding that union breached its duty of fair representation because the ALJ's overly narrow scope of inquiry did not account for the totality of circumstances).

[8] *Vaca*, 386 U.S. at 191.

For example, in *Union of Security Personnel of Hospitals*,[9] the Board concluded that the union's conduct, in particular its continuous inaction and willful misleading of the employee, breached its duty of fair representation in violation of Section 8(b)(1)(A). Over a span of about four months, the union gave a recently discharged employee assurances on five separate occasions that they were pursuing his grievance, they "would get this thing into arbitration and see how far we can go with it," and that they would keep him abreast of any developments.[10] The Board affirmed the ALJ's conclusion that the union's inaction constituted perfunctory treatment because the union did not abandon the grievance based on an investigation and rational analysis; rather, the evidence demonstrated a continued nonaction that amounted to a willful failure to pursue the grievance.[11] The ALJ also highlighted that the union further violated its duty of fair representation when it repeatedly told the grievant that there was no news to report on the grievance and they were still taking it to arbitration, even after the union knew it was untimely and the employer could properly refuse to hear it.[12]

A review of the totality of the circumstances in our case demonstrates that the Union, much like the unions in *Union Security of Personnel of Hospitals* and *Beth Israel Medical*, breached its duty of fair representation when it ignored the Charging Party's grievance and failed to take any action to file or investigate the matter, in addition to willfully misleading [redacted] when [redacted] inquired about the status of [redacted] case. After [redacted] series of calls went unanswered for several weeks, the Charging Party was eventually told by the (b) (6), (b) (7)(C) that the (b) (6), (b) (7)(C) was taking care of [redacted] grievance. This suggested that the Union was aware of the grievance and that it was working to resolve it, when in fact the Union never even began an investigation of the Charging Party's issue. While unions are not obligated to pursue every grievance they are presented with, here the Union's conscious inaction was not the product of a rational weighing of the evidence that tilted towards a finding of no merit, but rather a willful failure to engage in even a superficial

---

[9] 267 NLRB 974, 979 (1983).

[10] *Id.*

[11] *Id.* at 980.

[12] *Id.*; *see Beth Israel Medical*, 281 NLRB at 1148-49 (specifying that it was the union's behavior *after* it failed to file a timely grievance that breached its duty of fair representation; when the steward learned that the grievance was time barred, rather than informing the grievant of its time-barred status and/or contacting the employer to see what could be done under the circumstances, he chose to mislead the grievant and encouraged him to gather evidence for a grievance they never filed).

examination of the Charging Party's issue.[13] Furthermore, when the [redacted] finally spoke with the Charging Party about [redacted] grievance, [redacted] counseled [redacted] to wait and see what happened with [redacted] state claim—an independent claim that had no impact on [redacted] contractual grievance—and did not mention that the grievance [redacted] sought was already contractually barred. Thus, [redacted] withheld the true status of the Charging Party's grievance in an attempt to cover up the Union's inaction.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(1)(A) by breaching its duty of fair representation by arbitrarily failing to process the Charging Party's grievance and willfully misleading the Charging Party about the status of [redacted] claim.[14]

/s/
J.L.S.

ADV.27-CB-215546.Response.Local312SchoppeCo[redacted]

[13] This conclusion is particularly appropriate when an employee, like the Charging Party, does not have the contractual right to file a grievance against the employer on [redacted] own. *See Office Employees*, 268 NLRB at 1356 (noting that the grievant must bear some of the blame in her time-barred grievance because she was aware of the CBA's time constraints and had the ability to file a grievance without the union's involvement; thus, while the union was negligent in failing to communicate its no-merit finding to the grievant, its nonaction was based on a rational conclusion and the grievant could have acted on her own).

[14] (b) (5) [redacted]