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

DATE: December 12, 2018

TO: Mori Rubin, Regional Director
Region 31

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: SEIU United Healthcare Workers (Kaiser Los Angeles Medical Center)
Case 31-CB-217249

536-2581-0140-0000
536-2581-0180-0000
536-2581-0180-5000

This case was submitted for advice as to whether the Union violated Section 8(b)(1)(A) when it failed to notify the Charging Party that [redacted] grievance was denied until well after the contractual period for appeals. We conclude that the Union violated the Act by breaching its duty of fair representation because its system for tracking grievances, which includes an electronic database system, failed in one of its most basic functions: to keep grievants and the Union officials responsible for processing grievances apprised of a grievance's status. Further, the steward willfully ignored the Charging Party's repeated requests for updates regarding the status of [redacted] grievance before it was too late to elevate it to the next step of the grievance process. Accordingly, absent settlement, the Region should issue complaint.

FACTS

The SEIU United Healthcare Workers ("the Union") represents a unit of employees at Kaiser Los Angeles Medical Center ("the Employer"). The Union and the Employer are parties to a collective-bargaining agreement that includes grievance and arbitration procedures.

The Charging Party is an [redacted] in the Employer's [redacted] department. The Charging Party typically works overtime three or four days a week. When overtime hours are available, the Employer's policy is to post a sheet of paper stating the day coverage is needed. Employees interested in working overtime must place their names on the sheet. The Employer then reviews the sheet and assigns overtime first to part-time employees, then to per diem employees, and then to full-time employees based on seniority.

In March or April 2017,[1] a full-time employee with less seniority than the Charging Party was given overtime shifts ahead of the Charging Party and without any prior postings by the Employer of available overtime. The Charging Party believed the overtime was given to the employee in violation of the Employer's overtime policy and decided to file a grievance. Although the Charging Party's department did not have a dedicated shop steward, [redacted] was able to discuss [redacted] grievance with a steward from another department.

The steward filed a grievance on behalf of the Charging Party on [redacted] The Employer, Union steward, and Charging Party had an initial meeting around the end of July, where the Employer acknowledged that some overtime days appeared to be in question but that the information had to be reviewed further with the Human Resources department. On or about November 15, the Employer, Union steward, and Charging Party met again for a formal Step 1 grievance meeting. At the meeting's conclusion, the Employer stated that it would provide a formal response within 10 business days. On November 27, about eight business days after the meeting, the Employer mailed a letter to the Union office, denying the grievance. The letter was addressed to the steward, who did not work at the Union office. It appears the Union did not forward the letter to the steward or otherwise inform [redacted] of the Employer's decision.

At the conclusion of 10 business days, the Charging Party followed up with the Union steward, who said that [redacted] had not heard anything from the Employer. The Charging Party followed up daily with the steward from the end of November to approximately January 2018. Each time, the Union steward replied only that [redacted] had not received a response from the Employer. The Charging Party also phoned one of the Union's Contract Specialists on a weekly basis seeking updates, but the Contract Specialist never answered or returned the calls.

Sometime in January 2018, the Union steward followed up with the Employer for a response. The Employer sent the steward a copy of the November 27 grievance-denial letter. The Union steward then forwarded the denial letter to the Charging Party. Per the parties' collective-bargaining agreement, the Union needed to elevate the Charging Party's grievance to Step 2 by December 7, ten days after the Step 1 denial.

Following the January 2018 receipt of the grievance denial, the Union steward told the Charging Party that [redacted] would be attending a Union meeting and would inquire into what else the Union could do for the Charging Party. However, the

[1] All dates hereinafter are in 2017 unless otherwise stated.

Charging Party heard nothing from the steward or the Union until February 7, 2018, when the steward gave the Charging Party the email address of another Union official to contact. The Charging Party emailed the official and received a response on February 13, asking the Charging Party whether the grievance had been denied or resolved and requesting some additional information. The Charging Party provided the information but never received a response from anyone in the Union. The Charging Party filed the instant charge on March 26.

ACTION

We conclude that the Union violated Section 8(b)(1)(A) because its system for tracking grievances failed in one of its most basic functions: keeping grievants and the Union officials who are responsible for processing grievances apprised of a grievance's status. This systemic failure, which precluded the Charging Party's grievance from being timely appealed, constituted arbitrary conduct that violated the Union's duty of fair representation.

It is well settled that a union's duty of fair representation applies to its processing of grievances. Mere negligence in processing a grievance does not constitute a breach of the duty of fair representation, but processing a grievance in a discriminatory, arbitrary, or perfunctory manner does constitute such a breach and violates Section 8(b)(1)(A).[2] Thus, where a union undertakes to process a grievance and then, for no good reason, fails to do so, its "nonaction amount[s] to a willful failure to pursue the grievance, and [is] therefore perfunctory."[3] In the absence of some rationale for a union's failure to file a grievance, or for abandoning it, it cannot be said that the union's actions, or inactions, were mere negligence.[4] Likewise, even where a union has a formal system in place to manage unit employees' grievances, that system's failure to communicate grievance outcomes to the grievant or the union official handling the grievance is more than mere negligence and instead constitutes

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[2] *See Union of Security Personnel of Hospitals*, 267 NLRB 974, 980 (1983) (when a union decides to undertake an employee's grievance, it is "obligated to dispose of the grievance in accordance with the standards imposed by [the union's] duty of fair representation").

[3] *Id.*

[4] *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995, 996 (1986) (to avoid arbitrary conduct, union must at least have a reason for the action or inaction taken (citing *Teamsters Local 315 (Rhodes & Jamieson)*, 217 NLRB 616, 618 (1975), *enforced*, 545 F.2d 1173 (9th Cir. 1976)).

arbitrary conduct in violation of Section 8(b)(1)(A).[5] The mere existence of a formal system is not a safe harbor[6] if the system fails to insure that grievances are properly tracked and that employee inquiries about them are addressed.

Here, although the Union maintains a system for tracking grievances, that system failed in one of its most basic functions: to inform the Charging Party and the steward that the Step 1 grievance had been denied so that a timely decision could be made whether to proceed to the next step. Although the Employer sent the grievance-denial letter to the Union office rather than the steward—who worked elsewhere—the steward's name was on the letter, which could easily have been forwarded to [redacted] in a timely manner. Indeed, the steward and Union should have been expecting the letter because the Employer explicitly put them on notice that it would have an answer to the Step 1 grievance within 10 days. At the end of those 10 days, the Charging Party followed up with the steward *daily* for over a month, checking on the status of the grievance. Thus, the Union's main office had the denial letter in its possession for over a month but failed to forward it, and the steward, even in the face of the Charging Party's persistent inquiries, failed to take any initiative to follow up for over a month. This systemic failure was more than mere negligence by the Union; it amounted to a willful failure to communicate that prejudiced the Charging Party by rendering any possible grievance appeal untimely.

We reject the Union's defenses. First, it claims that its stewards handle only Step 1 grievances and then are expected to give the grievance to a Contract Specialist to move the grievance to Step 2, implying that the Employer was at fault for sending the grievance-denial letter to the Union office rather than sending it to the steward's workplace so that [redacted] could forward it to the Contract Specialist. But this defense is essentially an admission that the Union's grievance-tracking system is inadequate because the letter was specifically addressed to the steward, who the Union knew or should have known how to contact. Second, the Union claims that the failure may also have been due to turnover among Contract Specialists. However, the same Contract Specialist was serving at all relevant times, and even if high turnover in that position

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[5] *Cf. Union of Security Personnel*, 267 NLRB at 980 (union breached duty of fair representation by willfully keeping employee misinformed about grievance's status, where union told employee it was waiting on news of grievance even though it had not filed anything); *Linden Maintenance*, 280 NLRB at 996 (violation where union agreed to take grievance and then failed to process it while willfully misinforming employee and claiming it was processing grievance).

[6] *See* Memorandum GC 19-01, at 1–2 (Oct. 24, 2018).

somehow played a part in the failure to properly represent the Charging Party, the Union should have a system in place that takes such turnover into account.

Accordingly, for the foregoing reasons, the Region should issue complaint, absent settlement.

/s/
J.L.S.

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