

Syracuse University and Teamsters Local 317 and Staff Complaint Process. Case 3–CA–23985

August 15, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On October 29, 2003, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief, and a reply brief in further support of its exceptions. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The central issue in this case is whether the Respondent's employee complaint procedure, the Staff Complaint Process (SCP), is a labor organization within the meaning of Section 2(5) of the Act. We conclude that it is not.

Background

We begin by reviewing the development of the SCP, its structure, its operation, and its role in conjunction with the unionization effort by employees in the parking services department of the University.²

Following a decision in 1999 by the university chancellor to redesign a longstanding but underutilized and management-dominated complaint handling procedure, a committee of the Respondent's managers drafted the outline of the SCP. The Respondent's goal was to "develop a new procedure that is user-friendly, fair to all concerned, trusted by all participants, and that provides timely resolution of workplace complaints." Accordingly, beginning in early 2002,³ the Respondent held a series of "town meetings" with the nonunion personnel (the intended users)⁴ to "discuss new procedures for resolving staff complaints about workplace problems" and to seek input from them before finalizing the SCP. With this input from the intended users, the Respondent finally approved the SCP in April. The SCP governing docu-

ments specify the types of grievances eligible for processing through the SCP as well as the types of grievances that are not covered.⁵ Between April and August, the Respondent presented the SCP to the chancellor's cabinet, deans, and department heads.

The Respondent introduced the SCP in its final form to employees in early September in a memorandum that described the SCP as "a new process intended to resolve employee relations issues between nonbargaining unit University employees and their supervisors," and sought volunteers to serve in the various official roles established in the SCP.⁶ More than 150 personnel volunteered to serve, over two-thirds of them nonsupervisory employees. These volunteers form the SCP "pool of potential panelists, advocates and mediators," from which names are drawn to fill the positions necessary to process complaints accepted into the SCP.

The Respondent announced the implementation of the SCP effective January 3, 2003. At all relevant times, the Respondent has recruited and "validated"⁷ the volunteer participants and trained them in the operation of the SCP and in advocacy and mediation techniques, using manuals and training programs developed by Respondent's human resources department (HRD) and other University resources. The SCP operates during paid work time using facilities and supplies provided by the Respondent.

In the meantime, Teamsters Local 317, the Union, filed a petition in late October for an election in a unit of the Respondent's parking services employees, who would be covered by the SCP.⁸ The Respondent expressed its opposition to unionization by conducting an election campaign, in which the SCP was featured. Jack Matson, the director of staff relations and recruitment in the Respondent's HRD, conducted a series of meetings with small groups of unit employees. Each employee attended about 10 meetings. During the meetings, Matson generally explained the Respondent's position disfavoring unionization, and presented the SCP to employees

⁵ The SCP applies to disciplinary actions, including termination, for violations of specific University rules, policies or practices. It excludes cases involving discrimination and sexual harassment, contents of University policies, performance evaluations, interpersonal disagreements, and such managerial decisions as scheduling and reassigning employees and matters concerning pay.

⁶ Although the term "employees" was used, it appears that the intended users include other persons employed by the Respondent, e.g., supervisors.

⁷ It is not entirely clear what this "validation" entails. One element appears to involve a joint determination by the SCP complaint coordinator and the Respondent's associate vice president, human resources, that volunteers meet the criteria for service, which include employment at Respondent for at least 3 years and a clean disciplinary record.

⁸ The election, scheduled for mid-December, was blocked by the unfair labor practice charges in this case.

¹ Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent was permitted to call the Board's attention to its recent decision in *IBM Corp.*, 341 NLRB 1288 (2004).

² The facts and circumstances giving rise to this case are more fully set forth in the detailed discussion in the judge's decision.

³ All dates are 2002, unless otherwise indicated.

⁴ Specifically, it was anticipated that the SCP would be applicable to approximately 2300 managers, supervisors, professionals, administrative, clerical, and hourly employees.

as “an employee-based hearing and review process” and a new, cost-free “benefit.” For example, Matson told employees to “[d]o the math, [the SCP is] available to you at no cost, while if you choose to organize, then it’s going to cost you . . . union dues.” Many of the Respondent’s campaign handouts similarly promoted the SCP as a new, cost-free employee benefit.

SCP Officials and Participants

Respondent’s HRD plays an active role in the SCP. The staff complaint coordinator (complaint coordinator) is an HRD employee who administers the SCP, coordinates the selection and training of SCP volunteers, and serves as a resource for all parties regarding the SCP and the Respondent’s rules and policies. The vice president, HRD (VP/HRD) supervises the complaint coordinator and, as we discuss below, “has a role in confirming the decisions of the SCP Hearing Panel.” Managers, supervisors, and employees are eligible to serve in the various official positions within the SCP, i.e., as staff advocates, staff mediators, and panel members.⁹ However, the Respondent instructs its managers to “work with support staff rather than HR or other management to mediate resolution of a complaint.”

The Process

Use of the SCP is at the employees’ option. As a preliminary step to involving the SCP, an aggrieved employee presents his complaint to the complaint coordinator for a determination whether the subject matter falls within SCP jurisdiction. If so, the complaint formally enters the SCP. If the complaint coordinator determines that the complaint falls outside SCP jurisdiction, he refers the determination for review by a three-member “special panel” composed of one HRD representative and two staff members, one of whom must be a supervisor outside of the complainant’s chain of command. The HRD representative is selected by the VP/HRD, and the

⁹ Staff advocates support the complainant during the complaint process by helping to analyze the complainant’s grievance, attending mediation and other meetings or interviews attendant to the process, and accompanying (but not participating in) the hearing. The SCP documents specify that staff mediators may not personally know either party to the complaint and must remain impartial and nonadversarial at all times. Their role is to facilitate settlement attempts during the informal stage by focusing on the issues, brainstorming, attempting to identify areas of common interest, and proposing potential resolutions. Panel members are charged with holding fair and impartial hearings, admitting evidence bearing on the complaint, and issuing written decisions based on a preponderance of the evidence and containing facts, conclusions, and a rationale, as reached by the panel majority. Panel members decide the disposition of grievances in the formal and appeals stages. The complaint coordinator assists with the process throughout the life of the complaint.

two staff representatives are randomly drawn from the SCP panel pool.

Informal Stage: In the informal stage, the complainant and the supervisor whose action has given rise to the complaint engage in mediation in an attempt to achieve a settlement. The complainant chooses a staff mediator from the SCP pool. The complainant may seek the assistance of a staff advocate who, at the complainant’s election, can be a SCP pool member or any other employee. The staff advocate assists and supports the complainant throughout this stage of the SCP as an active participant. The staff mediator may, at his discretion, request the participation of up to two higher levels of management if he determines that it would assist in the resolution of the complaint. If there is no settlement, the complainant may request initiation of the formal stage of the SCP.

Formal Stage: At the formal stage, a hearing panel is convened to conduct a hearing, receive evidence from the parties, and issue a written decision. The complaint coordinator randomly selects a three-member hearing panel—a chair and two members—from the SCP pool. The SCP governing documents do not specify the supervisor/nonsupervisor ratio of the panel. However, the VP/HRD testified that he applied a policy that if the complainant is a nonsupervisor, the panel is composed of two nonsupervisors and one supervisor. The staff mediator and staff advocate may attend the hearing but may not actively participate. Following the hearing, the hearing panel chair issues the written decision of the panel and forwards it, with comments, to the VP/HRD. The VP/HRD can either accept the decision or return it once to the hearing panel, along with input, for reconsideration. This request for reconsideration occurs in writing, and the VP/HRD does not have personal contact with the panel members. In reviewing its decision, the panel gives the input from the VP/HRD whatever weight it deems warranted and may even find the input entirely meritless. The panel then submits its final decision in writing to the VP/HRD, who transmits the final decision to the parties. Absent an appeal, the Respondent is bound by this decision.

Appeals Stage: Either party may appeal the decision of the hearing panel based on specified criteria.¹⁰ The complaint coordinator randomly selects a three-member review panel from the pool. If the complainant is a nonsupervisor, the three members consist of a supervisor and two employees. The review panel may rehear the case in its entirety or limit proceedings to specific issues raised in the appeal. The review panel issues its decision in

¹⁰ Appeals must be based on new evidence, procedural error, errors in the interpretation of University policy, or grossly inappropriate sanctions.

writing and, just as in the formal stage, forwards the decision to the VP/HRD, who can either confirm the decision or make a written request for reconsideration by the review panel. Thereafter, the panel issues its final decision in writing and provides it to the VP/HRD for transmission to the parties. This final decision is not subject to further review, and it is binding on the Respondent.

At the time of the hearing in this case, limited evidence about the history of complaints under the SCP was available. Only three complaints had been submitted. Two were settled as a result of mediation at the informal stage; the third was rejected for processing by the complaint coordinator because the subject matter did not fall within the jurisdiction of the SCP. Therefore, the record does not contain evidence of how the SCP worked in actual practice at the formal and appeals stages.

Judge's Decision and Exceptions

At the hearing and on brief, the Respondent admitted that it dominated and assisted the SCP in its formation and administration. Thus, the dispositive issue before us, as it was before the judge, is whether the SCP is a statutory labor organization. If the SCP is a labor organization as contemplated by Section 2(5), it follows that the Respondent violated the Act as alleged.

The judge found that the SCP is a labor organization within the meaning of Section 2(5). Specifically, he found that the SCP is a "plan" or "agency" created by the Respondent where employees participate in a bilateral process with management for the purpose of resolving employee grievances with their supervisors concerning discipline and other matters. He further found that the staff advocates and staff mediators "deal" with management on the complainant's behalf, thus, that they perform functions that are representational in nature. Therefore, he found that the SCP meets the statutory definition of "labor organization." He further found that the Respondent violated Section 8(a)(1) by telling employees during its election campaign to select the SCP as a cost-free option to the Union.

The Respondent excepts to the judge's findings in each of these respects. It contends, in sum, that the SCP performs a delegated management function that is strictly adjudicatory in nature. We find merit in the Respondent's exceptions.

Applicable Legal Principles

The provisions of the Act applicable to the issues in this case are found in Sections 2(5), 8(a)(1), and (2):

Section 2(5). The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the

purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Section 8(a)(1). It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title].

Section 8(a)(2). It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

In *Electromation, Inc.*,¹¹ the Board established the standard for determining whether the entity that is the object of the employer's allegedly unlawful conduct is a labor organization within the meaning of Section 2(5) of the Act. In promulgating this standard, the Board reviewed the legislative history of the Act, which establishes that one of the primary purposes of the Act was the abolition of employer-dominated labor organizations. The Board also provided further insight into the meaning and interplay between Sections 2(5) and 8(a)(2) and (1) of the Act.

The Board's inquiry is two-fold. First, the Board considers whether the entity involved is a "labor organization" under Section 2(5) of the Act. The Board will find that a committee is a labor organization under Section 2(5) if (1) employees participate, (2) the organization exists, at least in part, for the purpose of "dealing with" employers, (3) these dealings concern conditions of employment or other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment, and (4) if an "employee representation committee or plan" is involved, there is evidence that the committee is in some way representing the employees.¹² Second, if the organization satisfied those criteria, the Board considers whether the employer has engaged in any of the forms of conduct proscribed by Section 8(a)(2), i.e., domination or interference with the organization's formation or administration, or unlawful support of the organization.¹³

¹¹ 309 NLRB 990 (1992), enf. 35 F.3d 1148 (7th Cir. 1994).

¹² *Id.* at 996.

¹³ *Id.*

The term “dealing with” in Section 2(5) is broader than the term “collective bargaining” and can apply to situations other than the negotiation of a collective-bargaining agreement.¹⁴ It contemplates a “bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals.”¹⁵ “That ‘bilateral mechanism’ ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, [and] management responds to the proposals by acceptance or rejection by word or deed.”¹⁶ On the other hand, “[a]n organization whose purpose is limited to performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5).”¹⁷ It should be noted that the “purpose” of an organization is relevant to a Section 2(5) determination of whether the organization is a “labor organization.” By contrast, the “motive” for establishing the organization is not relevant to Section 2(5).¹⁸

Analysis

We conclude that SCP is not a labor organization because its purpose is not to “deal with” the employer on terms and conditions of employment.¹⁹ Rather, its purpose is limited to an adjudicative function; specifically, to finally resolve the propriety of employer actions against an employee. It does not make proposals to management, and thus there are no management counter-proposals. The panel simply renders a decision as to the propriety of the Employer’s action.²⁰

Although the SCP panel must submit its proposed decision to management for input before its decision is final, the SCP panel gives such input, if any, whatever weight it deems warranted and is not obligated to “get back” to management.

While, in accord with the Respondent’s unwritten policy, a management official sits on any three-member panel convened to consider a grievance filed by a non-supervisory employee, the majority of the panel consists of employees and there is no evidence that the manage-

rial official deals with the two employees as if they were on opposing sides. Rather, it appears that the three persons simply consider the evidence and make a group decision.²¹

We note that the Board did not find similarly structured adjudicative entities to be labor organizations in *Mercy-Memorial Hospital*, 231 NLRB 1108 (1977), and *John Ascuaga’s Nugget*, supra. In those cases, as here, the committees in question were vested with final authority to resolve grievances. In *John Ascuaga’s Nugget*, the employees council performed a purely adjudicative function without interacting with management for any purpose other than to render a final decision on a grievance, and did not recommend changes in terms and conditions of employment or act as an advocate of employee interests. Id. at 276. The Board thus held that the employees council did not deal with management, but appeared “to perform a function for management; i.e., resolving employee grievances.” Id. The same is true here.

In contrast, the Board in *Keeler Brass Co.*, 317 NLRB 1110 (1995), cited by the General Counsel, found that an employer’s grievance committee that did not have final decisionmaking authority engaged in “dealing” with the respondent and constituted a labor organization. There, after the committee presented conclusions to management, management and the committee “went back and forth explaining themselves until an acceptable result was achieved” (namely, the committee’s capitulation to management). Id. at 1114. In deciding a grievance concerning a discharge, for example, the committee recommended that management reverse its discharge decision and met with the company vice president to present six recommendations, including one concerning terms and conditions of employment regarding the respondent’s no-call, no-show policy. Management considered and rejected the committee’s proposals as to the grievance; the committee then considered further evidence from management, discussed the matter with its HR representative, and “capitulated.” Id. 1113–1114. Further, in distinguishing that committee from those in *Mercy-Memorial*, supra, and *John Ascuaga’s Nugget*, supra, the Board stated that the respondent “consistently has not considered the committee’s decisions to be final and has instead treated them as recommendations that it was free to accept or reject.” Id. at 1114 fn. 16. Additionally, management acted on the committee’s request that the respondent reconsider its no-call, no-show policy. Id. at

¹⁴ *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211 (1959).

¹⁵ *Electromation, Inc.*, supra at 997. See also *Polaroid Corp.*, 329 NLRB 424, 429 (1999); *E. I. du Pont de Nemours & Co.*, 311 NLRB 893, 894 (1984).

¹⁶ *E. I. du Pont de Nemours & Co.*, supra at 894, cited in *Crown Cork & Seal, Inc.*, 334 NLRB 699, 700 (2001).

¹⁷ *Electromation, Inc.*, supra at 995.

¹⁸ However, motive may be an element of establishing that the creation of an entity is a violation under other sections of the Act.

¹⁹ We need not decide whether other elements of Sec. 2(5) are met.

²⁰ Of course, the SCP process cannot even begin if the complaint coordinator concludes that there is no SCP jurisdiction. However, the coordinator, a management official, makes this determination based on the facts and not on any process of “dealing.”

²¹ See *John Ascuaga’s Nugget*, 230 NLRB 275 (1977), enfd. in pertinent part 623 F.2d 571 (9th Cir. 1980), cert denied 451 U.S. 906 (1981), where a similar impartial adjudicatory committee, which the Board found lawful, comprised one employee and two management officials, including the respondent’s director of employee relations.

1111. The Board distinguished the operation of that committee from one in which

an employee committee receives ‘input’ from management and then independently and finally resolves employment issues. In that case, there is contact between the committee and management, but only as an aid to the committee’s independent authority to render a final decision.

Id. at 1114 fn. 18.

Here, the SCP provides the VP/HRD one opportunity to request reconsideration at the conclusion of both the “formal” (hearing) stage and the appeals stage, after which the SCP must issue the final decision, and management must transmit the SCP’s final decision to the parties regardless of whether it agrees. The HRD’s limited opportunity to request reconsideration, in light of the prompt final decision that must follow, is sufficient to preclude the sort of back and forth that characterized the decisionmaking process in *Keeler Brass*. Furthermore, while the judge did not find that the SCP has final decisionmaking authority, the SCP documentation clearly shows that it does. At the time of the hearing in this matter, no SCP adjudication had gone beyond the mediation stage. Therefore, the only evidence in the record is that the SCP decision is, indeed, final.

Based on the above, there is no “dealing” between management and the SCP. Accordingly, we find that the SCP is not a labor organization within the meaning of Section 2(5) of the Act.

Conclusion

Since the SCP is not a statutory labor organization, the Respondent did not violate Section 8(a)(2) and (1) of the Act as alleged by establishing and maintaining the SCP. For the same reason, the Respondent did not violate Section 8(a)(1) by interfering with employee rights to refrain from supporting a “labor organization.”

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting.

The Staff Complaint Process is an integrated dispute resolution mechanism. Viewed in the entirety of its operation, the process fulfills the four characteristics of a Section 2(5) labor organization discussed in the majority opinion. Therefore, I dissent and would find the Section 8(a)(1) and (2) violations as alleged.

Linda M. Kowalski, Esq. and *Robert A. Ringler, Esq.*, for the General Counsel.

William L. Bergan, Esq. and *L. Lawrence Tully, Esq.*, of Syracuse, New York, for the Respondent.

Mairead E. Conner, Esq., of Syracuse, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Syracuse, New York, on June 23 and 24, 2003. The charge was filed on December 16, 2002, by Teamsters Local 317 (the Union) against Syracuse University (Respondent). The complaint issued on February 28, 2003, and alleges Respondent violated Section 8(a)(1) and (2) of the Act by: serving as the administrator of the staff complaint process (SCP); establishing policies and procedures, and participating in the affairs and meetings of the SCP; rendering assistance and support to the SCP by creating it, determining its structure and function, allowing the SCP to use Respondent’s facilities, and by selecting and training the SCP’s members; and since January 1, 2003, recognizing and bargaining with the SCP as the exclusive collective-bargaining representative of certain of its employees in that by the aforementioned conduct Respondent has dominated and interfered with the formation and administration of and has been rendering unlawful assistance and support to a labor organization. The complaint also alleges Respondent violated Section 8(a)(1) of the Act by telling employees about the SCP and stating employees could represent each other at no cost while the Union charges dues thereby suggesting employees should choose representation through the SCP rather than the Union.¹

On the entire record, including my observation of the demeanor of the witnesses,² and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a private nonprofit University, with its principal location in Syracuse, New York, has been engaged in the operation of an institution of higher learning from which it annually derives gross revenues, excluding contributions, in excess of \$1 million, and it annually purchases and receives at its Syracuse location goods and materials valued in excess of \$5000 directly from points outside the State of New York. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ Complaint pars. 6(a) and (b) were withdrawn due to a prehearing settlement.

² In making the findings herein, I have considered all the witnesses’ demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (1950), reversed on other grounds 340 U.S. 474 (1951).

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Formation and Operation of the Staff Complaint Process

Respondent has 4500 to 5000 benefit eligible employees, 1000 of whom are faculty and another 750 are represented by a local of the Service Employees International Union. Neil Strodel, Respondent's associate vice president of human resources, testified that, excluding faculty and union-represented employees, Respondent has about 2300 employees in exempt and nonexempt classifications under the Fair Labor Standards Act (FLSA) including managers, supervisors, professionals, administrative, clerical and other hourly employees and they all are covered by the provisions of the (SCP).

Respondent's governing body includes a chancellor and the chancellor's cabinet, who report to the chancellor. Eleanor Ware, senior vice president of human services and Government relations, is a member of the chancellor's cabinet. Strodel reports to Ware. Strodel is in charge of Respondent's human resources department (HRD), which oversees benefits and labor relations for Respondent's entire faculty and staff. There are 35 people employed in HRD, which is divided into five areas, each with a director who reports to Strodel. Two of the directors in HRD are: Jack Matson, in staff relations and recruitment; and Curlene Autrey, in diversity employee relations and problem resolution.³

Strodel's testimony reveals that in 1999, the chancellor approved the decision to develop the SCP to replace an existing employee complaint procedure which, in Respondent's view, had been under utilized because it culminated in a hearing before a management-dominated panel. Strodel, Autrey, Matson, and representatives of two of Respondent's senate committees participated in a committee to create the SCP.

On February 8, 2002, Strodel sent a memo through interuniversity mail to "Syracuse University Nonbargaining Unit Staff," in which the recipients were invited to a "town meeting" to "discuss new procedures for resolving staff complaints about workplace problems." It stated in the memo that the existing procedure has been underutilized and the chancellor charged HRD to "develop a new procedure that is user-friendly, fair to all concerned, trusted by all participants, and that provides timely resolution of workplace complaints." Strodel stated in the memo that managers and staff had a stake in workplace problem solving, and were encouraged to attend one of the town meetings to learn about the new process and provide input before it is finalized. Alternate town meeting dates were scheduled in the memo.

The chancellor finally approved the new SCP in April 2002 and on April 19, Strodel sent a memo to the chancellor's cabinet discussing the SCP. Strodel states in the memo that the SCP was for "resolving complaints lodged by staff against supervisors," and that the SCP covers "all nonbargaining unit staff (approximately 2300)." The April 19 memo contains certain bulleted items, some of which are set forth below:

The new Process includes an informal and formal procedure, and a review procedure for hearing appeals.

The types of complaints covered by the Process and not covered by the Process are specified.

The Process is facilitated by the Staff Complaint Coordinator (SCC), an HR administrator whose duties include providing information on the rights and responsibilities of the Complainants and Respondents and offering advice and counsel to all parties, including policy information and interpretation. The SCC will ensure timelines [sic] and generally administer the Process. . . .

Significant peer involvement is featured through development of a pool of interested staff to act as Advocates, Mediators, Hearing Panel Members, and Review Panel Members. (Defined in Appendix I). Advocates provide support for the Complainant throughout the Process; Mediators facilitate attempts to reach resolution during the informal phase; Hearing Panel members serve during the formal phase; and Review Panels hear appeals.

The April 19, 2002 memo goes on to state that:

HR's role in the new Process is to train, document, communicate, support, and report on Process activities. The Associate Vice President for Human Resources has a role in confirming the decisions of the Hearing Panel in the formal procedure, and of the Review Panel in the appeals procedure. In cases where the Associate Vice President disagrees with the decision of a Panel, he may send it back once for reconsideration, but whatever decision comes from the panel the second time is binding.

The April 19, 2002 memo also states that: "Managers will work with support staff rather than HR or other management to mediate resolution of a complaint." The memo states that volunteers would be sought to serve as mediators, panelists, and advocates and the effective date for the SCP was January 2003.

On August 23, 2002, Strodel sent a memo about the SCP to "Deans, Directors and Department Heads," who Strodel testified are "our management structure." The information in the August 23 memo was basically the same as that in Strodel's April 19 memo to the chancellor's cabinet. The August 23 memo also states, "Consider volunteering yourself. This new Process depends on volunteerism and we are asking nonbargaining unit staff at all levels to step forward; in addition, encourage those in your department to volunteer."

On September 3, 2002, Strodel sent a memo through interuniversity mail to "All Nonbargaining Unit Staff." The memo repeated the information set forth in Strodel's April 19 and August 23 memos. The memo described the SCP as "a new process intended to resolve employee relations issues between nonbargaining unit University employees (approximately 2300) and their supervisors." The September 3 memo solicits volunteers for mediators, panelists, and advocates, and states that a comprehensive plan had been developed, "for communications, training, and web support." The memo cites a website where a description of the SCP could be located and states the goals of the SCP are to be: "user friendly, fair to all concerned, trusted by all participants, and provide timely resolution of workplace complaints."

³ The complaint alleges and Respondent admits Matson is a supervisor and agent within the meaning of Section 2(11) and (13) of the Act.

Respondent held campuswide meetings in the fall of 2002 concerning the SCP, and Respondent compiled a list of volunteer advocates, mediators, and panelists for these SCP positions for which Respondent established eligibility requirements. Strodel's testimony reveals that: The 2300 employees covered by the SCP are split between FLSA exempt and nonexempt classifications including about 850 hourly employees. Over 150 people volunteered to serve in one or more of the SCP advocate, mediator, and panelist roles and 106 of the volunteers are nonsupervisory employees and 46 are supervisors. Strodel testified supervisors volunteered to participate in all three positions in the SCP and an employee complainant can choose a supervisor or nonsupervisor as an advocate. Strodel testified that, within the nonsupervisory volunteers, there are professional, technical, administrative, and hourly employees.

The SCP is set forth in a 20-page document with an effective date of January 1, 2003. It states at the outset that, "This process is intended to resolve complaints arising between University employees and their supervisors. All nonunion employees functioning in a supervised or supervisory capacity are subject to this staff complaint process. This includes staff, administrators, and supervisors in their supervised or supervisory capacity." The SCP states it includes "an informal procedure that attempts resolution through mediation, and a formal procedure that reaches final resolution by means of hearing panels made up of other staff and supervisors. There is also an appeals procedure." It states that, "All supervised and supervisory employees covered by this Process are encouraged to participate by contributing their paid time at the University to the implementation of this Process in roles such as mediators, advocates and Hearing Panel members. . . ." The SCP sets forth certain requirements for the volunteers to serve in the pool of panelists, advocates, and mediators. It states that, "The Senior Vice President for Human Services and Government Relations shall appoint Pool members for a term of two years following a validation process undertaken by the Associate Vice President, Human Resources in coordination with" the SCC. The SCP provides, in pertinent part:

1.2 A staff member may bring a support person to any or all of the meetings related to addressing a work-place problem. The support person cannot be an attorney. Staff Advocates . . . , who are trained in conflict resolution techniques are available as resources for Complainants to provide support and guidance throughout the entire process. As another option, the Complainant may choose his/her own support person instead of a Staff Advocate. . . .

1.3 . . . Nothing in this procedure is intended to limit the University's right to manage and direct its work force and operations, including the University's right to adopt or alter any rule, policy or practice with advance notice.

1.4 Supervision of the Staff Complaint Process is the responsibility of the Associate Vice President, Human Resources with oversight responsibility by the Sr. Vice President, Human Services & Government Relations. The Diversity and Resolution Processes unit of Human Resources is responsible for the implementation of the Staff Complaint Process.

1.5 The Staff Complaint Process is subject to change from time to time and will be subject to periodic review and modification.

The SCP states that the SCC "is an HR administrator whose duties include the general administration of the SCP, including the maintenance of all records, monitoring of deadlines, statistical reporting of results and execution of all responsibilities" described in the SCP. One of the responsibilities of the SCC is, in consultation with the associate vice president of human resources, to coordinate the selection, training, activities, and replacement of "Staff Advocates, Staff Mediators, and Hearing Panel members, using appropriate University and external resources."

The SCP provides an employee begins the complaint process by contacting the SCC and if the SCC:

. . . judges preliminarily that the complaint is outside the jurisdiction of this Process, a trained Special Panel . . . consisting of a member from Human Resources plus two staff members, one of whom is supervisory, will be contacted to decide whether there is jurisdiction or not. If the panel determines there is jurisdiction, the complaint will be heard. If the panel determines that there is no jurisdiction, the SCC will notify the Complainant of the existence of other alternatives, if any, for recourse.

The SCP states that the human resources representative on the "special panel" is to be selected by the associate vice president of human resources. The SCP states that the "special panel" is charged with determining jurisdiction based on criteria set forth in the SCP, which delineate items covered and not covered. Included in matters covered are a variety of disciplinary actions ranging from documented verbal warnings to dismissals in which the employee, referred to in the SCP as the complainant, alleges their supervisor, referred to in the SCP as the respondent, acted inappropriately such as disciplining too severely or the complainant alleges they were not guilty of the offense. Also included in items covered is an alleged "violation of a specific University rule, policy or practice."

If jurisdiction is found, the SCP requires that the complainant file a "notification of complaint" form in order to participate in the informal stage of the SCP, which involves mediation between the complaining employee and their supervisor. The complainant then "must choose a staff mediator," with the assistance of the SCC. The SCP states that staff mediators "are not advocates and do not judge the merits of a complaint. They act only to do fact-finding, facilitate attempts at resolution of the problem, and help staff members involved understand" the SCP. The SCP states that the complainant is also encouraged to obtain a "Staff Advocate or other support person (not an attorney) for help and support throughout this process." The SCP states, "The mediator may determine at some point that resolution of the issue will be assisted by involving up to two additional levels of management. When there are more than three levels of management in the management chain (including the Respondent) to expedite matters human resources will determine which two levels of management should be involved." The complainant has the option at the informal stage of the process of signing a complaint termination form at any

time. There is a 20-day time limit in the informal stage at which point, if there is no resolution, the complainant can elect to close the complaint and terminate the process; request an extension of the informal stage if certain conditions are met, or request initiation of the formal procedure. The complainant can consult with staff in HRD for assistance “in determining the best course of action.” If 21 days pass and the complainant has not elected one of the three aforementioned options the complaint automatically terminates.

The SCP provides the complainant may initiate the formal procedure by filing a “request for hearing” form with the SCC. The complainant may request help from the mediator and/or the staff advocate in completing the form. The SCP states that the SCC will draw the hearing panel chair from the pool of potential panelists, advocates and mediators (hereafter referred to simply as the pool). The staff mediator, who took the issue through the informal procedure is required to file with the hearing panel chair, a written account of the steps taken to attempt informal resolution of the complaint, and the panel chair provides the complainant and respondent a copy of the report. The hearing panel chair sets the hearing date and informs the parties of the identity of the other two panel members and the parties right to request disqualification of any panel member, including the chair for cause. The SCP states the staff mediator and the staff advocate or other support person for the complainant and/or respondent may attend the hearing, without voice. Following the hearing, the hearing panel chair issues a written decision, as determined by a panel majority, based on a preponderance of the evidence.

The SCP states that, “The Hearing Panel Chair will forward a copy of the hearing decision and written comments to the Associate Vice President, Human Resources. The Associate Vice President can either confirm the decision, or return it once to the panel, . . . , for further review. In the event the Associate Vice President returns the decision for further review, the Panel shall then have five business days to review it and return its final decision to the Associate Vice President.” The SCP states that the “Associate Vice President, Human Resources will issue to all parties in writing the disposition of the complaint within five business days of the receipt of the final decision.”

The SCP provides that either party may appeal the decision of the hearing panel based on a specified criteria such as “new evidence,” “procedural error,” “errors in interpretation” of Respondent’s policy sufficient to deny a fair hearing, or a “grossly inappropriate sanction.” The SCP provides that SCC “will randomly draw a three-member review panel from the pool to determine whether the criteria for appeals has been met and to determine what process should be used to resolve the matter.” The review panel may rehear cases or limit the proceedings to specific issues raised in the appeal. The review panel issues its decision, a copy of which is forwarded to the associate vice president of human resources, who can either confirm the decision, or return it once to the review panel for further consideration. If the decision is returned to the review panel it has 5 days to return its final decision to the associate vice president, who forwards it to the parties. The SCP states the “Review Panel’s decision is the University’s final action on the complaint.”

The SCP contains a definitional section further explaining

the roles of the various participants in the SCP. One of the functions listed for the SCC is to schedule and conduct regular meetings with staff mediators. The SCP provides that, “All advocates, mediators, and panelists are employees covered by this policy who contribute their paid time at the University, serving to implement the process.” It states that “Pool members” for advocates, mediators, and panelists are required to be employed by the Respondent for a minimum of 3 years, with no disciplinary actions in their files within the past 2 years, but that HRD reserves the right to go beyond 2 years. The SCP states that, “The Senior Vice President for Human Services and Government Relations shall appoint Pool members for a term of two years following a validation process undertaken by the Associate Vice President, Human Resources in coordination with the” SCC. “Prior to beginning their two-year terms Pool members will be required to undertake a training period appropriate for their role.”

The SCP states, in the definitional section, that the complainant draws the mediator from the “Pool of Potential Panelists, Advocates and Mediators.” The mediator’s responsibilities include upholding the “neutrality” of the SCP; meeting with and assisting any staff member (including complainant and Respondent) with any complaint issue to analyze her or his concerns; and facilitating informal resolution of complaints through discussion and mediation.

The SCP provides in the definitional section that, “The Complainant selects the Staff Advocate from the Pool of Potential Panelists, Advocates, and Mediators and that responsibilities of the Staff Advocates include:”

1. Maintaining the integrity of the process as well as the interests of the Complainant.
2. Assisting any staff member who may request help from a Staff Advocate in analyzing her/his concerns.
3. Serving as a support person for the Complainant.
4. Attending any meetings or interviews undertaken as part of the Staff Complaint Process, with voice.
5. The Staff Advocate may, if requested by the Complainant, accompany him/her to the hearing before the Staff Complaint Hearing Panel and may serve as an advocate without voice at the hearing. A Complainant has the option of choosing his/her own support person in place of a Staff Advocate. This support person cannot be an attorney.

The SCP provides that:

A Hearing Panel consists of three members, including the Chair, and is drawn by the Staff Complaint Coordinator from the Pool of Potential Panelists, Advocates, and Mediators. . . . If the Pool is representative of all employee groups (non-exempt, exempt, supervisory), one name will be drawn from a subset of the Pool of people in a similar employment situation as the complainant, and one name drawn from a subset of the Pool of people in a similar employment situation as the respondent.

The SCP provides that the hearing panel is charged with participating in orderly, objective and fair hearings that are based on factual information that precludes discussion with parties

outside of the hearing, and thereafter issuing an objective decision including a determination of the facts, and recommendations. It is stated that "Voting will be based upon a simple majority of those present. . . ." "Dissenting members may choose to provide written dissenting opinions, and are encouraged to do so." The SCP states that the hearing panel chair shall be drawn by the SCC from the pool of panelists, advocates and mediators, and must receive training as a hearing officer. They must conduct fair hearings, which precludes discussions with the parties outside the hearing.

Under the SCP the "review panel" is a three-member panel drawn from the same pool of panelists, mediators, and advocates by the SCC, with one member of the panel in a similar employment situation to the claimant and one in a similar employment situation to the respondent. The "review panel chair" is also selected by the SCC. The review panel determines if the grounds for appeal have been satisfied, and whether further process is necessary to resolve the appeal. The review panel may choose among various options such as rehearing a case or limiting the proceedings to specific issues outlined in the appeal. It can affirm or overturn the original decision. The review panel issues a written determination of facts, and recommendations. Voting is based on a majority, and dissenting members are encouraged to author dissenting decisions.

Respondent's HRD officials supervised the development of training manuals for the volunteer advocates, mediators, and panelists including a "Mediator Handbook," a "Hearing Panel Handbook," and an advocate training manual. HRD was assisted by another branch of the University in also developing a separate mediation training manual entitled, "Staff Mediation Training," dated January 2003. The volunteers received training for their respective positions in January and February 2003, with each volunteer receiving copies of the appropriate training manual or manuals. The "Staff Mediation Training" manual states, at page 3 under process, that, "We will explore possible options toward a mutually satisfying solution to issues discussed." It states that if "all parties feel comfortable with outcome, mediators will type the agreement and all parties will sign." It states that as a mediator, "Begin with first item on list and facilitate discussion and brainstorming options by participants." The pamphlet later states on the same page, "BE CAREFUL NOT TO GENERATE OPTIONS YOURSELF!!!" The pamphlet states once options have been generated, "Parties will evaluate the options as the mediator facilitates this process." The mediator is charged with "Point(ing) out options that seem similar toward meeting each party's interests." The HRD distribution entitled, "Mediator Handbook" states that, "Sometimes because of the complexity of the issues, the inexperience of the selected facilitator or for other reasons it is necessary to have co-mediators." The handbook states that, "As mediator, you must remain neutral and not propose any options yourself." It later reiterates, "DO NOT GENERATE OPTIONS YOURSELF!!!" However, it also states the mediator is to "Point out options that seem similar toward meeting each party's interests." Respondent's "Hearing Panel Handbook" provides, "Be sure that you clarify any conflicting information before you enter into deliberation. Continue to ask questions until you have the necessary facts regarding the incident. Do

not wait until you are in deliberation and then start guessing at reasons why the information presented was conflicting."

Strodel testified to the following: Strodel, along with HRD, is charged with the administrative oversight of the SCP. Sharon Cole, an R & D specialist in HRD, is the SCC for the SCP. The majority of intended complaints for the SCP are disciplinary situations between a supervisor and a staff member as well as alleged violations of University rules and policies. A grievance concerning a University rule or policy could be a situation where a supervisor denies an employee's request to issue a job evaluation, or a denial of a travel reimbursement request.

Strodel testified that: At the informal stage of the SCP, the complaining employee has the option of choosing an advocate and a mediator, and the SCC produces a list of mediators from the pool of Respondent's trained volunteers. The mediator could be a supervisor, an hourly employee, or a salaried manager. There could actually be two mediators used for training purposes. The mediators facilitate the process at a time when the conversation is still between the staff member and their supervisor. The mediator is there to make sure that positions are understood on either side and to fact find. The mediator remains neutral in that they do not represent the complainant or the manager. Strodel testified that the mediator is not supposed to propose solutions and that in the training manual such conduct is prohibited. However, Strodel gave an affidavit dated January 21, 2003, wherein he testified that in the SCP, "the mediator can suggest possible solutions or try to tease solutions from the parties."

Strodel testified that: The advocate is charged with the responsibility of acting as a support for the claimant. The advocate can help the complainant analyze arguments and help them express themselves in a more refined manner. The advocate can speak during mediation stage of the SCP. The advocate could be a supervisor or employee.

Strodel testified that: If mediation does not work to the complainant's satisfaction they go back to the SCC and a hearing panel is selected. The SCC first chooses the chairperson for the panel and in the case of a nonsupervisory complainant the chair would be nonsupervisory. The SCC would then select another nonsupervisory person for the panel, and the third panelist would be a supervisor. Strodel testified that if the complainant is nonsupervisory the hearing panel will be composed of a non-exempt employee, an exempt employee, and a supervisor, although he admitted there is no instruction in the SCP as to the classification of the third panelist. He testified that the third panelist will be nonsupervisory when the complainant is not a supervisor, "Because I decided to do it that way." Strodel testified that a panel for an hourly employee complainant could be composed of an hourly employee, an administrative employee, and a supervisor.

Strodel testified that: Following the hearing, the hearing panel writes a majority decision based on the preponderance of the evidence and the decision is submitted to Strodel for "confirmation." Strodel has no role in the formal process prior to receiving the decision. The hearings are taped, and can be transcribed if necessary. Strodel does not receive a copy of the tape. Strodel either implements the panel's decision, or if he

disagrees, he can send it back once with his input. After the panel receives Strodel's input, they can choose to ignore it, retain their original decision and then the panel issues the final decision.

Strodel testified that: The complainant or respondent supervisor can appeal the hearing panel's decision. The composition of the review panel would be the same as the hearing panel, that is if the complainant is not a supervisor, the review panel would consist of two nonsupervisors and a supervisor. The SCC draws the panel names from the list of volunteers. After reviewing the case, the review panel makes a decision. The review panel's decision then goes to Strodel. Strodel can affirm the decision, or send it back once with input. Strodel testified that while the process provides him two occasions for input, he would not provide new input to the review panel if he had previously provided it to the hearing panel as his input to the hearing panel would be part of the record for the review panel. Strodel testified he would provide input to the review panel if he had affirmed the hearing panel's decision and the review panel altered that decision.

At the time of the unfair labor practice trial, three claims had been filed under the SCP, and all were resolved before reaching the formal stage of the process. Strodel testified that two of the three complaints had been resolved at mediation, and one was not allowed into the process. A complaint for employee A was filed on April 8, 2003 on a "staff complaint process notification of complaint" form.⁴ Employee A is a communication specialist and the complaint was filed against the assistant deputy director in the department of public safety. By letter dated April 7, 2003, the director, citing three incidents, issued a 2-day suspension without pay to the employee. Employee A alleged disparate treatment and that there were no written rules or procedures covering the accusations. Strodel testified that the complaint was addressed at the mediation stage of the SCP. The employee selected a mediator, and thereafter the complaint was resolved when the employee and supervisor agreed to meet with another staff person to discuss relationship issues. However, the suspension remained as part of the employee's record. The complaint resolution was set forth on a "mediation agreement" form signed on May 2, 2003, by the employee, supervisor and mediator. A complaint for employee B, a registered nurse, was filed on April 9, 2003, against the director of nursing. Strodel testified that the complainant is a nonsupervisory employee, and her complaint involved a sentence in her performance review. The parties signed a "mediation agreement" form on April 30, 2003, where the complainant agreed to submit a written letter as part of her performance review expressing her opinion on the objectionable portion of her supervisor's narrative. Strodel testified that the content of the supervisor's performance review was not altered as part of the resolution of the complaint. Along with the employee and supervisor, two mediators signed off on the "mediation agreement."

Employee C, a folder operator, filed a complaint on April 23, 2003, against an individual listed as a supervisor in the com-

plaint. Employee C accused the supervisor of asking employee C if he liked his job, and if he liked working there, which employee C took as a threat. It is stated in the paperwork related to the complaint that the complaint was not accepted into the SCP. It was reported that SCC determined that employee C did not want to fill out a self assessment form to complete his performance review as requested by employee C's supervisor and it is stated that employee C was notified that his complaint would not be accepted into the SCP. Strodel testified that after the SCC looked into the situation it was determined that the complaint should not be part of the process, that it was a relationship issue between the complainant and the supervisor, and should be handled another way. Strodel testified that the SCP "special panel" is part of the decisionmaking process for jurisdiction of a complaint, but that the record of the complaint did not show that SCC referred the matter to the special panel before telling the complainant that the SCC did not have jurisdiction.⁵

B. The Union's Petition for Election and the Election Campaign

On October 21, 2002, Teamsters Local 317 (the Union) filed a petition for an election for a unit of about 40 employees in Respondent's parking services department (PSD). The General Counsel called current PSD employees Matthew Olszewski and David Gursky to testify about events leading up to the scheduled December 18, 2002 representation election, which has been blocked by the filing of the Union's December 16, 2002 unfair labor practice charge. Their testimony reveals that beginning in October or November 2002, Matson began to conduct a series of meetings with small groups of PSD employees where Matson explained Respondent's position as to why the employees should vote against the Union. They each testified they attended about 10 of these meetings.

Matson testified that he first mentioned the SCP to SPD employees during a campaign meeting on November 15, where he listed the SCP as one of a package of benefits Respondent provides to the PSD employees. Respondent distributed a sheet during this meeting describing the employees' current benefit package, including the SCP. It is stated at the top of the sheet that, "This comprehensive benefit package, . . . , has been brought to you by Syracuse University, without the need for negotiation with a union and *without costing you anything in dues*. Make the right choice, vote NO on December 18th."

Matson testified there were some questions in followup meetings leading him to conclude that some employees did not fully understand what was included in the SCP, so on November 18 or 19, Respondent posted a memo on a bulletin board for the PSD employees. The memo entitled "NEW STAFF COMPLAINT PROCESS" tells the employees to vote no at the December 18 election and reads as follows:

. . . effective January 1, 2003, all current non-union staff employees will have the opportunity to resolve com-

⁴ The parties agreed to refer to the three complaining employees as employee A, B, and C in this proceeding in lieu of using their real names.

⁵ I have concluded the SCC did not refer this matter to a "special panel" before informing employee C the SCP did not have jurisdiction because Strodel failed to testify that he appointed the human resources representative on the special panel as required by the SCP.

plaints arising between them and their supervisors through a new and improved process that provides employee advocates, mediators, and an impartial Hearing Panel comprised from a pool of trained volunteers, including volunteers from Parking Services.

.....
This procedure is intended to ensure the prompt and impartial resolution of disputes that have been addressed through supervisory channels but cannot be or have not been satisfactorily resolved.

You may bring an Advocate to any or all of the meetings related to the problem. Staff advocates will be trained in conflict resolution techniques and will be available as your resource and support *absolutely free of charge*.

Here is another reason not to pay the Teamsters *your hard-earned money!*

Gursky's credited testimony reveals Matson reviewed this document with employees during one of the meetings Gursky attended.

On December 10, 2002, the Union issued a handout to PSD employees in which the Union discussed the SCP. The handout reads, in pertinent part:

If employees do not need a Union then why is management attempting to create a grievance procedure? Why is management giving an illusion that they intend to mirror a provision that is contained in Union contracts that allows for dispute resolution? Because a true grievance procedure is an important element to enforce a contract and ensure fair treatment. However, make no mistake that management will control every aspect of its 'grievance procedure' to keep absolute control over their employees. Therefore the real truth is that the committee will only function how and for as long as management allows it to.

Respondent responded to the Union's memo with a memo to PSD employees distributed on December 16, 2002. The memo reads, in pertinent part:

Staff Complaint Process

We are *implementing* a process we have worked on for almost 3 years that improves our current staff complaint process and includes *employee advocates*, mediation and an *employee based Review Panel*.

The memo ends with the highlighted statement, "Ignore the union's last minute hype and misinformation, VOTE NO!" Gursky's testimony reveals he attended a meeting on December 16, where Matson said employees could sign up and be involved in the process by becoming an advocate, mediator, or panelist. Gursky received the above memo at this meeting.

Olszewski's credited testimony reveals that, during one of the meetings, Matson said, in reference to the SCP, "Do the math," "this [sic] available to you at no cost, while if you choose to organize, then it's going to cost you dues, Union dues." Olszewski testified during one of the meetings, Matson mentioned the SCP had an employee-based hearing or review panel meaning that it would be made up of employees rather than supervisors and the new SCP would be implemented as of

the first of the year as a benefit the employees did not have to pay for. Gursky also credibly testified that Matson told employees that the SCP was a way of taking care of grievances free of charge, and that it did not involve union dues.⁶

C. Positions of the Parties

The General Counsel argues that the SCP is a labor organization under Section 2(5) of the Act since Respondents' employees participate as advocates, mediators, and panelists and the SCP exists for the purpose of dealing with Respondent concerning grievances. The General Counsel argues that at every stage of the process the employee organization makes proposals, which are given real or apparent consideration by management.

The General Counsel argues the special panel is dominated by management representatives and there is the potential for dealing among the members of the panel, as the management majority may reject the proposals of the employee member as to whether complaint allegations are allowed in the SCP. It is asserted that "dealing" also exists between the complainant and advocate and the Special Panel regarding grievances as to whether a complaint should be allowed in the process.

The General Counsel argues the mediation stage of the SCP is intended to achieve an informal resolution of the employee's complaint and the various participants propose solutions during mediation, including the advocate who represents the complainant. Quoting Strodel's prehearing affidavit, it is asserted that the mediator "can suggest possible solutions or try to tease solutions from the parties." It is asserted that the mediator can involve up to two higher levels of management in attempting to resolve the complaint. The General Counsel argues the mediator tries to persuade management to modify its actions, which are the subject of the complaint, and the mediator, in addition to the advocate, are representing the interests of the complaining employee. The General Counsel argues the advocate and mediator make proposals to management and management responds by acceptance or rejection and this process constitutes "dealing with" under Board law.

The General Counsel argues that, during the formal stage of the SCP, the hearing and review panels make recommendations to Strodel, which he responds to, and therefore this also constitutes dealing. It is asserted that the panels' decisions are not final decisions, as they must be considered and acted on by Strodel before being implemented. If Strodel rejects a panel's decision he returns it to the panel with his written input, which contains a rationale for his rejection along with factors the panel should examine in reconsidering its decision. Strodel's written disposition is made part of the record that is considered by the review panel if a complaint is appealed. Strodel, under the SCP policy, has the opportunity to present management's position three times. First, when he issues his written determination to the hearing panel; second, when the review panel considers Strodel's determination previously submitted to the

⁶ I do not credit Gursky's testimony, in the face of Matson's denial, that Matson said during one of the meetings that Strodel would have the final decision concerning a complaint in the SCP. I did not find Gursky's memory as to the substance of the meetings to be that precise to enable him to accurately report the fine details on how Matson said the SCP would work.

hearing panel, and third when the review panel issues its initial decision to Strodel, who either accepts or rejects it. The General Counsel contends the exchange that exists between the panels and Strodel constitutes “dealing.” The General Counsel argues the hearing and review panels are not vested with managerial authority to resolve grievances as they cannot issue or implement a decision without further recourse to management. The Union did not file a posthearing brief. However, counsel for the Union argued in her opening statement at the hearing that, under the SCP at section 1.3, Respondent retains the right to manage and direct its work force, including the right to adopt or alter any rule, policy, or practice. It is asserted that based on this language, Respondent did not delegate final authority to either of the panels under the SCP.

The General Counsel argues Respondent’s contention that it is premature to find “dealing” and that there is no pattern or practice demonstrating that the SCP exists to “deal” with management should be rejected. It is asserted the SCP became effective in January 2003, volunteers have been solicited and trained, and three complaints have been filed and resolved through mediation. Furthermore, that the SCP’s purpose is to “deal” with Respondent is evident from SCP’s provisions. It is asserted that Respondent’s statement to employees that SCP is free of charge and should be chosen over the Union, provides further support of its purpose.

Respondent states at pages 5 and 6 in its posthearing brief that:

The question of employer support for the SCP, whether that be characterized as assistance or domination, is not at issue in this case. Tr. p. 23, LL. 5–11. The University freely acknowledges that it drafted and implemented the SCP in a good faith effort to delegate part of its management authority to an employee complaint process for the resolution of certain employee grievances. Now that the SCP has begun to function, the University continues to support the Process by training the volunteer participants and allowing them to use the process on paid time and on University premises.

Respondent contends that its support for the SCP is lawful because it is not a labor organization because employees maintain control at every stage of the process and they do not “deal with” Respondent “in the statutory sense of that term.” (R. Br. at 6.)

Respondent contends it is lawful for Respondent to establish the jurisdictional parameters of the SCP. It asserts that the SCC, a management representative from HRD, makes a preliminary determination whether a complaint is outside the jurisdiction of the SCP, and then a “special panel” decides whether there is jurisdiction. Respondent states in its brief that the special panel is management dominated as it is a three-member panel composed of a member of the HRD selected by the associate vice president of human resources, a supervisory staff member, and another staff member, who may be supervisory or nonsupervisory. (R. Br. at 22.) Respondent contends that an employer has the right to delegate part of its management power to employee committees as well as the right to withdraw that power and it is inherent in that right that the Respondent can allow the SCC and its representatives on the spe-

cial panel to apply the SCP jurisdictional rules in each case. It is asserted that the mere presence of one nonmanagement person on the SCP special panel does not violate the Act because the panel is governed by majority decisionmaking therefore the decisionmaking as to jurisdiction is management dominated.

Respondent contends the role of the advocate in the SCP is limited. They are not permitted to speak at the hearing stage of the SCP. They can only assist the complaining employee in a confidential manner. They do not solicit grievances or discuss the grievances with other employees outside the SCP. It is contended that the staff advocate has no representational function in the statutory sense of the term. Similarly, it is contended that the mediation process in the SCP does not convert the grievance procedure into a labor organization. It is stated the complaining employee chooses the mediator from the list of employees who have volunteered to be mediators. (R. Br. at p. 20.) Respondent contends:

Obviously, the SCP mediator facilitates discussions back and forth between the complaining employees and the Respondent supervisor in the hopes of revolving the problem. On the surface, that might seem to resemble the bilateral mechanism that the Board has prohibited in the Section 8(a)(2) context. On close analysis, however, we submit that the NLRB has never challenged a mediation process as violating Section 8(a)(2) precisely because the employee remains in control of the mediation process. (R. Br. at 21.)

Respondent contends that the employee and their supervisor might make proposals and counterproposals at the mediation stages with the assistance of a mediator, but there is no dealing between an employee committee and the employer at the mediation stage of the SCP.

Respondent asserts that if the complainant is not satisfied with the discussion at the mediation stage they can initiate the formal hearing procedure at which a majority of the employee’s peers will make the final decision. It is asserted that if the complaining employee is a nonsupervisory hourly or exempt person, two of the three hearing or review panelists will be nonsupervisory hourly or exempt persons. Respondent contends since no panels have been selected there is no basis to attack Strodel’s testimony that a panel’s majority will be nonsupervisory when an employee files the complaint. Respondent argues the Board has found that an employer does not violate the Act if it delegates management authority to an employee grievance committee to adjudicate employee grievances, if a majority of the committee consists of employees and their decisionmaking authority is not controlled by management. Respondent argues that under the SCP the hearing panel or review panel makes the final decision on a grievance. It is asserted that while the associate vice president of human resources has an opportunity for input to both panels, he does not make any decision or a final one. Respondent argues there is no pattern or practice that the associate vice president has exerted undue influence at the panel stages because no grievance has reached that level.

Respondent contends there is no case law or precedent that the involvement of a staff advocate or mediator in an employee complaint procedure is violative of Section 8(a)(2) of the Act,

or that the mere potential for undue influence by an employer at the hearing panel stage of an employee complaint procedure is unlawful. Respondent contends the Union filed the charge before the SCP became effective, and the General Counsel issued complaint before any complaint was filed under the SCP. At the time of the unfair labor practice trial only three complaints had been filed and none of them had gone to the hearing stage of the SCP.

D. Analysis

1. Legal principles

Section 2(5) of the Act provides:

The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

In *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959), the Court concluded that employee committees established and supported by employers at several plants were labor organizations. In *Cabot Carbon Co.*, there was a grievance procedure applicable to nonunion plants where in handling an employee's grievance it was the employee committee's duty to consult with various levels of management and then prepare a written report to be presented to the plant superintendent. Thereafter, the district superintendent or the department head, or both, were required to meet with the committee and plant management to discuss the problem and announce their decision. The employee committee could then appeal the matter to the general manager who met with the committee and plant management and then announced his decision. *Id.* at 206 fn. 3. The Court in concluding that the employee committees were labor organizations stated that nothing in Section 2(5) of the Act "indicates that the broad term 'dealing with' is to be read as synonymous with the more limited term 'bargaining with.'" *Id.* at 211. The Court stated:

It cannot be, and is not, disputed that, by the terms of the by-laws, which were accepted both by the employees and by respondents, the Employee Committees undertook the 'responsibility to,' and did, '(h)andle grievances (with respondents on behalf of employees) at nonunion plants and departments according to a grievance procedure set up (by respondents) for these plants and departments'. . . . It is therefore as plain as words can express that these Committees existed, at least in part, for the purpose 'of dealing with employers concerning grievances. . . .' This alone brings these Committees squarely within the statutory definition of 'labor organizations.' *Id.* at 213.

In *Electromation, Inc.*, 309 NLRB 990 (1992), enf. 35 F.3d 1148 (7th Cir. 1994), the Board found the respondent employer's creation of five employee "action committees" to be violative of Section 8(a)(2) of the Act. Each committee consisted of six employees and one or two members of management, as well as the employer's employee benefits manager, who also coordinated all of the committees. The Board noted

there was no evidence presented that the respondent was aware of the charging party union's organizational efforts at the time it created the action committees. When the union made a recognition demand, the respondent informed the action committees that the employer could no longer participate, but that the employees could continue to meet. Two of the committees continued to meet on company premises; one of the committees disbanded, and one of the committees was never organized and held no meetings. The attendance bonus committee formulated two proposals, the second of which the respondent's controller deemed fiscally sound. However, the proposal was not presented to the respondent's president, who informed employees that due to the union's campaign the respondent would not be able to participate until after the election.

In finding a violation in *Electromation*, the Board stated the legislative history of the Act reveals "the provisions outlawing company dominated labor organizations were a critical part of the Wagner Act's purpose of eliminating industrial strife through the encouragement of collective bargaining." The Board quoted the following remarks from Senator Wagner:

Genuine collective bargaining is the only way to attain equality of bargaining power. . . . The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since the enactment of [the National Industrial Recovery Act]. Such a union makes a sham of equal bargaining power. . . . (O)nly representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees. For these reasons the very first step toward genuine collective bargaining is the abolition of the employer dominated union as an agency for dealing with grievances, labor disputes, wages, rates, or hours of employment. *Id.* at 992.

The Board stated, "In sum, Congress brought within its definition of 'labor organization' a broad range of employee groups, and it sought to ensure that such groups were free to act independently of employers in representing employee interests." *Id.* at 994. The Board stated that:

Under the statutory definition set forth in Section 2(5), the organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and (3) these dealings concern 'conditions of work' or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment. Further, if the organization has as a purpose the representation of employees, it meets the statutory definition of 'employee representation committee or plan' under Section 2(5) and will constitute a labor organization if it also meets the criteria of employee participation and dealing with conditions of work or other statutory subjects. Any group, including an employee representation committee, may meet the statutory definition of 'labor organization' even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues. *Id.* at 994.

The Board stated in *Electromation* that, "Board precedent and decisions of the Supreme Court indicate that the presence

of antiunion motive is not critical to finding an 8(a)(2) violation.” Id. at 996. Rather, Section 2(5) of the Act requires an inquiry into whether the employee entity exists for the “purpose of dealing” with conditions of employment. Id. at 996. The Board stated:

Purpose is a matter of what the organization is set up to do, and that may be shown by what the organization actually does. If a purpose is to deal with an employer concerning conditions of employment, the Section 2(5) definition has been met regardless of whether the employer has created it, or fostered its creation, in order to avoid unionization or whether employees view that organization as equivalent to a union. Id. at 996–[99]7.

Despite the fact that the functioning of some of the *Electromotion* action committees ended soon after they came into existence and that none of their proposals were implemented the Board concluded that the action committees were a “labor organization” within the meaning of Section 2(5) of the Act; and that the respondent dominated it, and assisted it, i.e., contributed support to them in violation of Section 8(a)(2) of the Act. The Board noted that:

The evidence thus overwhelmingly demonstrates that a purpose of the Action Committees, indeed their only purpose, was to address employees’ disaffection concerning conditions of employment through the creation of a bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals. This is the essence of ‘dealing with’ within the meaning of Section 2(5). Id. at 997.⁷

⁷ In *Electromotion, Inc. v. NLRB*, 35 F.3d 1148, 1158 (7th Cir. 1994), in enforcing the Board’s order the court rejected the respondent’s contention that each action committee should be considered separately as to whether it was a statutory labor organization noting that they were formulated and administered as part of a single program, and a single manager was assigned to coordinating all action committee activities. The court went on to state that, “even if the committees are considered individually, there exists substantial evidence that each was formed and existed for the purpose of ‘dealing with’ the company. It is the fact the shared similarities among the committee structures which compels unitary treatment of them. . . .” Similarly, in *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153, 1160 (1980), enfd. in part denied in part w/o opinion 657 F.2d 272 (7th Cir. 1981), the Board affirmed a 8(a)(2) violation finding where a respondent employer fostered the creation of an employee grievance committee, which was subsequently disbanded by the employer before any grievances were processed. It was stated in finding the employee committee constituted a statutory labor organization that, “since the purpose of that (committee) election was to deal with Respondent concerning grievances, the disjunctive ‘or’ in the statute mandates the conclusion that the purposes of the ‘organization,’ if organization there be, came within the meaning of Section 2(5) of the Act.” It was stated in *Edward A. Utlaut Memorial Hospital*, supra, that “The intent of the organization, and not what it actually performs, is critical in ascertaining labor organization status, regardless of the progress of the organization’s development.” Id. at 1160. Thus, if the purpose of an organization can be gleaned from its structure, it is not necessary to review its actions to determine it is a statutory labor organization. See also *Armco, Inc.*, 271 NLRB 350, 350 (1984), enfd. 774 F.2d 1170 (8th Cir. 1985).

In *E. I. du Pont de Nemours & Co.*, 311 NLRB 893 (1994), the Board found that seven committees were employer-dominated labor organizations within the meaning of Sections 2(5) and 8(a)(2) of the Act. The Board, in *E. I. du Pont*, stated that:

. . . the term ‘dealing with’ in Section 2(5) of the Act is broader than the term ‘collective bargaining.’ The term ‘bargaining’ connotes a process by which two parties must seek to compromise their differences and arrive [at] an agreement. By contrast, the concept of ‘dealing’ does not require that the two sides seek to compromise their differences. It involves only a bilateral mechanism between two parties. That ‘bilateral mechanism’ ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. Id. at 894.

In *Keeler Brass Automotive Group*, 317 NLRB 1110 (1995), the Board found the respondent employer violated Section 8(a)(1) and (2) of the Act by its actions concerning a grievance committee. The employer established a grievance procedure and issued memos setting forth the details concerning selection of employees for participation and how it would operate. The grievance procedure had a five-member employee grievance committee. The Board noted that the grievance committee’s purpose related to addressing grievances, a subject delineated in Section 2(5) of the Act. The Board concluded that the actual functions of the grievance committee show that it existed, at least in part, for “dealing with” the respondent concerning grievances and other conditions of employment. Id. at 1113. In *Keeler Brass*, the processing of two grievances, and the exchange between the grievance committee and the employer concerning the employer’s no-call, no-show policy showed several instances where the employer and the committee dealt with each other concerning grievances and terms and conditions of employment. The Board stated that the grievance committee altered its position concerning the discharge of two employees, upon receipt of the input from the respondent’s officials. The grievance committee initially recommended the two employees in question not be discharged, but changed its position upon receiving input from the respondent. The Board stated that, “These events show that the grievance procedure functioned as a bilateral mechanism, in which the Respondent and the committee went back and forth explaining themselves until an acceptable result was achieved.” Id. at 1114. The Board reached this conclusion although the grievance procedure in *Keeler Brass* stated that the decisions of the grievance committee were final. The Board noted that despite what the policy said the respondent’s practice was to treat the grievance committee’s decisions as only recommendations that it was free to accept or reject. Id. at 1114 fn. 16. The Board stated in *Keeler Brass*, “We do not pass on the situation when an employee committee receives ‘input’ from management and then independently and finally resolves employment issues. In that

case, there is contact between the committee and management, but only as an aid to the committee's independent authority to render a final decision. That is not the case here." *Id.* at 1114, fn. 18.⁸

In *Polaroid Corp.*, 329 NLRB 424 (1999), the Board found that the employee-owners' influence council (EOIC) established by *Polaroid* constituted a labor organization within the meaning of Section 2(5) of the Act and by its conduct with respect to the EOIC the employer violated Section 8(a)(1) and (2) of the Act. In finding the EOIC to be a labor organization, the Board stated:

The evidence establishes that the EOIC functioned, on an ongoing basis, as a bilateral mechanism in which that group of employees effectively made proposals to management, and management responded to these proposals by acceptance or rejection by word or deed. *E. I. du Pont*, supra at 894. See *NLRB v. Webcor Packaging*, 118 F.3d 1115, 1122 (6th Cir. 1997) ('dealing with' element satisfied by ongoing continuous bilateral interaction between employer and committee). *Id.* at 429.

Based on our review of all the record evidence, we are compelled to conclude that the EOIC was operated so as 'to create in employees the impression that their disagreements with management had been resolved bilaterally.' (Emphasis in original.) *Electromation, Inc.*, supra at 998. *Id.* at 432.

In *Polaroid Corp.*, following the dissolution of the EOIC, the respondent employer was also found to have unlawfully dominated and assisted a labor organization where 25 employees were given the title of "employee advocate" (EA). *Id.* at 444-446. The EA's were assigned to the respondents human resource division and reported to the human resource director. The respondent's employees could elect to be represented by an EA concerning their grievances, and the EA would attempt to resolve the grievance with the employee's supervisor. When asked to do so the EA would represent the employee at all five steps of the grievance procedure. The respondent paid the EA's salaries and provided them with supplies. It was concluded in *Polaroid Corp.*, supra at 445, that the "Employee Advocates constituted a 'agency' or 'plan' in which employees participated, and which existed in whole or part for the purpose of dealing with the Company concerning grievances. Therefore, Employee Advocates was a labor organization under the Act." The judge in *Polaroid* compared the EA's to union stewards, and noted that they functioned collectively under management supervision and pursuant to rules and procedures established by

⁸ The grievance procedure in *Keeler Brass*, *id.* at 1120, provided for mediation at the second step of the procedure where a company human resource department representative acted as a mediator. The grievant was allowed to bring another employee to the meeting. The Board did not address this aspect of the procedure in its decision. Rather, it found the interaction of the *Keeler* grievance committee with management at a subsequent level of the process constituted dealing with the employer within the meaning of the Act.

the company.⁹

2. Conclusions

I find that Respondent, as it admitted at the hearing and in its posthearing brief, has dominated and assisted the SCP in its formation and administration. The idea for the SCP was derived from Respondent's officials, who thereafter embarked on the process of drafting the SCP procedures and staffing it with the SCC, an HRD administrator, whose duties include the general administration of the SCP. Respondent also staffed the SCP with paid volunteers in staff advocate, staff mediator, and panel slots. The volunteers must meet criteria established by the HRD department, are appointed by a high level HRD official, and are trained by Respondent at its expense. The SCP provides that supervision of the SCP is the responsibility of Respondent's associate vice president of human resources, who testified that he has independently established procedures for selecting SCP panel members beyond the confines of the written SCP document. The SCP also contains specified limitations authored by Respondent's management as to what employee complaints may be lodged there, and provides for a "special panel" dominated by management representatives to interpret these regulations. See *Electromation, Inc.*, 309 NLRB 990, 997-998 (1992), *enfd.* 35 F.3d 1148 (7th Cir. 1994); and *Keeler Brass Automotive Group*, 317 NLRB 1110, 1114-1115 (1995).

The question to be resolved is whether the SCP is a labor organization within the meaning of Section 2(5) of the Act in order to determine whether Respondent's domination of and assistance to it is violative of Section 8(a)(1) and (2) of the Act. For the reasons set forth below, I have concluded that the SCP is a statutory labor organization.

Section 2(5) of the Act provides that "labor organization" means any organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances. . . ." The SCP is clearly a "plan" or "agency" created by Respondent where employees participate for the purpose of resolving employee grievances with their supervisors concerning discipline and other matters. Once a grievance is accepted into the process, the complaining employee is required to select a staff mediator trained by Respondent, and has the option of also selecting a staff advocate who has been trained by Respondent. If the employee's complaint proceeds to the formal level of the SCP, he can, accompanied by the staff mediator and staff advocate, and appear before two separate panels which include employee members to argue his cause. The Respondent pays the staff mediators, staff advocates, and panelists for their time. Strodel's testimony reveals that two-thirds of the individuals who have volunteered for the SCP staff mediator, staff advocate, and panel positions are nonsupervisory employees. Thus, the SCP meets the statutory labor organization requirements of being an "agency" or "plan" which employees participate for the resolution of grievances with management. See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *Polaroid Corp.*, 329

⁹ The respondent in *Polaroid* did not except to the judge's findings that the "employee advocates" constituted a labor organization. *Id.* at 426 fn. 11.

NLRB 424, 444-446 (1999); *Beverly California Corp.*, 326 NLRB 154, 154 (1998); *Keeler Brass*, supra; *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153 (1980), enfd. in part denied in part w/o opinion 657 F.2d 272 (7th Cir. 1981); and *Pennsylvania Greyhound Lines*, 1 NLRB 1, 14-15 (1935), affd. 303 U.S. 261 (1938).

I also find that, under the terms of the SCP, the staff advocates and staff mediators perform a representational function for employees in the processing of their grievances and that the purpose of the SCP is for these employee representatives to “deal” with management in the processing of employee complaints.¹⁰ The SCP states that “Staff Advocates, . . . , who are trained in conflict resolution techniques are available as resources for Complainants to provide support and guidance throughout the entire process.” The SCP states in its definitional section that the Staff Advocate, “maintains . . . the interests of the Complainant”; helps them “in analyzing her/his concerns”; serves as their support person, attends “any meetings or interviews undertaken as part of the Staff Complaint Process, with voice”; and may if requested by the Complainant attend the hearing before the Hearing Panel and “may serve as an advocate without voice at the hearing.” Strodel testified the Staff Advocate is charged with acting as a support for the complainant in that they can help them analyze arguments, express themselves in a more refined manner, and the Staff Advocate can speak during the mediation stage of the SCP.

While the SCP states the staff mediators are not advocates, they perform certain functions as designated by the SCP that are representational in nature. The SCP requires the complaining employee, not the Respondent, to select the staff mediator at the outset of the informal stage of the process. Thus, the staff mediator selection process sends a signal that the staff mediator, although Respondent pays them, is aligned with the employee. The SCP provides that the informal phase of the process involves mediation between the complaining employee and their supervisor and that the mediators engage in fact find-

ing and facilitate attempts at resolution of the problem through discussion and mediation. The SCP states that the mediator may, at the informal stage, involve two additional levels of management in their mediation efforts. Respondent’s mediator training manual provides that, “We will explore possible options toward a mutually satisfying solution to issues discussed.” The mediator is required to facilitate discussion and brainstorming options by the participants. While the mediator is instructed in the manual to remain neutral and not to generate options, they are also charged with pointing out options to meet each parties’ interests.¹¹ The manual states that sometimes the process may necessitate the use of two mediators. The staff mediator is required to type the written agreement if there is a resolution of the complaint. Respondent states in its brief that, “Obviously, the SCP mediator facilitates discussions back and forth between the complaining employees and the Respondent supervisor in the hopes of revolving the problem.” (R. Br. at 21). The SCP provides if mediation fails the complainant may initiate the SCP’s formal procedure by filing a request for hearing with the SCC. The SCP provides that both the staff advocate and staff mediator may help the complainant in drafting the complaint form, clearly a representational function to be performed by the staff mediator. The SCP also provides that the staff advocate and staff mediator may attend the panel hearing without voice. Since the complainant selects the staff mediator, and can seek their assistance in drafting the complaint form, the implication is that the staff mediator, along with the advocate, will attend the panel hearing at the complainant’s request to provide support for the complaining employee.

I therefore find that the SCP through the use of employees as staff mediators and staff advocates constitutes an “agency” or “plan” with the purpose of representing employees and dealing with management in the resolution of grievances and as such the SCP is a labor organization within the meaning of Section 2(5) of the Act. The SCP as drafted, and as described in other documents generated by Respondent’s officials as well as by Strodel’s testimony provides a “plan” for a grievance procedure where employee complainants can be represented by an employee staff advocate paid and trained by Respondent, along with one to two staff mediators, both of whom can be employees, who, at the informal stage, facilitate discussion between the parties, and help to refine proposals in an effort to resolve the dispute. The staff mediators, who are also paid and trained by Respondent, can bring in additional layers of management for dispute resolution at the informal stage. The SCP clearly contemplates a bilateral process involving employees and management at the mediation stage in order to reach solutions to employees complaints based on proposals initiated both by employees and management. See *Electromation*, supra at 997. Moreover, during this process, management responds to these proposals by acceptance through word or deed as the staff mediator is charged with drafting settlements that are thereafter signed by all parties including the staff mediator. See *E. I. du Pont de Nemours & Co.*, 311 NLRB 893 (1994). In fact, employee A and B’s complaints were resolved at the mediation

¹⁰ Since I have concluded there is dealing at the informal and formal stages of the SCP, I do not find it necessary to resolve the parties’ competing contentions as to whether there is dealing at the special panel level of the SCP where the determination is made concerning the SCP’s jurisdiction over a particular employee complaint. At the outset of the process, the complainant contacts the SCC, who along with the management dominated three-member special panel determines whether the SCP has jurisdiction over the employee complaint. Neither the staff advocate nor the staff mediator are involved at this stage of the process as the SCP provides that they first become involved at the informal stage of the procedure after it is determined that the SCP has jurisdiction over the complaint. While there is the possibility of dealing here since there is an employee member on the SCP’s special panel, the deliberative process for the special panel was not established on this record. See *E. I. du Pont de Nemours & Co.*, 311 NLRB 893, 895 (1994), where the Board found dealing where decisions were made by committees staffed by employees and management on a consensus basis, thereby affording management the authority to reject employee proposals after discussions with employees. But see *John Ascuaga Nugget*, 230 NLRB 275, 276, (1977), enfd. in part denied in part 623 F.2d 571 (9th Cir. 1980), where a employee council staffed by two members of management and one employee was found to perform an adjudicatory function rather than dealing with employees.

¹¹ Strodel testified in his prehearing affidavit that, “the mediator can suggest possible solutions or try to tease solutions from the parties.”

stage based on agreements signed by all parties including the staff mediator, and in the case of employee B two individuals signed as staff mediators. Thus, the SCP contemplates the mediation session being attended by as many as four employees, the complainant, the staff advocate, and up to two staff mediators where proposals are generated back and forth between the employees and management in the hope of resolving the employee's grievance.¹² The SCP provides that if the complaining employee is not satisfied with the mediation results they can enlist the staff advocate and staff mediator to help them draft the complaint in order to initiate the formal hearing procedures of the SCP. At the complaining employee's election, they can bring a staff advocate to the SCP formal panel hearing. The staff advocate training manual specifically states they are to act as an advocate for the complainant at the hearing. Moreover, the hearing panel stage of the SCP does not provide for further mediation, therefore implicit in the staff mediator's function, who can also attend the panel hearing without voice, is that the staff mediator will be acting along with the staff advocate in a representational capacity for the complaining employee. Again, including the complainant, there can be up to four employees, that is the staff advocate and two staff mediator's attending the panel hearings. Thus, I have concluded that, at the hearing stage, the SCP constitutes a plan where complaining employees are to receive representation by one or more employees in the presentation of their grievances against management on a regular basis. Accordingly, I find the SCP is a labor organization within the meaning of Section 2(5) of the Act. See *NLRB v. Cabot Carbon Co.*, supra; *Beverly California Corp.*, supra; *Keeler Brass*, supra; *Edward A. Ullaut Memorial Hospital*, supra; *Polaroid Corp.*, supra, where an organization of employee advocates similar to the one Respondent has established here was found to constitute a statutory labor organization unlawfully dominated and assisted by the respondent employer; and *Pennsylvania Greyhound Lines*, supra, where an employer established association that included representatives who were dependent on management for their expenses and financial support in the processing of employee grievances was found to be an unlawfully dominated and assisted labor organization.

Respondent has also repeatedly conveyed to employees the representational purpose of the SCP. In his September 3, 2002, memo to nonbargaining unit staff, Strodel informed employees that "Advocates provide support for the Complainant throughout the Process. . . ." and that "Mediators facilitate attempts to

reach resolution during the informal phase" of the SCP. Employees were told that "Respondent and complainants will work with support staff rather than HR or other management to mediate resolution of a complaint." During the Union's election campaign, Respondent raised the SCP as part of its campaign propaganda to defeat the Union. On November 18 or 19, 2002, Respondent posted and distributed a memo to PSD employees stating that the SCP provides "employee advocates." The memo goes on to state, "You may bring an Advocate to any or all of the meetings related to the problem. Staff advocates will be trained in conflict resolution techniques and will be available as your resource and support *absolutely free of charge*. Here is another reason not to pay the Teamsters *your hard-earned money!*" Thus, Respondent has clearly sought to convey the message among its employees that the SCP is a cost-free alternative to the Union to bilaterally resolve their disputes with management. See *Polaroid Corp.*, supra at 432.¹³

I further find that the SCP formal stage provides for dealing between the hearing panel, the review panel, and Strodel, the vice president of human resources, in the processing of employee grievances. The SCP provides for a formal hearing and appeals procedure. The hearing and review panels are each three-member panels, which Strodel testified at his direction would be composed of nonsupervisory majorities.¹⁴ The SCP provides that both the hearing and review panels are to write majority decisions and that dissents are encouraged to be in writing. The panel chair at each level forwards the decision to Strodel who can confirm the decision, or return it once to each panel with his input for further review. Thus, I do not view the hearing panel or review panel's majority decisions as final. The SCC, an official of Respondent's HRD department who reports to Strodel, selects the panel members on both panels and the panelists are trained, paid, and certified by Respondent. The SCP also provides that Strodel supervises the SCP. Clearly, this system is not designed for either the hearing panel or the review panel to ignore Strodel's input, which is a requirement under the SCP before a final decision can issue. In fact, implicit in the manner the panels are constituted establishes that it is Respondent's intent that the panels give Strodel's input great weight.¹⁵ I find that the purpose of the

¹² I do not find Respondent's assertion that the Board did not find the mediation procedure in the grievance procedure in *Keeler Brass* to be a labor organization to support Respondent's position here. The procedure in *Keeler Brass* provides that the respondent's "Human Resources Department representative will act as the mediator." *Keeler Brass*, supra at 1120. Whereas as the SCP provides at the complainants' option to select an employee trained by Respondent to serve as staff mediator in the processing of their grievance with management. While in *Keeler Brass*, the employee was entitled to bring a coworker to the session, the SCP entitles the employee to bring a staff advocate paid and trained by Respondent. Finally, the grievance procedure in *Keeler Brass* was found unlawful on other grounds and the lawfulness of the mediation phase was not litigated there.

¹³ I do not find the fact that employees could elect to use a coworker in lieu of Respondent's trained staff advocates in processing the complaint through the SCP as a viable argument to detract from its status as a labor organization. First, Respondent recruited and trained 150 individuals to staff the SCP and touted as a benefit to the employees the advantage of using an advocate trained by Respondent. Moreover, an employee complainant is required to use the services of a staff mediator, who is possibly a coworker, just to participate in the process. Thus, Respondent has enlisted and trained a large group of employees to staff the SCP, paid them for their time, and touted them as a benefit to employees for "a new procedure that is user-friendly, fair to all concerned, trusted by all participants," for the resolution of workplace complaints.

¹⁴ Strodel testified that one of the two nonsupervisors on the hearing panel could be a senior salaried administrative employee creating the potential that on occasion a three-member hearing panel could be composed of an employee, supervisor, and managerial employee.

¹⁵ See *Pennsylvania Greyhound Lines*, supra at 14-15, where the Board stated, "In its functioning the Association is a mechanism for the

panel stage of the SCP is to create a “bilateral” mechanism where Respondent through Strodel and the employee-based panels go back and forth until an acceptable result is achieved. In this respect I find the planned interrelationship between Strodel and the SCP panels to be similar to the relationship between the grievance committee and vice president of human resources in *Keeler Brass*, supra, which the Board found to be an unlawful employer dominated labor organization. Moreover, even if I were to conclude, which I do not, that the SCP hearing and review panels have been provided with the management function of finally deciding grievances, I nevertheless find the SCP constitutes an employee representation “plan” which exists for the purpose of dealing with Respondent for grievances because, as set forth above, the SCP provides for the representation of complaining employees by their coworkers as trained staff mediators and staff advocates at both the mediation and hearing stage of the process.

I reject Respondent’s contention that this case is not ripe for decision because grievances have not gone through the SCP hearing process. Respondent has made several announcements to its employees about the SCP, has held meetings, posted the process on the internet, and trained 150 staff members as paid participants. Moreover, the Board has stated that the purpose of an organization under Section 2(5) of the Act can be determined by what it is set up to do, rather than what it actually does. See *Beverly California Corp.*, supra at 154; *Electromotion, Inc.*, supra at 996–997; *Edward A. Utlaut Memorial Hospital*, supra at 1160; and *Armco, Inc.*, 271 NLRB 350 (1984), enfd. 774 F.2d 1170 (8th Cir. 1985). The purpose of the SCP as a statutory labor organization is abundantly clear by its terms and by the representations about it Respondent has made to its staff.

I find Respondent intended to convey to its employees that the SCP is a process in which their grievances would be decided bilaterally. See *Polaroid Corp.*, 329 NLRB 424, 432 (1999). In fact, Respondent’s representations about the SCP insinuated themselves into the Teamsters’ campaign with Respondent’s PSD employees. Respondent made three written distributions concerning the SCP to the PSD employees, which the Respondent used as a vehicle to persuade those employees to vote against the Teamsters. Respondent’s November 18 or 19, 2002 distribution stated the SCP “provides employee advocates, mediators, and an impartial Hearing Panel comprised from a pool of trained volunteers, including volunteers from Parking Services.” It went on to state, “This procedure is intended to ensure the prompt and impartial resolution of disputes. . . .” The memo stated, “You may bring an Advocate to any or all of the meetings related to the problem. Staff advocates will be trained in conflict resolution techniques and will be available as your resource and support absolutely free of charge.” “Here is another reason not to pay the Teamsters your hard-earned money!” In a memo distributed to PSD employees on December 16, 2002, just 2 days before the scheduled election, Respondent stated the SCP “improves our current staff complaint process and includes employee advocates, mediation

and an employee based Review Panel.” Moreover, Matson told SPD employees during Respondent’s antiunion meetings that the SCP is available at no cost to the employees, while if they selected the Union it would cost them union dues. Clearly, Respondent was intentionally creating the impression among employees that it was offering a bilateral process to resolve their grievances through the SCP without the cost of union dues. I find that by, during the Union’s campaign for election, repeatedly citing the SCP as an alternative to the Union, without the need to pay union dues, Respondent restrained and coerced employees in violation of Section 8(a)(1) of the Act by encouraging them to support an employer-dominated labor organization. See *Beverly California Corp.*, supra at 154; and *Polaroid Corp.*, supra at 452.

I sum, I find the SCP is a labor organization within the meaning of Section 2(5) of the Act, and that Respondent dominated and assisted the SCP in violation of Section 8(a)(1) and (2) of the Act. I also find Respondent has violated Section 8(a)(1) of the Act by encouraging employees to support an employer dominated labor organization.

The cases cited by Respondent are distinguishable from the facts presented here. None of these cases involved a grievance procedure which included employer-trained employee advocates and mediators as are provided to grievants by Respondent in the SCP. The grievance procedure in *Mercy-Memorial Hospital*, 231 NLRB 1108 (1977), had a employee-dominated grievance committee whose majority decision was appealable by the grievant to the personal committee of the board of directors of the hospital. However, that the board of directors did not consider the matter unless it was appealed and once there was an appeal it did not send the matter back to the grievance committee for further consideration. In *Mercy-Memorial*, the personnel director provided input to the grievance committee by merely reporting what had happened at prior steps of the grievance procedure prior to the grievance committee issuing its decision. It was concluded that, in the circumstances in *Mercy-Memorial*, the grievance committee was not engaged in negotiating or discussing with management. Rather, it was there to decide employee complaints and the appropriateness of disciplinary action. Similarly, in *John Aschuaga’s Nugget*, 230 NLRB 275 (1977), enfd. in part, denied in part 623 F.2d 571 (9th Cir. 1980), the grievance culminated in a final decision by a council composed of two members of management and an employee. The Board held the council performed an adjudicatory rather than a representational function and that it was not a labor organization. The SCP procedure is clearly distinguishable. The SCP employee-dominated hearing panel’s decision goes to associate vice president of labor relations, Strodel, for input whether or not any participant appeals the panel’s decision. The decision is then returned to the panel for them to consider Strodel’s input and whether to alter their decision. This process repeats itself at the review panel’s level and therefore the SCP structure requires dealing between the employee panel’s and management until a final decision is reached in view of Strodel’s stature as supervisor of the SCP. In *Crown Cork & Seal*, 334 NLRB 699 (2001), and *General Foods Corp.*, 231 NLRB 1232 (1977), cited by the Respondent, the employee committees involved were actually performing management

handling of grievances, an important aspect of employment, albeit it is management-controlled and the participation of employees is futile.”

functions rather than dealing with the respective employers. The Board in *Crown Cork & Seal Co.*, supra at 700, distinguished that case from *Keeler Brass*, supra, noting that the committee in *Keeler* and the company went back and forth explaining themselves until an acceptable result was achieved. The back and forth that occurred in practice in *Keeler* is written into the SCP procedures, which is also separate and apart from the hearing and review panel provided grievants access to trained coworkers who are paid by Respondent acting as employee advocates and mediators to represent them in processing in their grievances and to facilitate dealing with management to resolve their disputes.

CONCLUSIONS OF LAW

1. Syracuse University, the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Teamsters Local 317, the Union, is a labor organization within the meaning of Section 2(5) of the Act.
3. The staff complaint process (SCP) is a labor organization within the meaning of Section 2(5) of the Act.
4. By dominating, interfering with the formation and administration of, and rendering unlawful assistance and support to the SCP, Respondent has been and is violating Section 8(a)(2) of the Act.

5. By telling employees to select the SCP, an employer-dominated labor organization, over the Union because employees would not have to pay union dues Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found Respondent has committed violations of Section 8(a)(1) and (2) of the Act, I shall recommend that it be required to cease and desist therefrom from any like or related conduct, and to post appropriate notices. I shall further recommend that the Respondent be ordered to withdraw all recognition from and to completely disestablish the SCP, and refrain from recognizing it as a representative of any of Respondent's employees for the purpose of dealing with Respondent concerning wages, grievances, rates of pay, or other conditions of employment. See *Webcor Packaging*, 319 NLRB 1203, 1206 (1995), enfd. 118 F.3d 1115 (6th Cir. 1997), cert. denied 118 S.Ct. 1035 (1998).

[Recommended Order omitted from publication.]