

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

Advice Memorandum

DATE: January 26, 2011

TO : Wanda Pate Jones, Regional Director
Region 27

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

SUBJECT: IBEW, Local 12 536-2581-0100
(Bechtel Construction Co.) 536-2581-3384
Case 27-CB-5265 536-2581-6733-5000

This case was submitted for advice regarding whether the Union violated its duty of fair representation by refusing to process an employee grievance over the Employer's collection of union dues on a Davis-Bacon project where, although deposited into the Union's general fund, those funds could be used to support the Union's Market Recovery Program ("MRP").

We conclude, in agreement with the Region, that the charge should be dismissed, absent withdrawal, because the Union's refusal to process the Charging Party's grievance was neither discriminatory nor arbitrary and was based on a good faith evaluation of the merits of his complaint.

First, there is no evidence, and the Charging Party makes no contention, that the Union's refusal to process the grievance was discriminatorily motivated.

Second, we conclude that the Union did not act arbitrarily or in bad faith. Although the Union initially rejected the grievance for a minor procedural defect, it demonstrated good faith by taking steps to investigate the merits of the grievance, including speaking with the Charging Party and accepting supporting information from him, contacting the International Union for guidance, and consulting the collective-bargaining agreement.¹ Also, the Union's refusal to process the Charging Party's grievance was not irrational because, given the "factual and legal landscape,"² it was reasonable for the Union to decide that

¹ Vaca v. Sipes, 386 U.S. 171, 190, 194 (1967).

² Air Line Pilots Assoc. v. O'Neill, 499 U.S. 65, 67, 79-81 (1991) (The Court will find "a union's actions [arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." (quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953))).

the grievance lacked merit. The Charging Party cited no contractual provision that was violated nor did he provide the Union with any evidence indicating that dues were being deducted other than as authorized. Further, the collective-bargaining agreement does not mention the MRP, and thus a grievance related to that program may not even be cognizable under the agreement.³ Finally, although DOL considers unlawful the deduction of MRP dues from the wages of employees on Davis-Bacon projects,⁴ it has instituted a non-enforcement policy regarding such deductions where dues are deposited into the union's general fund, as is the case here.⁵ Finding a Section 8(b)(1)(A) violation in this case would have the effect of requiring the Union to pursue compliance with the Davis-Bacon Act in circumstances where the DOL itself would not attack the deduction of union dues at issue here.

In these circumstances, we agree that the Union did not violate its duty of fair representation by refusing to process the Charging Party's grievance, and the Region should dismiss the charge, absent withdrawal.⁶

B.J.K.

³ American Federation of Musicians (Atlanta Symphony Orchestra), 333 NLRB 1108, 1112, 1116 (2001) (union had rational basis for its denial of employee's grievance where the subject of the complaint was not set forth in the collective-bargaining agreement).

⁴ See Building and Construction Trades Dept. v. Reich, 40 F.3d 1275 (D.C. Cir. 1994); IBEW, Local 357 v. Brock, 68 F.3d 1194 (9th Cir. 1995).

⁵ Decision of Maria Echaveste, Administrator of DOL's Wage and Hour Division, June 20, 1995 letter. In fact, the Charging Party filed a claim with DOL, which DOL has decided to dismiss.

⁶ The Region has determined that the Charging Party is not interested in filing a charge against the Employer; nor has the Charging Party alleged that the MRP itself is unlawful. We further note that in Kingston Constructors, 332 NLRB 1492, 1500 (2000), the conduct found unlawful was the union's effort to cause the discharge of an employee on a Davis-Bacon job who refused to pay separate dues to support a job targeting program. Here, the dues are not collected separately, and the Union has not threatened or taken any action against the Charging Party.