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

Advice Memorandum

DATE: July 27, 2012

TO : Terry Morgan, Regional Director
Region 7

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

SUBJECT: Local 542, Michigan Council 25, AFSCME 536-2559
(Detroit Institute of Arts) 536-2573
Case 7-CB-068861 536-2509-9300

This case was submitted for advice on the issue of whether the Union violated Section 8(b)(1)(A) by pledging to refund dues overpayments to bargaining unit members in advance of a decertification election, and then refusing to refund the dues overpayments in retaliation for losing the election. We conclude that such conduct would have violated Section 8(b)(1)(A), but that the evidence here does not support a finding that the Union withheld any dues overpayments. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

Detroit Institute of Arts (Employer) was party to a collective-bargaining agreement with Local 542, Michigan Council 25, AFSCME (Union), effective from 2007 through June 30, 2011, covering eleven unit employees. The contract, under "Article 6—Dues Checkoff," states: "[e]ach employee and the Union hereby authorize the Employer to rely upon and to honor certifications by the Treasurer of the Council 25, regarding the amounts to be deducted and the legality of the adopting action specifying such amounts of Union dues…" On May 19, 2010, the Council 25 Secretary-Treasurer informed the Employer that unit employees' dues should be deducted from their bi-weekly paychecks at a rate of $23.10 for "full-time" members, $19.83 for "regular part-time" members, and $14.32 for "less than part-time" members.

According to Union records, "full-time" members were defined as those working in excess of 20 hours per week, "regular part-time" members were defined as those working between 12 and 20 hours per week, and "less than part-time" members were defined as those working less than 12 hours per week. The hours of the unit employees, however, did not fit neatly into any one of those categories, but instead fluctuated on a weekly basis. Indeed, on 10 occasions between June 2010 and June 2011, a unit employee worked less

than 12 hours in a week, while on 179 occasions, a unit employee worked over 20 hours in a week. Regardless of the amount of hours worked on a weekly basis, however, all unit employees paid the "regular part-time" rate of $19.83.

On April 28, 2011,[1] a unit employee filed a decertification petition in Case 7-RD-3693. In a letter dated May 9, in response to concerns arising from the decertification petition, a Union staff representative informed the Union's administrative director that the employees' "major complaint…has been the amount of union dues they pay." The staff representative further stated that "[t]hey currently pay $19.83 bi-weekly which is actually more than the current minimum dues rate per month for members who work part-time hours…" On May 24, the Union's administrative director drafted a letter addressed to the unit employees, which stated in relevant part:

> On behalf of Michigan AFSCME Council 25, let me first apologize for the error on your Dues Deductions. The Union will request from the [Employer], a list of hours worked by you, the members. Upon receipt of this information, Council 25 will make the proper adjustments and forward to you, a check in the amount that records indicate you are entitled to.

On June 2, one day prior to the decertification election, a Union organizer distributed the May 24 letter to the unit employees.[2] On June 3, the unit employees voted to decertify the Union.

In September and October, the Charging Party (CP) left phone messages with the Union and wrote a letter to the Union referencing the May 24 letter and requesting a dues refund. CP has not asserted that she was charged an incorrect dues rate; rather, she thought the Union's dues rates were too high for the wages she and her coworkers earned and interpreted the Union's May 24 letter as acknowledging that employees were paying too much and promising to return money to her and other unit members. After

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[1] All subsequent dates are in 2011, unless otherwise noted.

[2] There is no evidence that the Union ever attempted to contact the Employer in order to obtain payroll records, as it pledged to do in the May 24 letter.

failing to receive a refund from the Union, CP filed the instant ULP charge on November 14.[3]

On November 17, a Union official emailed a copy of the charge to the Union Executive Secretary. In the email, the official stated that the Union's administrative director "wanted me to forward this charge to [the Council 25 Secretary-Treasurer] since he was the one who made the decision to not pay the members since they [d]ecertified." In her November 17 email response, the Executive Secretary expressed confusion about the nature of the charge, stating that she was "unable to determine what they are asking for" and could not find any documentation "denying a request of refund of dues deducted in error."

The Union contends that it is unaware of any dues overpayments; that instances where an employee may have worked less than 12 hours in a pay period does not establish that the employee was being overcharged dues; and that it would promptly refund any unit employee who established that he or she overpaid dues.

ACTION

We conclude that the Region should dismiss the charge, absent withdrawal. Although a union would violate Section 8(b)(1)(A) by pledging to refund an overpayment of dues in advance of a decertification election, but then refusing to do so in retaliation for losing the election, the evidence here does not support a finding that the Union refused to refund any overpayment of dues.

A union exercises unlawful restraint and coercion in violation of Section 8(b)(1)(A) when it fines a member in retaliation for filing a decertification petition.[4] Unlike expelling a union member or removing the member from union office, the distinctively punitive nature of a fine not only

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[3] At no time did CP work less than 12 hours in a given week; in fact, on 24 occasions she worked over 20 hours per week.

[4] *Intl. Molders' and Allied Wkrs., Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208, 209 (1969), *enf'd,* 442 F.2d 92 (7th Cir. 1971); *Sheet Metal Workers Local 18 (Globe Sheet Metal)*, 314 NLRB 1134, 1135 (1994). See also *Electrical Workers Local 45 (Adelphia Communications)*, 345 NLRB 7, 10 (2005) (threat to fine members in retaliation for filing decertification petition violated Section 8(b)(1)(A)).

impedes access to Board processes but also serves no legitimate defensive purpose.[5]

Although the Board has not addressed whether a union violates Section 8(b)(1)(A) by refusing to refund dues overpayments in retaliation for filing a decertification petition, the same concerns underlying the union-fines cases are present. Like a fine, a refusal to refund dues overpayments would be a financially punitive measure that impedes employees' use of the Board's processes.

Here, however, the Union did not withhold any overpayment of dues. Initially, under the collective-bargaining agreement, the Union is the party that establishes unit employees' dues rates. Although the Union established different bi-weekly dues rates for "full-time employees" ($23.10), "regular part-time" employees ($19.83), and "less than part-time" employees ($14.32), the evidence shows that all of the unit employees were considered "part time" regardless of the number of hours they actually worked in any particular week. For example, unit employees worked under 12 hours in a week on only 10 occasions between June 2010 and June 2011, but worked over 20 hours in a week on 179 occasions over that same period. If employees' dues rates varied depending on how many hours they actually worked in a given week, unit employees would owe the Union far more in back dues than the Union would owe employees, yet there is no evidence that the Union considered unit employees to be in arrears.[6] Moreover, dues were deducted on a *bi-weekly* basis, but the three tiers of dues rates were based on hours per *week*. If the dues rates were variable, the parties would have great difficulty determining the appropriate biweekly dues amount for an employee who happened to work eight hours one week and 22 hours the next week. Finally, no unit employees have informed the Union (or the Region) that they were charged an incorrect dues rate based on their hours worked. Although CP eventually

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[5] *Blackhawk Tanning*, 178 NLRB at 209. Cf. *Tawas Tube Products, Inc.*, 151 NLRB 46, 48 (1965) (union did not violate Section 8(b)(1)(A) by expelling member who had filed decertification petition); *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1420 (2000) (union did not violate Section 8(b)(1)(A) by retaliating against member for wholly internal union activity, which is protected solely under the LMRDA).

[6] In particular, CP would have been in arrears, considering the 24 occasions on which she worked more than 20 hours in a week between June 2010 and June 2011, yet she only paid the $19.83 rate. CP never worked less than 12 hours in a week during that period.

sought a refund from the Union, she merely asserted that she thought the dues were excessive for her wage rate and interpreted the May 24 letter as promising a refund.

The May 24 letter from the Union and the Union's internal communications following the decertification do not constitute admissions that the Union overcharged dues and failed to refund employees in retaliation for the decertification election. Viewed in its entirety, the internal Union correspondence suggests that the May 24 letter was premised on the Union administrative director's mistaken belief that individual employees' dues rates were supposed to be adjusted between the three different dues levels every pay period depending on how many hours the employees had actually worked. Instead, the Union's practice had been to charge unit employees a uniform rate of $19.83 per pay period as "regular part-time" employees. Viewed in that context, the November 17 email stating that the Council 25 Secretary-Treasurer had decided "to not pay the members since they decertified" merely indicates that, following the decertification election, the Union determined that no employees had been overcharged dues. Accordingly, the Union's decision not to return dues money to CP or other bargaining unit members following the decertification election did not violate the Act.[7]

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

[7] The Union has continued to maintain that should any dues overpayments on behalf of unit employees come to its attention, it would refund the overpayments.