

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 4, 1997

TO: Gerard P. Fleischut, Regional Director, Region 26

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

SUBJECT: International Comfort Products, Case 26-CA-18196

524-0133-8000, 524-0133-8700, 524-0133-8750, 524-3350-6000

This case was submitted for advice to determine whether the Employer could reject an applicant for a supervisor and/or confidential assistant position,⁽¹⁾ because of the applicant's current activities as union grievance committeeman.

The charging party, Joe Fults, has been employed at Comfort Products for approximately 5 and a half years. Fults also currently serves the Union in the position of union grievance committeeman. On about May 12, 1997, the Employer posted a job opening for Supervisor, Labor Relations, a position whose primary duties include the processing of grievances and administering hourly employee discipline. The Employer failed to promote Fults into this position stating, in part, that it felt Fults would have difficulty making the transition from being the Union's spokesperson in the grievance procedure to precisely the opposite position of being the Company's spokesperson. The Employer also particularly noted that other members of the grievance committee had told the Employer that they would have a difficult time working with Fults. The Employer stated that the perceived inability of Fults to get along with his union counterparts on the committee was an "important consideration to management because of the absolute necessity for the Supervisor, Labor Relations to be able to communicate and work well with the Union grievance committee."

We agree with the Region in these circumstances that the Employer has asserted a legitimate business defense to the charge that it discriminatorily failed to promote Fults. In that regard, we do not view the evidence as establishing that the Employer denied Fults this position either because of his status as a union member or officer, or based on its belief that Fults would not be loyal to the Employer.⁽²⁾ It would appear that the Employer in failing to promote Fults, and the Union in recommending against his appointment, were not concerned with his status as a union officer or member. Instead, both parties were concerned in substantial part with the manner in which Fults personally would be able to perform his duties, and particularly with his relationships with members of the Union grievance committee.⁽³⁾

In all the circumstances of this case, particularly the lack of demonstrated anti-union animus,⁽⁴⁾ including the facts that other union members have been promoted to supervisory positions and the Employer encouraged Fults himself to apply for other supervisory positions, we conclude that the instant charges should be dismissed, absent withdrawal.

B.J.K.

¹ The Region appears to be treating the position at issue as solely a supervisory position, and does not address whether the position was instead, or was also, a confidential employee. However, it is not necessary to decide this issue. Regardless of whether the position is supervisory and/or confidential, refusing to promote the charging party into it based on his union activity violates Section 8 (a)(3) of the Act. See *Pacific American Shipowners Association*, 98 NLRB 582, 597 (1952), and *E&L Transport Co.*, 315 NLRB 303, 304 (1994).

² See *Little Lake Industries, Inc.*, 233 NLRB 1049, 1057 (1977) (Employer may not question an employee's loyalty to management based on his/her protected activity as a rank and file employee while that employee is being considered for a supervisory position); *St. Anne's Hospital*, 245 NLRB 1009, 1010 (1979) (same).

³ We, therefore, do not decide whether an employer may lawfully rely upon the specific duties of a particular union office as a dispositive disqualification for a specific management position.

⁴ See *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967) ("antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct" (emphasis in the original)).