

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

Advice Memorandum

DATE: October 19, 2015

TO: Terry A. Morgan, Regional Director
Region 7

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

SUBJECT: Michigan Council 25, American Federation of State,
County and Municipal Employees (AFSCME),
AFL-CIO (Stant USA Corp.)
Case 07-CB-146694

536-2581-0160

536-2581-3370

536-2581-6700

The Region submitted this Section 8(b)(1)(A) case for advice as to whether Michigan Council 25, American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO (“the Union”) breached its duty of fair representation by failing to file an unfair labor practice charge on behalf of a member pertaining to her discharge, and by failing to advise the member of its decision not to do so.

We conclude that the Union did not violate its duty of fair representation under Section 8(b)(1)(A) because neither its failure to file a charge on behalf of the member nor advise the member of its decision not to do so were arbitrary, discriminatory, or in bad faith. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

On June 13, 2014,¹ the Union was certified as the exclusive collective-bargaining representative of a unit of employees employed by Stant USA Corporation (“the Employer”) in Romeo, Michigan. The parties thereafter commenced negotiations for an initial collective-bargaining agreement. In late August while negotiations were ongoing, the Employer advised the Union official

¹ All dates are in 2014 unless otherwise indicated.

representing the unit (“the Union’s representative”) that it was investigating allegations of inappropriate conduct on the part of the Charging Party. Although the Union’s representative met with the Employer and sought to mitigate the discipline imposed, the Employer terminated the Charging Party on September 5 for unacceptable conduct that allegedly violated the final warning she had been working under since the previous December.² There is no evidence that the Charging Party was engaged in Section 7 activity, or that her termination was unlawfully motivated.³

Immediately following her termination, the Charging Party called the Union’s representative and informed him that she wanted to file an unfair labor practice charge against the Employer. During this conversation, the Union’s representative explained that before doing so he was required to submit a legal request form, together with the evidence to support it, to the Union’s legal department for approval. He therefore asked the Charging Party to send him a written statement explaining what had occurred and supporting evidence. The Union’s representative further explained that they had six months from the date of her discharge to file an unfair labor practice charge with the Board.

Over the next several days, the Charging Party sent the Union’s representative numerous texts and emails regarding her case. On September 10, she again texted him asking, “[a]ny word on what’s going to happen?” According to the Charging Party, the Union’s representative replied, “[a] charge will be filed.”⁴ During the following week, the Charging Party sent the Union’s representative several more texts. By voicemail on September 23, the Union’s representative advised the Charging Party that he would get back to her because he was engaged in contract negotiations with the Employer. On October 8, he again called and advised the Charging Party that he had met with the Employer in an effort to obtain a settlement of her case. He cautioned, however, that reaching a settlement was going to be difficult due to her disciplinary history and her strained relationship with the Employer’s human resources manager.

² The final warning was effective from December 11, 2013 to December 6, 2014.

³ The Charging Party states that she was not involved in any aspect of the Union’s organizing campaign and had no knowledge of which of her coworkers was on the organizing committee.

⁴ The Union’s representative denies telling the Charging Party that he would file a charge regarding her termination. Rather, he states that he advised her only that he would submit the matter to the Union’s legal department in order to obtain its approval to file a charge on her behalf with the Board.

On December 1, after the parties had reached tentative agreement on an initial contract,⁵ the Union's representative met with the Employer's attorney and its human resources manager to discuss the Charging Party's discharge. As a result of the meeting, the Employer offered to settle the matter for \$1,000.00 in exchange for the Charging Party's release of all claims related to her termination. The Union's representative then contacted the Charging Party, advised her of the Employer's settlement offer, and recommended that she accept it. On December 23, the Charging Party advised him that she would not accept the settlement because she believed she was entitled to more money, as well as reinstatement.

On January 26, 2015, the Charging Party informed the Union's representative – who had asked her what she would accept to settle her case – that she believed she deserved \$250,000. On January 27, the Union's representative informed the Charging Party that the Employer had flatly rejected her proposed settlement. As a result, on February 5 he submitted her case to the Union's legal department for review. That same day, the Charging Party contacted the Region about filing an unfair labor practice charge against the Union. She also sent a text to the Union's representative inquiring about the status of her case. The Charging Party recalls that the Union's representative told her that he was preparing her paperwork to send to the Board and that after this conversation she sent him a text requesting copies of the paperwork.⁶ The Union's representative recalls receiving a text from the Charging Party requesting a copy of the paperwork but states that he never agreed to provide it because it was no longer in his possession. About two weeks later, on February 19, the Charging Party filed the current unfair labor practice charge against the Union alleging that since February 5 it had violated its duty of fair representation “by refusing to file my discharge of [sic] grievance for a reason that [is] arbitrary, capricious and in bad faith.”⁷

⁵ The collective-bargaining agreement is effective from December 1, 2014 to November 1, 2015, at which time the Employer is slated to close the Romeo facility.

⁶ The Charging Party's recollection of this conversation with the Union's representative is unclear. Although she initially testified that he told her he was preparing her case to send to the Board, she later clarified in a conversation with the Region that he told her that he was preparing her paperwork to send to the Union's legal department.

⁷ On May 21, 2015, the Charging Party filed an amended charge alleging that the Union had violated Section 8(b)(1)(A) and its duty of fair representation by

On March 5, 2015, the Section 10(b) period for filing a charge over the Charging Party's discharge expired without the Union doing so. By email dated March 13, the legal department advised the Union's representative that there was no merit to the Charging Party's case. The legal department explained that the Employer had terminated the Charging Party for unacceptable conduct and violating her final warning, but not for Section 7 activity.⁸ The Union's representative did not, however, advise the Charging Party of the legal department's conclusion and decision not to file an unfair labor practice charge regarding her termination.

In response to the current charge, in April 2015 the Union filed a position statement in which it asserted, among other things, that "[the Charging Party] was not informed that an unfair labor practice charge would not be filed on her behalf because she had already filed a charge against the Union before [the Union's representative] had the opportunity to inform her of the same." The Charging Party acknowledges that she never experienced any animus on the part of the Union's representative; rather, he would simply tell her he was busy and would have to get back to her.

ACTION

We conclude that the Union did not violate its duty of fair representation under Section 8(b)(1)(A) because neither its failure to file a charge on behalf of the Charging Party nor advise her of its decision not to do so were arbitrary, discriminatory, or in bad faith.

A union owes all unit employees the duty of fair representation, which extends to all functions of the bargaining representative.⁹ When a union's conduct towards a unit member is arbitrary, discriminatory, or in bad faith, it breaches its

"willfully and unlawfully misleading" her to believe that an unfair labor practice charge would be filed on her behalf regarding her discharge.

⁸ A handwritten notation at the top of the email indicates that the legal department had spoken with the Union's representative on March 5, 2015 and informed him that "the case had no merit to proceed forward and would therefore be closed out."

⁹ See *Letter Carriers Branch 529 (Susan Ellyn Tudor)*, 319 NLRB 879, 881 (1995) (finding union violated Section 8(b)(1)(A) by arbitrarily refusing employee's request to have copies of two documents in her grievance file).

duty of fair representation.¹⁰ But a union must be allowed a wide range of reasonableness in serving the unit employees, and any subsequent examination of a union's performance must be "highly deferential."¹¹ Mere negligence does not constitute a breach of the duty of fair representation.¹² A union's conduct is arbitrary only if, in the 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.¹³

We conclude that the overall circumstances here establish that the Union did not act arbitrarily or in bad faith.¹⁴ Prior to the Charging Party's termination, the Union's representative met with the Employer and sought to mitigate the discipline it imposed on her. Thereafter, despite the fact that he was involved in contract negotiations, the Union's representative remained in contact with the Charging Party, responding in a reasonable manner to her numerous emails and texts. As soon as negotiations were completed on December 1 and the parties had reached tentative agreement on an initial contract, the Union's representative met with the Employer and obtained a proposed settlement of the Charging Party's case. Subsequently, after the Charging Party rejected the Employer's offer to settle for \$1,000, it became apparent that no settlement could be reached, and the Union's representative sent the legal department a request to file an unfair labor practice

¹⁰ *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

¹¹ *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 78 (1991).

¹² *Teamsters Local 692 (Great Western Unifreight System)*, 209 NLRB 446, 447-448 (1974) (finding union did not violate Section 8(b)(1)(A) where it negligently failed to file and process meritorious grievance for discharged employee); *Letter Carriers Branch 529*, 319 NLRB at 881.

¹³ *Air Line Pilots Assn.*, 499 U.S. at 78; *Steelworkers v. Rawson*, 495 U.S. 362, 376 (1990); *Vaca*, 386 U.S. at 177, 190; *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962), *enf. denied*, 326 F.2d 172 (2d Cir. 1963).

¹⁴ We also note that there is no argument or evidence that the Union's conduct in failing to file an unfair labor practice charge on the Charging Party's behalf, or in failing to advise her of its decision not to file a charge, was discriminatorily motivated. Indeed, the Charging Party specifically states that she never experienced any animus on the part of the Union's representative. Nor is there any evidence to indicate that the legal department's decision not to file a charge was motivated by discrimination.

charge on behalf of the Charging Party. Thus, the Union's representative sought to assist the Charging Party both before and after her termination, and acted in accordance with their initial conversation in which he explained that he needed the legal department's approval before filing a charge with the Board. It is therefore apparent that the conduct of the Union's representative was neither arbitrary nor in bad faith. Nor can the decision of the Union's legal department not to pursue a charge be characterized as arbitrary or in bad faith. To the contrary, it was entirely reasonable for the legal department to conclude that there was no merit to the Charging Party's case given the factual and legal landscape at the time of its decision, including that the Charging Party had been working under a final warning and that she had not engaged in Section 7 activity.

The Union's failure to specifically inform the Charging Party that it was not filing an unfair labor practice charge also was neither arbitrary nor in bad faith. The Union's representative informed the Charging Party immediately after her termination that she had six months from the date of her discharge to file a charge, and she was aware before that cutoff date that the Union had not filed the charge for her. Moreover, as evidenced by her current Section 8(b)(1)(A) charge against the Union, the Charging Party demonstrated that she knew she could file an unfair labor practice charge concerning her termination by herself. The substance of the current Section 8(b)(1)(A) charge, which the Charging Party filed on February 19, also shows that she was fully aware of the Union's decision not to file a charge on her behalf before the six-month period following her discharge had lapsed on March 5.¹⁵ Consequently, it was unnecessary for the Union to inform the Charging Party of its decision.

The Union's explanation in its position statement — that “[the Charging Party] was not informed that an unfair labor practice charge would not be filed on her behalf because she had already filed a charge against the Union before [the Union's representative] had the opportunity to inform her of the same” — does not support finding a Section 8(b)(1)(A) violation. Although the statement itself is ambiguous (i.e., it may conceivably be construed as evidence that in failing to inform the Charging Party of its decision not to pursue a charge, the Union was

¹⁵ The Charging Party's reference in the current charge to the Union refusing to file a “grievance” on her behalf appears simply to be imprecise wording used by the Charging Party, who is not a labor law practitioner. Although the Union had been certified as the unit employees' bargaining representative less than three months earlier, there was no grievance procedure in place at the time the Employer discharged the Charging Party. Given the discussions between the Charging Party and the Union's representative, it is reasonable to infer that she was referencing the Union's failure to file an unfair labor practice charge.

retaliating against her because she had filed an unfair labor practice charge against it), it is more plausibly understood as a lawful, good-faith explanation as to why the Union did not need to inform the Charging Party of its decision. Thus, because the Charging Party had filed a charge against it for failing to “grieve” her discharge, the Union believed that she already understood that it would not be filing a charge on her behalf and, consequently, there was no need for it “to inform her of the same.” Moreover, any ambiguity is resolved by considering the statement in the totality of the circumstances. As detailed above, the Union engaged in repeated efforts to obtain some relief for the Charging Party over her discharge, although it ultimately determined that the allegation had no merit. And, as the Union sought to explain in its position statement, it believed she understood that it would not be filing a charge based on the substance of the Section 8(b)(1)(A) charge that she had filed against it. In that context, it is apparent that the Union intended the lawful interpretation noted above — that it did not need to inform the Charging Party that it was not filing a charge regarding her termination because she already was aware of that decision.¹⁶

In sum, we conclude that the Union did not violate its duty of fair representation because its conduct was not arbitrary, discriminatory or in bad faith. Accordingly, the Region should dismiss the Section 8(b)(1)(A) charge, absent withdrawal.

/s/
B.J.K.

¹⁶ In any event, since an examination of the Union’s representation efforts must be “highly deferential,” this isolated statement is insufficient to establish that the Union acted arbitrarily or in bad faith. Even if we were to interpret the statement as indicating that the Union had retaliated against the Charging Party for filing a charge against it, in light of the Union’s overall efforts on behalf of the Charging Party, it did not breach its duty of fair representation under Section 8(b)(1)(A). *See Steelworkers Local 3029 (Gardner-Denver Co.)*, 250 NLRB 813, 819 (1980) (finding union did not violate Section 8(b)(1)(A) by failing to take employee’s grievance to arbitration because totality of circumstances showed union fairly represented employee despite union president telling employee that union had no reason to process grievance where employee had filed unfair labor practice charge against it; however, union president’s statement itself violated Section 8(b)(1)(A)).