

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

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DATE: February 25, 2019

TO: Teresa J. Poor, Acting Regional Director
Region 29

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Local 1199 SEIU (South Oaks Hospital-
Northwell Health) 536-2581-0180
Case 29-CB-215856 536-2581-3370
536-2581-3370-7300
536-2581-3384

This case was submitted for advice as to whether the Union breached its duty of fair representation by willfully misleading employees about their future terms and conditions of employment and waiving their contractual rights to grieve an involuntary transfer and to receive severance pay. We conclude that, while the Union violated Section 8(b)(1)(A) of the Act by willfully misleading its employees about maintaining all of their terms and conditions of employment at the new employer, the Region should issue a merit dismissal of the charge, pursuant to Section 10122.2(c) of the Casehandling Manual, because the misrepresentation had no impact on employees' terms and conditions of employment. We also conclude that the charge regarding the Union's waiver of the grievance procedure and severance pay should be dismissed, absent withdrawal, because the Union's negotiations were not discriminatory, in bad faith, or arbitrary.

FACTS

South Oaks Hospital-Northwell Health ("South Oaks") operates a hospital in Amityville, New York. South Oaks's campus consists of multiple buildings, including Broadlawn Manor ("Broadlawn"), a nursing home/rehabilitation center. Local 1199 SEIU ("Union") represents the service and maintenance unit at South Oaks, which includes housekeepers, laundry, and dietary workers. The employees are in one campus-wide unit and are assigned to work in different buildings on a regular basis, rather than being assigned to specific buildings. The parties' CBA, which is in effect from April 30, 2015 through March 31, 2019, provides both a grievance procedure¹ and severance pay.²

¹ "Article XXXV GRIEVANCE PROCEDURE. A grievance shall be defined as a dispute or complaint arising between the parties hereto under or out of this

In early 2017,³ South Oaks informed the Union that it had agreed to sell Broadlawn to the Kennedy Group/Massapequa Center (“Massapequa”) and that, as part of the sale, South Oaks agreed to provide Massapequa with as many housekeepers and dietary workers as it needed in order to keep the facility fully operational during and after the sale.⁴ Because there was not a specific group of employees assigned to Broadlawn, the parties needed to determine which employees would be transferred to Massapequa. The Union, with the assistance of a committee of unit employees, formulated a proposal for selecting employees for transfer. Its priority was avoiding layoffs. Ultimately, the Union gave employees the opportunity to volunteer for transfer and recommended that remaining vacancies be filled by the least senior employees according to job classification and shift. In at least two cases, the Union recommended departing from straight seniority because transferring the most junior employee would have resulted in an employee being laid off.⁵

On August 29, the Union and Massapequa finalized a Memorandum of Agreement (“MOA”), in which Massapequa recognized the Union and adopted the majority of its collective-bargaining agreement with South Oaks. Notably, however, the MOA specified that transferred employees would receive two fewer days of sick leave and one week less of vacation leave than they were entitled to under the South Oaks agreement.

Agreement or the interpretation, application, performance, termination, or any alleged breach thereof, and shall be processed and disposed of in the following manner:”

² “Article XXII SEVERANCE PAY. Employees with one (1) or more years of bargaining unit seniority, who are permanently laid off, or who are temporarily laid off in excess of seven (7) days, shall receive severance pay at the rate of one (1) week's pay for each year of bargaining unit seniority, prorated, up to a maximum of four (4) weeks' pay, at his/her regular pay in effect at the time of such layoff, provided the amount of severance pay shall not exceed the regular pay the Employee would have earned during the period of layoff. . . .”

³ All remaining dates are in 2017 unless otherwise indicated.

⁴ Massapequa contracted out its laundry services and did not need laundry employees to staff Broadlawn after the sale.

⁵ In one instance, an employee with higher seniority was transferred because the junior employee was banned from working at Broadlawn under an earlier agreement. In the other case, the more senior employee was transferred because post-sale there would be no job at South Oaks for which [REDACTED] was eligible.

On October 27, during a meeting between South Oaks managers, Union officials, and employees selected for transfer, a Union official repeatedly assured employees that they would keep everything that the Union fought for at South Oaks and that they wouldn't lose any benefits after their transfer to Massapequa.⁶ On that same day, the Union and South Oaks finalized the details of the employees' transfer. This agreement included waivers of the employees' contractual rights to grieve and to receive severance pay for the transfer. The Union did not inform the employees about the decrease in their sick leave and vacation time, nor did it tell the employees about the contractual waivers.

The transaction between South Oaks and Massapequa was completed on November 21 and the affected employees were transferred as of that date. The employees learned about the loss of benefits shortly after they began working for Massapequa. In (b) (6), (b) (7)(C) 2018, an employee filed a grievance against South Oaks over (b) (6), (b) (7) involuntary transfer. (b) (6), (b) (7) attended a grievance meeting in June 2018 along with representatives from the Union and South Oaks. At that meeting, a South Oaks representative informed (b) (6), (b) (7) that the transfer was not grievable.

ACTION

We conclude that the Union breached its duty of fair representation in violation of Section 8(b)(1)(A) by willfully misleading employees about the terms and conditions of employment they would receive post-transfer, but the Region should issue a merit dismissal of the charge, pursuant to Section 10122.2(c) of the Casehandling Manual. We also conclude that the allegation regarding the Union's waiver of the employees' contractual rights to grieve the transfer and to receive severance pay should be dismissed, absent withdrawal, because the decision was not discriminatory, in bad faith, or arbitrary.

It is well established that a union, as an exclusive bargaining representative, has a statutory obligation to represent the interests of its members fairly, impartially, and in good faith, insuring that all employees are free from unfair, invidious treatment, hostility, discrimination, arbitrariness, or capriciousness.⁷ The duty of fair representation—which is “akin to the duty owed by other fiduciaries to their

⁶⁶ The Charging Party provided an audio recording of the meeting in question, on which the Union official's repeated assurances can be clearly heard.

⁷ See *Teamsters Local 814 (Beth Israel Medical)*, 281 NLRB 1130, 1146 (1986) (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), and summarizing legal foundation of a union's duty of fair representation).

beneficiaries”—applies to a union’s negotiations as well as its contract administration and other representational duties.⁸ A union has a responsibility not to willfully mislead employees about its negotiations or grievance handling.⁹ With regard to the substance of negotiations, Congress did not intend for courts to insert themselves into the bargaining process beyond ensuring that unions and employers refrain from negotiating in bad faith, with discriminatory intent, or in an arbitrary manner.¹⁰ As such, an examination of negotiations must be deferential—“recognizing the wide latitude necessary for effective bargaining”—and consider both the “facts and the legal climate that confronted the negotiators at the time the decision was made” before interfering with the product of the parties’ bargaining.¹¹

Here, the Union violated its duty of fair representation when it told employees that all of their terms and conditions of employment would remain unchanged after transferring to Massapequa when two months earlier it had agreed to a decrease in sick leave and vacation time in the parties’ MOA. The Union disputes that its official made these statements, but the audio recording of the meeting in question is clear. The Union also asserts that the affected employees knew or should have known about

⁸ *Air Line Pilots Ass’n, Int’l. v. O’Neill*, 499 U.S. 65, 76-77 (1991) (clarifying that the prohibition of acting with discriminatory intent, in bad faith, or arbitrarily extends to a union in its negotiating capacity).

⁹ See, e.g., *Teamsters Local 814 (Beth Israel Medical)*, 281 NLRB at 1148-49 (specifying that union’s willful misleading of grievant violated its duty of fair representation); *Alicea v. Suffield Poultry, Inc.*, 902 F.2d 125, 130 (1st Cir. 1990) (explaining that “serious misrepresentations that lack rational justification or are improperly motivated” constitutes a bad-faith violation of the duty of fair representation); see generally *Vaca*, 386 U.S. at 191 (explaining that while union is allowed a wide range of reasonableness, a violation will be found if the union acted in a perfunctory manner that was so far outside the wide range of reasonableness that it was wholly irrational).

¹⁰ See *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103-104 (1970) (holding that the Board cannot compel parties to agree to specific substantive terms even as it requires them to bargain in good faith; “[I]t was never intended that the Government would . . . step in, become a party to the negotiations and impose its own views of a desirable settlement.”); *NLRB v. Insurance Agents’ Int’l Union*, 361 NLRB 477 (1960) (“Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences”).

¹¹ *Air Line Pilots*, 499 U.S. at 78.

the changes in sick leave and vacation time because the changes had been memorialized in the MOA; however, there is no evidence that the employees were given the agreement at that time. Whether the Union intended to mislead the employees about their future benefits or not, this conduct constituted a violation of the Union's duty to its members. Nonetheless, we conclude that the Region should merit dismiss this allegation because the misrepresentations had no impact. By the time the Union made its inaccurate statements, all of the transferring employees had volunteered or been selected and no one relied upon the Union's assurances. Thus, it would not effectuate the purposes of the Act to utilize Agency resources to litigate this technical violation, and the Region should issue a merit dismissal of this allegation pursuant to Section 10122.2(c) of the Casehandling Manual.

We further conclude that the Union's agreement to waive the employees' contractual rights to grieve the transfer and receive severance pay was not a breach of its duty of fair representation. The Union's primary objective in negotiating the transfer of employees from South Oaks to Massapequa was to protect all of its members from layoffs. The Union made necessary compromises in an effort to secure that goal. "Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation" and "the complete satisfaction of all who are represented is hardly to be expected."¹² Moreover, the waiver of severance pay and the right to grieve transfers was entirely consistent with the structure and terms of this agreement; severance pay is ordinarily appropriate for terminations, not transfers, and it would be highly unusual for parties to negotiate a resolution and for the employer to then permit grievances challenging that resolution. In the absence of evidence suggesting that the Union's actions were discriminatory, in bad faith, or arbitrary, we conclude the charge should be dismissed absent withdrawal.

/s/

J.L.S.

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¹² *Ford Motor Co.*, 345 U.S. at 338; *see also NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 326 (1983) (concluding that a union is free to bargain away its members' contractual and economic rights, so long as employees are not impaired in the choice of their bargaining representative).