

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

S.A.M.

DATE: April 8, 2019

TO: Leonard J. Perez, Regional Director
Region 14

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

SUBJECT: National Association of Government
Employees, Local R14-139
(EDP Enterprises, Inc.)
Case 14-CB-227097

133-2575
536-5025-6700-0000
536-5025-8300-0000

The Region submitted this case for advice as to whether the Union violated Section 8(b)(1)(A) of the Act by maintaining a provision in its Constitution and Bylaws that requires members who believe their grievances have been mishandled to first exhaust internal Union remedies before pursuing legal claims against the Union in court or with an administrative agency. We initially conclude that the Union's rule is lawful under the Board's recent decision in *IATSE Local 151 (Freeman Decorating Services)*.¹ However, the Region should issue complaint, absent settlement, and urge the Board to overturn that precedent because it is based on faulty legal premises. The Region should ask the Board to find that the Union's rule is *per se* unlawful because it fails to explicitly refer to the four-month limitation for exhausting internal remedies imposed by Section 101(a)(4) of the Labor Management Recording and Disclosures Act ("LMRDA"). Absent that limiting language, employees would reasonably interpret the rule as precluding them from filing a Board charge for the entire duration of the Union's internal appeal process, even if it extended beyond the six-month limitations period for filing a charge.

FACTS

National Association of Government Employees Local R14-139 ("the Union") represents a bargaining unit of food service employees employed by EDP Enterprises ("the Employer") at Fort Leonard Wood, a United States Army training installation in Missouri. In about (b) (6), (b) (7)(C), the Employer hired the Charging Party, who subsequently became a Union member. On (b) (6), (b) (7)(C) 2018,² the Employer terminated

¹ 364 NLRB No. 89 (Aug. 26, 2016).

² All subsequent dates are in 2018.

the Charging Party for alleged misconduct that occurred the previous day. The Charging Party then contacted the Union's recently elected (b) (6), (b) (7)(C) about grieving the termination. On about August 14, the Charging Party learned that the Union's newly elected officers had failed to timely file a grievance regarding the termination, and that the Employer would not waive the untimeliness of a grievance as a defense. On September 6, the Charging Party filed the instant charge against the Union alleging it had violated Section 8(b)(1)(A) by failing to timely file a grievance over the termination.³

As part of its defense before the Region, the Union asserted that the Charging Party did not have standing to file the instant charge because the Charging Party did not first exhaust internal Union remedies. Article IV A of the Union's Constitution and Bylaws,⁴ which is entitled "The Handling of Grievances," states in Section 3 that:

Local Unit members who believe their grievances have been improperly handled by their Local Unit Grievance Committee or other authorized local bargaining agent shall, without exception, employ the remedies and procedures contained herein. Complainants shall not be entitled to enforce or present his or her claims against the National Union or its Local Unit subordinate in any court or other administrative body without first exhausting these internal procedures.⁵

Section 2 of the same article sets forth the appeal procedure that members must follow if they disagree with how the Union processed their grievances. It states that

³ The Region has concluded that the Union's failure to timely process the Charging Party's grievance violated Section 8(b)(1)(A).

⁴ The internal Union rules quoted and referred to in this memorandum are from the National Union's Constitution and Bylaws. That document states that affiliated locals, such as the Union here, are required to adopt the National Union's governing documents as their own unless they follow a specified procedure for opting out. *See* National Union's Constitution and Bylaws, Article IV, Section 4 ("Each authorized Local Unit shall adopt as its Constitution and By-Laws, the Constitution and By-Laws of the National Association of Government Employees. . . ."). The Union has cited to the National Union's governing documents in defending against this charge, and there is no evidence that the Union opted out and adopted different governing documents.

⁵ In the National Union's Constitution and Bylaws, the term "Local Unit" refers to the various local unions. Thus, it is generally understood that this provision applies only to Union members.

step one is for the aggrieved member, within 72 hours of being notified in writing by the Local Grievance Committee that it will not proceed with a grievance, to provide written notice to the Local Grievance Committee that the member is appealing that decision to the National President. Step two requires the aggrieved member, within five days of receiving the aforementioned written notice from the Local Grievance Committee, to provide written notice to the National Union's General Counsel that the member is appealing the Local's decision.⁶ The National President then designates a National Officer to decide the appeal. The National Officer is required to schedule and conduct a hearing, if necessary, as soon as administratively possible. The National Officer may then decide the appeal or refer it to the National Executive Committee, which is comprised of the National President, all National Executive Vice Presidents, and all National Vice Presidents and is required to meet at least every other month. The Union's Constitution and Bylaws do not specify timelines for decisions by either the National Officer or National Executive Committee.⁷

ACTION

We initially conclude that the Union's rule is lawful under current Board precedent. However, the Region should issue complaint, absent settlement, and urge the Board to overturn that precedent and conclude that the rule is *per se* unlawful because it fails to explicitly refer to the four-month limitation for exhausting internal remedies imposed by LMRDA Section 101(a)(4). Absent that limiting language, employees would reasonably interpret the rule to preclude them from filing a Board charge for the entire duration of the Union's internal process, even if it extended beyond the six-month limitations period for filing a charge.

⁶ Although the Union's Constitution and Bylaws refer to these appeal procedures as "Step One" and "Step Two," those phrases do not appear to indicate successive rounds of an appeal process. Rather, it appears that an aggrieved member must take both "steps" together to appeal an adverse decision by the Local Grievance Committee.

⁷ The National Union's website sets out a different procedure for a member to appeal a Local's denial of a request to proceed to arbitration. To appeal such a decision, the member must provide written notice to the National President within seven business days following the Local's determination. The National President then designates an Appeals Board comprised of one National Vice-President and two members of the Executive Board, which is a different body than the National Executive Committee. After a decision by the Appeals Board, the member or Local President may request final review by the National President. No timelines are given for designating the Appeals Board or issuing decisions. See <http://www.nage.org/member/arbitration-policy> (last visited March 14, 2019).

A. The Union Did Not Violate Section 8(b)(1)(A) Under Recent Board Precedent by Maintaining an Exhaustion-of-Internal-Remedies Rule.

Section 8(b)(1)(A) prohibits a union from “restrain[ing] or coerc[ing] employees in the exercise of the rights guaranteed in section 7,”⁸ but includes a proviso stating that “this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.”⁹ In *Scofield v. NLRB*, the Supreme Court explained that under Section 8(b)(1)(A) unions are free to maintain and enforce internal regulations so long as those regulations do not affect a member’s employment status or “invade[] or frustrate[] an overriding policy of the labor laws”¹⁰ The Court noted that it previously had recognized the ability of employees to freely file unfair labor practice charges or otherwise access Board processes as one overriding policy of the Act that union’s may not regulate.¹¹

At the same time, Section 101(a)(4) of the LMRDA provides that union members “may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within . . . [a labor] organization, before instituting legal or administrative proceedings against such organizations or any officer thereof”¹² In *NLRB v. Industrial Union of Marine and Shipbuilding Workers of America*, the Supreme Court considered the relationship between Section 8(b)(1)(A) of the Act and

⁸ 29 U.S.C. § 158(b)(1)(A).

⁹ *Id.*

¹⁰ *See* 394 U.S. 423, 429, 430 (1969) (“§ 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule”). *See also IATSE Local 151*, 364 NLRB No. 89, slip op. at 4 (same).

¹¹ *See Scofield*, 394 U.S. at 430 (citing *NLRB v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 424 (1968)). *See also Operating Engineers Local 138 (Charles S. Skura)*, 148 NLRB 679, 682 (1964) (“Considering the overriding public interest involved, it is our opinion that no private organization should be permitted to prevent or regulate access to the Board, and a rule requiring exhaustion of internal union remedies by means of which a union seeks to prevent or limit access to the Board’s processes is beyond the lawful competency of a labor organization to enforce by coercive means.”).

¹² 29 U.S.C. § 411(a)(4).

Section 101(a)(4) of the LMRDA.¹³ In that case, the issue was whether the union had violated Section 8(b)(1)(A) by expelling a member for filing a Board charge before the member had exhausted internal remedies as required by the union's constitution.¹⁴ The Court affirmed the Board's holding that the union had violated Section 8(b)(1)(A).¹⁵ It reasoned that while a union is free to self-regulate its legitimate internal affairs, "other considerations of public policy come into play" when an internal rule penalizes an employee for filing a Board charge.¹⁶ In the Court's view, a "policy of keeping people 'completely free from coercion'" when making complaints to the Board is paramount to the Board's ability to effectuate public policy considering it cannot initiate its own proceedings.¹⁷ Thus, "[a]ny coercion used to discourage, retard, or defeat that access [to the Board] is beyond the legitimate interests of a labor organization."¹⁸

In *IATSE Local 151 (Freeman Decorating Services)*, the Board recently considered the issue of whether a union violated Section 8(b)(1)(A) simply by *maintaining* a provision that required the exhaustion of internal remedies before filing a Board charge, and specifically focused on whether such a provision is facially unlawful because it does not explicitly refer to the four-month limit in LMRDA Section 101(a)(4).¹⁹ The Board majority concluded that the absence of the four-month limitation did not cause the provision to be facially unlawful. It found that internal

¹³ See 391 U.S. at 424.

¹⁴ *Id.* at 420–21. The Court considered only whether the union had violated Section 8(b)(1)(A) by *enforcing* its exhaustion-of-internal-remedies rule, not by *maintaining* it.

¹⁵ *Id.* at 424, 428, approving *Operating Engineers Local 138 (Charles S. Skura)*, 148 NLRB at 682 (finding union violated Section 8(b)(1)(A) by fining a dissident member who filed a Board charge for violating an exhaustion-of-internal-remedies provision).

¹⁶ *Id.* at 424.

¹⁷ *Id.* at 424 (internal quotation marks and citations omitted).

¹⁸ *Id.* at 424.

¹⁹ 364 NLRB No. 89, slip op. at 3–4. There have been other cases that have considered the facial validity of such clauses, e.g., *Operative Plasterers' Local 521 (Arthur G. McKee & Co.)*, 189 NLRB 553, 556-57 (1971), and *Teamsters (Red Ball Motor Freight)*, 191 NLRB 479, 479 (1971), *enforcement denied on other grounds*, 462 F.2d 201 (5th Cir. 1972), but those cases did not focus on whether the clauses were facially unlawful because they failed to refer to the four-month limitation in LMRDA Section 101(a)(4).

exhaustion provisions serve the legitimate interest of allowing unions to resolve their members' problems internally, while still permitting resort to outside tribunals when a matter cannot be resolved internally, and are consistent with Section 101(a)(4) even if they do not explicitly refer to the four-month limit.²⁰

The majority then rejected the dissent's argument that, absent an explicit reference to the four-month limit, employees would reasonably believe their obligation to exhaust internal remedies is open-ended and, therefore, may interfere with their right to file Board charges. The majority distinguished cases the dissent relied on, which involved employer-mandated arbitration policies that interfered with employees filing Board charges, noting they permanently prohibited recourse to the Board. In contrast, the union's rule expressly allowed members to access other forums after exhausting internal remedies, and the four-month limit imposed by Section 101(a)(4) "ensures that the internal exhaustion may not exceed 4 months, leaving ample time to file a charge with the Board."²¹ The majority continued that the dissent, by considering how employees would reasonably interpret the rule, applied the wrong standard for determining if an internal union rule is facially unlawful. Rather, an internal union rule is lawful so long as it complies with the test articulated in *Scofield* (i.e., does not affect a member's employment or frustrate an overriding labor law policy).²² The majority also stressed that the Board previously had found only the enforcement of exhaustion-of-internal-remedies provisions to be unlawful, which the case did not involve. Finally, the majority noted that nothing in the text of the LMRDA requires labor organizations to explicitly set forth Section 101(a)(4)'s four-month limitation in their constitution and bylaws.²³ Nor does the LMRDA make it an actionable offense for a union to maintain a contrary provision.²⁴

Based on the majority's reasoning in *IATSE Local 151*, the Union here did not violate Section 8(b)(1)(A) by maintaining the exhaustion-of-internal-remedies provision in Article IV A, Section 3.

²⁰ *Id.*, slip op. at 4.

²¹ *Id.*

²² *Id.*, slip op. at 5.

²³ *Id.*

²⁴ *Id.*

B. The Region Should Urge the Board to Overturn *IATSE Local 151* and Require the Union to Explicitly Refer to Section 101(a)(4)'s Four-Month Limit in the Exhaustion-of-Internal-Remedies Provision.

The Region should use this case as a vehicle to urge the Board to reconsider its recent decision in *IATSE Local 151 (Freeman Decorating Services)* because it was based on faulty legal premises that resulted in a standard that fails to protect employee access to the Board. Thus, the Region should request that the Board find the Union's exhaustion-of-internal-remedies policy to be unlawful because it does not contain explicit language that indicates its compliance with the four-month limit in LMRDA Section 101(a)(4).²⁵

Under *Scofield*, an internal union rule violates Section 8(b)(1)(A) if it frustrates an "overriding policy of the labor laws."²⁶ Both the Supreme Court and the Board have long recognized that unfettered access to Board processes is an overriding policy of the Act, particularly because the Board cannot initiate its own proceedings to enforce public rights.²⁷ By failing to explicitly refer to Section 101(a)(4)'s four-month limit for exhausting internal remedies, Article IV A, Section 3 of the Union's Constitution and Bylaws frustrates that policy. No language in that provision informs Union members, such as the Charging Party, that they are free to file a Board charge or pursue other legal claims against the Union after four months even if internal Union procedures have not been completed.²⁸ As a result, members would reasonably interpret the provision to impose an open-ended restriction on their right to file Board

²⁵ The Region should also urge the Board to overrule *Operative Plasterers' Local 521* and *Teamsters (Red Ball Motor Freight)* to the extent they are inconsistent with this approach.

²⁶ *Scofield*, 394 U.S. at 430.

²⁷ See, e.g., *Marine & Shipbuilding Workers*, 391 U.S. at 424; *Operating Engineers Local 138 (Charles S. Skura)*, 148 NLRB at 681–82.

²⁸ The Union's reliance on a phrase in Article XIII, Section 5 of its Constitution and Bylaws stating that its internal exhaustion process is "[s]ubject to the provisions of applicable statutes" is misplaced. Article XIII sets forth the internal process to appeal either Union election results or disciplinary decisions based on internal Union charges. Article XIII, Section 7 explicitly states that the procedures in Article XIII do not apply to internal appeals over the mishandling of grievances, which is what is involved here. Thus, apart from whether the phrase in Section 5 is sufficient to inform Union members of the four-month limit in Section 101(a)(4), it does not apply to the internal exhaustion provision at issue in this case.

charges.²⁹ And if internal Union procedures take longer than six months to complete, the statute-of-limitations in Section 10(b) of the Act will permanently bar members from filing a charge.³⁰

With respect to the last point above, the majority in *IATSE Local 151* relied on a faulty legal premise to reject the possibility of such internal union rules causing members to forfeit their right to file a charge. Specifically, the majority stated that “LMRDA Section 101(a)(4) ensures that the internal exhaustion may not exceed 4 months, leaving ample time to file a charge with the Board.” But “[n]othing in LMRDA Section 101(a)(4) imposes a requirement that all internal union procedures be completed within 4 months.”³¹ The Supreme Court read Section 101(a)(4) to mean only that “public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union.”³² Moreover, in the current case, while the Union’s internal appeal process for the mishandling of grievances imposes deadlines that members must meet to preserve their appeals, it does not include any timelines by which those appeals will be decided. Thus, nothing in the Union’s Constitution and Bylaws suggests that the Union’s internal process will end at the four-month mark so that members will be able to timely file Board charges if they desire.³³ In short, the majority’s reasoning in

²⁹ See *IATSE Local 151 (Freeman Decorating Services)*, 364 NLRB No. 89, slip op. at 8 (Member Miscimarra, dissenting in relevant part) (agreeing with the General Counsel’s argument that “employees would reasonably believe that their obligation to exhaust internal remedies is open-ended” because the union’s exhaustion-of-internal-remedies provision did not refer to Section 101(a)(4)’s four-month limit).

³⁰ *Id.* LMRDA Section 101(a)(4) also does not provide a separate cause of action if a union member cannot timely file a Board charge.

³¹ See *IATSE Local 151*, 364 NLRB No. 89, slip op. at 10 (Member Miscimarra, dissenting in relevant part).

³² *Marine & Shipbuilding Workers*, 391 U.S. at 426. The majority in *IATSE Local 151* relied on different language in *Marine & Shipbuilding Workers* to support their conclusion that Section 101(a)(4) limits internal exhaustion procedures to four months. See 364 NLRB No. 89, slip op. at 4. But the majority’s conclusion is based on a misconception of what the Court decided in that case. See also *IATSE Local 151*, 364 NLRB No. 89, slip op. at 10, n.9 (Member Miscimarra, dissenting in relevant part) (noting that the majority improperly relied on *dictum* from *Marine & Shipbuilding Workers* to support its conclusion).

³³ See *IATSE Local 151*, 364 NLRB No. 89, slip op. at 10 (Member Miscimarra, dissenting in relevant part).

IATSE Local 151 fails to properly explain how internal exhaustion rules such as that at issue here will not block access to the Board.

The majority in *IATSE Local 151* further erred by failing to consider how employees would reasonably interpret an internal exhaustion requirement. The majority relied on *Scofield*, which imposes a different standard for internal union rules than is applicable to employer-mandated work rules,³⁴ but *Scofield* does not preclude consideration of how employees would reasonably interpret an internal union rule when determining if that rule frustrates an overriding labor policy. Indeed, the Board specifically has considered how an employee would reasonably read a union policy in determining whether that policy violates Section 8(b)(1)(A).³⁵ Similarly, the Board has considered whether union members would reasonably understand their membership obligations under their union’s constitution and bylaws when deciding if the union had provided them with proper notice of those obligations.³⁶ Based on these principles, it would be improper—if not illogical—for the Board to ignore employees’ reasonable interpretation of union rules and policies when determining if they restrain or coerce Section 7 rights.

Here, Article IV A, Section 3 states that a grievant “shall not be entitled to enforce or present his or her claims against [the Union] in any court or other

³⁴ 364 NLRB No. 89, slip op. at 4–5 (majority opinion).

³⁵ See *California Nurses Assn. National Nurses Organizing Committee*, 2018 WL 6017809 (Nov. 14, 2018) (Board remanded Section 8(b)(1)(A) allegation that statement on the union’s contract about employees’ *Weingarten* rights was unlawful to the ALJ for reconsideration under the new standard in *Boeing Co.* for assessing whether work rules are facially unlawful), *remanding*, 359 NLRB 1391 (2013), *vacated on other grounds*, *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014). Cf. *Boeing Co.*, 365 NLRB No. 154, slip op. at 3, 14 (Dec. 14, 2017) (establishing new standard for determining whether facially neutral employer work rules violate Section 8(a)(1); new standard focuses on the balance between the rule’s negative impact on employees’ ability to exercise their Section 7 rights and the rule’s connection to employers’ legitimate interest in maintaining discipline and productivity in their workplace).

³⁶ See *Distillery, Rectifying, Wine & Allied Workers Local 38 (Schenley Distillers)*, 242 NLRB 370, 371 (1979) (finding union violated Section 8(b)(1)(A) by requesting that employer discharge two members for not satisfying their union-security obligation where, among other things, the union’s constitution and bylaws informed members only that they “may be” removed from employment and expelled from the union for dues arrearages), *enforced*, 642 F.2d 185 (6th Cir.), *cert. denied*, 452 U.S. 941 (1981).

administrative body without first exhausting these internal procedures.” Union members simply would not reasonably interpret that language as permitting them to file Board charges against the Union if internal procedures continued after four months.³⁷ “Rank-and-file employees do not generally carry law books to work or apply legal analysis,”³⁸ and they certainly cannot be expected to understand that the Union’s exhaustion-of-internal-remedies provision is subject by law to the four-month limitation in LMRDA Section 101(a)(4). Because the Union’s constitutional provision restrains member access to Board processes, the Union violated Section 8(b)(1)(A) by maintaining it.³⁹ The Union can lawfully maintain an exhaustion-of-internal-remedies provision if it states that members are free to pursue external legal claims after four months even if internal Union procedures remain ongoing.

³⁷ See *IATSE Local 151*, 364 NLRB No. 84, slip op. at 9 (Member Miscimarra, dissenting in relevant part) (concluding that an exhaustion-of-internal-remedies provision “is a trap for the unwary” if it does not state members can file Board charges after four months).

³⁸ See *Ingram Book Co.*, 315 NLRB 515, 516 n.2 (1994) (finding employer maintained overbroad no-distribution rule; rejecting employer’s defense that savings clause adequately informed employees of their rights by stating, “[t]o the extent any policy may conflict with state or federal law,” the employer would abide by those laws).

³⁹ Although this memorandum specifically addresses the Union’s exhaustion-of-internal remedies provision applicable to the handling of grievances (i.e., Article IV A, Section 3), the Region should allege that the Union has separately violated Section 8(b)(1)(A) by maintaining similar provisions on its website and in Article XIII of its Constitution and Bylaws, which provides the procedure by which members may appeal internal Union discipline or dispute Union election results, each of which do not refer to the four-month limit in LMRDA Section 101(a)(4). To the extent the Union argues that the internal exhaustion provision in Article XIII is lawful because Section 5 therein states it is “[s]ubject to the provisions of applicable statutes,” that language would not result in members reasonably interpreting the rule as permitting Board access after four months. Union members would not know what conduct is permitted by “applicable statutes” unless the Union specifically informs them. See *McDonnell Douglas Corp.*, 240 NLRB 794, 802 (1979) (finding employer maintained overbroad no-distribution rule despite language in rule explicitly stating it would not interfere with Section 7 rights; “it can reasonably be foreseen that employees would not know what conduct is protected by the [NLRA] and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act”)

Accordingly, the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(1)(A).

/s/
J.L.S.

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(b) (6), (b) (7)(C)