The Region submitted this case for advice as to whether the Union breached its duty of fair representation by providing the Charging Party the incorrect deadline for filing a grievance over the hiring hall and by rejecting the grievance without convening the three-member panel provided for in the collective-bargaining agreement. We conclude that the Union’s actions did not violate Section 8(b)(1)(A) because there is no evidence that the Union’s mistake was more than mere negligence, the Charging Party could have filed the grievance on its own, and the Union’s failure to convene a panel was not arbitrary or perfunctory given that it investigated the complaint and determined that the grievance was untimely and unmmeritorious.

The International Union of Operating Engineers, Local 18 (“Union”) represents workers in the construction industry and maintains an exclusive hiring hall, which it operates according to the rules set forth in Article III (“Referral System”) of its collective-bargaining agreement with the Ohio Contractors Association. Certain hiring hall rules are the product of a federal court consent decree that are now incorporated in the collective-bargaining agreement. Article III, Section 21(E) states that:

[a]ny applicant who quits employment or fails to show up for [a] work assignment at starting time after being dispatched (provided he/she was dispatched the previous day), for whatever reason, except accident verified by police report, shall be placed at the bottom of the applicable registration group regardless of the number of days worked and shall not be eligible for request until he/she puts in a new registration card.

Pursuant to Section 25 of that same article,

[a]ny registrant . . . who may feel aggrieved by the operation of this referral system shall have the right to and must file his/her grievance, in writing, within ten (10) days[1] after the occurrence of the event concerning which he/she complains with a Board of Review and Arbitration consisting of one (1) representative of the Union, one (1) representative of the Employer, and an impartial third member to be selected by agreement of the Union and the Employer, and the decision of this Board shall be final and binding on all parties.

On March 24, 2020, the Charging Party was dispatched for a job the next day and accepted the assignment [redacted] claims [redacted] began to feel ill that evening and became concerned that the illness might be COVID-19. The next morning, [redacted] called the Employer and the Union to inform them that [redacted] could not work. According to the Charging Party, the Employer agreed that [redacted] should not report to work if [redacted] was experiencing COVID symptoms. But the Union informed [redacted] that Section 21(E) mandated that [redacted] be moved to the bottom of the referral list for failing to appear at the worksite. The Charging Party objected to being dropped down the list but did not submit a formal complaint at that time.

On [redacted], the Charging Party called the Union and reiterated [redacted] disagreement with the Union’s decision to move [redacted] to the bottom of the list. According to the Charging Party, the district representative told [redacted] that [redacted] could have filed a “grievance,” but that [redacted] had three days to do so had expired.[2] Nonetheless, on [redacted], the Union considered Charging Party’s disagreement and reopened the case. A Union representative thereafter investigated the situation and confirmed that the Charging Party had accepted an
assignment, had not shown up for work on the first day for reasons other than an accident, and had not filed a complaint within 10 days of being dropped to the bottom of the referral list. The representative was unable to verify whether the jobsite supervisor had conveyed to the Charging Party that [redacted] was not required to report to work under the circumstances. On [redacted] the Union informed the Charging Party via letter that [redacted] complaint was both untimely and unmeritorious.

The Union does not admit that its representatives erred when advising the Charging Party about the filing deadline. Rather, it asserts that a representative correctly informed the Charging Party that it had ten days to file a “grievance” over the matter and informed the Charging Party that it had three days remaining to submit such a “grievance.”

A union owes employees a duty of fair representation both when it processes grievances and operates a hiring hall. See, e.g., Plumbers Local 342 (Contra Costa Electric), 336 NLRB 549, 551 (2001), petition for review denied sub nom. Jacoby v. NLRB, 325 F.3d 301 (D.C. Cir. 2003); Service Employees Local 3036 (Linden Maintenance), 280 NLRB 995, 996 (1986). A breach of this duty occurs when a union’s conduct toward a unit member or hiring hall participant is “arbitrary, discriminatory, or in bad faith.” Vaca v. Sipes, 386 U.S. 171, 190 (1967). A union’s actions are arbitrary “if, in 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.” Air Line Pilots Ass’n v. O’Neill, 499 U.S. 65, 67 (1991) (citation omitted). “Lack of sensitivity,” inept manner, poor judgment, or negligence do not supply the ‘something more’ than mere negligence which is necessary to provide a violation of the duty of fair representation.” Musicians Local 148-462 (Atlanta Symphony), 333 NLRB 1108, 1116 (2001). The duty can be breached, however, if a union willfully misinforms employees about the status of their grievances or willfully keeps them uninformed. See Postal Workers, 328 NLRB 281, 282 (1999). Likewise, a violation can occur when a union processes a grievance in a perfunctory fashion. See Service Employees Local 3036 (Linden Maintenance), 280 NLRB 995, 996-97 (1986) (grievance processing was perfunctory where, despite assurances that grievance was being taken care of, union abandoned it and failed to offer any explanation for its actions); Marine Union District 1 (Mormac Marine Transport), 312 NLRB 944, 944 (1993) (finding a violation when the union assured employee his grievance would be handled but failed to begin the investigation for eleven months).

We conclude that there is insufficient evidence to demonstrate that the Union intentionally or recklessly misled the Charging Party about the deadline for filing what amounts to an internal complaint with the Union concerning its operation of the referral system. As an initial matter, we note that the “grievance” under consideration here is not the type of grievance ordinarily involved in duty of fair representation cases because it concerned the Union’s administration of the referral system rather than an employer’s alleged breach of a contractual provision. However, mindful that the procedure is provided for in the collective-bargaining agreement, and even assuming the same principles of law would apply to this type of grievance, we conclude that the inaccurate statements that the Union purportedly made to the Charging Party do not constitute a violation. Here, there is no evidence of animus toward the Charging Party and nothing to suggest that the misinformation was more than an unintentional mistake. For example, it does not appear that the Union misinformed [redacted] of the deadline in order to cover up any misconduct in administering the referral hall, since the Union merely adhered to the consequences of failing to report spelled out in the contract. Cf. Teamsters Local 814 (Beth Israel Medical), 281 NLRB 1130, 1148-51 (1986) (union breached duty of fair representation where it did not merely cause the grievance to become time-barred but also led grievant to believe that it would still process his grievance if he acquired additional evidence and then questioned the grievance’s merits “as a screen to add justification to its action”). Additionally, we find it significant that the collective-bargaining agreement clearly set forth the deadline for
filing such grievances and contemplated that employees would submit them on their own behalf. In *Office Employees Local 2*, the Board found that the union did not breach its duty where it neglected to inform an employee of its decision not to pursue her grievance, in part, because the omission did not extinguish the employee’s contractual rights given that the employee herself had the right to file a grievance. 268 NLRB 1353, 1355-56 (1984), enforced *sub nom.* *Eichelberger v. NLRB*, 765 F.2d 851 (9th Cir. 1985). Since the deadline for filing a grievance over the referral system here is plainly set forth in the agreement and the Charging Party was entitled to file it on its own, “must bear some portion of the responsibility for sleeping on her rights.” *Id.* at 1356.

We further conclude that the Union’s rejection of the Charging Party’s so-called grievance, without submitting it to the Board of Review and Arbitration, did not constitute perfunctory or arbitrary conduct. Here, the Union investigated claim and had a rational basis for finding it to be without merit given that the Charging Party’s situation did not fall under the sole exception for failures to report for duty—an “accident verified by police report.” In this regard, we note that the Charging Party has not pointed to any evidence suggesting that the Union was lenient with any other hiring hall users concerning no-shows due to the COVID-19 pandemic. In addition, the Union verified that the grievance was untimely, and we find that the contract is ambiguous as to whether employees are entitled to a hearing before the three-member Board of Review and Arbitration when a referral hall complaint like this is untimely. Thus, we do not find that the Union acted so irrationally or arbitrarily by failing to convene the aforementioned panel.

Accordingly, the Region should dismiss these aspects of the charge, absent withdrawal. This email closes this case in Advice. Please contact us with any questions or concerns.

[1] According to the Union, the parties have interpreted this language to mean 10 business days.

2 The contract provides that grievances against the Employer unrelated to the hiring hall must be presented within three working days of the occurrence or discovery of the grievance.