

Unions to Face Greater Scrutiny for Negligent Conduct to Their Members

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National Labor Relations Board's field office staff have been directed to prosecute a broader array of cases against unions that engage in negligent behavior toward their members, according to an internal memorandum obtained by *Bloomberg BNA*.

The Office of the General Counsel Memorandum expresses a marked contrast to the Board's historical position with respect to cases addressing a union's "duty of fair representation." "General Counsel's Instructions Regarding Section 8(b)(1)(A) Duty of Fair Representation Charges" Memorandum ICG 18-09 (Sept. 14, 2018).

A union owes its members an obligation to represent them in good faith and without discrimination. A union breaches the duty of fair representation when it engages in conduct that is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Where, for example, a member believes that a union has failed to adequately prosecute a grievance on the member's behalf, the member may file a duty of fair representation charge against a union under Section 8(b)(1)(a) of the National Labor Relations Act.

Under existing Board law, a union can defend itself against such a charge by showing its behavior was "merely negligent." As one example, a union may successfully argue that where the union lost or misplaced a grievance, the union's conduct was merely negligent and did not constitute a violation of the duty of fair representation. Citing an "increasing number of cases" where unions have employed such a defense, the Memorandum toughens considerably the standards on unions. This is particularly true in two specific circumstances.

The first pertains to situations where a union loses track of, misplaces, or otherwise forgets about a member's grievance. Under the Memorandum, the loss of a grievance will constitute gross negligence, unless the union can show that it had an established, reasonable tracking system in place for grievances, but the system failed "for an identifiable and clearly-enunciated reason."

The second example pertains to situations where a union fails to communicate its decisions about a grievance or fails to respond to inquiries for information from a member on the status of a grievance

or the member's attempt to file one. The Memorandum states that such conduct (for example, where a union ignores emails or phone calls) is willful and arbitrary, unless the union can prove that it had a "reasonable excuse or meaningful explanation" for its lack of responsiveness.

While the Memorandum is not controlling law (ultimately, the five-member Board issues controlling interpretations of federal labor law), because the General Counsel's office prosecutes cases filed with the NLRB, the Memorandum may cause a considerable uptick in cases filed against unions. This increase, in turn, could increase members' awareness that the duty of fair representation owed to them cannot be taken lightly by their unions.

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