UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1457, AFL-CIO Respondent	Case No. 9-CO-00006
and	
GWEN HORN, AN INDIVIDUAL Charging Party	

Susan E. Jelen, Esquire, Regional Attorney
For the General Counsel

Mr. Allen F. Perdue, President of the Respondent
Mr. Greg Hudson
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Life has in store for us some experiences that seem calculated to take us to our wits' ends. We deal with them: it comes with the territory. Some comment may be appropriate, however, when the circumstances that cause such discomfiture also threaten to interfere with one's public responsibility. Of whatever value these comments may have for policy makers, I hope they may be of some help or at least consolation to anyone who is about to read the record in this case.

This case involves a union's duty of fair representation. The complex and convoluted background of arguably relevant facts from the point of view of the defense made it essential that the defense be presented in a systematic and reasonably sophisticated manner. (This is not a case where, the makings of a colorable defense being unavailable, the best defense strategy might be creative confusion.) But, unable to afford counsel or to obtain knowledgeable outside

representation, the Respondent Union's president, personally accused of committing the unfair labor practices alleged here, essentially defended himself.

Although Mr. Perdue knew basically what he wished to dispute and to prove, his inability to overcome his intensely subjective view of the case made it difficult to establish a mutual understanding of the relevant factual and legal issues being litigated and to insure that the record contained a cogent presentation of the Respondent's version of pertinent events. Such a presentation was particularly important also because, where the duty of fair representation is involved, the legal standard is itself so unclear of application that one respected commentator has described it as being in a "state of hopeless confusion." Aaron, An Overview, in THE CHANGING LAW OF FAIR REPRESENTATION 46 (McKelvey ed. 1985). In such circumstances the presiding official must do his or her best to insure that the relevant evidence the pro se party seeks to introduce is presented in a manner that makes it at least potentially probative.

The case involves employee Gwen Horn's attempts to have the Respondent (the Union) take appropriate action to enforce her rights as an employee when she encountered difficulties with management. Thus, the unfair labor practice complaint alleges that on several different occasions Mr. Perdue told Horn that he would file a grievance or grievances on her behalf, and that he failed to do so. The complaint alleges that Horn's reasonable reliance on Perdue's promise to file grievances precluded her filing the grievances on her own and resulted in her rights being extinguished. It is alleged, finally, that Perdue's conduct violated section 7116(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute) because it failed and refused to represent Horn as required by section 7114(a)(1) of the Statute.

A hearing was held on March 12 and 13, 1990, in San Francisco, California. The following findings are based on the record, the briefs, my observation of the witnesses, and my evaluation of the evidence.

Findings of Fact

A. Background

The Union is the exclusive representative of employees at the Presidio in San Francisco, including employees in an organizational component called the U.S. Army Information

Systems Command (USAISC). USAISC operates a printing plant which employees about 11 employees who are in the bargaining unit the Union represents. There is no Union steward in the printing plant. Printing plant employees therefore must contact Union officials outside the plant with their employment-related problems.

Allen Perdue is the president of the Union and Kevin Blackwell is the vice president for matters arising within USAISC, but there is no strict division of representational duties as far as the Union is concerned. Vice presidents Sherman Taylor and Greg Hudson also represented printing plant employees.

The printing plant was described by Union witnesses as being a "problem area," possibly involving racial animosities, and a place where "the anger and hostility was that great that I thought that somebody--their lives were actually in danger there." There were references to alleged drunken behavior by a management official and to illegal printing for private purposes. The Charging Party (Horn) herself made allegations of "cheating on reports, inaccurate production units and cost, false reporting of supply usage, withholding important documents, illegal printing . . . , and security violations." There were also references to the Charging Party's being thrown out of her office and having her telephone taken away. Another printing plant employee had over 25 "actions" taken against him in one year, some or all of which he took up with Union officials. This list includes only allegations as to events within about a year prior to the alleged unfair labor practices. All this in a plant with 11 employees.

Charging Party Horn was hired into the printing plant in February 1987 at grade GS-5. She testified that she should have been promoted to GS-7 in February 1988, but she was not. The reason for this was not explored at the hearing. In April 1988 Alvin Chan became the supervisor of the printing plant. Ms. Horn was promoted to GS-7 in July 1988.

Horn began complaining to the Union in October 1988 about the delay in her promotion, being downgraded on a performance appraisal, and "being moved around." She talked to Perdue, Hudson, and Taylor in 1988. In January or early February 1989 Blackwell got involved in some of the issues Horn was concerned about. Blackwell wrote a letter to USAISC Director James Scheffer on February 7, requesting a meeting about the "several problems between supervisor and employees" at the printing plant, and focusing on the

possible downgrading of Horn's position and that of coworker Eric Robinson. The letter suggested that the problem, which "will eventually [a]ffect the promotions that are due for both employees," might involve "a combination of race, personality conflict, or mis-communication between supervisor and employee." (R Exh. 1A.) Horn and Robinson are African-Americans, and Chan, I infer, is probably an Oriental-American.1/

Blackwell's February 7 letter resulted in a meeting on March 22, which Blackwell, Taylor, Chan, Horn, and Robinson attended. They discussed, in addition to the scheduled subject of "positions structures," issues of alleged job harassment and alleged excessive use of leave. The meeting was marked by (in Blackwell's words) "a lot of animosity" and does not appear to have resolved anything of substance.

Sometime within this general period of time Taylor had meetings with Horn's supervisors and with Presidio Labor Relations Specialist Gina Razel about "certain issues" Horn had consulted him about. These included harassment, leave control, and lack of promotions. It is not clear, however, whether the meetings Taylor so described were separate from meetings otherwise noted here.

B. Events Immediately Surrounding the Alleged Unfair Labor Practices

It will pay to bear in mind that the unfair labor practices alleged here all involve undertakings by Perdue to file grievances on Horn's behalf. The five alleged undertakings are a March or April promise to file a grievance over the employer's failure to promote Horn to GS-9, three promises (identified as having been made about April 11, April 25, and May 4) to file grievances over letters of counselling Horn received, and a May 31 promise to file a grievance over a failure to furnish Horn her performance appraisal. The evidence, or lack of it, concerning each of these incidents, is fairly straightforward although subject to credibility determinations. Evidence concerning some of the surrounding events is not as clear. As will appear, their sequence and timing is a bit foggy.

1/ For whatever further light it might shed on the case, Perdue and Hudson are white; Taylor and Blackwell are black.

Over the course of her employment, Horn had observed what she believed to be a number of improper and illegal acts concerning the operation of the printing plant. She apparently mentioned this to Perdue at some point, and at his suggestion went to Hudson for assistance in presenting her charges to the appropriate authorities. On April 12 she signed a one-sentence designation of Hudson as her "union representative." Although Horn had discussed other issues with Hudson, including her performance appraisal, she did not believe that he was representing her for anything except the presentation of charges of official misconduct. Hudson, on the other hand, was under the impression that Horn also wanted him to assist her concerning her performance appraisal. Hudson proceeded under that assumption.

On April 13, Horn received a letter of counselling, dated April 11, from Supervisor Chan. It accused her of entering Chan's office and ridiculing him, then shouting at someone else. The letter ended with a warning that disciplinary action would follow any "similar misbehavior." Horn refused to sign on the line provided for acknowledging receipt of the letter. Instead, she wrote, "This is a lie." She took the letter, however. On the reverse side she wrote a brief account of its receipt. (GC Exh. 4, R Exh. 31.) What she did next is in dispute.

According to Horn, she called Perdue immediately and went to the Union office to see him, although she was not sure whether she went on the same day. Horn says that she gave Perdue a copy of the letter and asked him what she could do about it. Perdue told her he would file a grievance for her.

Perdue did not deny any of this directly. He testified that Horn never asked him personally to represent her. The gist of his testimony in connection with this statement is that his subordinate Union officials do most of the representation of individual employees.

Credible testimony from Union Vice President Hudson, inartfully adduced but well filled out and corroborated by contemporaneous notes (R Exh. 20, 21, Tr. 241-2) establishes that Horn called Hudson on April 13 about the letter of counselling. Hudson requested and obtained official time to go to the printing plant to investigate. He met, first, with Chan, then with Horn and Eric Robinson. While Hudson was talking with them, Chan interrupted and told Hudson that Director Scheffer had ordered Hudson out of the printing plant--that he was not permitted official time for this.

Hudson followed up by requesting official time and also requesting annual leave, on April 17, to represent Horn and Robinson. Both requests were denied.

Perdue testified that Horn did call him in the middle of April, but that it was about her dissatisfaction with Hudson. Horn complained that Hudson was a spy for the agency and had sold her out. Perdue told Horn that Hudson had tried to represent her to the best of his ability but had been denied the right to represent her. On rebuttal, Horn testified that a conversation somewhat along the same lines occurred in June, not April. I shall discuss this below.

On April 17, Horn gave Hudson a statement about her observations of official mismanagement of the printing plant (GC Exh. 3). Hudson told her that her allegations constituted "whistle-blowing" that fell within the jurisdiction of the Special Counsel (Office of Special Counsel, Washington, D.C.) but that first her statement had to be "registered" with the Presidio's Central Investigative Division (CID). Horn testified that Hudson said he would, and later told her that he did, forward her "complaint" to the Special Counsel. Hudson submitted Horn's statement to CID, but, apparently, not to the Special Counsel. Horn, on April 17, also met with Blackwell regarding other matters.

On April 21, Perdue wrote to General Moore, the installation commander at the Presidio, complaining about management's refusal to grant Hudson official time to represent employees in the printing plant whom Perdue referred to as "whistle blowers." On the same day, Union Vice President Taylor wrote to Presidio Labor Relations Specialist Razel, requesting a meeting to be attended by Union representatives Taylor, Blackwell, and Hudson, employees Horn and Robinson, and management representatives Scheffer and Chan, to discuss "Annual Leave, Sick Leave, harassment at the work site, and job descriptions." In preparation for the meeting, Taylor asked Horn for any documents that might relate to the matters to be discussed. Taylor testified that Horn gave him a copy of the April 11 letter of counselling. Horn testified that she could not remember whether she gave him a copy. I credit Taylor.

On April 25, Chan issued another counselling letter to Horn (GC Exh. 5). It alleged an impropriety and several unsatisfactory job results. The letter concluded as follows:

> Your unsatisfactory job performance and conduct reflect poorly on you and the Field Printing Plant as a whole. Further unsatisfactory job performance could merit disciplinary action.
>
> A copy of this letter will be furnished to Civilian Personnel Division for placement into your personnel records.

Again, Horn does not appear to have acknowledged receipt of this letter, and there is no record evidence as to the date she received it. She testified that, once more, she called Perdue when she received it and Perdue told her to come to the Union office. Horn says she went, that this might have been anytime between April 25 and April 28, that she gave him the letter, and that Perdue promised to file a grievance.

On April 28, Union Vice President Taylor wrote a letter to Chan concerning the meeting he had requested in his April 21 letter to Razel. That meeting was scheduled for May 2. Taylor requested that Chan bring Horn's and Robinson's personnel files to the meeting. Both Horn and Robinson also signed the letter, indicating their authorization of the request for their files.

The following related events also occurred. According to witnesses' approximations or based on surrounding circumstances, they probably occurred in April:

(1) Horn consulted Perdue about insuring that she receive a scheduled performance appraisal in May. Horn had reason to doubt that she would receive it on time, and feared that its untimeliness would delay her next promotion. Perdue told her he had taken some kind of action on behalf of employees who had not received their appraisals on time. Horn could not remember whether he promised to file a grievance on this. (Tr. 46-49.)

(2) Hudson met with a Colonel Swift and informed him about some problem concerning performance appraisals. The context of his testimony suggests that the problem was the failure of supervisors to issue timely appraisals. (Tr. 257.)

(3) Perdue told Robinson that the grievance procedure was "tainted," and that an employee with a complaint should be prepared to go to many forums until he got one to "listen." Hudson similarly told Robinson that the grievance

procedure was tainted, at least for whistle-blowing purposes and perhaps in general. (Tr. 109-10, 122-23, 282.)

(4) Hudson told Horn not to worry about letters of counselling because eventually she would be protected under the "Whistleblowers Act" (Whistleblowers Protection Act of 1989) (Tr. 43).

On May 1, Union Vice President Blackwell wrote to Labor Relations Specialist Razel about the negative results of the March 22 meeting. Blackwell's letter insisted that the problems arising from the bad working atmosphere in the printing plant be resolved at the scheduled May 2 meeting.

The May 2 meeting included Horn, Robinson, two other printing plant employees, Union representatives Blackwell, Hudson, and Taylor, and Supervisor Chan. It turned into a shouting match. Horn characterized it as "unorganized," testifying that "everyone ranted on," and that no conclusions were reached. Both Horn and Blackwell testified that a number of issues came up, but neither could remember what they were. Taylor testified credibly, however, that all of the items on the agenda he had presented in his April 21 letter were discussed, including sick leave, annual leave, harassment, and job descriptions.

Taylor testified credibly that to the best of his recollection Chan did not bring Horn's and Robinson's personnel files to the meeting as requested. At any rate, he did not see the files. Nevertheless, based on information management had given him on other occasions indicating "negative material" in their files, he wrote to USAISC Director Scheffer on May 2, presumably after the meeting (which was scheduled for 9 a.m.), requesting that all such material be removed from their personnel files.

While no one testified that Labor Relations Specialist Razel was at the May 2 meeting, Hudson testified credibly that at a meeting where about 10 people were hollering and yelling, Razel told him that she was going to take a statement concerning leave control out of Horn's records "for the time being." I infer the probability that the meeting he described was the May 2 meeting, although the exact date of his conversation with Razel is not crucial.

Blackwell called Perdue after the meeting and briefed him about it.

On May 4, Chan issued another letter of counselling to Horn which repeated the allegations he made in the April 25 letter. However, there was a difference. At the end of the April 25 letter, Chan had warned Horn that "[f]urther unsatisfactory performance could merit disciplinary action." He also stated that a copy of the letter would be placed in Horn's personnel records. In place of these statements, the May 4 letter ended as follows (GC Exh. 6):

> Should you so request, I will discuss with you any portions of this letter, explain further any standards of performance and review your past work. It is my desire that you improve your performance in order that the interests of this organization and the Department of the Army will best be served.

Horn testified that she took the May 4 letter, also, to Perdue, who again told her he would file a grievance.

Horn and Robinson testified that on some occasions they saw Perdue together. On one or more occasions, according to Robinson, Horn asked Perdue to represent her, and among the issues on which she requested representation were promotions and letters of counselling. Robinson testified that Perdue told both of them that he would file "whatever it took"--unfair labor practice charges, grievances, or Merit Systems Protection Board proceedings--to get their problems solved. Similarly, Horn testified that Perdue was "always" promising to file grievances for her, and that he promised it on so many issues that she could not say whether he promised to file one about her career ladder (promotions). (Tr. 52, 55, 99.)

One other loose end must be fit into the narrative. On an undisclosed date, presumably in the general timeframe of March-May 1989, Hudson talked to Chan privately about Horn's performance appraisal. Chan told him that he, Chan, was tired of dealing with Taylor and Blackwell about Horn's problems. (Tr. 260-62.)

C. Epilogue

No grievances were filed on Horn's behalf. Under the collective bargaining agreement, "employee grievances" must be filed within 10 working days of the date the employee could reasonably have become aware of the grievable event. While the agreement is not specific about who may file an "employee grievance" (one that involves an individual

employee's rights, as opposed to one involving "overall operations and policies"), the parties here seem to agree that either the Union or the employee may file it. Horn, being unaware of the time limits and allegedly relying on Perdue's promises, did not file any for herself.

Horn did not receive her scheduled performance appraisal in May. On June 12, Perdue wrote a letter to Union members informing them that the Union had filed a class action complaint on behalf of all employees who had not been given timely appraisals in each of the last three years (GC Exh. 7). The letter requests that employees inform the Union if they fall into that class. Horn received a copy of the letter, but as to what she did about it, she could only say that she "may have" called Perdue and asked him about it.

Around the middle of June, Horn called Hudson to check on the progress of her whistleblower complaint. Hudson told her that CID had rejected her complaint. He indicated that he thought he had told her about it previously. Horn then called Perdue and told him she felt that she had been "misrepresented by the Union." She thought Hudson had lied to her because he never sent the complaint to the Special Counsel as he said he did. At that point she determined that the Union was not going to do anything for her, and she started to "attack management" herself by writing memos to secure her rights.

Horn did not receive a promotion to GS-9 at the July anniversary of her promotion to GS-7. She finally received her promotion in December 1989, but no backpay for the five-month delay. As of the date of the hearing, about three months after her promotion, she still had not received a performance appraisal for the prior year.

D. Credibility Determinations on Central Disputed Facts

Horn appears to have been a basically honest witness, but her anger or frustration toward the Union, especially toward Perdue and Hudson, subjected her to a tendency to exaggerate their derelictions and her certainty of the facts concerning her version of the events. Thus, although Horn had at least some knowledge of Hudson's efforts to represent her interests, she was quick to leap from the fact that he did not go beyond the CID with her whistleblower's complaint to the conclusion that he had not filed anything and that the Union had in effect abandoned her.

Minor inconsistencies, perhaps unimportant in isolation, are also illustrative. Thus, on direct examination Horn insisted that she "always" contacted Perdue on the same day she received each letter of counselling (Tr. 27). Later, however, when challenged as to whether she was sure Perdue was on duty on those days, she admitted that, as to each of the letters, she may have given it to him anytime within a few days of receipt (Tr. 38-39, 90-91). (I recognize that, consistent with her original statement, Horn may have called Perdue immediately and delayed delivery for a day or more, but her responses to the later questioning imply a more carefully considered, and, in this instance, probably a more accurate recollection than her original response.) I notice also an inaccurate assurance by Horn that she gave Perdue the April 11 letter--which she received on April 13--on April 11, but I attach minimal significance to it (Tr. 31).

I am persuaded that Horn did go to Perdue with her letters of counselling. However, I am not persuaded that she specifically asked Perdue to represent her. In this, I credit Perdue's denial. Horn acknowledged that she did not ask Perdue to file grievances, but testified that he volunteered to do so. Her own testimony, as well as Robinson's, was to the effect that Perdue was always promising to do something. Robinson testified credibly that in his presence Perdue said that he would file whatever was necessary to get their problems resolved. Considering this testimony in the context of the contemporaneous events, I believe that Robinson put his finger on the substance of what Perdue said he, or the Union, would do about Horn's letters of counselling.

In crediting Perdue's denial that Horn asked him to represent her, I have also considered credible testimony about the Union's practice of requiring a signed designation of a representative and the fact that Horn did not sign one designating Perdue. Perdue, of course, never told her that this was necessary. His failure to do so may have indicated either a lack of understanding that Horn expected him to take over personally, a negligent omission, or a plan (premeditated or instantly hatched) to escape responsibility for his intended inaction. I believe the first to be the most likely explanation. The second seems somewhat unlikely because the procedure was so routine; the third assumes an otherwise unexplained desire to cause her harm.

My ultimate finding on the alleged promises regarding the three letters of counselling, therefore, is that Horn brought each one to Perdue and that he took them and said in

effect that he would take care of the problem. If he mentioned a grievance at all, it was as an example of the possible steps toward finding a solution. Horn either heard it or, in retrospect, remembered it, as something more specific.

Less significant, but to help flesh out the probable sequence of events, the phone call Perdue testified that he received from Horn in April complaining about Hudson being an agency spy and selling her out must be the same call Horn testified about as occurring in June, when she learned that Hudson had not filed her complaint with the Special Counsel. As Horn had no apparent reason for making such a call in April, I believe that if she did so in June, as she testified.

Discussion and Conclusions

A. Applicable Standard

Section 7114(a)(1) of the Statute requires of unions afforded exclusive recognition that they represent the interests of all employees in the units they represent (1) without discrimination and (2) without regard to union membership. Union membership is not a factor in this case. Therefore, only the first part of the requirement applies.

The Authority refers to section 7114(a)(1)'s bifurcated requirement as a "duty of fair representation." National Federation of Federal Employees, Local 1453, 23 FLRA 686, 689 (1986) (NFFE). Its standard for determining whether the first ("without discrimination") part has been breached is "whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit." Id. at 691 (emphasis added). NFFE explains this standard as meaning that in order to cross the threshold of violative conduct "the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee." Id.

There have been so few decided cases involving this aspect of the section 7114(a)(1) duty, however, (NFFE apparently having been the first: Id. at 687, 701) that it would be helpful to determine where, if at all, the Authority's standard fits within the diverse body of law involving "fair representation" developed by the courts and the National Labor Relations Board (NLRB) for the private

sector. Guidance from a broader base of compatible caselaw is especially to be welcomed where, as here, the unique facts presented are not easily categorized with respect to the standard as stated in principle.

The key words in the Authority's standard, "deliberately and unjustifiably," are borrowed, as recommended by the administrative law judge who heard the NFFE case (Id. at 715), from a Railway Labor Act case decided by a United States Court of Appeals. Graf v. Elgin, Joliet and Eastern Ry. Co., 697 F.2d 771, 778 (7th Cir. 1983). Recognizing the range of approaches to the duty of fair representation taken by the courts and the NLRB in cases under the National Labor Relations Act and the Railway Labor Act, Administrative Law Judge Dowd performed a detailed and scholarly analysis of the private sector caselaw and ultimately recommended the "deliberately and unjustifiably" standard as one that was appropriate to Federal employee unions. Id. at 701-16. He described this standard as a narrow one--i.e., less intrusive into union operations--compared to the standards used by some courts and narrower than the NLRB's standard for the private sector: "something more than [mere] negligence". Id. at 714-16.

Judge Dowd also emphasized that "deliberately" means "intentionally." Id. at 715-16. This might seem at first blush to be an innocuous tautology. But it signifies, as a choice among existing approaches to the doctrine of fair representation, his emphatic rejection of a line of cases that interprets the duty as one that is breached by some degree of negligence or by a "perfunctory" performance of the union's representative function. Id. at 703-07, 714. See, e.g., Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891 (4th Cir. 1980) and cases cited there in which courts found that breaches of the duty need not be intentional. Moreover, when the court that devised the "deliberately and unjustifiably" standard reaffirmed its rejection of the "negligence"-"perfunctory" standard, it characterized that standard as being based on "causation or negligence," as contrasted with its own standard, which it said was based on "prohibited intent". Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242, 244 (7th Cir. 1986).

In adopting the "deliberately and unjustifiably" standard, the Authority stated that it was "in substantial agreement" with Judge Dowd's rationale and ultimate conclusions. However, the Authority specifically declined to adopt his "comments about the economic strength of Federal unions or the ability of their representatives." Id. at 688-89 and n.1. It also disagreed with Judge Dowd's

description of the "deliberately and unjustifiably" standard as narrower than the NLRB's "something more than mere negligence" standard. The Authority stated that the standard it adopted is "consistent with that used . . . by the [NLRB] in deciding similar cases." Id. at 691. As noted, the Authority made "more than mere negligence" a part of its own explanation of its standard. However, "something more than mere negligence", while it is consistent with "deliberately and unjustifiably," does not direct our focus in any particular direction within the spectrum of fair representation caselaw, as none of the standards equate "mere" negligence with breach of the duty.

Arguably of more predictive value than its "something more" standard, the NLRB treats the duty of fair representation as a fiduciary duty, carrying with it "some degree of affirmative responsibility with regard to the allocation of benefits the union has secured for the employees in a collective-bargaining agreement." General Truck Drivers Local 315, 217 NLRB 616, 617 (1975) aff'd 545 F.2d 1173 (9th Cir. 1976)(emphasis added). Treating the duty as including an affirmative responsibility means that, with respect to the union action or inaction at issue, the union must be able to explain why it did what it did. "Sometimes the reason will be apparent, sometimes not. When it is not the circumstances may be such that we will have no choice but to deem the conduct arbitrary [and in violation of the duty] if the union does not tell us what it is." Id. at 618.

The concept of the duty's having an affirmative component, however, would seem to be at odds with the "deliberately and unjustifiably" standard, at least as described by Judge Dowd when he recommended it to the Authority in NFFE. The standard he described is based on the Seventh Circuit's application of the Supreme Court's dictum that the duty is not breached "without substantial evidence of fraud, deceitful action or dishonest conduct." NFFE at 705, quoting Hoffman v. Lonza, 658 F.2d 519, 522 (1981).2/ Whether the Authority adopted the standard with

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2/ Recently, however, most of the Justices of the Supreme Court have indicated that they regard the duty of fair representation as akin to a trustee's fiduciary duty. See Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry, ___ U.S. ___, 110 S.Ct. 1339, 1346-47 (plurality opinion), 1355-56 (dissenting opinion) (1990). But at least one court has refused to read into this analogy any broad principle of fiduciary responsibility. Le'Mon v. NLRB, 902 F.2d 810, 814-15 (10th Cir. 1990).

this understanding is a different question and one that is not easily answered.

This difficulty is illustrated in the NFFE case itself. Judge Dowd applied the recommended standard to dismiss that part of the complaint that involved the union's inaction with respect to a grievance filed on behalf of employee Crawford. He found a failure to prove a breach of the duty in the absence of evidence of "hostility towards Crawford," evidence that the union's failure to take any further action on the grievance "was motivated by an intent to discriminate against Crawford or an intent to treat him unfairly," and, in short, "an absence of evidence to serve as a basis for imputing to the Union an intention on its part to deliberately and unjustifiably fail to represent Crawford properly. NFFE at 717-18. These representative excerpts make clear the kind of evidence Judge Dowd would have required to find a violation. On the other hand, the Authority concluded simply that there was no showing that the Union's conduct "constituted other than mere negligence or miscommunication." Id. at 691.

While the Authority reached the same result as the judge did in NFFE, it is worth illustrating how application of different standards may affect the outcome of cases. In Graf v. Elgin, Joliet and Eastern Ry. Co., supra, where the Seventh Circuit first articulated the "deliberately and unjustifiably" standard, union representative Evans had failed to file a grievance for employee Graf although he told Graf that he would and, later, that he had. Evans insisted that his failure was inadvertent. 697 F.2d at 774. The court did not necessarily believe him, but noted an absence of evidence that he "was trying to do in Graf," or of "such a reckless indifference to Graf's interests that it can be called intentional misconduct." Id. at 779. In the absence of such evidence the court suggested another explanation--one not even presented by Evans--that it considered to be exculpating:

> [W]hile common sense tells us that the reason Evans was not careful to preserve Graf's appellate rights may have been that he thought the grievance had little merit, this would make Evans at worst somewhat devious. It would not show intentional misconduct.

Id. Cf. Camacho v. Ritz-Carlton Water Tower, supra, 786 F.2d at 244 ("Camacho presented no evidence that at the time of the grievance meeting he was on the outs with the

Union"). Thus, the Seventh Circuit, like Judge Dowd, who attempted to apply its standard, is reluctant to impute an improper motivation to the union without some persuasive affirmative evidence, whether direct or circumstantial.

On rather similar facts, the NLRB applied the affirmative duty theory to reach the opposite result. It noted the absence of any evidence of union hostility or anumus toward the employee whose grievance it had failed to process, but then considered, as an independent issue, whether the unions actions "constituted arbitrary conduct or perfunctory treatment" of his grievance. Local 3036, New York City Taxi Drivers Union, SEIU, AFL-CIO, 280 NLRB 995, 996 (1986). The union had simply abandoned the grievance without any explanation, not even the discredited inadvertence explanation offered in Graf, supra. The NLRB held that the lack of any explanation, even that the union exercised discretion in abandoning the grievance, led to the conclusion that its actions constituted "more than mere negligence," and amounted to "a willful failure to pursue the grievance, and was therefore perfunctory." 280 NLRB at 997. Thus, while one would not have thought that motivation was an essential ingredient of the NLRB's standard, the decision imputes that element, perhaps in recognition of the fact that some courts require it.

Closer to home, the Authority has reached the same result as the NLRB did in Local 3036, in a somewhat similar case, by using the "deliberately and unjustifiably" standard. In International Association of Machinists and Aerospace Workers, Local 39, AFL-CIO, 24 FLRA 352 (1986) (Machinists), the Authority held that it was proper to infer that a union's failure to file a grievance was intentional where the circumstances made it "implausible" that its mishandling of the grievance was inadvertent and where it failed to rebut this "clear inference." Id. at 353, 361-62. But in that case the circumstances underlying this inference were reasonably compelling: the grievant had made contact with the union's representative several times during the filing period, attempting to discuss the grievance with him, but the representative had avoided him.

The Authority has put one other potentially relevant gloss on the "deliberatately and unjustifiably" standard. In National Federation of Federal Employees, Washington, D.C., 24 FLRA 320 (1986) (NFFE II), it held that a union's failure to represent an employee because of "internal Union disorganization" and "lax administration" would not, absent independent evidence that it acted "arbitrarily or in bad

faith," warrant the conclusion that it "deliberately and unjustifiably treated [him] differently from other bargaining unit employees." Id. at 324.

B. Application of the Standard to this Case

From the preceding discussion of the applicable standard, one of the only things that may be clear is that the messy bundle of facts presented here cannot be plugged into the standard without a struggle.

Preliminarily, the difficult aspects of the case may be isolated by eliminating those that, by any measure, may not contribute to a finding of a breach of the duty of fair representation. First, with respect to the allegation of paragraph 6(a) of the complaint that Perdue told Horn in March or April 1989 that he would file a grievance over her failure to be promoted to GS-9, there is no evidence that he promised to take any specific action at any identifiable time. Horn was not eligible for that promotion until July. One wonders what Perdue could have filed before then. Once Horn's anniversary date passed without a promotion, she could not reasonably rely on an open-ended promise in April to do whatever was necessary, without at least informing him that the time was now ripe. Second, Horn's equivocal testimony concerning a promise to file a grievance over her failure to receive her May 1989 performance appraisal is insufficient on its face to sustain that allegation, found in paragraph 6(e) of the complaint.

This leaves the alleged promises to file grievances over Chan's April 11, April 25, and May 4 letters of counselling to Horn. My finding above that Perdue did not promise specifically to file grievances does not necessarily dispose of the substance of these allegations. Arguably, under some reading of the "deliberately and unjustifiably" standard, Perdue breached the Union's duty by leading Horn to believe that he would take some timely and appropriate action to protect her rights and then failing to do so. That seems to be the essence of the General Counsel's case, as trimmed to fit my factual findings.

Taken in isolation, Perdue promise to do something about the letters of counselling, and his failure to show that he, personally, did anything, makes a colorable case of a breach--if the standard is the one that posits an affirmative fiduciary duty, or, as one might put it, a "more than perfunctory" standard. Using this approach one could argue that, to successfully defend his inaction, Perdue was

required at least to explain it, whether his explanation was inadvertence, exercise of discretion, or something else.

The difficulty is that Perdue could not have explained it without admitting that he undertook to represent Horn in the first place, and although I have found that he gave her certain assurances in April and May, I do not know that he remembered this in November, when the original charge was filed in this case. After all, if he was always making promises, why would he particularly remember these? Even Horn, who was vitally interested in the problems she discussed with Perdue, had difficulty remembering which ones he specifically promised to do something about.

On the other hand, if Perdue regularly made promises recklessly (that is, without any intention to fulfill them), would not those unfulfilled promises constitute breaches of the duty of fair representation? Assuming so, there is insufficient evidence here to warrant more than a suspicion that these particular promises were made recklessly. And, at least absent a finding that Perdue was reckless in this manner, Perdue's failure to explain why no grievances were filed for Horn does not necessarily warrant the inference, as in Machinists, supra, that the nonfiling was "deliberate and unjustified." For the circumstances are such that, even without a direct explanation from Perdue, the surrounding facts at least suggest legitimate reasons he may have relied on without being able to remember them.

Horn's counselling letters were, to all appearances, connected at least in some way with the other problems she was having with her supervisor--particularly her whistle-blowing. Union Vice President Hudson, in fact, expressed the view that the Whistleblowers Act would protect her from any effects from the letters. Moreover, at the same time Horn was receiving these letters, Union representatives were actively attempting to resolve a series of problems affecting Horn's working atmosphere in the printing plant. It is probably more than a coincidence that almost immediately after the May 2 meeting and Taylor's letter to Scheffer requesting that all negative material be removed from Horn's and Robinson's files, Chan revised the April 25 counselling letter so as to remove its disciplinary aspect, as discussed further below.

I conclude from this brief review of the contemporaneous events that Perdue had reason to believe that Horn's problems were being dealt with. He knew about Hudson's attempt to investigate the circumstances surrounding the

April 11 counselling letter, he received a briefing from Blackwell on the May 2 meeting, and he presumably kept informed about the situation. Given this knowledge, and even if it would have been prudent for him to file grievances over each of the letters, I can not say that in failing to do so he acted, in the words of the Authority's NFFE decision, supra, "arbitrarily or in bad faith." 23 FLRA at 691. Moreover, although I am not sure how to interpret the further requirement in NFFE that the action "must have resulted in disparate or discriminatory treatment" (Id.), I do note the absence of evidence that the letters had any substantial effect on Horn's subsequent career prospects.

Staying for a moment with Perdue's conduct as the focus of inquiry, it is clear that his conduct did not amount to a breach of the duty if one interprets the "deliberately and unjustifiably" standard the way the Seventh Circuit does and Judge Dowd, in NFFE, did. For not only is there an absence of evidence of hostility or intention to discriminate against her; in the light of Perdue's knowledge of the ongoing efforts on Horn's behalf there is also no basis for finding a reckless indifference to her interests.

Up to now I have accepted the General Counsel's premise that Perdue's conduct alone provides the key to the question of whether the Union fulfilled its duty to Horn. Even so, I refused to ignore the other Union officials' activities, but have used those activites Perdue knew about as an aid in evaluating his conduct. Ultimately, however, I do not take Perdue's conduct as the sole measure of the Union's compliance. It is the Union, not Perdue as an individual, that has the duty to represent unit employees.

The General Counsel argues that the other Union officials represented Horn on different issues from those on which she sought Perdue's assistance. But that is only partly true, and to that extent, only superficially so. Horn called Hudson about her April 11 counselling letter, and he promptly sought to investigate it. On another occasion he told her that he thought her whistle-blowing complaint would take care of any problems raised by the counselling letters. Taylor reviewed the April 11 letter in preparing for the May 2 meeting, and, after that meeting, wrote a request for all "negative material" to be removed from Horn's file. The whole series of letters and meetings to address various problems for Horn and Robinson had in common the subject of the bad relations between these employees and their supervisor, and must be taken into consideration in deciding whether the Union made a good

faith effort to deal with the letters of counselling. Further, it is at least arguable that compliance with the duty of fair representation is not to be measured by a union's efforts to deal with a single aspect of the employee's representational needs but by the totality of its efforts.

I need not decide whether to go that far because here the Union made substantial efforts to protect the very interests of Horn's that were potentially jeopardized by the problems underlying the letters of counselling. Surely Taylor's May 2 request to remove all "negative material" from Horn's file encompassed her protection from any future progressive discipline based in any part on the misconduct alleged in the letters. The timing of Taylor's request further warrants the inference that he or one of the other Union representatives had attempted or at least had intended at the May 2 meeting to address the subject of the letters.

No great significance should be attached to the fact that the Union did not use the formal grievance procedures to seek a remedy. Unfortunately, it let the time to file a grievance over the April 11 letter go by without taking any effective action to preserve Horn's rights. But the Union's opportunity to act was impeded, at least to some extent, by Hudson's difficulties in being released and by his opinion (erroneous, it would seem) that the Whistleblowers Act would protect her. More importantly, that failure is not to be viewed in isolation. The Union, however skillfully or clumsily, was attempting to sort out the issues and to get to the bottom of the general problem.3/ When it came to the (apparently more serious) April 25 letter, the Union did take effective action, albeit not through the grievance procedure.

Thus, Chan's May 4 letter constituted no additional threat to Horn's security but might reasonably be seen as an attempt by Chan (probably at the direction of his superiors) to defuse or dilute the implications of the April 25 letter. While Chan repeated the allegations of misconduct, he essentially changed the nature of the letter from a basis for future disciplinary action to an informal counselling, which, on its face, was not to be made part of Horn's permanent file. It is true that the May 4 letter did not expressly supercede the April 25 letter and that the record

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3/ As Taylor credibly testified, "I started to work on this, and the deeper I got, the . . . deeper it got."

contains no evidence that the April 25 letter was removed from her file. Nevertheless, Chan's action indicates that management understood the Union to be seeking relief for Horn with respect to the letters. The May 4 letter does appear to be a positive response to the Union's efforts.

Should the Union nevertheless have filed formal grievances over the April 25 and May 4 letters? Should Perdue at least have told Horn that (in his opinion) the May 4 letter was a relatively harmless resolution of the problems the April 25 letter raised for her? Shouldn't he at least have informed her that she had a right to file a grievance on her own?

If, under some standard of conduct, the Union and its representatives should have done one or more of these things, I am not satisfied that any of them were required by the Authority's standard for the statutory duty of fair representation. Clearly there was no breach under the Seventh Circuit's and Judge Dowd's narrow interpretation of the "deliberately and unjustifiably" standard.

To the extent that the Authority might be thought, despite its nominal adoption of the Seventh's Circuit's standard, to be more in tune with the NLRB's approach, the case is arguably closer but does not cross the line. If one looks at what the Union did to try to rescue Horn from the sea of troubles in which she saw herself in the spring of 1989, it is difficult to characterize its conduct as inaction, as more seriously deficient than "mere negligence," or as "perfunctory." If the Union's efforts did not seem to Horn as well coordinated as she might have wished, at least a partial explanation could have been that the Union was, as Horn described it, "unorganized in that manner" (Tr. 92). Cf. NFFE II, supra, 24 FLRA at 324. Finally, the record contains insufficient basis for a conclusion that the Union "treated [Horn] differently from other employees in the unit." NFFE, supra, 23 FLRA at 691.

For all of the reasons discussed above, I recommend that the Authority issue the following order:

ORDER

The complaint is dismissed.

Issued, Washington D.C., January 24, 1991

JESSE ETELSON
Administrative Law Judge