

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

1199 SEIU-UNITED HEALTHCARE WORKERS
EAST A/W SERVICE EMPLOYEES INTERNATIONAL
UNION, SOC, CLC (WHITMAN-WALKER CLINIC, INC.
d/b/a WHITMAN WALKER HEALTH)

and

Case 05-CB-267953

CHARLOTTE LUISA W. CLEVELAND,
An Individual

Andrea J. Vaughn, Esq.

for the General Counsel.

James R. Rosenberg and Ashley E. Macaysa, Esqs. (Abato, Rubenstein and Abato, PA,
Baltimore, Maryland),

for the Respondent.

Kara M. Maciel, Esq., (Conn, Maciel, Carey LLP, Washington, D.C.) for the Employer,
Whitman-Walker Health.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan,, Administrative Law Judge. This case was tried in Washington, D.C. from September 13, to September 16, 2022. Charlotte Luisa W. Cleveland filed the charge giving rise to this matter on October 21, 2020. The General Counsel issued the complaint on June 27, 2022.

The General Counsel alleges that Respondent Union violated Section 8(b)(1)(A) of the Act by failing to take the grievance it filed over the Charging Party's termination to arbitration. The General Counsel alleges that the failure to go to arbitration was perfunctory and/or arbitrary. Unlike many other duty of fair representation cases, the General Counsel does not allege that the Union failed to take the grievance to arbitration on account of any animus towards Ms. Cleveland. For the reasons stated below, I conclude that Respondent Union did not violate the Act as alleged.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

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I. JURISDICTION

The Charging Party’s employer, Whitman-Walker Clinic/Health (WWH) provides outpatient medical care in Washington, D.C. It annually derives revenues in excess of \$250,000 and receives goods valued in excess of \$5,000 directly from points outside of the District of Columbia. Whitman-Walker and the Respondent Union admit and I find that the employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, 1199 SEIU Health Care Workers, is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

The Charging Party, Charlotte Luisa W. Cleveland, was hired by Whitman-Walker Health in July 2018 as a bilingual public benefits insurance navigator (PBIN). Her job was to assist patients with their health insurance coverage.

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With the advent of the COVID pandemic in the Spring of 2020, Ms. Cleveland and other WWH employees began working remotely. To do so, she signed the employer’s telework policy. At about the same time, Whitman-Walker-made its computerized records available through Sharepoint so that they could be accessed remotely.. It hired a third-party contractor to move its records to Sharepoint. The original contractor made some records, which were not supposed to be generally available, accessible to all employees. Included in these records were confidential personnel records. Prior to and after this migration, Whitman-Walker, required employees to get permission from its human resources department to access their own personal records. Its telework agreement requires employees to immediately inform the Employer’s Compliance and Information Technology Departments, via an incident report, and the employee’s supervisor, in the event of any unauthorized access to WWH records

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Ms. Cleveland testified that she had concerns as to whether all the employees in the PBIN department were being compensated equitably. On May 13, 2020, Cleveland accessed WWH payroll records. She testified that she was looking for the letter granting her an annual 2020 wage increase. Between May 13 and 15, she looked at personnel records of several other employees. On May 14 at least, Cleveland did not access her own documents and may not have done so until May 15.

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¹ Tr. 168, line 8 is improperly transcribed. I did not address anyone as “you gals.” Tr. 416, lines 15 and 23 should read compliance rather than clients.

At least 3 other employees also looked at personnel records without authorization. 1 of these was Judy G,² who looked at the W-2 form of one fellow employee and the performance summary of another. The 2 other employees self-reported their unauthorized access. The record does not indicate whether the 2 self-reporting employees looked at records other than their own.

5 The compliance department did not refer the self-reporting employees to human resources for possible disciplinary action, as it did with Cleveland and Judy G.

On or about July 6 or 7, Estelle Johnson, WWH's Director of Compliance, contacted Cleveland to inform her that WWH had discovered her unauthorized access of employee personnel records. Johnson sent Cleveland an Excel spreadsheet depicting these incidents and informed Cleveland that WWH was investigating this situation. Johnson spoke with Cleveland on July 9. She told Cleveland that she would investigate the report she received from WWH's IT department and would forward the results to WWH's human resources department.

On July 10, Nile Franks, WWH's Director of Human Resources, contacted Cleveland to inform her that HR was investigating Cleveland's accessing of personnel files. Franks informed Cleveland of her right to have a union representative present when she interviewed Cleveland. Cleveland selected union delegate (shop steward) Katie Supko and union administrative organizer Lisa Wallace to be present at the interview, which was conducted on July 13, virtually.

20 After the interview Franks put Cleveland on paid administrative leave.

On July 14, Cleveland emailed Supko and Wallace complaining that Ms. Franks and WWH's IT department had a conflict of interest in conducting their investigation. On July 15, Cleveland submitted a statement setting forth her concerns about her compensation, G.C. Exh. –

25 12.

In her statement, Cleveland continued to discuss the events of May 13. She stated that she accessed Sharepoint to view her 2020 wage increase letter.³ She admitted that while doing so she noticed that other employees' increase letters were accessible. In a sentence that Franks and then the Union found particularly significant, Cleveland wrote:

Curiosity along with the long-held feeling of pay disparities and pay inequity got the best of me and I looked at some of my fellow staff's letters. I never downloaded any information. I did open and view some of the documents on the excel list [which Franks had provided her]; others on the list I do not recall opening.

I recognize now that it was a mistake and I will not do it again.

Nile Franks met with Cleveland, Supko and Wallace virtually on July 17. In that call, Franks stated that Cleveland's statement, that curiosity got the best of her, jumped out at her.⁴ Franks mentioned the security provisions of the telework agreement, WWH's employee

² Aka Judy H.

³ I find that this may or may not be true. I generally do not automatically credit uncorroborated self-serving testimony on a material fact.

⁴ When several witnesses focused on Cleveland's curiosity, I interpret this as an understanding that Cleveland did not have any legitimate reason to look at these records.

handbook, its guide to ethical conduct and the provisions of the Union's collective bargaining agreement pertaining to just cause for discipline. Then Franks informed Cleveland that she was being terminated immediately.

5 When the termination meeting ended, union delegate Katie Supko called Cleveland and told her that she would have to look into what their next steps might be. On July 17, Supko
texted that Administrative Organizer Lisa Wallace told her to let Cleveland know that she had
the right to grieve her discharge. Both commented on the fact that Wallace did not say much or
anything at the termination meeting. Supko stated that Wallace's silence made it more difficult
10 for her to say anything due to Wallace's greater experience in such matters.

 On July 17, co-worker Judy G called Cleveland and told her that she also was fired for
looking at W-2 forms. The record indicates that Judy G looked at documents pertaining to 2
fellow employees. Judy G had applied for graduate school and in her meeting with Franks, she
15 told Franks that she was going to resign. She asked if her resignation could be accelerated rather
than being terminated. Franks agreed. The record does not establish whether Judy G informed
WWH management of her intention to resign prior to her becoming aware that she was being
investigated. Nile Franks testified that she learned that Judy G had informed her supervisor that
she would be resigning from the supervisor, Erin Loubier. She did not specify the date that
20 Loubier so informed her, Tr. 415-17.

 Cleveland had also been accepted to graduate school in the Fall of 2020, but decided to
defer her attendance. The record does not indicate what WWH knew about Cleveland's plans
other than at some point Cleveland had told her immediate supervisor, Erin Loubier, that she
25 planned to go to graduate school and that Loubier had written a letter of recommendation for
Cleveland.

 On July 21, 2020, Lisa Wallace informed Cleveland that the Union would file a grievance
on her behalf and explained, at least to some extent, the steps of the grievance and arbitration
30 process. Wallace discussed the Union's internal appeals process with Cleveland, assuming
WWH denied the grievance. Wallace explained that a panel of 3-5 coworkers from WWH
would consider her case in a Chapter Appeals Proceeding and decide whether the Union would
arbitrate the grievance. If the Chapter Appeals Panel decided against arbitration, Cleveland was
told she had a right to go to a Regional Appeals panel. The Union filed a grievance on
35 Cleveland's behalf on July 22.

 The major factual dispute in this case is whether Wallace explained to Cleveland her role
in the Chapter Panel's deliberation. Wallace testified that she explained that her role was to give
her "neutral" evaluation of the merits of Cleveland's grievance and her assessment of the
40 chances for success in arbitration. Cleveland testified that Wallace gave her no such explanation.

 Wallace requested that WWH provide her all information relating to Cleveland's
discharge on July 23. She followed up on this request on July 28.. Franks provided the log
showing Cleveland's accessing Sharepoint files, her termination letter, the telework agreement,
45 portions of the WWH handbook and Cleveland's acknowledgement of the handbook, and
Cleveland's statement.

Sometime between July 22 and the grievance hearing on July 29, Cleveland met with Lisa Wallace and Katie Supko. Wallace or Cleveland mentioned the case of Jess S, a friend of Cleveland. Cleveland testified that Jess S. had told her that he had been investigated for a potential HIPPA violation in 2019 and that he was not discharged. Wallace suggested that Cleveland get a written statement from Jess S., who no longer worked for WWH in the summer of 2020.

At 3:00 p.m. Eastern Time on July 29, Nile Franks conducted a virtual grievance meeting with Cleveland, Supko and Wallace. This meeting was scheduled to occur prior to the end of Supko's employment with WWH on July 31. 15 minutes after the meeting started Cleveland forwarded to Wallace and Supko an email she received at 3 p.m. from Jess S. Jess S. stated that in April 2019 he and another staff member briefly accessed a medical chart about a staff member who was also a patient.. Jess went on to write that compliance investigated the incident and concluded that he had violated HIPPA. According to Jess S., he was given an administrative warning and required to take HIPPA retraining as were 2 other employees.⁵

At the grievance hearing, HR Manager Franks reiterated many of the things she had said at the termination meeting. She stated that Cleveland's statement that, curiosity got the best of her, jumped out at her and that she, Franks, would not be comfortable working with someone who knew how much she was being paid.

Cleveland read her prepared statement, G.C. Exh. 12, and said she was aware of a staff member who violated HIPPA and was not discharged. Franks refused to discuss this, stating it was confidential. Katie Supko argued that this incident was relevant to Cleveland's termination. Franks again refused to discuss it. Franks also refused to discuss whether anyone else who accessed Sharepoint files in an unauthorized manner had been terminated. Wallace stated that Cleveland was being treated disparately compared to a white male.

Wallace and Supko at least inferentially asked Franks to reinstate Cleveland. They argued that she had been a good employee and that her violation of WWH confidentiality rules was largely the fault of the IT department. Supko, in particular, pushed back on Franks' refusal to consider the Jess S. case, Tr. 602.

Supko asked if Cleveland would be eligible for rehire. Franks said she would but that if she applied to WWH, the circumstances of her termination would come up. Franks also promised that WWH would not contest Cleveland's claim for unemployment insurance. The record indicates that WWH did not live up to this promise.

Franks denied Cleveland's grievance on August 5, 2020. Cleveland spoke with Wallace on August 7. Wallace told Cleveland that she understood why Franks refused to discuss the alleged HIPPA violation on the grounds of confidentiality. They also discussed a hearing before a panel of rank and file employees who were union delegates (stewards). Cleveland asked Wallace what she thought this appeals board would decide. Wallace told her that she

⁵ Nile Franks confirmed that Jess was only required to undertake retraining regarding HIPPA.

thought the panel would vote not to go to arbitration because Cleveland admitted she accessed the other employees' files out of curiosity.

5 Prior to the Chapter Appeals Board Meeting on August 18, Wallace did not tell Cleveland that she and/or Yahnae Barner, a vice-president of the local union, had determined that Cleveland's grievance had insufficient merit to arbitrate or that Wallace would tell this to the appeals board panel members at their meeting.

10 Prior to talking to Cleveland on August 7, Wallace exchanged text messages with Barner. R. Exh. 14. Barner wrote, "...Hearing and Appeals? It's her only option because I can't push this forward to arbitration knowing her case doesn't have any merit."

The August 18, 2020 Chapter Appeals Board Meeting

15 A chapter appeals board meeting was conducted virtually on August 18, 2018. The hearing was taped, G.C. Exh. 38 and transcribed, G.C. Exh. 39. Participating in the hearing were Yahnae Barner, a Vice-President of Local 1199, Cleveland, Wallace and 3 union delegates employed by WWH: Soerner Jaramillo, Jisanet Gonzales⁶ and Camille Benbow.

20 Barner opened the hearing by telling Cleveland, "You will state the facts of the case the way you see it. Lisa Wallace will state the facts of the case the way she sees it," GC Exh..39, at 3. Then Barner called upon organizer Wallace. Wallace went through the chronology of Cleveland accessing the Sharepoint personnel files and the Employer's response. She mentioned that Cleveland would never have been able to view these files if WWH's information technology
25 department had migrated the personnel files to Sharepoint properly. Cleveland then read the statement she had prepared for WWH's human resources department.

30 Wallace told the panel that the Union and Cleveland had attempted to convince HR Director Franks that Cleveland was being treated disparately. Panel member Jaramillo asked Cleveland, if in accessing these files on 3 different days, it occurred to Cleveland that the information was confidential, G.C. Exh. 39 at 16.

35 Later, Wallace made a number of incorrect or misleading or confusing statements about what happened to other employees guilty of the same offense:

We have had other staff that has been disciplined for the exact same thing.

We have Union and non-Union that was held accountable.

40 G.C. Exh.-39, p. 22

Some people were found to self-report and some people had been found to not understand exactly what they accessed but compliance did reach out to them. They went through the whole thing and found that some of the people were not, you know, not at fault.

⁶ Also known as Jisanet Gonzalez Uben.

So, but unfortunately, Charlotte's case was different.

G.C. Exh. 39, p. 24.

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Wallace's statements do not accurately reflect WWH's treatment of Judy G.

The panel then discussed whether there were alternate means for Cleveland to address her concerns about pay disparity. After about 45 minutes of deliberation, Barner asked Wallace and Cleveland to make a closing statement, *Ibid.*, at 40-43. Wallace concluded her remarks as follows:

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Given the history of me doing Hearing and Appeals and arbitrations, their [WWH] decision to do that [terminate] would be honored by an arbitrator. So they could have been very nasty and just said, oh, no, no, no, but they didn't do that. But I don't see like, their movement in this situation, I don't see as being able to win this case in arbitration. But, that would be definitely up to the committee, but given the experience and history that I've spent with 1199, I just don't think we will win this in arbitration.⁷

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Cleveland responded:

No worries. Yeah, I just wanted to say, like I do hope that I'm granted the opportunity to move to arbitration...

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I don't know what you all's process is but if the committee, if you are discussing and, like need anything else from me, I'm more than happy to , like forward any documents I have or hop on another call.

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Barner, Wallace and Cleveland left the virtual meeting and the three panel members deliberated. Panel member Benbow appeared to be on the fence as to whether to go to arbitration, balancing the failure of WWH's IT department to secure the information with Cleveland's failure to tell anyone that she saw confidential information. Jaramillo chimed in:

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I was kind of shocked is the-she's not the only person who did it. There's more than one person who did it...That's the only part I'm conflicting with because they should be a call across the board...I don't think it matters how many times...they should all be handled the same way.

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Id. at 44.

Panel member Gonzalez disagreed that the number of times Cleveland accessed the files was irrelevant.

⁷ In the 2 hour and 21 minute audio recording, G.C. Exh. 38, this appears at about 1 hour and 13 minutes.

It is clear that she went a couple of days, not all those she accessed, but the ones that say download which I counted, it was seven of them. Download means that she did open it, and that was seven items that she opened.

5 Id. at 45.

Later Gonzalez opined:

10 I think maybe it should have been a write up, but at the same time, she maliciously went back is what the main issues is. If it was only one or two things, I can understand that, but it was, you know, I mean different times in here, but there was times on different days, too.

15 Id. at 47.

The panel members agreed that Ms. Cleveland's misconduct was in large part the fault of WWH's IT department.

20 Gonzalez then stated:

Even if that was the case, and you know, that she just kept, you know, opening stuff, I think—I don't believe she has a case to be honest. Maybe if it was not many times, because I know all these are not open, you know, what she opened...

25 Id. at 49.

Jaramillo responded by agreeing that Cleveland was at fault, but went back to the fact that 3 other employees who accessed confidential files at the same time were not terminated. However, she noted that the panel did not know how many times these 3 clicked on confidential files.

30 Gonzalez then stated that the panel was to make a decision based on Cleveland's conduct alone. Jaramillo agreed, but then said she could not put aside that WWH decided to terminate one employee and not the others. Gonzalez reiterated the importance of Cleveland's repeated misconduct. Benbow, who said very little, chimed in with her concerns about Cleveland's repeated accessing the confidential personnel files. Id. at 51.

Later Benbow stated:

40 I just think that the main argument would be that she access it so many times I don't think that—honestly I don't think that it would get to arbitration on that entire issue...My major issue, you know, concern is the, you know, the fact that she went back and back..

45 Id. at 54.

Jaramillo reiterated that she thought the whole situation was the fault of the IT department. She seemed to believe that other employees guilty of the same misconduct had been terminated. Benbow, incorrectly responded, "They were terminated." Then there appeared to be some confusion as to what happened to other employees. The essence of the discussion is that the panel members were under the impression that Cleveland was not the only employee terminated for accessing the Sharepoint personnel files, which is incorrect. Id. 56-57.

Jaramillo asked that the panel members vote and asked if Cleveland had a chance going to arbitration.

Benbow responded, "I honestly don't think so."

Jaramillo and Gonzalez opined that Cleveland had a lot of good points, but then Gonzalez stated, "I don't think she has a chance."

Id. 57-58.

Jaramillo asked Gonzalez if she was voting No. Gonzalez indicated that she was. Benbow agreed. Jaramillo said she was torn.

Honestly, I think she has a lot of valid points, and I think that she might have a chance, might, but I do understand the fact that it has to be an agreement first. So you two said no. so that's completely a no.

At this point Lisa Wallace rejoined the meeting and asked if the panel members were o.k.⁸ Wallace told the panel members not to say anything, but Jaramillo asked her whether all the employees who accessed confidential files were terminated. Wallace answered that they were not. She said some of those were in the files legitimately and then confidential files popped up. She also mentioned that some employees self-reported their access to the files. Then Jaramillo stated:

Okay. So with that being said, I think we all come to an agreement, right ladies? It's a no go.

Id. 58-60.

The panel confirmed their decision a few minutes later, Id. at 62, after Ms. Wallace hung up. They also continued to deliberate. Ms. Gonzalez appeared to have changed her mind at Id. 69:

I think to be honest, we should give it a shot. Do[es] she have a big shot? No. But at least she will have a first shot which I don't think she had with HR.

⁸ Wallace testified that Lenny Frazier, the Union's Office Manager, asked her to check on the panel because the members were taking a long time deliberating.

Then Gonzalez said she did not think Cleveland could win in arbitration and that her vote was still No, Id. at 70-72.

5 Jaramillo asked Gonzalez if she was voting no because Wallace said she did not think Cleveland had a chance in arbitration. Gonzalez denied that and returned to Cleveland's repeated clicking on the files. Benbow appeared to agree, Id.. at 71.

10 During the Appeals Board meeting, Cleveland texted Katie Supko, who no longer worked for WHW. Cleveland told Supko that Wallace was not on her side, that Wallace was "laying into the curiosity piece." Cleveland also told Supko that Wallace told the committee that she doesn't think the Union should arbitrate.

15 Cleveland asked Supko, "Isn't Lisa supposed to be my representative and on my side? Or at least neutral?" Supko replied that "it seems like she shouldn't have done that." Cleveland stated that she was confused about Wallace's job and role and that at the appeals meeting she acted as if she was in bed with WHW, G.C. Exh. 28.

20 After the hearing Cleveland and Yahnae Barner exchanged emails about Wallace's role in the chapter appeals board meeting. Cleveland took issue with Barner's assertion that Wallace had explained her role to Cleveland prior to the hearing. I find that Wallace did not explain her role in the chapter appeals hearing to Cleveland beforehand. Wallace never testified that she did so,

25 On August 20, 2020 Barner informed Cleveland that the chapter hearing and appeals board decided not to submit her grievance to arbitration. Barner advised Cleveland of her right to appeal to a "Regional" Hearing and Appeals Board, G.C. Exh. 30.

30 Cleveland and Barner spoke by phone on August 24. Cleveland told Barner that nobody explained to her that Wallace would be recommending against taking her grievance to arbitration. Cleveland's testimony at the instant hearing confirms that Wallace told her on August 7 that the Appeals Board would likely vote not to take her grievance to arbitration, Tr. 181-82, 304. Cleveland's notes of her conversation with Wallace on August 7, indicate that Wallace told her Wallace did not think her grievance would go anywhere because she accessed
35 the employee files out of curiosity, Tr. 340-41, G.C. Exh. 8.

40 Barner told Cleveland that she and Wallace had discussed her grievance prior to the Chapter Appeals meeting and determined that it did not merit going to arbitration. There is no evidence that Wallace or any other union official communicated to panel members before the August 18 chapter appeals board meeting.

Cleveland asked for a new hearing before the chapter hearing and appeals board. This request was denied by the Union's Executive Vice President Lisa Brown, Barner's boss.

45 On September 18, Cleveland asked Barner to provide her certain information to prepare for the Regional Appeals Board meeting. One of the requests was for information relating to

WWH's treatment of other employees who looked at the Sharepoint files. Barner responded that she could not give Cleveland this information due to its confidentiality, G.C. Exh. 24.

5 Cleveland also asked Barner whether there were any procedural rules applicable to the Regional hearing that she should be aware of. Barner responded that there were no procedural differences between the Chapter and Regional panel meetings, G.C. Exh. 42.

The Regional Appeals Board Meeting

10 Cleveland, Wallace and Barner participated in a virtual Regional Appeals Board meeting on September 24, 2020. This panel consisted of union delegates who did not work for WWH. The meeting was chaired by Donald Bolin, a 1199 delegate who works for Georgetown Hospital. Bolin refused to consider any information not considered in Cleveland's grievance hearing, G.C. Exh. 41. Wallace reiterated her opinion that Cleveland's grievance should not be arbitrated.
15 Cleveland emphasized the WWH IT department's role that led to her accessing the confidential files. She attempted to read into the record the statement from Jess S. Bolin asked Wallace if this statement was considered in the grievance meeting with WWH and by the Appeals Board. Wallace incorrectly responded that the statement was not used in either, Id. at 15.

20 Cleveland stated she submitted the statement to Wallace in advance of her grievance hearing. Wallace stated:

The document where Ms. Cleveland wanted to read from came after the grievance hearing, and we did not use it for the hearing and appeals.

25 Bolin refused to consider the statement or any evidence of disparate treatment..

Cleveland took issue with Wallace, stating that the statement was sent to Wallace and Supko at 1:15 p.m., which was Mountain Time. The statement was sent to Wallace at 3:15 p.m.
30 Eastern time, 15 minutes after the grievance meeting began.

Bolin asked Wallace if the Jess S. statement was read into the record at the grievance hearing. Wallace said it was not because WWH (Franks) insisted that the statement involved a confidential matter. Bolin reiterated his ruling that the statement could not be considered by the
35 Regional Appeals Board. Cleveland challenged Bolin on his statement of the rules for the Regional Proceeding. Bolin allowed Cleveland to read the Jess S statement but said the board would not take it into consideration.

40 Cleveland also raised for the first time an assertion that WWH's chief external affairs officer had violated HIPPA in 2019 and had not been terminated.

In answer to a panel member's question, Wallace stated that those employees who were not fired after accessing the confidential files self-reported that fact to WWH. Later she stated these employees were terminated. Chairman Bolin indicated that what happened to other
45 employees was irrelevant, G.C. Exh. 41. at 23-25.

Cleveland informed the Regional Board that Wallace had not explained her role at the Chapter Appeals Board hearing to her beforehand. Wallace disputed this. After Cleveland, Wallace and Barner left the meeting the Regional Panel voted unanimously not to take Cleveland's case to arbitration. The only thing the panel members discussed then was whether Cleveland had someone coaching her. There is no credible evidence that the Union has any rule preventing a grievant from consulting with anyone else during any type of panel hearing. Yahnae Barner informed Cleveland that the Regional Board decided that her grievance did not merit arbitration on September 29, 2020.

10 Comparison between Judy G and Cleveland

Nile Franks conducted an investigatory interview with Judy G on July 17, 2020. Supko and Wallace represented Judy G. According to Franks, Judy G had already submitted her resignation from WWH to start graduate school. The record does not reflect that Judy G submitted her resignation or told WWH that she was planning to go to graduate school in the Fall of 2020, prior to July 17. G.C. Exh. 49 suggests she did not do so until after she learned that she was being investigated by human resources and after July 14. G.C. Exh. 50 indicates that Judy G did not offer to resign until July 17. Franks testified that she spoke to Erin Loubier, the immediate supervisor of Judy G and Cleveland. Further she testified that Loubier told her that Judy G had submitted a resignation to Loubier, which had not reached human resources, Tr. 465. Franks did not testify as to when she talked to Loubier. I find there is no credible evidence that Judy G offered to resign before being told she was being investigated by human resources and before she understood that she was in danger of being terminated.

Franks offered to accept Judy's resignation in the presence of Wallace and Supko. It became effective July 20. No grievance was filed on behalf of Judy G. There is no evidence that Franks or the Union suggested that Cleveland offer to resign in lieu of being terminated.

30 Evidence regarding the role of the union representative at a chapter appeals hearing

Charlotte Cleveland testified that she understood Wallace's role at the chapter appeals board hearing was to be her representative. She testified that nobody had explained to her anything to the contrary or that Wallace would tell the panel that she did not think Cleveland's grievance should go to arbitration. Jisanet Gonzalez, the panel member most unsympathetic to Cleveland, had the same understanding, Tr. 519-521.⁹

Analysis

The General Counsel submits that Respondent Union breached its duty of fair representation and handled her grievance in a perfunctory manner based on the following:

1. Failure to Advocate for Ms. Cleveland during her suspension and discharge meetings.

⁹ At page 37 of its brief, Respondent indicates that Gonzalez' testimony was inconsistent and confused. I have reviewed her testimony several times and do not agree.

Specifically the General Counsel faults the Union for not taking issue with Nile Franks assertions as to how Cleveland accessed employee files.¹⁰ The Union clearly advocated on Ms. Cleveland's behalf with Ms. Franks. For example, It tried to shift responsibility to the WWH IT department. I find that the Union did not act perfunctorily or arbitrarily in accepting Franks' explanation as to how Cleveland got to the files over Cleveland's self-serving explanation. Franks had no obvious stake in misrepresenting how the access occurred. Cleveland had every incentive to contend that she did not access the confidential files intentionally.¹¹

2. Failure to adequately investigate Cleveland's grievance¹²

The General Counsel argues that the Union's request for information to WWH was inadequate and failed to follow-up after WWH responded.

The General Counsel faults the Union for asking Cleveland to obtain a statement from Jess S. and for not asking for the disciplinary records of other employees who accessed the confidential files and for not investigating Cleveland's claims that she was discharged as the result of harassment. The Union made an information request. It is difficult to determine how a more extensive one would have changed the outcome of Cleveland's grievance-other than specifically asking for information which would have disclosed WWH's treatment of Judy G. WWH was not going to provide the Union with comparator evidence. One could argue that the Union should have filed an unfair labor practice charge against WWH for its failure to provide comparator evidence, but I do not think that translates into an 8(b)(1)(A) violation.

3. Failure to push back against Nile Franks' refusal to consider the Jess S. statement.

Katie Supko pushed back against Franks' claim of confidentiality. Whatever else she and Wallace did not do does not make their efforts perfunctory.

4. Failure to inform Cleveland that the Union had decided her grievance did not merit arbitration prior to the chapter appeals panel meeting, thus leading Cleveland to believe that the decision to arbitrate or not was an open question.

The General Counsel did not establish that there was anything improper in Wallace and Barner determining that Cleveland's grievance did not have sufficient merit to warrant arbitration.

5. Failure to adequately assess the merits of Cleveland's grievance.

¹⁰ The record does not establish that Franks' assertions were incorrect.

¹¹ I also find that the Union was under no obligation to accept at face value Cleveland's self-serving explanation as to why she accessed these files. There is evidence in the record that Cleveland looked at other employees' information before accessing her own.

¹² There is no evidence that Cleveland was discharged as the result of harassment or discrimination on the basis of gender, ethnicity or race.

There is no evidence to support this. Wallace and Barner determined that Cleveland accessed the confidential personnel files of other employees repeatedly without authorization. That alone was adequate assessment of the grievance.

- 5 a. Failure to investigate Cleveland's claim that she was searching for her own pay increase letter and pay disparities at WWH.¹³ Whether Cleveland started looking into the personnel files, as she claimed, to look at her own pay increase letter is totally irrelevant to whether or not WWH had just cause to terminate her.
- 10 b. Failure to investigate comparator evidence, particularly that regarding Judy G. and Jess S.
- c. Failure to push back against Franks' assertions of confidentiality. Supko, on behalf of the Union adequately challenged Franks on this point.
- 15 6. Failure to seek a settlement short of termination. The Union, at the grievance hearing, at least inferentially was arguing that Cleveland's termination was not warranted.
7. Failure of the panel members at the Chapter and Regional appeals meetings to understand the Union's processes. Reliance on misinformation from Wallace.
- 20 a. Failure to mention that Judy G. was allowed to resign. This is Cleveland's strongest argument. However, it is not enough to find that the Union's efforts on her behalf were perfunctory, i.e., superficial or cursory.
- 25 b. Benbow and Jaramello's understanding that other employees involved had been terminated. The panel did consider whether Cleveland was being treated fairly in comparison to other employees. However, it ultimately found that regardless, Cleveland would not prevail at arbitration because she access confidential files repeatedly over a 3-day period without authorization. I deem the continual reference to her curiosity as being recognition that Cleveland did not have any legitimate reason to access other employees' confidential personnel information.
- 30 c. Panel members' impression or confusion as to whether an arbitrator could consider WWH's IT role in making personnel files available to all employees and comparator evidence. Although, the panel members thought that the role of WWH IT should be considered by the Union, there is no evidence that an arbitrator would have found that
- 35 WWH lacked just cause to fire her on that basis.
8. The Union's failure to provide Cleveland with procedures for the panel meetings. Despite this Cleveland was able to fully plead her case to the chapter panel.
- 40 9. Failure to tell the Regional Panel that Cleveland had tried to get Franks and the Chapter panel to consider the Jess S. statement and Wallace's false statements in this regard. There is nothing in this record that indicates that an arbitrator would have found in Cleveland's favor on the basis of the Jess S. statement.
- 45 10. Wallace's misstatements to the Regional panel regarding WWH's treatment of Judy G.

¹³ I find this to be totally irrelevant.

11. The Regional panels' quick decision not to arbitrate after discussing only whether Cleveland had been coached. It has not been established that the Union had a rule prohibiting Cleveland from having assistance in the Regional panel hearing. However, the record does not establish that the Regional Panel decided the issue before it on this basis.

Applicable case law and application to this case

A union breaches its statutory duty of fair representation when its conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.

Contrary to my understanding when hearing this case, bad faith or hostility to the bargaining unit member is not a prerequisite to finding a violation of a Union's duty of fair representation under Section 8(b)(1)(A). Although a Union has great latitude in its handling of grievances, it must have a reason for its decision not to file a grievance or as in this case, not to proceed to arbitration, *General Truck Drivers Local 315*, 217 NLRB 617 (1975).¹⁴

The Respondent Union in this case clearly had a reason for not taking Cleveland's grievance to arbitration: its inherent weakness. There is no question that Cleveland accessed the confidential personnel files of several employees over a period of 3 days and had no legitimate reason for doing so. Respondent's policies in its employee handbook, its guide to ethical conduct, the telework agreement and the provisions of the Union's collective bargaining agreement pertaining to just cause for discipline provided WWH a basis to terminate Cleveland.

The duty of fair representation does not require that every possible option be exercised or that a grievant's case be advocated in a perfect manner, *Truck Drivers, Local Union No. 355*, 229 NLRB 1319 (1977).

While there are many additional things this Union could have done for Cleveland, what it did fulfill its duties under the Act. The Union filed a grievance, represented Cleveland at her investigatory meeting with Franks and at her termination meeting. Supko, apparently a friend¹⁵ of Cleveland's, and Wallace advocated for Cleveland, in trying to shift blame for Cleveland's misconduct to the IT department, at least inferentially arguing that for that reason and others she should not be terminated.

A Union does not violate the duty of fair representation if its conduct is the result of mere negligence, poor judgement, ineptitude, forgetfulness, or inadvertence, *Plumbers Local 195 (Stone & Webster)*, 240 NLRB 504 (1979); *Amalgamated Transit Union Local 1498*, 360 NLRB 777, 779 (2014).¹⁶

¹⁴ However, the Supreme Court decision in *Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967) suggested that the union's conduct must be arbitrary, discriminatory or in bad faith. That prerequisite is met if a union ignores a meritorious grievance or processed it in a perfunctory fashion. Perfunctory to me means superficial or cursory.

¹⁵ Cleveland confided in Supko during the appeals board meeting as to her misgivings about Wallace.

¹⁶ I would add the adjective laziness to this list.

I do not think there is any credible argument that the Union breached its duty of fair representation prior to August. Afterwards, Wallace could have done more for her, such as eschew giving the chapter appeals board her opinion that Cleveland could not win an arbitration and giving both panels incorrect and misleading information about what happened to other employees. However, there is no evidence that these failings, if they all were failings, were the product of anything other than poor judgment, ineptitude, negligence or inadvertence.

The record does not establish that the Union, i.e., Wallace and Barner, acted inappropriately in deciding that Cleveland was unlikely to win an arbitration prior to the appeals board meeting. The record indicates they were following the normal procedure by afterwards informing Cleveland of her right to appeal the decision.¹⁷ Moreover, I disagree with the General Counsel that the Union was obligated to accept Cleveland's self-serving excuses as fact. In this regard, the Union appears to have accepted Franks' version as to how Cleveland accessed files over Cleveland's. I find that the Union did not breach any duty in doing so. Furthermore, Cleveland was allowed to fully argue before the Chapter Appeals Board why she believed her grievance merited arbitration. Indeed, the panel's deliberations indicate that she had an adequate opportunity to make the case for going to arbitration.

This record also does not establish, one way or another, whether a union official is allowed to recommend against arbitration in a panel hearing. I also conclude that Gonzalez' testimony is insufficient to establish that Wallace departed from past practice or violated any procedural rule.

Did Wallace put her thumb on the scales of justice?

For starters, it is not clear that the Chapter Panel members would have voted to take Cleveland's grievance to arbitration had Wallace not voiced her opinion. On the other hand, despite the fact that 2 of the 3 panel members appear to have been inclined to vote No throughout most of the deliberations, it is possible that they were so inclined in part due to Wallace.

In any event I do not find that the Union's handling of Cleveland's grievance was perfunctory, i.e., superficial or cursory, at any stage of the process. The Union made some effort on Cleveland's behalf and legitimately determined that her grievance had insufficient merit to arbitrate. There is insufficient evidence that Wallace's misstatements at the chapter appeals board meeting were deliberate or were the product of anything more than ineptitude, negligence and perhaps laziness. Finally, at all stages of the process, including the 2 appeals meetings, Cleveland had an ample opportunity to argue that the Union should arbitrate her termination because her misconduct was not primarily her fault, but that it was the fault of WWH's IT department.

¹⁷ Albeit without sending the letter the Union normally sends a grievant whose grievance is deemed insufficiently meritorious to arbitrate. I would note that at page 25 of its brief, the General Counsel describes R. Exh. 12 as the Union's standard post-grievance denial letter. If that is so, it establishes that Union officials make a determination regarding the worthiness of a grievance for arbitration before informing the grievant of his or her internal appeals rights.

The General Counsel did not prove that the Union would have prevailed if it had taken Cleveland's grievance to arbitration

5 If the General Counsel establishes a breach of the duty of fair representation, it must still show that the grievant would have prevailed if the grievance had been properly handled by the union, *Iron Workers Local 377 (Alamillo Steel Corp.)* 326 NLRB 375, 377 (1998). This record does not establish that Cleveland had a meritorious grievance. It establishes that she repeatedly violated WWH rules and was terminated for doing so. As to disparate treatment, with the possible exception of Judy G, it is at least arguable that those cases, including that of Jess S, are distinguishable. Even Judy G can be distinguished on the number of violations (2 verses at least 10 6 over a 3-day period). Finally, the General Counsel has not established that an arbitrator would conclude that WWH did not have just cause to terminate Cleveland on the grounds that she was treated disparately.

15 At trial I suggested that this case settle on the basis of Ms. Cleveland being offered the option of resignation in lieu of termination, with an expungement of her personnel file. Both the Union and the Employer appeared to be amenable to that. The Respondent Union repeats that it would agree to such a resolution at page 71 of its post-trial brief. I still believe that would be the best resolution of this matter. The best case of prevailing at arbitration for Ms. Cleveland would 20 be the disparate treatment compared to Judy G. If she prevailed, it is hard to imagine that her monetary remedy would be any more than backpay for a few days.

Order¹⁸

25 The complaint is dismissed.

Dated, Washington, D.C. November 9, 2022

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Arthur J. Amchan
Administrative Law Judge

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¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.