

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

UNITE HERE, LOCAL 26
(ENCORE BOSTON HARBOR)

and

01-CB-319086

AHMED GOHARI, an Individual

John McGrath, Esq.

Kenneth Revoredo, Esq.

for the General Counsel.

James Hykel, Esq.

Alfred Gordon O'Connell, Esq.

for the Respondent.

DECISION

STATEMENT OF THE CASE

SUSANNAH MERRITT, Administrative Law Judge. This case was tried in Boston, Massachusetts, on October 7, 8, and 24, 2024. Ahmed Gohari (Gohari), an individual, filed the charge on May 30, 2023, and the General Counsel issued the complaint on April 5, 2024. The complaint alleges that UNITE HERE Local 26 (Respondent or the Union) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by refusing to process a grievance on behalf of Gohari concerning his termination of employment.

The Counsel for the General Counsel (hereafter General Counsel) and Respondent filed post-hearing briefs, which I have read and considered. Based on those briefs and the entire record in the case,¹ including testimony of the witnesses and my observation of their demeanor,² I make the following:

¹ Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh.” for General Counsel’s Exhibit; “R. Exh.” for Respondent’s Exhibit; “GC Br.” for General Counsel’s brief; and “R. Br.” for Respondent’s brief.

² Certain of my findings are based on witness credibility. A credibility determination may rest on various factors, including “the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole.” *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd. sub nom.* 56 Fed. Appx. 516 (D.C. Cir. 2003). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness’ testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950). Where there is inconsistent evidence on a relevant point, my credibility findings are specifically addressed.

FINDINGS OF FACT

I. Jurisdiction

It is admitted that Respondent is a labor organization within the meaning of Section 2(5) of the Act. It is also admitted that Wynn MA, LLC, the entity operating a casino called Encore Boston Harbor, is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

II. Alleged Unfair Labor Practices

Background

Wynn MA, LLC (the Employer), is engaged in operating a casino and hotel in Everett, Massachusetts. Respondent and another labor organization, Teamsters Local 25, represent a unit of about 1,400 of the Employer's employees (the Unit). Approximately 1,250 bargaining unit employees, including Gohari, are represented by Respondent, while about 150 are represented by Teamsters Local 25. During the relevant time-frame, the unit employees were covered by a collective bargaining agreement between the Respondent, Teamsters Local 25, and the Employer, which was effective April 19, 2021, to April 18, 2023, this was the parties' first collective bargaining agreement (CBA) after the Unit was ratified.³ (Tr. at 228-230; GC Exh. 3.)

With regard to discipline and discharge, Article 17 of the CBA provides that:

Employees may be discharged, suspended, or disciplined by the Employer for just cause. The parties agree that the policy of progressive discipline shall be used in all cases where warranted but egregious matters may result in suspension pending investigation (SPI) or termination with no prior discipline. (GC Exh. 3 at 14.)

The CBA also contains a grievance and arbitration procedure,⁴ which requires that grievances be filed within 13 days of the incident giving rise to the grievance and must bear the signature of either a shop steward or other union representative. (GC Exh. 3 at 16.) When an employee is interested in filing a grievance, they contact a shop steward, who will investigate and decide whether or not to file a grievance. Sometimes the shop steward will request information regarding the adverse employment action before they file the grievance and sometimes they will file the grievance and the information request at around the same time. Shop stewards usually handle grievances up through Step 1 of the process and Union representatives generally do not become involved in the grievance process until it has moved to Step 2. Shop stewards are generally assigned to cases in their department unless the shop steward is not available or in cases where there is a possible conflict of interest. When there

³ After the expiration of initial CBA, the parties negotiated a new contract which was ratified in July 2023, however the initial CBA was in place during the relevant events at issue here. (Tr. at 229.)

⁴ Article 20 of the CBA. (GC Exh. 3 at 16-17.)

is a conflict of interest concern, a shop steward from a different department may be assigned to the investigation. (Tr. at 237-240.)

Ahmed Gohari

Charging Party Gohari was employed as a doorman for the casino and was represented by the Union under the parties' CBA. Gohari was a member, but did not hold any formal position with the Union. As a doorman, Gohari's job involved greeting guests as they came in, opening doors, helping them with their luggage, and helping them connect with valets. Another key part of the job was running the casino's VIP parking. There are seven VIP parking spots located prominently in front of the casino. These seven spots are reserved for cars that are valued at \$100,000 or more. VIP parking costs \$100 in cash, which is collected by the doorman on duty, and not remitted to the casino. If there is only one doorman on duty, he or she collects and keeps the \$100, but if there are two on duty, the doormen split the fee (including tip if there is any). Most shifts require only one doorman, but busier shifts require two. VIP parking and tips are a significant source of income for the doormen. (Tr. at 42-43, 46-48; GC Exh. 2.)

The December 9 Incident Between Gohari and Kamal Nadir

On December 9, 2022,⁵ Gohari was on shift with fellow doorman Kamal Nadir (Nadir) when the two got into an argument.⁶ Nadir was also a shop steward for the Union. The argument began when Nadir accused Gohari of not splitting a tip he received as he was returning from his lunch break. Gohari told Nadir that he was mistaken and that Gohari had not received a tip from the customer. The two argued on and off for a significant period of time while they were on the clock and interacting with customers in front of the casino. The back and forth between the two doormen was captured on the Employer's security videotape, but without audio. (GC Exh. 17-19.) During the argument Nadir accused Gohari of stealing his part of the tip and at some point told Gohari that he would never get the Employer to perform a new shift bid.⁷ (Tr. at 51.) It is uncontested that during the exchange Gohari repeatedly called Nadir a thief, made disparaging comments about his family, swore at him, and gave him "the finger." (Tr. at 51-53; 191.) Gohari also admitted that he told Nadir that he was going to go out with Nadir's wife, that she had Gohari's number and that she had

⁵ All dates are in 2022, unless otherwise indicated.

⁶ Nadir worked from 11:00 a.m. to 7:00 p.m., and Nadir worked from 3:00 p.m. to 11 p.m. that day. So, the two doormen were scheduled to overlap for four hours from 3:00 p.m. to 7:00 p.m. (Tr. at 50.)

⁷ Nadir was referring to the fact that Gohari had been requesting that the Employer create a new departmental schedule, referred to as a "shift bid." In September 2022, Gohari asked the Employer to hold a new shift bid for the department. When the Employer refused, Gohari reached out to Union representative Haley Kossek and Nadir asking the Union for help. Both Nadir and Kossek informed Gohari that the CBA did not require the Employer to conduct regular or periodic shift bids, so there was no basis to demand that the Employer do so or to file a grievance on this issue. The Union's view was that conducting a new departmental shift bid was generally disruptive to the majority of the unit members as the Employer had complete control to structure the new shift bid and the Union's role was limited to ensuring that the shift bid was conducted in order of seniority. The Union's position on this issue was consistently applied. (Tr. at 130-138, 263,363-365; GC Exh. 22; GC Exh. 23; GC Exh. 24.)

been calling him. (Tr. at 191.) The video segments introduced into evidence only capture a few minutes of Gohari and Nadir's argument but they do show that the two are clearly engaged in a heated exchange. At one point Gohari appears to step toward Nadir forcing Nadir to back up towards a moving car while it drives past and at another point Nadir steps toward Gohari briefly bumping into his chest. (GC Exh. 18 at 16:47:35 and 16:49:15.) They show Nadir following Gohari around with Gohari walking away from Nadir at times, but also looking towards Nadir and talking to him over his shoulder while walking away. The video also clearly shows Gohari giving Nadir the middle finger while there are hotel guests in the vicinity. (GC Exh. 18 at 16:48:15.) Gohari holds his finger up close to his chest when he gives Nadir "the finger" but the action is clearly visible in the video.⁸ At some point during the shift, Nadir complained to management about Gohari's behavior and a supervisor identified as James approached Gohari and asked him what was going on. Gohari testified that he told James that "Kamal [Nadir] was just being Kamal," and that James did not ask any follow up questions. (Tr. at 53-54.) The video, however, shows James and Gohari having a longer conversation, but as the video has no audio and James did not testify, the content of the rest of the conversation is unknown. (GC Exh. 19.) At around 5:34 p.m., Nadir went inside the casino and Gohari testified that he did not see Nadir again throughout the rest of his shift. (Tr. at 121.)

Immediately after the argument, Nadir wrote up a statement about the incident and emailed it to director of front services Matthew Grogan (Grogan), human resource partner Charlotte Valentin (Valentin), human resources manager John O'Brien, assistant front office manager Cindy Ramos (Ramos), and Employer president Jenny Holaday. In his email entitled "Statement" he wrote:

On Friday at 4:43 guest from Vip he gave a ticket to Ahmed [Gohari] and he departure. I so giving him an tips and when I asked him he denied it. And he told me I'm not a thief like you. He's starting insulting me my family with bad words. Coming to my face, and start talking about my wife that he's gonna go out with her and she's been calling him she has his number and his gonna make her leave me Tony she's walking by to get the car and she heard him keep saying you are a thief. You are a thief. After 15 minutes, he came back to me and he told me how you holding up motherfuckers. I'm going to make your fired from this place. I told Josh jimmy. He come back again and he keeps saying to me what's up theif what's up thief so I couldn't do anything I don't have no idea how to prove this so I had to record him for the third time he came to me again, to my face and he told me I don't have no respect for you and I'm a motherfucker person and shut the fuck up . . . All this because of the shift bid he think he's in touchable he can do whatever he want. He told me that before.

Jimmy so him walking toward my face and ask me that step outside I will beat you up. I don't know if Jimmy heard it or not
FYI I recorded him because I feel I'm in danger next to him and I want to prove what he was saying to me all day long and every day just to protect myself, because he was very aggressive for seven weeks now, with me

⁸ There was no evidence that any customer complained to the Employer about Gohari or Nadir's actions. (GC Exh. 18 at 16:48:15.)

Kamal nadir (R. Exh. 1.)

Nadir also sent a text with a similar recounting of what had occurred to Union representative Haley Kossek (Kossek) at some point after the interaction. Kossek testified that she spoke with Nadir on the phone after he sent her the text and Nadir recounted that Gohari had used “bad words” about his wife and family and that Nadir had recorded part of the exchange in order to protect himself. Kossek told Nadir that he should not have made the recording without Gohari’s knowledge and she declined to listen to the recording, telling Nadir never to record someone without their consent again. Kossek also told Nadir that it was up to the Employer to investigate and make an assessment based on its investigation of the interaction.⁹ (Tr. at 283–285.)

Gohari testified that when he got home after his shift that night, he realized that he had one hundred dollars more in cash than he could account for. Once he discovered the money, Gohari texted Nadir at 11:50 p.m. to let him know that he owed him \$50 and that he would give it to him the next day. Gohari attributed the extra money to a tip from a different driver than the tip that Nadir had accused him of taking earlier that day. (Tr. at 58–60; GC Exh. 4.)

On Tuesday, December 13, Valentin requested a meeting with Gohari about the incident. As Gohari was out on vacation, the meeting did not take place until he returned to work on December 30. (Tr. at 55–57, 62; GC Exh. 5.) Upon his return to work, Gohari was immediately called into a meeting with Valentin, Ramos, and Union shop steward Juan Carlos Espinal (Espinal). (Tr. at 63.) Valentin had called Espinal into the meeting in his capacity as a shop steward to represent Gohari.¹⁰ (Tr. at 410–411, 416.) At the meeting, Valentin told Gohari that Nadir had filed a statement that Gohari swore at him and had talked about his family on December 9. (Tr. at 64.) Gohari told Valentin that the two were arguing over a split tip and that Gohari was trying to walk away from Nadir in order to diffuse the situation, but that Nadir kept following Gohari around and arguing with him. (Tr. at 64, 163.) At some point during the interview Valentin asked Gohari if he gave Nadir “the finger” during the argument and Gohari denied it. Valentin asked him the question again and Gohari again denied that he had given Nadir “the finger.” Next, Valentin told Gohari that she had seen the video of their interaction and at that point Gohari admitted that he had given Nadir “the finger” because he was angry at Nadir for taking his tips.¹¹ (Tr. at 450.) During the

⁹ I found Kossek to be an extremely credible witness. She answered questions specifically, directly, and completely, and she gave testimony that was corroborated by other witnesses and evidence. Overall, Kossek gave thoughtful, sincere answers on both direct and cross-examination, even when questioned about arguably uncomfortable topics.

¹⁰ Espinal worked in a different department and was presumably chosen by Valentin because Nadir was the only shop steward for the doormen.

¹¹ I credit Espinal’s testimony that Gohari had denied giving Nadir “the finger” more than once and admitted it only after Valentin had called him out on it. Espinal’s testimony about this part of the interview was direct, specific, and elicited by counsel’s nonleading questions. Espinal’s testimony was also supported by Kossek’s testimony regarding Valentin’s description of the interview. (*Supra* at 8.) At no point in his testimony, did Gohari deny Espinal’s description of this exchange, instead during his direct examination, he failed to mention it at all until the General Counsel directly asked him: “Okay. Did the topic of a middle finger come up at some point?” and Gohari vaguely responded, “She told me about it and I told her that I cannot reflect.” (Tr. at 64.) Gohari admitted several times in his testimony and in

interview Valentin asked Gohari to provide a written statement about the incident, but Gohari declined to do so. Valentin told Gohari that he would be suspended pending an investigation and asked him to sign the suspension notice. At that point, Espinal asked to have some time alone with Gohari. After management left, Espinal told Gohari to sign the paper and when management came back in Gohari signed it and the meeting concluded. The suspension notice stated that Gohari was “being suspended for Company Policy Violation for incident on 12/9 with another Doorperson in a guest facing area.” After that Gohari was told to turn in his badge and Valentin accompanied Gohari as he gathered his belongings and left. (Tr. at 65–70; GC Exh. 6.) At the time of the incident, investigatory suspensions were not considered to constitute grievable disciplinary actions. (Tr. at 241–242.)

A couple of days after the suspension, Gohari texted Espinal and asked him if the Union needed any more information from him. Espinal texted Gohari back and spoke to Gohari on the phone. In the phone call Espinal told Gohari that the Union did not need anything more from Gohari and Gohari told Espinal that Grogan had reached out and wanted to meet with him on January 9, 2023. (Tr. at 72, 175; GC Exh. 7 at 1–2.)

On January 9, 2023, Gohari and Espinal met with Grogan and department supervisor Joshua Ferrera. The meeting was brief and consisted of Grogan informing Gohari he was being terminated based on the Employer’s investigation and Grogan handing Gohari his termination notice and unemployment forms. The termination letter simply states that Gohari was terminated for “Company Policy Violations.” (Tr. at 72–74; GC Exh. 12.)

After the meeting, Espinal walked out of the building with Gohari and Gohari asked him what kind of disciplinary action the Employer generally issued for an argument like the one he had had with Nadir, and Espinal replied that it would usually be a write up or a week or two suspension. When Gohari asked Espinal what the next steps would be, Espinal told Gohari that they would grieve the termination. (Tr. at 77.)

After he was terminated, Gohari texted Kossek letting her know that he had been terminated and that he had been working with Espinal. Kossek texted Gohari back thanking him for letting her know and expressing that she was glad that Gohari had connected with a shop steward to take on investigating the case. (GC Exh. 24 at 9–10; Tr. at 268.) He also texted Espinal afterwards letting him know that he had contacted Kossek and asking if Espinal needed any information from Gohari in order to file a grievance. Espinal responded that they did not need anything else, but that he would let Gohari know if they needed something later. Gohari thanked Espinal and Espinal followed up by leaving him a voice memo stating: “Everybody who work over there, we’re family. So, I will do my best and I’m pretty sure we will get you back, okay? So, let’s do this job and um don’t worry, I got your back we’ll do everything [inaudible] if it’ll bring you back man.” (GC Exh. 7 at 3; GC. Exh. 8.)

other documentary evidence that he gave Nadir “the finger” during the exchange. (Tr. at 52, 164; GC Exh. 13 at 2; GC Exh. 14 at 3.) Generally, I did not find Gohari to be a credible witness as his testimony was evasive, self-serving, and inconsistent.

On January 14, 2023, after being prompted by Kossek, Espinal submitted an information request asking that the Employer provide witness statements, camera footage, and all other evidence that the Employer examined in making their decision to terminate Gohari. (R. Exh. 2 at 5; Tr. at 268, 270.) Two days after Espinal submitted the request for information, Kossek followed up with the Employer reminding Valentin of the grievance timeline and requesting a response by January 20, 2023. In the meantime, Espinal responded to Gohari's texts asking for any updates by letting him know the Union was waiting for the Employer's response to the information request and that the Employer had until January 20, to respond. (GC Exh. 7 at 9.) On January 19, 2023, in response to the information request, Valentin provided the Union with a copy of Nadir's statement and informed them that Gohari had declined to provide a written statement during the investigatory interview. She also informed the Union that she had video footage of the incident that led to Gohari's termination available for the Union to view.¹² (R. Exh. 2 at 4.) While the parties made arrangements for the Union to view the video, Kossek requested that the Employer provide the Union with an extension of time for filing a grievance on the matter as the Union wished to view the video before deciding whether to file a grievance. (R. Exh. 2.) The Employer granted an extension of time and the parties agreed to meet on January 26, 2023, to view the video. (Tr. at 269.)

Around this time, Kossek contacted Nadir and asked him to meet her in the hotel's cafeteria. Kossek testified that she arranged the meeting because she wanted to inform Nadir that the Union was investigating Gohari's termination and depending on what the investigation showed, they might be filing a grievance on Gohari's behalf. Kossek testified that since Nadir had not been involved in the investigation, she did not want him to find out about it secondhand. When Kossek let Nadir know that the Union was conducting an investigation about Gohari's termination, Nadir became angry and got up and left the conversation abruptly. The two had no additional conversations about the incident. (Tr. at 286-289.)

In the meantime, Gohari continued to text Espinal asking him for updates and asking if the Union needed anything else. Espinal responded that they were waiting to hear back from the Employer and that they were setting up a time to view video footage of the incident. Gohari texted back thanking Espinal and telling him that Espinal should point out to the Employer that Gohari was trying to separate himself from Nadir during the shift. (GC Exh. 7 at 4-13.)

On January 26, 2023, Kossek, Espinal and another Union representative named Keenan Green (Green) went to the Employer's human resources office to view the video footage and Valentin was there to answer questions. (Tr. at 270-271.) The employee from the surveillance department played the video for the Union representatives. The Union representatives were able to ask the security employee to stop the video and go back and replay segments, which they did during the meeting. (Tr. at 271, 293.) The video revealed Gohari and Nadir having an ongoing argument and shows at one point Gohari giving Nadir

¹² It was the Employer's practice to show the Union surveillance video footage only at the Employer's Human Resources office with a representative from the casino's surveillance department and a representative of the human resources office present. (Tr. at 270.)

the finger in the front of the hotel while at least two customers were present.¹³ (GC Exh. 18 at 16:48:15–16.)

5 After the video was played through, the surveillance employee left, and Kossek, Espinal, and Green stayed and spent about 15 minutes with Valentin asking her questions. Kossek initially asked Valentin if the information that the Employer had provided about the termination was complete and Valentin confirmed that the Employer had turned over all the requested information. Valentin also described the investigatory interview that she had conducted with Gohari on December 30. Valentin reported that she had asked Gohari multiple times if he had given Nadir the middle finger during the incident and he denied having done so repeatedly. Valentin also reported that when she told Gohari “I’ve seen the video footage, don’t lie to me,” he changed his answer and admitted that he had given Nadir “the finger.” When she was asked for the specific reasons that the Employer had relied on in deciding to terminate Gohari, Valentin stated that the Employer had made that decision for two reasons: first, because Gohari had made a profane gesture in a public area in front of guests; and second, because he had engaged in dishonesty during the investigative interview. (Tr. at 273–276.)

20 After that, Valentin left the office giving the three Union representatives time to themselves to discuss the video and the Employer’s rationale for the termination decision. (Tr. at 294–295.) The three discussed how the video footage was troubling and showed Gohari and Nadir getting into each other’s space and obviously arguing in front of the hotel guests. (Tr. at 294, 436–438.) All three of the Union representatives agreed that the footage confirmed that Gohari gave Nadir “the finger” and that he had done so in a public area while guests were present. (Tr. at 299, 436.) Espinal specifically stated that the footage had been ugly and that he felt that both of the doormen should have been fired. (Tr. at 296–297; 435–436.) The three also discussed the fact that Gohari denied that he gave Nadir “the finger” and only admitted it when Valentin told him that she had seen the video. Espinal, who had been present at the investigatory interview, confirmed that Gohari had repeatedly denied that he gave Nadir “the finger” only admitting that he had done so after Valentin told him she had viewed the video. Given the video evidence combined with the fact that Gohari had been dishonest during the investigatory interview, the three Union representatives agreed that the Union should not file a grievance in the case. (Tr. at 308–312, 446.)

35 Kossek also consulted with her superior organizing director Jenna Karlin (Karlin) after she had viewed the video. Kossek explained to Karlin that the video footage confirmed that Gohari had given Nadir the middle finger in a guest facing area and that Espinal confirmed Valentin’s report that Gohari had initially denied that he gave Nadir “the finger” but admitted that he had done so only after Valentin told him that she had watched the video. Karlin and Kossek also discussed how the Union takes a particularly strong perspective on documented verified instances of dishonesty when processing grievances. Kossek testified that the reason for this is two-fold. First, an employee’s dishonesty during an investigatory interview is viewed as misconduct on its own. Second, when pursuing a grievance and going up against management or eventually before an arbitrator, the disciplined employee’s credibility is

¹³ One customer is walking from his parked car towards the casino entrance and the other is getting out of his white car and being helped by a valet. (GC Exh. 18 at 16:48:15–16.)

vitaly important and if the individual has already shown that they are willing to lie, it weakens their case considerably. (Tr. at 321–323.) After discussing the evidence presented by the Employer, Karlin agreed with Kossek, Espinal, and Green’s recommendation not to go forward with the case. (Tr. at 329.)

5 The day after the Union had watched the video, Espinal texted Gohari to set up a time to talk on the phone and to let him know that the Union had viewed the video. (GC Exh. 7 at 13–14.) On January 30, 2023, Espinal followed up with Gohari on the phone and told him that he, Kossek and Green, had met with management, reviewed Nadir’s statement and
10 watched the surveillance footage. Espinal informed Gohari that the video showed Gohari and Nadir arguing in front of guests and Gohari giving Nadir the middle finger. Espinal also told Gohari that he saw Nadir bump Gohari and follow him around. Gohari testified that he did not recall Nadir bumping into him, but he did remember Nadir following him around. (Tr. at 82-83; 437.)

15 On January 31, 2023, Gohari had a three-way phone call with Kossek and Espinal, during which Kossek informed Gohari that the Union had looked into his case and that they had reviewed the evidence provided by the Employer and assessed that there was no case to go forward on and that the Union would not be pursuing a grievance. (Tr. at 90, 31.) Kossek
20 specifically told Gohari that the Employer had terminated him because he had given “the finger” to Nadir in a public area in front of guests, which the Union confirmed by watching the video footage, and because Gohari had been dishonest during the investigation and that when taken together, the Union decided that they had no case to put forward to support a grievance. Gohari did not deny that the events occurred, but just stated that his offenses were
25 minor and did not warrant his termination. (Tr. at 337–340; 315–316.) Gohari also told Kossek that he had been helping out the Employer by covering shifts and performing most of the trainings, and that he had never had any disciplinary actions before. (Tr. at 92.) He accused the Union of protecting Nadir, complained about Nadir’s performance as a shop steward and told Kossek and Espinal that he was going to get a lawyer to sue the Union. At
30 the end of the phone conversation, Kossek told Gohari that he was welcome to contact the Union Hall for references to apply for jobs at other Union properties, but she confirmed that the Union would not be filing a grievance on Gohari’s behalf. (Tr. 90–94; 319.)

35 After the conversation, Espinal called Gohari and left him a voicemail message stating that he would call later and that he did not say anything on the phone call because he had been with Kossek. Espinal and Gohari spoke on the phone later and (according to Gohari) Espinal told Gohari that he felt he had a good case because Nadir appeared to be the aggressor and that Gohari should continue to pursue it, but he did not explain how to go about that. (Tr. at 95; GC Exh. 10.)

40 After that on February 6, 2023, Gohari filed an appeal of the Union’s grievance decision with Kossek’s supervisor Karlin. In the letter, Gohari complains that Nadir stole another employee’s tip and questioned how Gohari was doing his job. He tells Karlin that Nadir was harassing him on December 9, following Gohari around and even pushed Gohari. He also
45 admits: “[a]t one point in the shift I gave him the middle finger because he was harassing me.” (Tr. at 96, 226; GC Exh. 13 at 2.) After Karlin received Gohari’s email asking for the Union to reconsider the decision not to file a grievance, Karlin spoke to Kossek again about

the investigation and the decision not to file a grievance. In that conversation Kossek and Karlin reviewed the case, but as the two had already discussed the details in late January, there was little more to discuss. (Tr. 321-322.)

5 Gohari had a follow up phone conversation with Karlin in which he told her that he had never received a discipline from the Employer before this one and that he had helped the company by training employees and taking missed shifts. Karlin informed Gohari that based on her discussions of the evidence with Kossek, the Union was not going to change their position with regard to filing a grievance and Gohari asked Karlin for Union recording secretary Latifa Bekhechi's contact information, so that Gohari could appeal Karlin's decision. On April 10, 2023, Gohari sent an appeal letter to Bekhechi reiterating the same reasons for why he felt he had been unfairly terminated and asking the Union to reconsider grieving his termination. Although Gohari did not receive a response from Bekhechi right away, he did receive a letter in the mail sometime after April 14, 2023, from Kossek stating that the Union had conducted an investigation of his case and that pursuant to Kossek, Espinal, and Gohari's January 31, 2023 phone conversation, the Union had decided not to pursue a grievance on his termination. (Tr. at 98-99; GC Exh. 14 and 15.)

20 Gohari sent several emails asking to meet with the Union about his grievance, and Bekhechi and Karlin made arrangements to meet with Gohari in person at a hotel in Boston on May 17, 2023. Gohari testified that in the meeting he asked the Union representatives about who they spoke to and what evidence the Employer presented to support his termination. He testified that Karlin and Bekhechi told him that they had not seen Nadir's statement and had not watched the video themselves, and so they could not answer his questions, but they told him that the Union would not be pursuing his grievance and that he could reach out to lawyers and the NLRB for help. After the meeting, Gohari wrote another email to Karlin, Bekhechi, and Kossek, criticizing the fact that neither Karlin nor Bekhechi had viewed the video footage themselves and stating that: "No details have been shared besides that the video shows me giving the finger, which time and again I have said I do not recollect," which is blatantly contrary to not only Gohari's testimony, but also to the multiple admissions that he had previously provided to the Union in his emails about the incident.¹⁴ (Tr. at 102-104; GC Exh. 13 at 2; GC Exh. 14 at 3; GC Exh. 16 at 1.) The Union did not respond to this email.

35 DISCUSSION AND ANALYSIS

I. Applicable Legal Principals

40 Section 8(b)(1)(A) of the Act prohibits a union from restraining or coercing employees in the exercise of their rights under Section 7 of the Act. A union's failure to file or advance a grievance in a manner that is arbitrary, discriminatory or in bad faith is a violation of its duty of fair representation under Section 8(b)(1)(A). *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). See also *Amalgamated Transit Union Local 1498 (Jefferson Partners L.P.)*, 360 NLRB 777, 778 (2014). A union's duty of fair representation is afforded a "wide range of reasonableness" in assessing the merits of a grievance or any other representative function. Thus,

¹⁴ These inconsistencies further damage Gohari's overall credibility.

determinations not to pursue or advance grievances to arbitration are not violations if they are based on a reasonable interpretation of the collective bargaining agreement or a good faith evaluation of the chances of success. In short, the Board does not undertake to determine whether the union's decisions in these respects are correct, but rather whether they are reasonable under the circumstances. *Auto Workers Local 651 (General Motors Corp.)*, 331 NLRB 479, 479–480 (2000), citing relevant authorities.

To establish that the Union's decision was arbitrary, the General Counsel must show "more than mere negligence or the exercise of poor judgment . . ." *Local 337, Int'l Brotherhood of Teamsters*, 307 NLRB 437, 438 (1992). "A union's actions are considered arbitrary only if the union has acted 'so far outside 'a wide range of reasonableness' as to be irrational.'" *Amalgamated Transit Union Local 1498*, 360 NLRB 777, 778 (2014). Mere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation. *Service Employees International Union, Local No. 579, AFL-CIO (Convacare of Decatur d/b/a Beverly Manor Convalescent Center, et al)*, 229 NLRB 692, 695 (1977), and cases cited therein.

II. Analysis

The General Counsel here contends that the Union's conduct in handling Gohari's potential grievance was both arbitrary and perfunctory.

The General Counsel lists several bullet points purporting to endorse its theory that the Union's processing of Gohari's grievance violated Section 8(b)(1)(A) of the Act. First, the General Counsel asserts that the Union violated its duty because after Gohari was suspended he repeatedly asked Espinal if there was anything he needed to do, or if the Union needed anything from him, but Espinal never took "Gohari up on his offer, but instead assured Gohari that the Union was taking care of everything." (GC Br. at 22.)

First, although it is true that Espinal never asked Gohari to provide any further information, Gohari had plenty of opportunities to do so. There is no evidence to suggest that Espinal or the Union ever prevented Gohari from presenting any additional information, or that Gohari had any compelling exculpatory evidence to submit. Indeed, the evidence at hearing showed that communications between Espinal and Gohari between December 30, 2022, when he was initially suspended, and January 31, 2023, when Kossek informed Gohari that they would not be grieving his termination, showed that Espinal was responsive to Gohari's requests for updates, stayed in regular communication with Gohari, and had multiple phone conversations with him. The evidence shows that Gohari shared his defenses with Espinal during those exchanges, such as telling Espinal that the video should show that Gohari was trying to do his work and was trying to walk away from Nadir during the argument. The assertion that Gohari was somehow prevented from telling his side of the story or presenting exculpatory evidence is simply not borne out by the record. Compare *United Steelworkers of America, AFL-CIO (InterRoyal Corp.)*, 223 NLRB 1184, 1185 (1976), (where the Union was found to have violated its duty of fair representation when it emphatically refused to look at the grievant's documented exculpatory evidence.)

Second, although Espinal had initially told Gohari that he was pretty sure that they would get Gohari's job back and that the next step would be to file a grievance, Espinal made these comments right after Gohari had been terminated and prior to viewing or evaluating any of the evidence provided by the Employer. Once the Union had reviewed the evidence presented by the Employer, Espinal called Gohari and updated him on what the video showed, including the fact that the video showed Gohari giving Nadir "the finger" in front of the casino.

Next the General Counsel asserts that the Employer did not provide Gohari with the reasons for his termination when he was discharged, and that the Union never insisted that the Employer put the reasons for Gohari's termination in writing. First, although it is true that the Employer's generic statement that Gohari was fired for "Company Policy Violations" on his discharge notice lacked specificity, the Union certainly cannot be held responsible for how the discharge form was filled out. Second, Valentin did provide the Union with the Employer's specific reasons for the termination when Kossek asked her directly to do so at the December 26 meeting. Third, there is no requirement under the CBA or elsewhere, that the Employer must put their reasons for termination in any specific format. In this particular situation, once provided with the Employer's reasoning, the Union was able to independently verify the reasons provided and there was little reason to have the Employer reduce the reasons to writing. Moreover, there is no evidence that having the reasons set forth in writing would have benefitted Gohari in any way.

Next the General Counsel alleges that the Union's treatment of the grievance was arbitrary because upon hearing the reasons for Gohari's termination from Valentin, the Union made its decision not to grieve Gohari's termination before providing Gohari with an opportunity to respond to the Employer's rationale. While it is true that Kossek, Espinal, Green, and Karlin made the decision not to pursue a grievance for Gohari's termination after it conducted its investigation, but before discussing its decision with Gohari, Gohari was provided with an opportunity to discuss the Union's decision during the January 31 phone call. When Kossek provided Gohari with the Employer's reasoning during the three-way phone call, Gohari did not deny the allegations, but instead argued that his infractions were minor and did not warrant his discharge. During the phone call, Gohari argued his case that he had been a good employee who had never had a disciplinary action before and that he had helped the Employer by performing trainings and covering shifts when employees called out. At no time either in this conversation about the Employer's rationale nor when Gohari spoke with Karlin and Bekhechi, did Gohari deny that he gave Nadir the finger or that he lied during the investigation. Thus, Gohari was given several opportunities to argue his case to the Union, but the Union did not find Gohari's contentions compelling, which they were well within their discretion to decide. See e.g., *Diversified Contract Services, Inc.*, 292 NLRB 603, 605 (1989) (finding the Union's decision not to pursue a grievance not to be a violation of its duty of fair representation when the grievant provided inconsistent defenses.) The Board does not undertake to determine whether the union's interpretation was correct, but rather whether it was reasonable. *United Gov't Sec. Officers of Am. Int'l & Its Loc.* 129, 367 NLRB No. 5 (2018).

The General Counsel also lists the fact that Kossek had spoken to Nadir twice before the Union decided not to take Gohari's grievance but had not spoken with Gohari directly about

the grievance before the Union's decision not to grieve Gohari's termination, as evidence that the Union's decision was arbitrary. Initially, although Gohari was not in regular contact with Kossek during the investigation, Gohari was in steady contact with Espinal throughout the relevant time period. The evidence established that the Union's standard protocol was for the shop steward to handle all of the initial steps of a grievance investigation up through Step 2 of the grievance process. Thus, there was nothing irregular about Kossek having Espinal be Gohari's regular point of contact in the early steps of the investigation.

Second, while Kossek did talk to Nadir about the incident twice prior to the Union's decision not to file a grievance, the General Counsel failed to show that Nadir influenced the Union in any way. Thus, when Nadir reached out to Kossek after the incident complaining about Gohari's behavior and letting her know that he had reported the incident to human resources, Kossek's response to Nadir was to chastise him for recording Gohari without his consent and to inform Nadir that it was up to the Employer (not the Union) to investigate his allegations.

Additionally, when Kossek spoke to Nadir a second time, she did so to put Nadir on notice that the Union was investigating Gohari's discharge and that it might be filing a grievance on his behalf. Far from indicating that Nadir had any influence on the Union's investigation of Gohari's grievance, the evidence adduced at hearing shows that the Union took great pains to ensure that Nadir was not involved in the investigation to avoid a conflict of interest.

The General Counsel also contends that the Union simply accepted the Employer's allegation that Gohari intentionally lied during his investigatory meeting with Valentin, without asking Gohari for an explanation. Here, the Union did not blindly accept Valentin's description but verified that Valentin's description was accurate by checking her description with Espinal who was present at the interview. Espinal independently confirmed that Gohari denied giving Nadir "the finger" repeatedly, only confessing to having done it after Valentin told him she had seen the video. Having independently verified Valentin's claim that Gohari had lied during the investigatory interview, the Union was on firm ground in deciding that any grievance would have no real chance of success. *See Diversified Contract Services, Inc.*, 292 NLRB 603, 605 (1989) (finding that because the inconsistencies had come from the grievant herself, there was little in the way of investigation that the union could do to strengthen her case.) See also *Clerks and Lumber Handlers Union Local No. 939*, 269 NLRB 378, 389 (1984) (adopting the ALJ's decision finding that the union did not violate its duty of fair representation when it decided to withdraw a grievance when no real hope of success remained.)

The General Counsel also asserts that Nadir's conduct on the ninth was problematic as he initiated the argument with Gohari, called him a thief, repeatedly approached him, and eventually chest bumped and kicked Gohari. The video does show that Nadir repeatedly approaches Gohari and there is a moment in the video where Nadir appears to bump Gohari with his chest and foot, however the contact between the two is brief and Gohari himself acknowledged that he did not recall that Nadir had bumped into him. Although Nadir's behavior is problematic to the point where Espinal commented that he felt both of the doormen should have been terminated, it is important to note that Gohari was not terminated

for getting into an argument with Nadir but rather for making a profane gesture in a guest facing area and lying during his investigative interview, and there is no indication that Nadir engaged in either of those behaviors. Additionally, the issue is whether the Union should have grieved Gohari's termination, not whether the Employer should have terminated Nadir as well.

The General Counsel also contends that the Union should have filed the grievance because the Employer's disparate treatment of Nadir and Gohari provided a compelling argument that the Employer was violating the "just cause" provision of the CBA by imposing discipline in an inconsistent and arbitrary manner. The General Counsel goes on to theorize that it is possible that the Union decided not to file a grievance out of concern that if they did so, the Employer might reconsider its decision not to discipline Nadir for his conduct during the exchange.

The problem with the General Counsel's argument is manifold. First, it ignores the fact that Gohari was terminated for making a profane gesture in a guest facing area and for lying in an investigatory interview and there is no evidence that Nadir engaged in either of those behaviors. Second, there is absolutely no evidence to support the General Counsel's theory that the Union decided not to file a grievance to protect Nadir. Third, the Union is provided with broad deference in how it decides to process grievances.

The evidence also does not support the General Counsel's contention that the Union's investigation of Gohari's termination was handled in a perfunctory manner. The evidence presented at hearing showed that the Union fulfilled its duty of fair representation by conducting a comprehensive investigation of the termination. First, after Gohari was terminated, the Union made a timely request for all evidence that the Employer relied upon in making its determination. Second, two days after submitting the request for information, Kossek followed up with the Employer reminding Valentin of the grievance timeline and requesting a response by January 20, 2023. After receiving Valentin's response providing Nadir's statement and informing the Union that the Employer had also relied on surveillance video in deciding to terminate Gohari, Kossek conscientiously requested an extension of time to file the grievance, so that the Union representatives could view the surveillance footage prior to deciding whether to file a grievance on Gohari's behalf. When the Employer provided the Union with an opportunity to view the surveillance footage, the Union sent Union representative Kossek as well as two shop stewards into the meeting, so that the Union would have three different perspectives reviewing the Employer's evidence.

After viewing the video, Kossek checked with Valentin to ensure that the Union was being provided with all the evidence that the Employer relied on in making their termination decision and asked Valentin for the specific reasons the Employer relied upon in its decision to terminate Gohari. The Union also independently confirmed both of the reasons Valentin provided for terminating Gohari. First, the video clearly showed Gohari giving Nadir "the finger" in a guest facing area. Second, Espinal, who had attended the investigatory interview, corroborated Valentin's assertion that Gohari had initially lied under Valentin's questioning. After asking Valentin questions, Kossek checked in with both Espinal and Green and all three agreed that a grievance was not warranted under the circumstances.

In addition, Kossek checked in with Karlin before finalizing her decision not to pursue a grievance on Gohari's behalf. Kossek and Karlin focused in particular on the fact that Gohari had lied during the investigatory interview which significantly weakened his case. Thus, Kossek engaged in a comprehensive investigation of the termination and reasonably determined not only that the Employer's reasons for terminating Gohari were well supported, but also that Gohari's case was significantly weakened by the fact that he lied during his investigative interview. The assessment was reasonable and well within the Union's purview. *Branch 529, Nat. Ass'n of Letter Carriers, AFL-CIO*, 319 NLRB 879, 881 (1995) ("[A] union must be allowed a wide range of reasonableness in serving the unit employees, and any subsequent examination of a union's performance must be 'highly deferential.'")

Accordingly, I find that the Union did not violate its duty of fair representation in violation of Section 8(b)(1)(A) of the Act by failing to file a grievance on Gohari's behalf.

Accordingly, I render a conclusion of law that the Union has not violated the Act as alleged, and issue the following recommended

ORDER

The complaint is dismissed in its entirety.

Dated: Washington, D.C., February 14, 2025.



Susannah Merritt
Administrative Law Judge