

_____)
 JAMES ESCOTO,)
)
 Complainant,)
)
 v.)
)
 AFSCME COUNIL 93,)
 LOCAL 431,)
)
 Respondent.)
 _____)

DECISION AND ORDER

I. Statement of the Case

James Escoto filed this prohibited practice complaint against AFSCME Council 93, Local 481 (“Union”) alleging that the Union violated its duty of fair representation with respect to its representation of him in a pre-disciplinary meeting and a grievance challenging the termination of his employment with the Portland Housing Authority (“Authority” or “Employer”). [1] The Maine Labor Relations Board (“Board”) finds that the Union did not violate its duty of fair representation to Mr. Escoto during the course of its representation or in its refusal to proceed to arbitration with the grievance.

II. Procedural History

Mr. Escoto filed his prohibited practice complaint on November 22, 2022. On December 19, 2022, the Executive Director of the Board reviewed the complaint and found it sufficient to warrant a hearing. Board Chair Sheila Mayberry, Esq., conducted a prehearing conference with the parties on February 13, 2023, and issued a Prehearing Conference Memorandum and Order the following day. A Supplemental Prehearing Conference Memorandum and Order was issued on May 26, 2023, memorializing the parties’ stipulations of fact. The evidentiary hearing for this matter was held on May 31, 2023, and was presided over by Sheila Mayberry, Esq., Board Chair, Michael Miles, Employer Representative and Jessica Maher, Esq., Alternate Employee Representative. Mr. Escoto represented himself at the hearing, accompanied by Melissa Cote, and the Union was represented by Justin P. Murphy, Esq., accompanied by Robert J. Van Campen, Esq. The parties were given a full opportunity to examine and cross-examine witnesses, introduce evidence and to make their arguments. The parties were also permitted to file post-hearing briefs, which were submitted on July 7, 2023.

III. Stipulations

The parties have agreed to the following stipulations. [2]

1. AFSCME Council 93 ("AFSCME") is the exclusive bargaining representative for a number of employee classifications, including Assistant Maintenance Technician, employed by the Portland Housing Authority ("Authority" or "Employer").
2. James Escoto ("Mr. Escoto") was hired by the Authority as an Assistant Maintenance Technician on February 12, 2018.
3. Throughout the course of his employment, Mr. Escoto has been disciplined on numerous occasions.
4. Upon receipt of this complaint,[3] the Authority conducted a comprehensive investigation, which included an interview with Mr. Escoto on May 19, 2022. During that May 19th interview - at which Mr. Escoto was afforded the opportunity to explain the events of May 7th - he was accompanied by Union Steward Christopher Forbes ("Mr. Forbes").
5. On June 14, 2022, Ms. Sessions notified AFSCME of her conclusion that there was just cause to terminate Mr. Escoto's employment. Specifically, Ms. Sessions stated that, "notwithstanding a two-week suspension for aggressive and unprofessional behavior less than six months prior, Mr. Escoto again engaged in such aggressive and inappropriate behavior again."
6. Upon receipt of Ms. Session's decision, on June 16, 2022, AFSCME submitted its demand for arbitration on Mr. Escoto's behalf to the Authority.
7. Mr. Escoto received notice on September 26, 2022, that the Grievance Review Committee ("Committee") would be meeting on October 12, 2022, to conduct its review of his grievance.
8. Mr. Escoto attended the meeting on October 12, 2022, and was given the opportunity to present the merits of his grievance and his justification as to why it should proceed to arbitration.
9. After reviewing the grievance, and considering Mr. Escoto's presentation as to its merits, the Committee, by unanimous vote, decided not to proceed to arbitration.
10. On October 18, 2022, AFSCME Council 93, Local 481 President Jim Vance ("President Vance") was sent correspondence confirming the Committee's decision, and Mr. Escoto was simultaneously copied on that correspondence via certified mail.
11. President Vance was informed that "[u]nder the rules established by the Council 93

Executive Board for the Grievance Review Committee, the Committee's decision is subject to review by the full Executive Board if requested by the Local. There is no individual right to appeal." The Local did not request further review of the Committee's decision to withdraw Mr. Escoto's grievance from arbitration.

IV. Findings of Fact

Upon review of the entire record, the Board further finds the following.

On May 7, 2022, Mr. Escoto was involved in an incident that led to his eventual termination. A car that belonged to a non-resident was blocking a resident's parking space. Mr. Escoto was alleged to have yelled curses and a racial slur at the car's driver, as well as to have acted aggressively towards the driver and a nearby resident.

According to Mr. Escoto, he raised his voice only because he was wearing a mask and the car was some distance away, and he admitted that he may have used the "F" word, but he denies having used any racial slurs or making any aggressive moves towards the car. Mr. Escoto had been formally disciplined at work at least six times prior to this incident. One incident, on December 29, 2021, involved his use of aggressive and threatening behavior towards a supervisor that resulted in a two-week suspension and a final warning.

The Employer set a pre-disciplinary meeting, and Mr. Escoto requested representation from a former steward and a Union staff representative. To Escoto's disappointment, he ended up receiving representation from the chief steward, who was also the only steward available. The steward accompanied Mr. Escoto to his pre-disciplinary meeting and consulted with him afterward regarding the allegations and evidence. The Employer decided to terminate Mr. Escoto's employment, justifying its decision based on video evidence of the encounter, statements from two witnesses and Mr. Escoto's prior discipline for aggressive behavior.

The steward and a Union staff representative filed a grievance on June 1, 2022, challenging Mr. Escoto's termination. At a grievance step hearing on June 3, 2022, the steward and the Union staff representative met with the Employer and argued on Mr. Escoto's behalf that there was a lack of evidence regarding the alleged racial slur and that the punishment was excessive. Mr. Escoto did not attend the hearing. By letter dated June 14, 2022, the Employer denied the grievance, citing Mr. Escoto's aggressive and unprofessional behavior after less than 6 months from being disciplined for similar behavior.

The Union invoked arbitration for the grievance by letter dated June 16, 2022. The Union contacted Mr. Escoto on June 22, 2022, for his signature to allow the Union to obtain his personnel file. The Union then requested from the Employer "all records and materials as it relates to the termination of James Escoto, including but not limited [sic] all materials related to the incident that led to his termination," as well Mr. Escoto's personnel file. The Employer provided a large volume of material that the Union assumed included all information available at the time of the termination decision.

The local Union, Local 481, then reviewed the grievance, including all the received materials, to decide whether or not it supported proceeding to arbitration. The Union staff representative attended the local grievance review committee meeting in order to answer any

questions committee members may have had about the case. The committee voted unanimously not to proceed to arbitration, and on October 1, 2022, the local Union president notified Mr. Escoto of the decision and his opportunity to appeal. Mr. Escoto did not contact the local Union within the appeal timeframe.

The Union staff representative then sent the grievance to the regional Union, Council 93, for a final decision on whether or not to proceed to arbitration with Mr. Escoto's grievance. The Council 93 grievance review committee met on October 12, 2022 to review Mr. Escoto's case. Mr. Escoto attended the meeting where he was given the opportunity to present his side of the story and to ask questions. The committee asked Mr. Escoto questions about his prior discipline, and asked other questions, preparing Mr. Escoto for what an arbitration would be like and the kinds of information he would need to provide. After the meeting, the committee decided by a unanimous vote not to proceed to arbitration. The decision was based on a Union policy that had been implemented since 1997, and involved consideration of four factors: 1) the merits of the grievance, 2) the stakes at issue for the grievant, 3) the future impact or risk of win or loss for grievant and unit and 4) the fiscal and administrative resources of the local and council. The Union believed in this case that Mr. Escoto's prior disciplinary record was a defining factor in the grievance review committee's unanimous decision to withdraw the demand for arbitration. The committee's decision was sent to the local Union president with notice that the local Union could appeal the decision, which the local Union opted not to do.

V. Analysis

A. Jurisdiction

At all times relevant, the Union was a bargaining agent within the meaning of 26 M.R.S.A. § 962(2) and Mr. Escoto was a public employee within the meaning of 26 M.R.S.A. § 962(6). The Board's jurisdiction to hear this case and to issue a decision and order derives from 26 M.R.S.A. § 968(5).

B. Duty of Fair Representation

Under the Municipal Public Employees Labor Relations Law ("Act"), a bargaining agent (union) owes a duty of fair representation to all bargaining unit employees. See 26 M.R.S. §§ 967(2), 964(2)(A); *Moses v. AFSCME*, Council 93, No. [20-PPC-09](#), slip op. at 4 (September 8, 2020). Review of the union's conduct is "highly deferential". *Langley v. Maine State Employees Association*, Local 1989, SEIU, No. 00-14, slip op. at 28 (December 26, 2000) (quoting *Airline Pilots v. O'Neill*, 499 U.S. 65, 78 (1991)). A bargaining agent only breaches its duty of fair representation when its conduct towards a bargaining unit member is considered arbitrary, discriminatory or in bad faith. *Moses*, No. [20-PPC-09](#), slip op. at 4. A union's conduct is considered arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Id.* "Mere negligence, poor judgment or ineptitude" on the part of a union are not sufficient to establish arbitrary conduct that breaches the duty of fair representation. *Macomber v. Maine State Employees Ass'n*, No. [18-20](#), slip op. at 7, aff'd No. AP-18-67 (Me. Super. Ct., Ken. Cty., October 1, 2019). A union may not ignore a

meritorious grievance or process it in a perfunctory manner. *Brown v. MSEA*, [1997 ME 24](#), ¶ 7. However, a union may refuse to process a grievance, provided it does so with a good faith reason. *Lundrigan v. MSEA*, No. [83-03](#), slip op. at 6-7; aff'd sub nom. *Lundrigan v. Maine Labor Relations Board*, No. [CV-83-81](#) (Me. Super. Ct., Ken. Cty., July 25, 1983); aff'd, [482 A.2d 834](#) (Me. 1984). Discriminatory conduct that breaches a union's duty of fair representation involves "invidious" discrimination, for example, racially motivated conduct, conduct motivated by intraunion politics or conduct motivated by the fact that the employee is not a union member. *Moses*, No. [20-PPC-09](#), slip op. at 4. Bad faith conduct on the part of a union involves "fraud, or deceitful or dishonest action." *Id.* Mr. Escoto, as the complainant, bears the burden of proving that the Union violated its duty of fair representation. *Teamsters Local Union No. 48 v. Town of Fort Fairfield*, No. [86-01](#), slip op. at 9, 9 NPER ME-17008 (January 24, 1986).

1. Pre-disciplinary Meeting

Mr. Escoto claims that the denial of his request to have a different steward or the Union staff representative represent him at his pre-disciplinary meeting violates the Union's duty of fair representation. However, it was legally sufficient to have Mr. Escoto receive Union representation at the meeting, even if it wasn't a representative of his choosing. See *Moses*, No. [20-PPC-09](#). The record shows that the Union steward attended the meeting and that he actively engaged with Mr. Escoto regarding his employment situation. The Board finds, that without further evidence, Mr. Escoto has not met his burden to establish a breach of the Union's duty at the pre-disciplinary meeting.

2. Grievance Step Hearing

The Union steward worked with the Union staff representative to promptly file a grievance on Mr. Escoto's behalf once Mr. Escoto was terminated. They also represented Mr. Escoto at the grievance hearing with the Employer, mounting a strategic defense against the termination, despite Mr. Escoto's absence. Mr. Escoto faults the Union for not contacting him about the hearing. The Union counters that the Employer typically sends out information regarding such hearings. Both the Employer and the Union appeared to not expect Mr. Escoto's absence. Regardless, the Union actively participated on Mr. Escoto's behalf at the hearing. It argued that there was a lack of evidence to prove that Mr. Escoto used a racial slur and that the punishment was too severe.

The Union did not have possession of Mr. Escoto's personnel record, nor the video evidence used against him, at the grievance hearing. While this lack of preparation could arguably be considered negligent, it does not cross the line into irrational behavior that would violate the Act. Generally, a Union that actively represents an employee, even if not to the employee's satisfaction, does not violate its duty of fair representation. See *Moses*, No. [20-PPC-09](#). The Board finds, therefore, that the Union's representation of Mr. Escoto at this stage of the process was in line with its obligations.

3. Grievance Arbitration

Mr. Escoto asserts that the Union's grievance review process took an inordinate amount of time, and that the Union failed to consider all of the evidence in its decision not to advance

the grievance to arbitration. With respect to the amount of time it took the Union to make a final decision regarding arbitration, the Board does not find the time-frame unreasonable under the circumstances, based upon the grievance review process that took place at the local level and then regional level in Boston. There was no evidence of arbitrariness, discrimination or bad faith in the duration of the decision-making process.

The Board also finds that the Union considered sufficient evidence. The Union reviewed Mr. Escoto's termination letter and the Employer's notes regarding its investigation, including the description of the video evidence the Employer relied upon, in part, to support the claim that Mr. Escoto acted aggressively, as well as Mr. Escoto's prior disciplinary record.

While it is concerning that when the Union did not receive the video evidence pursuant to its information request, it did not request it further, and never reviewed it. The Board finds that this oversight is at least negligence. There is a point at which conduct may cross the line from mere negligence, which does not violate a union's duty of fair representation, into gross negligence, which does violate the duty. *Macomber*, [No. 18-20](#), slip op. at 7 ("Mere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty of fair representation"); see also *In Re Steamfitters Loc. Union No. 342 of United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada*, 336 NLRB 549, 553, n.9 (2001) (A union's conduct may cross into an actionable gross negligence when "the union's conduct demonstrates that it is deliberately or recklessly indifferent to employees' interests.").

However, based upon the entirety of the record, it is apparent that the Union's conduct in this case does not cross the line into gross negligence. The Board has recognized a union's right to refuse to pursue arbitration when that decision is reasonable and made in good faith. In *Dupont v. MSEA*, for example, the union declined to pursue arbitration on behalf of an employee who had been separated from employment for improperly trying to use her official position to avoid getting a ticket during a traffic stop. The Board found that the union had not acted arbitrarily because, based on the facts, it was reasonable for the union to conclude either that the employer had just cause to terminate the employee or that the low chance of success at arbitration did not justify the expense. [No. 11-05](#) (March 27, 2012).

As was the case in *Dupont*, the evidence here indicates that the Union had a reasonable basis to decline to proceed forward to arbitration. In particular, based on Mr. Escoto's undisputed disciplinary record and the documentation that the Union possessed regarding the incident, it was not unreasonable for the Union to conclude that either the Employer had just cause to terminate or that there was a low chance of success at arbitration which did not justify the expense.

Although the Union's failure to review the video evidence before making its decision on whether or not to proceed to arbitration with Mr. Escoto's grievance was negligent, it was not arbitrary, unlawfully discriminatory, nor made in bad faith given the Union's reasonable basis for ultimately declining to proceed to arbitration. The Board finds, therefore, that the Union met its duty of fair representation with respect to its decision not to proceed to arbitration.

VI. Conclusion

Although the Union was negligent in not considering the relevant video evidence, it acted rationally, without discrimination and in good faith in its advocacy for Mr. Escoto and in its consideration of whether to take Escoto’s grievance to arbitration. Under these circumstances, the Board Finds that Mr. Escoto has failed to meet his burden to establish that the Union has violated its duty of fair representation.

VII. Order

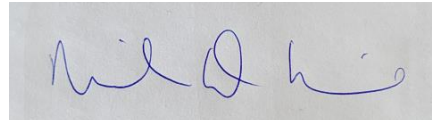
On the basis of the foregoing discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 M.R.S.A. § 968(5), it is ORDERED that the complaint in Case No. 23-PPC-10 be, and hereby is, DISMISSED.

Dated this day, August 31, 2023.

MAINE LABOR RELATIONS BOARD



Sheila Mayberry
Board Chair



Michael Miles
Employer Representative



Jessica Maher
Employee Representative

The parties are advised of their right pursuant to 26 MR.S.A. § 968(5) to seek a review of this decision and order by the Superior Court. To initiate such a review, an appealing party must file a complaint with the Superior Court within fifteen (15) days of the date of issuance of this decision and order, and otherwise comply with the requirements of Rule 80(C) of the Rules of Civil Procedure.

[1] Mr. Escoto also claims the Union violated his Weingarten rights. See *Teamsters Local Union No. 48 v. University of Maine*, Nos. [78-16 & 20](#), slip op. at 12, (MLRB June 29, 1979); *NLRB v. Weingarten, Inc.*, 420 US 251 (1975). Given this implicates an obligation of his Employer, who is not a party to this case, and the fact that Mr. Escoto clearly did receive union representation at his investigatory interview, this claim is without merit.

[2] At hearing, Mr. Escoto withdrew his support for stipulation number five, as listed in the Supplemental Prehearing Conference Memorandum and Order. The final stipulations as listed in this decision reflect that change.

[3] The complaint referred to in this stipulation is the complaint regarding Mr. Escoto, not this prohibited practice complaint.
