STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 09-04
Issued: January 28, 2009

SANFORD POLICE ASSOCIATION, Complainant, v. TOWN OF SANFORD, Respondent.	INTERIM ORDER ON MOTION TO DISMISS AND REQUEST FOR SUBPOENA

The prohibited practice complaint filed by the Sanford Police Association alleges that the Town of Sanford's police chief violated the First Amendment rights of various superior officers in the police department and violated the Municipal Public Employees Labor Relations Law by adopting a policy prohibiting criticism of department policies and practices by supervisors in the presence of subordinates. Specifically, the Union charges that this policy, particularly as it applies to off-duty hours and in union meetings, constitutes interfering with the exercise of the employees' collective bargaining rights in violation of 26 M.R.S.A. §964(1)(A).[1]

A prehearing conference was held on October 27, 2008. The Sanford Police Association (the "Union") was represented by Daniel R. Felkel, Esq., and the Town of Sanford (the "Employer") was represented by Bryan M. Dench, Esq., and Kelly M. Hoffman, Esq. In its response to the complaint and its prehearing submission, the Employer argued that the complaint should be dismissed because the Union could have, but did not, address the

[1]The Union's legal memorandum also refers to §964(1)(B) and (C), which prohibit encouraging or discouraging union membership by discrimination and prohibit employer domination of union organizations, respectively. No facts were alleged or offered in evidence to support a charge under either provision.

issue through the grievance procedure. In the Employer's legal memorandum submitted prior to the evidentiary hearing pursuant to the Prehearing Conference Memorandum and Order,[2] the Employer also raised the additional affirmative defense that the Maine Labor Relations Board does not have jurisdiction to hear constitutional claims.

The evidentiary hearing was held on January 14, 2009, at the offices of the Maine Labor Relations Board in Augusta. The Board consisted of Barbara Raimondi, Esq., Chair; Carol Gilmore, Employee Representative; and Karl Dornish, Employer Representative. Prior to the start of the hearing, the parties agreed to a number of stipulations which were later read into the record. The Employer formally renewed its motion to dismiss on the grounds that 1) the issue was amendable to resolution through the grievance procedure, and 2) the Board has no jurisdiction to hear First Amendment claims. The Employer also requested that an additional hearing day be scheduled and a subpoena be issued for the attendance of a witness that the Union failed to bring to the hearing. We will address all three of these issues in turn.

MOTION TO DISMISS BASED ON FAILURE TO EXHAUST REMEDIES AVAILABLE THROUGH THE GRIEVANCE PROCEDURE.

The Employer argues that by failing to pursue the remedies available through the grievance procedure, the Union has waived all claims for relief and the prohibited practice complaint should therefore be dismissed. Section 968(5)(A) of the Municipal Public Employees Labor Relations Law provides that:

> A. The board is empowered, as provided, to prevent any person, any public employer, any public employee, any public employee organization or any bargaining agent from engaging in any of the prohibited acts enumerated

[2]This Memorandum and Order was issued on October 29, 2008, by Peter T. Dawson, Esq., in his capacity as Prehearing Officer.

> in section 964. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise*.

26 M.R.S.A. §968(5)(A)(emphasis added). Thus, even if the conduct at issue were subject to the grievance procedure, the Board's authority to address the prohibited practice complaint is not affected. See, e.g., City of Bangor v. MLRB, et al., 658 A.2d 669, 673 (Me. 1995) (Board's ruling not to defer to arbitrator's decision on issue central to prohibited practice complaint was within Board's discretion and consistent with §968(5)(A)); and Minot School Committee v. Minot Education Assoc. and MLRB, 1998 ME 211, ¶16 ("The effect of subsection 968(5)(A) is that an arbitration panel's decision on disputed terms and conditions of employment does not affect the Board's authority to require a party to cease and desist from committing a prohibited practice.")

The Employer's Motion to Dismiss on the grounds that the dispute is amenable to resolution through the grievance procedure is denied.

MOTION TO DISMISS BASED ON LACK OF JURISDICTION

The Employer argues that the gist of the case before the Board is an alleged violation of the First Amendment rights of various unit employees and that the Board should dismiss the case because it does not have jurisdiction to address constitutional issues. The Union contends that the Board has taken up constitutional issues in the past when there are prohibited practices involved, and the Board should do so again now.

The jurisdiction of the Maine Labor Relations Board is limited to that set forth in statute, in this case the Municipal Public Employees Labor Relations Law. 26 M.R.S.A. §961, et seq. Apart from representation and unit determination matters, the Board's jurisdiction is limited to the prevention of "the

prohibited acts enumerated in section 964." There is nothing in section 964 or elsewhere in the law that even suggests that the Board has the authority to decide constitutional matters. The Union is correct to point out that the Board has addressed constitutional issues on occasion, but those instances have been where the Board discussed constitutional matters in the course of deciding a prohibited practice complaint. The Board was not actually adjudicating the constitutional claim. For example, in Teamsters v. Town of Fairfield, the Board noted that it did not have jurisdiction to hear complaints based on the denial of due process in discharge proceedings, but the Board stated that it could draw inferences of pretext from such evidence. Teamsters Union Local 340 v. Town of Fairfield, No. 94-01 , at p. 50 (Dec. 5, 1994). Similarly, in considering an interference, restraint and coercion charge, the Board rejected an employer's defense that coercive statements were protected by the First Amendment. AFSCME v. Bangor Water District, No. 80-26 (Dec. 22, 1980) at 11, citing NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

We conclude that to the extent that the Union is asking the Board to adjudicate a First Amendment claim, the complaint must be dismissed for lack of jurisdiction.[3] The Board's lack of jurisdiction to hear the First Amendment issue, however, has no bearing on the Board's authority to continue with its adjudication of the interference, restraint, or coercion charge. For that reason, there is no basis to dismiss the complaint entirely.

At this stage in the proceeding, we think it is appropriate to point out the difference in the legal analysis of a First

[3]We also note that the Sanford Police Association's complaint states at paragraph 10 that the Union seeks a ruling from the MLRB on "the propriety of Chief Connolly's Order." The Board has no jurisdiction to pass judgment on the "propriety" of a policy or order independent of an alleged violation of section 964. The request for such a ruling is denied.

Amendment speech claim, and the analysis used for a section 964(1)(A) interference, restraint or coercion charge. The First Circuit Court of Appeals recently presented a summary of the analysis used to assess whether a public employer violates a public employee's First Amendment rights:

> The court must first determine whether the speech involved is entitled to any First Amendment protection -- that is, whether the speech is by an employee acting as a citizen on a matter of public concern. If so, the court then decides whether the public employer "had an adequate justification," to use Garcetti's rephrasing of the Pickering test.

Curran v. Cousins, 509 F.3d 36 (1st Cir., 2007), citing Garcetti v. Ceballos, 126 S.Ct. 1951, 1958 (2006). See also Pickering v. Board of Education, 391 U.S. 563 (1968) and Connick v. Meyers, 461 U.S. 138 (1983). Thus, the essential issues in a First Amendment analysis are whether the public employee is speaking as a public citizen, whether the speech is on a matter of public concern, and whether the public employer had an adequate justification for the action interfering with free expression.

The legal analysis for whether a public employer's conduct violates section 964(1)(A) by "interfering with, restraining or coercing employees in the exercise of the rights guaranteed by section 963" is entirely different. As the Board explained,

> Our relevant decisional law is well established. Section 964(1)(A) prohibits an employer from engaging in conduct which interferes with, coerces or restrains union activity. A violation of section 964(1)(A) does not turn on the employer's motive, or whether the coercion succeeded or failed, but on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." Jefferson Teachers Association v. Jefferson School Committee, No. 96-24, slip op. at 25 (Me.L.R.B. August 25, 1997); MSEA v. Department of Human Services, No. 81-35, slip op. at 4-5, 4 NPER 20-12026, (Me.L.R.B. June 26, 1981)(quoting NLRB v. Ford, 170 F.2d 735, 738 (6th Cir. 1948)).

Duff v. Town of Houlton, No. 97-20 at 21 (Oct. 19, 1999). The Law Court has cited this standard with approval. See MSEA v. State Development Office, 499 A.2d 165, 169 (Me. 1985).

Thus, the issues relevant to a First Amendment claim, specifically whether the employee is speaking as a citizen, whether the speech involves a matter of public concern, and whether the employer was justified in taking the action it did, are not relevant to the legal analysis required in this prohibited practice complaint.

REQUEST FOR SUBPOENA

An additional matter that arose at the hearing was the Union's decision not to call Sergeant Anderson as a witness. Although the Union's submission for the prehearing conference listed ten (10) witnesses, the Union's legal memorandum submitted five days before the hearing date stated that only two witnesses would be called, Sergeant Anderson and the Union steward. At the start of the hearing, the Employer objected to the fact that Sergeant Anderson was not in attendance and asserted that, had they known that Sergeant Anderson would not be a witness for the Union, the Employer would have requested a subpoena to compel his attendance. The Union's attorney responded that when he spoke with the sergeant on Monday evening, the sergeant stated that he did not want to testify.[4] The Union's attorney told the Board that in light of the sergeant's statement and the circumstances surrounding the case, the Union had decided to present its case

[4]We note here for the record two items: Board Rule Ch. 12, §10(2) requires each party to list the names of its intended witnesses in the required submission for the prehearing conference. Section 10(4) requires a party to notify the Board and the other party at least 48 hours before the evidentiary hearing if there is any change in the list of prospective witnesses. The Union's attorney did not provide that notification and the Employer's attorney did not list Sergeant Anderson as an intended witness in its prehearing submissions. Neither of these rules were specifically discussed at the hearing.

on the basis of the testimony of the Union steward, the chief of police and the documents in evidence. The attorney for the Employer reiterated its objection and requested that an additional hearing day be scheduled to enable them to call Sergeant Anderson as a witness. The Board chair deferred ruling on the request until the testimony of those witnesses present had been completed.

After the last witness testified, the Employer's attorney stated that he would like some time to reflect on the testimony presented and consult with his client to determine whether to request a subpoena of Sergeant Anderson. When asked by the Chair what would be gained by calling the sergeant as a witness, the Employer's attorney would only say that the sergeant's behavior was significant because it precipitated much of what happened. After conferring with the other Board members and Board counsel, the Chair stated that even though the Board did not view the precipitating events to be relevant to deciding the interference charge, the Board would give the Employer's attorney 24 hours to confer with the client and decide whether to request a subpoena for Sergeant Anderson. The Chair instructed the Employer's attorney to get back to Board counsel with his decision. The Chair emphasized that the request would be considered in light of the Board's concerns about the potential relevance or lack of relevance of the witness.

The following morning, the Employer's counsel sent an email to the Board's executive director requesting that the subpoena be issued. In this email, counsel requested that an additional hearing day be scheduled and that a subpoena be issued for Sergeant Anderson. He also wrote:

> Sgt. Anderson's testimony is relevant to the case as he is the supervisor whose insubordinate behavior contributed most significantly to the orders of the police chief that are at the heart of this case. In addition, only one witness was presented yesterday to testify

> about the alleged affects of the chief's orders on the supervisors. Her testimony identified only one supervisor who allegedly has left union meetings because he was intimidated by the chief's orders, and that was Sgt. Anderson. Yet Sgt. Anderson himself has not been available to be questioned on this issue or on his understanding of the chief's orders. We believe that either the Board will have to conclude that the union has not presented sufficient reliable evidence of adverse affects, or permit us to question Sgt. Anderson.

The email was copied to the Union's attorney and to Board counsel. The Union's attorney responded with an email stating that the Union did not object to the Employer calling Sergeant Anderson as a witness, but the Union did not agree with the email's factual or legal assertions.

The Board is not convinced that the testimony the Employer intends to elicit from Sergeant Anderson regarding the effect of the Chief's policy will have an impact on the outcome of this matter. With the exception of the first sentence of the email, the testimony sought has to do with the effect of the chief's orders. As we noted above, the question in §964(1)(A) cases is not whether the coercion succeeded or failed but whether it reasonably tended to interfere with union activities. Evidence related to why the chief issued the directive (the "insubordinate behavior" referred to in the first sentence of the email) may be relevant in a First Amendment case, but it is not relevant here.

In spite of our concerns about relevance, we are willing to issue the subpoena because we are reluctant to say that Sergeant Anderson's testimony on the effect of the chief's order is so irrelevant that we should deny the Employer the opportunity to present that evidence. We must emphasize that the effect of this Interim Order is that the substance of the case has been narrowed considerably: The First Amendment claim has been dismissed and all that remains is the interference, restraint, and coercion charge. The Board will not permit questions to or entertain any

testimony from Sergeant Anderson regarding events that led to the chief's issuance of the order or that are not related to whether the order interfered with union activity.

Our Board members are available on Monday, February 9th, and Wednesday, February 11th, to hold a hearing for the purpose of receiving testimony from Sergeant Anderson. It is the Board's position that the hearing must be held on one of these two days if at all possible because shortly thereafter one of the Board's members will be leaving the state for a number of weeks. The Board is not comfortable leaving this matter unresolved for an extended period of time. The parties are therefore respectfully asked to make whatever re-arrangements might be required in order to accommodate this order. Board staff will contact the parties to confirm a date and time. We will issue the subpoena as soon as the date is set.

This Interim Order and Ruling on the Request for a Subpoena has been reviewed by the full Board and is the unanimous opinion of the Maine Labor Relations Board.

Dated at Augusta, Maine, this 28th day of January, 2009.

MAINE LABOR RELATIONS BOARD

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Barbara L. Raimondi, Esq.
Chair