STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 11-05
Issued: March 27, 2012

ALINE C. DUPONT, Complainant, v. MAINE STATE EMPLOYEES ASSOCIATION/ SEIU, Local 1989, Respondent.	DECISION ON APPEAL OF EXECUTIVE DIRECTOR'S DISMISSAL

On August 12, 2011, Complainant Aline C. Dupont filed a Motion for Review of the Executive Director's dismissal of her prohibited practice complaint against the Maine State Employees Association (MSEA or Union). Her complaint alleged that MSEA breached its duty of fair representation in its handling of her grievance over her termination from employment with the Judicial Branch, thereby violating 26 M.R.S.A. §1284(2)(A). The Executive Director conducted an investigation in accordance with the requirements of the Judicial Employees Labor Relations Act and concluded that no violation of the Act had occurred. Upon appeal, we have reviewed the record and the arguments submitted and conclude that the Union did not breach its duty of fair representation.

I. BACKGROUND

A. SUMMARY OF THE JUDICIAL ACT PROCEDURES

This is the first prohibited practice complaint filed under the Judicial Employees Labor Relations Act that has resulted in a

decision on the merits by the Board's Executive Director. The procedures set forth in the Judicial Employees Labor Relations Act (the "Act") are significantly different than the adjudicatory procedures used under the other statutes enforced by the Board.[1] The investigative and adjudicatory procedures specific to the Judicial Employees Act enable the Maine Labor Relations Board, an independent agency of the Executive Branch, to administer and enforce that Act in a manner that minimizes the necessity of conducting hearings over events occurring within the Judicial Branch. These unique procedures for addressing prohibited practice complaints in the Judicial Branch are designed to speed up the resolution of prohibited practice complaints and to respect the constitutionally-based separation of powers.

When a prohibited practice complaint is filed under the Judicial Employees Labor Relations Act, 26 M.R.S.A. ch. 14, it is initially handled in the same manner as a prohibited practice complaint filed under any of the other three statutes enforced by the Board. Under each of the four acts, the complaint must state the facts and allege a violation of the Act, it must be served on the opposing party, and the alleged violation of the statute cannot be based on conduct occurring more than six months prior to the filing of the complaint. 26 M.R.S.A. §968(5)(B) (Municipal); 26 M.R.S.A. §979-H(2)(State); 26 M.R.S.A. §1029(2) (University); 26 M.R.S.A. §1289(2)(Judicial). Likewise, under all four acts the Executive Director first rules on the sufficiency of the complaint by determining "whether the facts as alleged may constitute a prohibited act." Id. Complaints may be amended in accordance with MLRB Rule Ch. 12, § 8, and the

[1]The Municipal Public Employees Labor Relations Law, Title 26, ch. 9-A; the State Employees Labor Relations Act, Title 26, ch. 9-B; the University of Maine System Labor Relations Act, Title 26, ch. 12.

Executive Director's dismissal of all or part of a complaint for insufficiency can be appealed to the Board under that same rule. If the Executive Director determines that the complaint does allege a violation of the statute, a prehearing conference and a hearing before the Board would be the next step under all of the statutes except the one covering the Judicial Branch. The procedure under the Judicial Employees Labor Relations Act is markedly different at this stage.

Under the statutory procedure for preventing prohibited acts under the Act covering the Judicial Branch, once the Executive Director finds that the alleged facts may constitute a prohibited act, the statute requires the Executive Director to "forthwith cause an investigation to be conducted." 26 M.R.S.A. §1289(2). The next sentence establishes the scope of this investigation: "The executive director shall attempt to obtain and evaluate sworn affidavits from persons having knowledge of the facts." Id. If the Executive Director determines from the sworn facts that the complaint is meritorious, the Executive Director is required to recommend a proposed settlement, after which the parties have 30 days to attempt to resolve their dispute before the recommended settlement can be made public. Id. If the Executive Director or the Board determines that a formal hearing is necessary, an evidentiary hearing will be scheduled following a prehearing conference. Id. From that point on, the complaint would proceed in the same manner as prohibited practice complaints under the other three statutes. If, however, the Executive Director conducts the investigation and "determine[s] that the sworn facts do not, as a matter of law, constitute a violation, the charge shall be dismissed by the executive director, subject to review by the Board." Id.

B. PROCEDURAL HISTORY

In the present case, Ms. Dupont filed her complaint with the Board on September 23, 2010. The complaint consisted of a 2-page notarized complaint, a cover letter with a 5-page "full description of all matters related to [Complainant's] wrongful termination,"[2] also notarized, and 101 pages of documents with no identification or indication of their purpose. The gist of the complaint is the allegation that the Union failed to represent the Complainant properly when handling the grievance on her termination. As a remedy, the Complainant sought reinstatement, back pay, payment of her medical and legal bills, clearing her record, and five hundred thousand dollars for mental suffering.

C. BASIC SUMMARY OF FACTS AS ALLEGED

On July 20, 2009, on her way to work as a District Court Clerk, Ms. Dupont was pulled over by a Biddeford police officer for not wearing a seatbelt and was subsequently charged with "a minor criminal offense." At some point during the stop, Dupont called the Clerk of Court in Biddeford. A tape of the traffic stop was made from the dashboard of the police cruiser. The Clerk of Court went to the Biddeford Police Department later that day, viewed the tape, and took a copy back to the Court and showed it to her manager. Dupont was notified by the Judicial Branch Human Resources Director that she was the subject of an investigation for violation of the Judicial Code of Conduct by allegedly trying to use her position with the court system to get out of the traffic ticket. This investigation was later expanded

[2]When the PPC was initially filed, the "full description" included only 4 pages, but it was obvious that a page was missing. When notified of this omission by the Executive Director, the Complainant provided the full 5-page document, and also included another exhibit, a 2-page letter from MSEA dated May 21, 2010.

to include an allegation of harassment based on a complaint filed by a co-worker. Dupont was of the opinion that it was illegal for her Employer to view or use the traffic stop tape in relation to her employment. The Union Steward looked into it and responded that the Employer did have the authority to use the tape. Dupont also asserted in her complaint that the Union "illegally denied the presence of an attorney" who would have prevented the use of the traffic stop tape by the Employer. Dupont alleged that the Union missed a step in the grievance procedure and refused to set up a meeting with the State Court Administrator after he denied her grievance. Dupont also charged that she was misled that the Union Grievance Committee would take her case to arbitration, so she did not pursue her complaint that three members of the Committee were hostile to her. The complaint also included allegations regarding the Union's conduct at administrative hearings where she was seeking unemployment compensation subsequent to her termination and allegations of actions taken by the Employer and the Union at work that violated her privacy rights.

D. THE EXECUTIVE DIRECTOR'S PRELIMINARY DECISION

The Executive Director followed the standard procedure for the initial review of a prohibited practice complaint for sufficiency, as set forth §1289, sub-§2 ("the executive director or his designee shall review the charge to determine whether the facts as alleged may constitute a prohibited act.") Due to a variety of issues, including the Complainant's omission of a page of her narrative description of the charge, the sheer volume of documents accompanying the complaint,[3] and the Union's request

[3]We note that the Board's rules do not contemplate the submission of documentary evidence as part of the complaint. Such submissions should be discouraged. MLRB Rule Ch. 12, §5, specifies the required

for an extension to submit its argument, the Executive Director's decision on the sufficiency of the complaint took longer than usual, and was not issued until December 10, 2010.

The first part of the Executive Director's decision applied the 6-month limitation period imposed by 26 M.R.S.A. §1289(2) and concluded that any conduct occurring more than 6 months prior to the filing of the Complaint, that is, prior to March 23, 2010, could not serve as the basis for a complaint. In addition, the Executive Director dismissed those portions of the complaint dealing with the unemployment compensation hearing and the allegation that the dissemination of the traffic stop tape violated the Complainant's privacy rights because those issues were beyond the Board's jurisdiction. What remained was the Union conduct with respect to the March 23, 2010, union grievance committee meeting, at which time the Union considered whether it should pursue arbitration of Dupont's grievance. The Executive Director identified the insufficiencies in the allegations regarding this meeting as well as certain procedural problems with the complaint, such as the need to cite the specific section and subsection of the law allegedly violated and the need to set forth the facts concisely in separate paragraphs. The

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content of a complaint: the name of the complainant (sub-§1), the name of the respondent (sub-§2), a copy of the collective bargaining agreement (sub-§3), the relief sought (sub-§5), a "concise statement of facts" (sub-§4), and "other relevant information" (sub-§6), that is, "[a] brief statement of any other information relative to the charge." The "Concise Statement of Facts" is described in detail:

> **4. Concise Statement of Facts.** A clear and concise statement of the facts constituting the complaint, including the date and place of occurrence of each particular act alleged, names of persons who allegedly participated in or witnessed the act, and the sections, including subsection(s), of the labor relations statutes alleged to have been violated. The complaint must consist of separate numbered paragraphs with each paragraph setting out a separate factual allegation.

Complainant was given until December 27, 2010, to amend the complaint, which was later extended to January 27, 2011.

E. THE AMENDED COMPLAINT

On January 31, 2011, the Executive Director issued a ruling that the amended complaint sufficiently stated a claim under the Act. Stripped of its legal conclusions, the amended complaint can be summarized as follows:

The complaint states that the Judicial Branch terminated Complainant's employment as a District Court Clerk for allegedly trying to use her position as an officer of the court to get out of tickets issued during a traffic stop in Biddeford on July 20, 2009. The Employer considered her behavior to be a violation of the Judicial Code of Conduct. The only people present at the traffic stop were the Complainant and the police officer who pulled her over. There was a video recording of the entire stop made from the dashboard of the police cruiser. Later that day, the Biddeford Police Department contacted the Clerk of Court in Biddeford, and told her she should come see the video recording of the stop. The Clerk of Court viewed the recording and took a copy back to her manager. The allegation that the Complainant had violated the Code of Conduct came from watching this recording. The Employer did not interview the police officer when investigating the alleged Code of Conduct violation. It is the Complainant's position that it was illegal for the Biddeford Police Department to show or provide the tape to the Clerk of Court and therefore any information learned from that tape was hearsay and its use was improper. The Complainant charges that the Union's grievance committee was obligated to vote to take her case to arbitration because the use of the tape as the basis for her termination was "illegal," because the Employer did not

interview the police officer (the only eye-witness), and because her termination was based entirely on hearsay evidence. The Complainant states that she and her Union representative made these arguments to the committee. The Complainant asserts that because the grievance committee was aware that the Employer had no direct evidence to terminate her, it was "duty bound" to take her case to arbitration. The Complainant also charges that the grievance committee should not have included certain individuals with whom the Complainant had a "negative history" nor any employees who worked in the same office as the Human Resources Director. The Complainant charges that "it is obvious that the Committee did not deal with [her] in 'good faith' and therefore violated §1284(2)(A)."

F. THE EXECUTIVE DIRECTOR'S INVESTIGATION AND DECISION

In the same January 31, 2011, letter ruling that the amended complaint was sufficient, the Executive Director initiated the investigation of the complaint. As the first step of this investigation, the Executive Director required the Union to file a response to the amended complaint. In addition, the Union was directed to support its response with sworn affidavits from persons having knowledge of the facts of the case. The Executive Director asked that the Union's affidavits address the steps undertaken in processing Dupont's grievance, including the Union's efforts to file the grievance at step 2 and step 3 of the grievance procedure.

On March 1, 2011, the Complainant submitted an unsolicited copy of the February 22, 2011, decision of the Maine Unemployment Commission.

The Union filed its response to the Amended Complaint on March 3, 2011, and included six affidavits and eight documents

supporting its response. The Union also filed a Motion to Dismiss the Complaint, arguing that the facts alleged did not amount to a breach of the duty of fair representation.

After receiving the submissions of the Union, the Executive Director notified the Complainant and instructed her to file sworn affidavits addressing the factual matters relating to the merits of the complaint and any documents the Complainant believed were important to her case. The Executive Director also indicated that the Complainant should submit written argument in response to the Union's Motion to Dismiss. On April 20, 2011, the Complainant filed an "Affidavit of Aline Dupont," a "Response to Reply from Respondent," and a "Motion to Deny Respondent's Request for Dismissal."

On July 29, 2011, the Executive Director issued his decision concluding that the sworn facts did not, as a matter of law, constitute a violation of the Act and dismissed the complaint. The decision included 40 separate findings of fact, extensive consideration of the actions taken by the Union in handling her case, and a discussion of the Complainant's various arguments.

G. THE APPEAL TO THE BOARD

The Complainant timely appealed the Executive Director's decision to the Board. The Complainant filed a "Revised Motion for Review of Dismissal of Complaint" on Oct. 27, 2011.[4] The Motion presented new arguments that the Union failed to oppose

[4]Upon review of the initial motion for review, it became apparent that the Executive director cited an MLRB Rule that was not appropriate for an appeal of this nature. The Board issued an Interim Order explaining that an appeal to the Board was not a review of the Executive Director's sufficiency determination, but was a review to address whether the sworn facts constituted a violation of the Act. Complainant was given the opportunity to amend the motion for review.

various decisions of the Employer and made Dupont a scapegoat because the Union did not want to embarrass the Judicial Branch or the Clerk of Court. The Motion also argued that the six-month limitations period should not have been applied to remove certain subjects from consideration.

Included with the Motion for Review was a copy of the February 22, 2011, decision of the Unemployment Commission; a copy of the Union's letter informing the Complainant that they decided not take her grievance to arbitration; a letter dated September 21, 2009, from Ms. Dupont's therapist describing her mental health issues; a DVD copy of the recording of the traffic stop; and audio recordings of the unemployment compensation administrative hearings on May 24 and 28, 2010, and the Maine Unemployment Commission's hearings on November 18, 2010, and January 6, 2011.

Following the receipt of the Union's response to the appeal, the Complainant submitted a 4-page reply that included thirteen (13) exhibits: a copy of an "Official Complaint" alleging improper sharing of confidential information filed by Dupont on October 5, 2009, against Lisa Morgan, the Union Steward initially involved with her situation; a total of three emails related to that issue; a copy of the December 23, 2009, letter from the State Court Administrator; a copy of an "Official Complaint" filed by Dupont on September 30, 2009, against the Clerk of Court and an Administrative Clerk for violating her "civil right to privacy" and creating a hostile work environment for her; a one-page excerpt from the Employer's Investigative Report, and various other documents with Dupont's handwritten notes on them reflecting her view that the documents support her theory that she was being made a scapegoat.

The Complainant's Motion asks the Board to consider all prior submissions to the Executive Director in deciding this appeal, and specifically objects to the Executive Director's ruling that the statutory six-month limitations period precludes consideration of some issues. In addition, the Complainant expressly requests the Board to view the video of the traffic stop because it was the basis of the Employer's action against her and because, in the Complainant's view, it substantiates the Complainant's version of the events. The Complainant's Motion also asks the Board to listen to the audiotapes of various unemployment hearings occurring several months after the Grievance Committee's decision because, the Complainant asserts, it proves her case that the Employer was trying to use her as a scapegoat. We conclude that listening to the unemployment hearings is inappropriate, for reasons explained below, and will defer discussion on the traffic stop tape until later.

II. STATUTE OF LIMITATIONS

The Executive Director ruled that events occurring prior to March 23, 2010, could not serve as the basis of any alleged violation of the Act. The Executive Director relied on the express terms of the statute and long-settled interpretation of that statute that prevents the Board from hearing any prohibited practice that is based on conduct occurring more than six months prior to the filing of the complaint. 26 M.R.S.A. §1289(2). In this case, that limitation precludes the Board from addressing a violation of the law based on conduct occurring before March 23, 2010. We affirm the Executive Director's ruling on that point.

Nevertheless, the Board is not precluded from considering evidence of events occurring before the six-month time frame in order to fully understand the events occurring within the six

months. It is well established that evidence of events occurring before the six-month limitation period can be considered for the limited purpose of "shed[ding] light on the true character of matters occurring within the limitations period." See, e.g., Teamsters Local 48 v. City of Waterville, No. 80-14, at 2-3, (April 23, 1980), citing Machinists Local Lodge No. 1424 (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411 (1960). Consequently, we will review all of the facts presented leading up to the Union's conduct which is the basis of the complaint here, that is, the Union Grievance Committee's denial of COmplainant's arbitration request.

III. FINDINGS OF FACT

1. The Complainant, Aline C. Dupont, was employed by the Judicial Branch for approximately seventeen years as a clerk in the office of the Clerk of Court at the various locations where she was assigned to work. Dupont's position was included in the Judicial Branch Administrative Services Bargaining Unit, for which MSEA is the certified bargaining agent.

2. On July 20, 2009, while on paid travel status and driving to work at the Biddeford District Court, Aline Dupont was stopped by an officer of the Biddeford Police Department. A videotape of the traffic stop was recorded by a camera located in the cruiser operated by the police officer. [Dupont affidavit ¶2; Sept. 15, 2009, Investigative Report (submitted with Complaint); Respondent's Reply Memo ¶1.]

3. By her own admission, Dupont did not react well to the situation and was discourteous to the officer. [Dupont affidavit ¶2; Amended Complaint ¶2; September 15, 2009, Investigative Report (submitted with Complaint).]

4. As a result of the traffic stop, Dupont was cited for failure to wear a seat belt, illegal attachment of plates, and refusal to sign a uniform traffic ticket. [Letter from Dana C. Hanley, Esq., to Mark Lawrence, D.A., dated 12/10/09, cc to Dupont (submitted with Complaint); letter from Linda P. Cohen, Esq., to Dupont dated 1/12/10 (submitted with Complaint).]

5. Later that same day, the Deputy Chief of the Biddeford Police Department phoned Kathy Jones, the Clerk of the Biddeford District Court, and invited Jones to view the tape of the traffic stop involving Dupont. [Dupont Affidavit ¶2]. Jones went to the Biddeford Police Department, viewed the tape and requested a copy of it. Jones then provided the copy of the tape to Rick Record, the Director of Clerks of Court at the Administrative Office of the Courts. [Dupont Affidavit ¶2.]

6. Dupont asked her son, an attorney, about the Employer's possession of the dashboard tape of the traffic stop. He informed her of the Criminal History Record Information Act (CHRIA), 16 M.R.S.A. §§611-623, which Dupont asserts makes the Employer's possession or use of the tape illegal. [Dupont Affidavit ¶3.]

7. Dupont learned that Rick Record had a copy of the video tape on the same day as the traffic stop. She told Record that his possession of the tape was illegal since the tape had been unlawfully obtained. [Dupont Affidavit ¶3]. Dupont also informed her union steward, Lisa Morgan, that the Employer was not supposed to have the tape and asked her to retrieve it. When Morgan got back to her on it, she told Dupont that the Employer was allowed to have the tape. [Dupont Affidavit ¶3.]

8. About ten days after the traffic stop, Dupont received an email from the Human Resources Director informing her that she was under investigation for violating the Judicial Code of Conduct. This notice was also sent to Lisa Morgan and another union representative. Dupont was disturbed by the fact that she received this notice by email, and by the fact that copies had been sent to Morgan and the other union steward. Dupont told Morgan that she wanted to have her lawyer present at this meeting. Morgan informed her that was not allowed. As the result of various conversations with other employees, Dupont and Morgan disagreed what kinds of conversations about her case were appropriate. This led to Morgan removing herself from the case. MSEA Field Representative Nicole Argraves assumed responsibility for handling Dupont's situation. [Narrative description of events p. 2 (submitted with Complaint).]

9. At a meeting on August 7, 2009, the Employer's Human Resources Director, Kimberley Proffitt, produced a copy of the tape for Dupont, Kathy Jones, Rick Record, and Union representative Nicole Argraves to see. At this time, Dupont was informed that she was going to be investigated for a complaint of harassment being filed against her by a co-worker. [Narrative description of events, p. 3 (submitted with Complaint).]

10. On September 15, 2009, the Judicial Branch issued its Investigative Report regarding the alleged violation of the Judicial Code of Conduct. In conducting the investigation, management viewed the DVD record of the traffic stop, reviewed Dupont's personnel record, including her disciplinary history, interviewed five judicial branch employees and reviewed written statements from Dupont and two other employees. The report concluded that, "Ms. Dupont has a long history of engaging in inappropriate behavior and that the facts support a finding that

Ms. Dupont did attempt to use her position and affiliations in express violation of the Judicial Branch Employee Code of Conduct. . . [and] that she made numerous statements meant to intimidate and coerce co-workers." The investigation also determined that the statements by Dupont that she did not remember the stop or what she said were not corroborated by the testimony of others. [September 15, 2009, Investigative Report (submitted with Complaint).]

11. After reviewing the report and considering all disciplinary alternatives, management recommended termination of Dupont's employment. Dupont was scheduled for a Loudermill meeting[5] on September 18, 2009, at which time she would be able to provide information prior to the final decision regarding termination. [Letter dated Sept. 15, 2009, from Proffitt to Dupont (submitted with Complaint)]. Because there was a complaint against Dupont regarding harassment still pending, Dupont's Union representative (Nicole Argraves) asked that the Loudermill hearing be delayed until the completion of that investigation. [Narrative description of events, p. 3 (submitted with Complaint]. Argraves had requested that Dupont be granted a follow-up interview as part of that investigation, which occurred on September 28, 2009. [Investigative Report Addendum dated October 1, 2009 (submitted with Complaint).]

12. The Addendum to the Investigative Report issued after the follow-up interview with Dupont concluded,

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[5]A Loudermill meeting is part of the "due process" that must be provided to a public sector employee to be allowed to respond to the charges before the government employer makes the final decision to terminate employment. In the Loudermill case, the U.S. Supreme Court held that certain due process requirements must be met when the public sector employee has a "property interest" in continued employment. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

> No compelling evidence was shared that would alter the previously stated determination that Ms. Dupont made statements to her co-workers in Bridgton that were designed to intimidate; and that at least one of these co-workers was intimidated and felt threatened by those statements. Ms. Dupont was not able to offer any rational reasons as to why the persons providing these detailed descriptions of her behavior would knowingly make false statements.

[Investigative Report Addendum dated October 1, 2009 (submitted with Complaint).]

13. The Loudermill meeting was held on October 8, 2009, at which time Dupont suggested that any inappropriate behavior she may have engaged in during the July 20, 2009, traffic stop was, in part, the result of her psychological condition. She requested that her inappropriate conduct at the stop be excused as an accommodation. That request was denied by James T. Glessner, the State Court Administrator. [Letter from Glessner to Dupont dated October 20, 2009, (submitted with Complaint).]

14. Dupont received a letter from State Court Administrator Glessner dated October 20, 2009, which terminated Dupont's employment effective at the close of business that day. The letter stated:

> You were notified by letter dated September 15, 2009 that a recommendation had been made that you be terminated from your position at the Judicial Branch. A Loudermill meeting was held on October 8, 2009. Prior to the Loudermill meeting, you were provided with a copy of the investigative report. At the Loudermill meeting, you were afforded union representation and the opportunity to provide information prior to the final decision regarding discipline.
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> At issue are the allegations that you: 1) were in violation of the Judicial Branch code of conduct relating to an incident that occurred on or about

> July 20, 2009; and 2) that you threatened, intimidated, harassed or engaged in verbal bullying and/or unprofessional conduct. After a thorough investigation, the allegations were substantiated. At the Loudermill meeting, you and/or your representative suggested that your inappropriate conduct may have been related, at least in part, to a psychological condition. In addition, you indicated that you did not intend to suggest that the DA would "drop" the tickets. After careful consideration of all the available information, I have concluded that you have not presented any information warranting reducing the proposed termination. To the extent that you have requested that your inappropriate conduct be excused as an accommodation, that request is denied as unreasonable.

[Letter from Glessner to Dupont dated October 20, 2009, (submitted with Complaint).]

15. A step 1 grievance was filed on behalf of Dupont by MSEA Field Representative Nicole Argraves via e-mail to the Human Resources Director, Kimberly Proffitt. [Argraves affidavit ¶4; Argraves e-mail dated October 23, 2009, (Union Submission to Executive Director, Attachment E)]. Proffitt replied on Friday, October 30, 2009, denying the grievance and stating that the grievance was deficient because it had not been submitted in writing and it did not list the contract articles violated. Argraves responded later that day that she would hand deliver the official grievance the following Monday. [Argraves affidavit ¶5.]

16. Argraves submitted a written grievance the following week, which contained the same information as the e-mailed grievance. Proffitt considered this submission to be a step 1 grievance while Argraves apparently considered it step 2, although she did not place any step number in the proper place on the form. [Argraves affidavit ¶5.]

17. On November 24, 2009, Proffitt e-mailed Argraves stating that she assumed that the grievance had been resolved because she had denied the step 1 grievance on October 30, 2009, and the time frame for moving the grievance to step 2 had passed. Argraves responded that she did file the grievance at step 2 and no step 2 response was received. Over the course of the next few days, Proffitt and Argraves exchanged several emails asserting their respective positions, but came to no agreement on whether a step 2 grievance had been properly filed within the established time limits. Argraves indicated that they were moving to step 3. [E-mail exchange (Union Submission to Executive Director, Attachment E).]

18. Argraves subsequently filed the step 3 grievance with State Court Administrator Glessner. Glessner responded in a letter to Argraves dated December 23, 2009, with a copy provided to Dupont. He concluded that there was no step 3 grievance to process because the Union had missed or erred on a previous step. Without conceding any contractual obligation to meet, Glessner offered to meet and explore "reasonable alternatives and resolution". [December 23, 2009, letter from Glessner (submitted with Complaint).]

19. Dupont asserts in her affidavit that she asked Argraves to arrange a meeting with Glessner, but that Argraves did not set up a meeting. Argraves stated in her affidavit that she approached Dupont about such a meeting and Dupont wanted to know if it would result in her reinstatement or get her 10 years of wages. Argraves told her that reinstatement was not likely, as the Employer had been clear in its refusal to return her to work and that 10 years of wages was also unlikely. According to Argraves, Dupont stated that those were her requirements, and if that outcome was not likely, there was no sense in meeting. Argraves

also stated that Dupont never asked her to set up a meeting with Glessner until after the Grievance Committee declined to take her grievance to arbitration. [Argraves affidavit ¶7, ¶9; Dupont affidavit, ¶6,; Narrative description of events, p. 4 (submitted with Complaint)]. Dupont asked that her case to go to arbitration. [Argraves affidavit ¶8.]

20. Argraves believed that the time lines of filing Dupont's grievance would likely be an issue at the grievance committee meeting because the Employer believed Argraves had not met the deadlines established in the grievance procedure. [Argraves affidavit ¶ 26.]

21. Dupont was notified by letter dated March 12, 2010, that the judicial non-supervisory grievance committee would meet on March 23, 2010, to decide whether to take her grievance to arbitration. [Union submission, attachment "C".] The letter informed her that if she was unable to attend the meeting either in person or by phone, her field representative would present her grievance on her behalf. The letter instructed Dupont to contact Argraves prior to the meeting to discuss the presentation of the grievance. The letter also referred her to an enclosure titled, "What is The Grievance Committee and What Does It Do?". The enclosure described how MSEA has separate grievance committees for supervisory and non-supervisory employees, and also stated:

> Grievance Committees exist to give members control over the administration of their contract. Not every grievance that remains unresolved at the arbitration step should go forward to arbitration. Why? Arbitration decisions not only serve as precedent for cases arising under the same contract but they also may be relied on by arbitrators deciding cases under other, similar contracts. Sometimes, the Union and bargaining unit members have an interest in our not going to arbitration over cases where we have little chance of

winning, especially where the decision could set a bad precedent for the future. . . .

22. The MSEA grievance committee ground rules provided an overview of the committees' responsibilities. [Union submission, attachment "F".] The ground rules stated, "The committees provide oversight of the arbitration process, balancing the competing interests of members, applying MSEA policy to the issues raised by particular grievances, and filtering out meritless grievances before arbitration." The ground rules gave a detailed explanation of the duty of fair representation, quoting from the Law Court's decision in Lundrigan v. MLRB. It explained that the duty of fair representation "does not mean that MSEA must arbitrate every grievance. The union has the right to walk away from a grievance, so long as it acts for legitimate reasons. For example, the union may decide that the grievance is too weak to justify the cost of arbitration."

23. The grievance committee ground rules identified a number of valid reasons a grievance committee could have for withdrawing a case from arbitration:

a. Based on the current contract, law, and precedents, there is no reasonable chance of success in arbitration;
b. The grievance implicates policy considerations that are appropriately decided by the membership;
c. The cost of arbitrating the dispute outweighs the potential benefits to be derived from a successful outcome
d. The grievance involves conflicting rights of union members;
e. The grievant has refused to cooperate, or has otherwise significantly impaired the union's ability to provide effective representation;
f. The employer has made a firm settlement offer which provides relief that is at least equal to the remedies that can reasonably be expected from arbitration;
g. For other legitimate reasons consistent with the policies and practices of the union, and with the

union's duty of fair representation.
[Union submission, attachment "F".]

24. The union grievance committee ground rules also stated, "No outside lawyers are permitted to represent unit members in the grievance process, or before the grievance committee." [Union submission, attachment "F".]

25. The grievance committee for the Judicial Branch Administrative Services and Professional Services Bargaining Units had not met for at least a year. The grievance committees are made up mostly of active stewards and chief stewards. If a committee had not met recently, the members would be contacted to see who is able and willing to serve. [Hodsdon affidavit ¶2-¶4.]

26. Argraves reviewed a list of grievance committee members with Dupont sometime around March 10, 2010, and then later in a meeting that included MSEA President Hodsdon [Argraves affidavit ¶10- ¶12, ¶15.] Dupont objected to any supervisors serving on the committee, but Argraves explained that none of the supervisors listed as members would be serving on the grievance committee handling her grievance. Dupont objected to Lisa Morgan serving on the committee and two others: Deborah Nowak and Michael Gilbert. Argraves responded that Morgan would be removed from the committee because of her earlier involvement with Dupont. Dupont did not provide a reason for her objection to Nowak. Dupont explained her objection to Gilbert was that he had lied to management about her falling asleep on the job. Argraves said she would look into it. Hodsdon informed Dupont that there was a limited pool of people able to serve on the committee and that some were unavailable. [Argraves affidavit, ¶12-¶16.]

27. Argraves contacted Gilbert about Dupont's concern. He explained that he had once been asked by a supervisor if he had

observed Dupont sleeping in the court on a particular day and he responded that he had seen her fall asleep. He said he could not lie when asked a direct question by a supervisor. He stated that he had no issues with Dupont and felt he could be impartial when considering Dupont's grievance. When Argraves reported this back to Dupont, she said to go ahead and use Gilbert on the committee. [Argraves affidavit, ¶¶17-18; Gilbert affidavit ¶4.]

28. At some point, Dupont indicated that two of the people listed as grievance committee members were unacceptable to her because they worked in the same office as the Human Resources Director. She was very uncomfortable because she felt many emails had already been shared inappropriately in her case. Dupont also believed that these two individuals were unduly influenced by the opinion of the Human Resources Director about the legality of using traffic stop tape and her right to have an attorney present at meetings. [Dupont affidavit ¶5, ¶7.]

29. In their respective affidavits, the two committee members who worked in the same office as the Human Resources Director stated that they never discussed Dupont's termination or grievance with the Human Resources Director. [Nowak affidavit ¶3, Fournier affidavit ¶3.]

30. Just prior to the March 23, 2010, grievance committee meeting, one committee member, Deb Nowak, spoke to Argraves about the possibility that Dupont might perceive a conflict because she had supervised Dupont in 1996. Nowak herself thought she could be impartial. Nowak's concern was discussed with Dupont prior to the meeting. Dupont waived any objection to Nowak being on her grievance committee. [Argraves affidavit ¶ 21-24; Hiltz affidavit ¶4, ¶5.]

31. Dupont stated in her affidavit that she waived the objection because she was informed by Bruce Hodsdon that there were no other members available to serve on the committee. He did not offer to delay the meeting. [Dupont affidavit, ¶8.]

32. Prior to the start of Dupont's grievance committee meeting, MSEA Director of Field Services Hiltz and MSEA President Hodsdon reviewed the duty of fair representation and the grievance committee ground rules with the committee. This training took about forty minutes. [Hiltz affidavit ¶7; Hodsdon affidavit ¶8] Then Argraves and Dupont were invited into the room to meet with the grievance committee. Hodsdon gave an introduction explaining the purpose of the grievance committee, the procedures for presenting the case and noting that the proceedings were confidential. After the grievance committee meeting convened, but before any discussion of the grievance occurred, Dupont was asked again if she had any problem with any members serving on the committee. She responded that she did not. [Argraves affidavit, ¶18; Hodsdon affidavit, ¶9-¶10.]

33. Argraves and Dupont presented the merits of Dupont's case to the committee. Argraves and Dupont explained their position on the illegality of the employer possessing or using as evidence the DVD of the traffic stop. [Amended Complaint ¶5.] Dupont presented a legal opinion written by an attorney on the legality of the dissemination of the video. [Dupont affidavit ¶9; March 22, 2010, letter from John S. Campbell to Argraves (submitted with Complaint)]. Dupont explained her health condition and her difficulties in handling stressful situations. [Dupont affidavit ¶9]. Argraves informed the committee that the Employer would likely raise a timeliness argument because they believed the Union had missed a deadline. Argraves indicated that the Union would dispute that point. [Argraves affidavit ¶26].

34. The committee members asked several questions of both Argraves and Dupont. At some point, the Union President asked Argraves if she thought that Dupont had violated the Code of Conduct and she said no. [Dupont affidavit ¶9.] Dupont and Argraves were asked if they had anything else to present. Neither had anything further. [Argraves affidavit ¶26.] Dupont and Argraves were then excused from the meeting. The presentation and question period lasted for about an hour and twenty minutes. [Argraves affidavit ¶26; Hiltz affidavit ¶10.]

35. The committee discussed the case for over an hour. The committee voted not to take Dupont's case to arbitration. [Hiltz affidavit ¶11; Hodsdon affidavit ¶11; Gilbert affidavit ¶6; March 26, 2010, letter to Dupont from Hiltz]. Once the decision was made, the President collected all the notes and materials from the committee members which were then destroyed.

DISCUSSION

THE DUTY OF FAIR REPRESENTATION

The legal question presented by this case is whether the MSEA breached its duty of fair representation in handling the grievance on the Complainant's termination. The duty of fair representation derives from the statutory provision that grants the certified bargaining agent the sole and exclusive authority to act as the bargaining representative for the employees in the bargaining unit. See 26 M.R.S.A. §1287(3)(D). With this statutory authority comes the corresponding obligation to represent all of the employees in the unit fairly. A breach of the duty of fair representation is a violation of §1284(2)(A) of the Act, which prohibits a union from "interfering with, restraining, or coercing employees in the exercise of the rights

guaranteed in section 1283." This Board and the Maine Law Court have consistently held that the duty of fair representation is breached only when a union's conduct toward a bargaining unit member is arbitrary, discriminatory, or in bad faith. Lundrigan v. MSEA, No. 83-03 at 6-7 (Feb. 4, 1983) aff'd Lundrigan v. MLRB, 482 A.2d 834 (1984), and Brown v. MSEA, 1997 ME 24, ¶7, 690 A.2d 956, citing Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967).

THE SCOPE OF DUTY OF FAIR REPRESENTATION

The scope of the bargaining agent's duty of fair representation does not extend beyond the scope of the agent's statutory authority. This means that the duty of fair representation only applies when a union is acting in its statutory capacity as the bargaining agent representing the employees in the bargaining unit. Thus, when a union is representing employees in negotiations and in administering a collective bargaining agreement, which includes grievance processing, it is subject to the duty of fair representation. Jordan v. AFSCME, No. 07-15 at 17 (June 18, 2008) (Duty of fair representation applies to negotiations but does not apply to ratification procedures); Stephen Collier v. Penobscot Bay Teachers Assoc./MEA, No. 92-30 at 12 (Sept. 25, 1992), aff'd Ken. Super. Ct. CV-92-478 (April 10, 1993)(same).

With this in mind, we note that the Executive Director's decision to dismiss that portion of the complaint regarding the Union's conduct at a subsequent unemployment compensation hearing was correct.[6] The Union has no statutory authority with respect to unemployment compensation, and as there is no exclusive representation issue limiting the complainant's rights in

[6]Similarly, whether the Union violated Dupont's expectations of privacy are beyond the scope of the duty of fair representation and beyond the jurisdiction of this Board.

unemployment proceedings, the Union's conduct is not subject to the duty of fair representation.

THE NATURE OF THE DUTY OF FAIR REPRESENTATION

The nature of the duty of fair representation under Maine law is comparable to the duty of fair representation under the National Labor Relations Act. Langley v. MSEA, No. 00-14, at 25 (Dec. 26, 2000), aff'd, 2002 ME 32, ¶10, 791 A.2d 100; see also Airline Pilots v. O'Neill, 499 U.S. 65, 67 (1991). In both cases, a showing that the union's conduct was arbitrary, discriminatory or in bad faith involves the same analysis:

> A union's actions are 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. A union's discriminatory conduct violates its duty of fair representation if it is invidious. Bad faith requires a showing of fraud, or deceitful or dishonest action.

Aguinaga v. United Food & Commercial Workers Int'l Union, 993 F.2d 1463, 1470 (10th Cir. 1993) cert. denied, 510 U.S. 1072 (1994)(internal quotations and citations omitted).

THE STANDARD IS INTENTIONALLY HIGH

The standard for proving a breach of the duty of fair representation is high, and is intentionally high in order to allow the collective bargaining system to function in accordance with the policies of the labor relations statutes. The Law Court has recognized that a union must be allowed to balance the collective interests of the whole with the individual interests of its members. Brown v. Maine State Employees Association, 1997 ME 24, ¶7, 690 A.2d 956, citing Peterson v. Kennedy, 771 F.2d 1244, 1255 (9th Cir. 1985). A union must be able to focus on the

collective interests of the entire bargaining unit without being forced to serve as a zealous advocate for each and every individual with a possible grievance. Liability for mere negligence or bad judgment calls would lead to direct costs that would have to be passed on to the entire membership and would weaken the union. Peterson v. Kennedy, 771 F.2d at 1255. The U.S. Supreme Court has long recognized that in order for the collective bargaining system to function properly, this high degree of deference is essential:

> Union supervision of employee complaints promotes settlements, avoids processing of frivolous claims, and strengthens the employer's confidence in the union. [Vaca v. Sipes, 386 U.S.] at 191-193, 87 S.Ct. at 917-918. Without these screening and settlement procedures, the [Vaca] Court found that the costs of private dispute resolution could ultimately render the system impracticable. Ibid.

International Bhd. Of Elec. Workers v. Foust, 442 U.S. 42, 51, 99 S.Ct. 2121, 2127 (1979). This reasoning is consistent with this Board's long-standing view that a union needs to be able to exercise discretion in order to perform its representational duties effectively. Lundrigan v. MSEA, No. 83-03 at 6-7, aff'd Lundrigan v. MLRB, 482 A.2d 834 (1984)(no violation of duty for Union attorney to refuse to make arguments at arbitration that grievant thought should be made); Casey v. Mountain Valley Educ. Assoc., No. 96-26 (Oct. 30, 1997)(no violation in refusal to take case to arbitration because of uncooperative behavior of grievant). See also Chauffeurs Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 567-68, 110 S.Ct. 1339 (1990)(A union has "broad discretion in its decision whether and how to pursue an employee's grievance against an employer." citing Vaca v. Sipes, 386 U.S. at 185, 87 S.Ct. 903).

APPLYING THE STANDARD IN THIS CASE

As noted above, the established standard for determining whether a union's conduct is arbitrary requires considering the conduct in light of the factual and legal landscape at the time of the action. Clearly, this means that subsequent actions and testimony given at the unemployment hearings occurring two months after the Union grievance committee meeting have no bearing on whether the Union breached its duty of fair representation in deciding not to take Dupont's grievance to arbitration. The Board therefore declines to listen to the audiotapes of those subsequent unemployment hearings, as the Complainant requested. Likewise, this Board will not consider the transcripts, evidentiary rulings or administrative decisions related to the Complainant's unemployment compensation proceedings occurring subsequent to March 23, 2010.

We also note that the ruling in February 2011 that the Complainant was eligible to receive unemployment compensation has no impact on this case, as that decision applied a misconduct standard unique to Maine's Employment Security Laws. Indeed, the definition of "misconduct" in the Employment Security Law expressly states:

> This definition relates only to an employee's entitlement to benefits and does not preclude an employer from discharging an employee for actions that are not included in this definition of misconduct. A finding that an employee has not engaged in misconduct for purposes of this chapter may not be used as evidence that the employer lacked justification for discharge.

26 M.R.S.A. §1043(23). Thus, contrary to the Complainant's assertion, the outcome of her claim for unemployment benefits has absolutely no bearing on this case.

In order to properly assess the duty of fair representation charge, we must review the nature of the factual and legal landscape at the time of the Union's action of denying the Complainant's request to go to arbitration. The facts are that the Complainant was discharged for two reasons, both supported by a well-documented investigation by the employer. The Union's grievance committee could have reasonably concluded that the Employer did have just cause to terminate Dupont's employment because of her behavior at the time of the traffic stop and because of her subsequent bullying and intimidation of a fellow employee. The Employer's decision to terminate Dupont was supported by a lengthy investigation process involving interviewing Dupont on more than one occasion and interviewing several other employees. The Employer's decision was influenced by the nature of the infraction, Dupont's history of discipline for behavior-related issues, and the inconsistencies in Dupont's statements regarding her behavior and her ability to remember what she said or did. These facts, which were evident to the union grievance committee, demonstrate that its decision against taking Dupont's case to arbitration was not "so far outside a wide range of reasonableness as to be irrational."

The added challenge of proving to an arbitrator that the grievance had been properly filed at each step was another valid consideration in deciding whether it was worth it to go to arbitration. We note that even if the arbitrator concluded that the Union failed to file the grievance at Step 2, such a failure is at most negligence, which is not a breach of the duty of fair representation. See Lundrigan v. MLRB, 482 A.2d 834, 836 (1984) ("mere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty of fair representation" quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 686

(1953)). In light of these facts, the Union could reasonably conclude that the Employer had just cause to terminate Dupont, or that the Employer's case was strong enough that the slim likelihood of prevailing did not justify the expense of arbitration.

The Complainant's central argument is that the Union breached its duty by failing to oppose the Employer's use of the traffic stop recording in terminating her. The Complainant does not seem to appreciate the fact that her opinion on the legality of the Employer possessing the traffic stop tape may be wrong. We do not need to come to a firm conclusion about the propriety of giving the tape to the Employer because it is enough that there are valid arguments that it did not violate the Criminal History and Records Information Act to do so. As the Executive Director noted, the CHRIA does not preclude criminal justice agencies from disseminating investigatory evidence to other criminal justice agencies. Title 16 M.R.S.A. §611(4) specifically includes the courts in the definition of "criminal justice agencies." The Executive Director noted that one could reasonably conclude that giving the tape to the Clerk of Court was merely one criminal justice agency providing it to another.

We also note that CHRIA does not prohibit all dissemination of criminal investigatory records, but only when "there is a reasonable possibility that public release or inspection of the reports or records would . . . constitute an unwarranted invasion of personal privacy."[7] 16 M.R.S.A. §614(1)(C). First of all, it is arguable whether dissemination of the tape to a Clerk of Court

[7]There are many other reasons listed, such as when there is the possibility that release would disclose the identity of a confidential source or would disclose investigative techniques or security plans not generally known by the public. 16 M.R.S.A. §614(1)(A-K).

and to two higher managers at the Court system would be considered "public release or inspection" of the record. Secondly, it is unlikely that the Biddeford Police Department would give the recording to the Complainant's Employer without some discussion of the statute restricting the public release of such material. Indeed, the Employer's resistence to providing a copy to the Complainant or the Union could be explained by a desire to respect the objectives of the statute and limit the display of the video on a strictly need-to-know basis. Consequently, there are valid arguments for concluding that releasing the tape to the Clerk of Court is permissible under the statute.[8] This interpretation of the statute would also help explain the Employer's consistent behavior in refusing to release the tape to Dupont's Union representatives or to the Union's grievance committee,[9] because one could consider each subsequent release bringing it incrementally closer to being a "public release."

With this in mind, we reject the Complainant's argument that the Union's failure to obtain a copy of the traffic stop recording to show to the grievance committee was a breach of the duty of fair representation. It is possible that the Employer was not willing to provide a copy of the tape to the Union. Even if the Employer had been willing to do so, it would

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[8]Even if there was something improper about showing the tape or giving a copy to the Employer, there is no exclusionary rule which would preclude the Employer relying on the tape in disciplining the Complainant. See Rule 28 of the American Arbitration Association Labor Arbitration Rules which states that the arbitrator is the judge of relevance and materiality of evidence offered and conformity to the legal rules of evidence is not necessary.

[9]It is noteworthy that the Complainant also asserts that the Employer refused to provide a copy of the tape at the unemployment compensation hearing on May 23, 2010, several months after her termination. See ¶5 of Amended Complaint.

not have been unreasonable for Argraves, who had viewed the recording on August 7, 2009, to conclude that showing it would not help Dupont's case before the grievance committee. Just as a union is not obliged to present arguments or evidence that the grievant insists on at arbitration, we hold that Argraves' failure to present the video recording in this case was not a breach of the duty of fair representation. See Lundigran v. MEA, No. 83-03 at 8 (Feb. 4, 1983), aff'd Lundrigan v. MLRB, 482 A.2d 834 (Me. 1984) (Union not obligated to introduce evidence it considered irrelevant or pursue arguments not grounded in the contract just because the grievant wanted it to).

Similarly, the duty of fair representation does not require a union to pursue a case to arbitration simply because there exists an argument that could be made. See Langeley v. MSEA, No. 00-14 at 29 (Dec. 26, 2000)(A decision not to pursue a "test case" is clearly within the Union's discretion), aff'd, 2002 ME 32, 791 A.2d 100, (Feb. 22, 2002), and Ridge v. Cape Elizabeth Educ. Assoc., No. 98-02 (Sept. 8, 1998) (no violation where union refused to pursue the grievant's desired remedy of reinstatement to her former job and withdrew from arbitration after she quit the comparable job to which she had already been reinstated.)

The Complainant also argues that the Union breached its duty of fair representation by failing to interview the police officer involved. Given that Argraves had viewed the traffic stop recording on August 7, 2009, it is certainly "within the wide range of reasonableness" for her to conclude that Dupont's case would not be helped by interviewing the police officer.

Contrary to the Complainant's assertions, Argraves did not breach the duty of fair representation in handling Dupont's grievance or in presenting Dupont's case to the grievance

committee. With respect to Dupont's assertion that Argraves was obligated to let Dupont bring her personal attorney to any meeting with the employer, Dupont is misinformed. The certified bargaining agent is the exclusive representative of all members of the bargaining unit and has no obligation or authority to delegate that responsibility to an employee's attorney. 26 M.R.S.A. §1287(2)(D). See Sharron Wood v. MEA and Maine Technical College System, No. 03-06, p. 36-37 (April 21, 2005) (Short of hiring someone as an attorney to represent the union, a bargaining agent cannot unilaterally grant to any person the authority conferred by statute). Argraves' handling of the grievance was not a breach of the duty of fair representation: She argued Dupont's case before the grievance committee, she presented the information so that the committee could make a fully-informed decision, and she allowed Dupont to present information on her mental health issues as well as the legality of the Employer's use of the traffic stop recording. The Committee simply disagreed with Dupont's assessment of her own case.

In an unusual twist, the Complainant simultaneously argues that the traffic stop recording substantiates her version of the events while arguing that the Employer should not have used or possessed the recording. As mentioned previously, the Complainant included a copy of the traffic stop recording with her appeal and specifically asked that this Board review it. Dupont argued that the video vindicated her by demonstrating that she was merely repeating the words stated by her supervisor on the other end of her cell phone conversation and that her supervisor was the one violating the Judicial Code of Conduct. Under normal circumstances, we would not consider reviewing any evidence offered on appeal, but it is our understanding that while the Executive Director was investigating and deliberating

this matter, the Complainant requested that he view the tape. The Executive Director chose not to do so. Given that background, and the conviction with which the Complainant asserts that the tape clears her, we decided to watch the video.

After reviewing the recording of the traffic stop, we do not agree with the Complainant that it substantiates her version of the events. The Complainant asserts in her Motion for Review that during her telephone conversation, the Clerk of Court stated that they could get the D.A. to take care of the ticket. The Complainant's Motion went on to state that, "With the cell phone still to her ear, the Complainant then repeated" what the Clerk of Court had just said. That description is not accurate. At fifteen minutes into the recording, the Complainant can be seen on her cell phone but neither side of the conversation is audible until the Complainant ended the phone call. The Complainant shut her cell phone and told the police officer that, "My boss is calling Biddeford Police Department". The officer asked why she was doing that, and Complainant said it was because she had not done anything wrong. When the officer pointed out that she was not using her seatbelt and had improperly attached plates, the Complainant said, "She's going to get the D.A. to get that off." Her cell phone was not "still to her ear" as she claimed in her written argument. Furthermore, when the Officer said, "I don't think so. . . I'll tell you right now. If anybody affects this charge improperly they'll be in more trouble than you are," her response was, "I don't think so," in a somewhat challenging manner. That type of response is far from what the Complainant depicted in her Motion for Review. In her Motion, she asserted that when the police officer reacted negatively to her statement, she realized that what had been suggested was wrong. There was nothing in her tone of voice in the video to suggest that she then suddenly realized it was wrong. For these reasons, we

conclude that the traffic stop recording does not substantiate Dupont's version of the events.

We also note that the nature of the conduct that led to the Complainant's discharge has a bearing in this case because it could reasonably and legitimately be viewed by the Union as conduct that should not be condoned. One of the reasons for the discharge, the breach of the Judicial Code of Conduct, was a significant charge reflecting on the integrity of the Judicial Branch workforce. The Union could reasonably have considered the political fallout of going to the mat for an employee found to have committed such an infraction as too great a risk to take. The added finding that Dupont had intimidated and attempted to coerce co-workers would make it even harder to support. There is no doubt that taking Dupont's case to arbitration would be making a statement that some union members (not to mention the public) might find objectionable. The union leadership is democratically elected, and the interests of the union membership as a whole are legitimate concerns. Furthermore, the Union itself is always subject to the possibility of being removed through the democratically-controlled decertification process. These factors are legitimate issues for a union to consider when deciding whether to take any case to arbitration.

The Union is correct that the Union and its members, through the actions of its democratically elected leadership and the appointed grievance committee, have the right to decide on what positions to take in defining the limits of just cause. The Union was under no duty to pursue Dupont's grievance and risk tarnishing its own reputation by advocating for an individual whose behavior might be considered an embarrassment. An arbitration hearing on this matter may well have required the testimony of several co-workers to address Dupont's inconsistent

statements about what happened as well as the intimidation and coercion charge. A decision that would avoid having to put Dupont's co-workers through such a process, when the chances of prevailing were so low, would be well "within a wide range of reasonableness" and therefore not a breach of the duty of fair representation.[10]

Finally, the Complainant argues that the Union breached its duty of fair representation by not accommodating her concerns about individuals chosen to serve on MSEA's grievance committee. The evidence indicates that Dupont's concerns about certain supervisors serving on the grievance committee were misplaced because supervisors are not used when the grievance involves a non-supervisory employee. The evidence also indicates that Dupont's concern about Lisa Morgan serving on the committee was addressed by disqualifying her from serving based on her prior involvement with Dupont's case.

Dupont also objected to three other members serving on the committee, one because of a "negative history" with her and the other two because they worked in the same office as the Human Resources Director. We find that the Union thoroughly investigated Dupont's claim of a "negative history" and concluded that the individual was capable of judging Dupont's case fairly. We also find that the Union obtained Dupont's agreement to proceed with that individual serving on the grievance committee.

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[10]We note that the Union could have found a basis for a concern for Dupont's co-workers in the fact that Dupont had a practice of filing "Official Complaints" against various people. In this case, she filed a complaint on September 30, 2009, against a co-worker and another complaint on that same date against both the Clerk of Court and her Administrative Clerk, and on October 5, 2009, she filed a complaint with the Union against the Union steward who first handled her case.

We also find the basis of her complaint about two of the individuals, that is, that they worked in the same office area as the Human Resources Director and were unduly influenced by her, as conjecture unsupported by the evidence. Both of these individuals stated in their affidavits that they had never discussed Dupont's case with the Human Resources Director. As with all MSEA grievance committee members, they were experienced union stewards knowledgeable about the grievance process. Even if there had been any discussions, we consider it unlikely that union stewards, of all people, would rely on opinions of management without seeking verification from experts in the Union.

Dupont's appeal states that she was told that there were not many members available to serve on the committee and that she relented only because "she was under so much pressure from her union to accept the make-up of the grievance committee." Dupont contends that because of her emotional distress, she did not voluntarily waive her rights and suggests that the Union should have offered to delay the meeting. The duty of fair representation, however, does not compel the Union to postpone the meeting until Complainant was fully satisfied with the committee membership, particularly when her objections were unsupported by concrete evidence. Dupont's statement in her appeal that "She did not anticipate such poor performance by her union representatives" suggests to us that her complaint about the make up of the committee is primarily based on her disappointment with the outcome.

Complainant's argument that the Employer and the Union conspired in bad faith to make her the scapegoat for the inappropriate conduct of another employee was presented for the first time on appeal. This argument is meritless. Even if we

thought it appropriate to consider a bad faith charge that had not previously been raised in this case, the Complainant's basis for the charge is speculative at best. There is no evidence that the Union failed to independently assess the merits of Complainant's grievance both on procedural and substantive grounds.

The Complainant's remaining arguments are also without merit. Her claim in ¶10 of her affidavit that the union representatives never considered her documented health condition is belied by her own statement in ¶9 of her affidavit that she explained to the Committee her health condition and her difficulties handling stressful situations; the argument she first presents in her appeal that she had a "panic attack" during the traffic stop is not supported by her behavior in the recorded traffic stop.

Complainant has requested a waiver of the charge for the per diem expenses of the Board for the meeting in which the Board deliberated this matter. In any proceeding at which the Board presides, the parties are required by statute to share the per diem and necessary expenses for Board members. 26 M.R.S.A. §968(1). When scheduling the deliberation in this case, we were cognizant of the financial circumstances faced by the Complainant after losing her employment. With that in mind, the matter was scheduled to coincide with a deliberation of another pending case so that the two parties in the two cases would all split the cost of the meeting. Consequently, the Complainant will be billed for only one quarter of the per diem costs of the Board, rather than the normal share of one half. The Complainant's additional request for costs related to filing her Motion for Review is denied.

ORDER

On the basis of the foregoing findings of facts and discussion and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by the provisions of 26 M.R.S.A. §1298(2), we conclude that the Union did not breach its duty of fair representation and therefore did not violate §1284(2)(A) of the Judicial Employees Labor Relations Act. It is hereby ORDERED that the Complaint be DISMISSED.

Dated at Augusta, Maine, this 27th day of March, 2012.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right to seek review of this decision and order by the Superior Court by filing a complaint pursuant to 26 M.R.S.A. §1289(7) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

_____
Peter T. Dawson, Esq.
Chair

_____
Karl Dornish, Jr.
Employer Representative

_____
Carol B. Gilmore
Employee Representative