STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 20-PPC-09

DON JUAN MOSES, Complainant, v. AFSCME, COUNCIL 93, Respondent.	DECISION AND ORDER

I. Statement of the Case

This case presents an alleged violation of an employee's right to fair representation by his union, the American Federation of State, County and Municipal Employees, Council 93 (Union), based on perceived bias against the employee in favor of the employer. The weight of the evidence does not indicate discrimination, bad faith or arbitrary conduct on the part of the Union in its advice to and continued representation of the employee. Therefore, the Board concludes that the Union did not violate its duty of fair representation.

II. Procedural History

Don Juan Moses (Moses) filed a prohibited practice complaint with the Maine Labor Relations Board (Board) on January 21, 2020, and an amended complaint on February 11, 2020, alleging the Union breached its duty of fair representation in violation of the Municipal Public Employees Labor Relations Law (Act) at 26 M.R.S.A. § 964(2)(A). The gist of Mr. Moses' allegations are that, in its representation of Moses in a disciplinary matter with his then-employer, the Union failed to properly and fairly investigate by not looking into certain facts and witnesses, gave more weight to information from the employer and other employees than to information from Moses, and allowed a representative with an alleged conflict of interest to participate in his representation.

On May 19, 2020, Katharine I. Rand, Neutral Chair, conducted a prehearing conference via videoconference and issued a Prehearing Conference Memorandum and Order on May 28. The Board held a hearing via videoconference on July 6 with Katharine I. Rand, Neutral Chair, presiding, and with Alternate Employer Representative Richard L. Hornbeck[1] and Employee Representative Amie M. Parker also participating. Don Juan Moses represented himself, the Complainant, and Joseph L. DeLorey, Esq., accompanied by Sylvia Hebert, represented the

Respondent/Union. The parties were given a full opportunity to examine and cross-examine witnesses, introduce evidence and to make their arguments.

III. Findings of Fact

The following facts are drawn from the record. Don Juan Moses worked as a Certified Nursing Assistant at the Barron Center, a facility operated by the City of Portland. While employed by the Barron Center, Mr. Moses was a member of a bargaining unit represented by the Union. Sometime in the summer of 2019, a coworker made an allegation of racist and sexist behavior by Mr. Moses, who in turn claimed that this accuser had been racist towards him. It appears that the Union became involved after the employer notified the local Union president at the facility, Cindy Pebenito, regarding a September 20 meeting to review the employer's investigatory findings. On September 19, Mr. Moses was called into the acting facility administrator's office where he was to be informed of the meeting the next day. Mr. Moses refused to sit down during the meeting, prompting the administrator to send Mr. Moses home and subsequently place him on paid administrative leave.

After leaving the building, Mr. Moses called Ms. Pebenito who suggested Mr. Moses transfer to another unit, as she felt that he was putting himself under undue stress that was affecting his job performance. Ms. Pebenito testified that she had offered similar changes in shift or unit many times in the past to other employees dealing with coworker conflicts. Mr. Moses refused this option and expressed his concern with alleged abuse of residents and that he perceived the work performance issues as retaliation by coworkers and the employer for his reporting alleged abuse at the facility to the Maine Department of Health and Human Services (DHHS). During the call, Ms. Pebenito attempted to focus the discussion on the pending meeting the next day, saying that the other issues could be dealt with later. At one point in the call, Ms. Pebenito told Mr. Moses, "I'm here to help you but you're not listening to anything I want to help you with. And there's not much I can do but watch the train wreck happen."

On September 20, AFSCME staff representative Sylvia Hebert and Ms. Pebenito accompanied Mr. Moses to the scheduled meeting. The employer held a pre-discipline hearing on October 10 to address certain other alleged work performance issues. Both Union representatives attended with Mr. Moses and spoke up several times on his behalf. During the course of the meeting, the employer became aware that Mr. Moses had audio recordings of interactions with coworkers and residents of the facility. The employer hired a third-party attorney to investigate whether Mr. Moses had violated the federal Health Insurance Portability and Accountability Act (HIPAA). The two Union representatives accompanied Mr. Moses to the interview with this attorney on December 10.

On November 13, 2019, Ms. Hebert and Ms. Pebenito met with Mr. Moses at the Union's local headquarters. The purpose of the meeting was to prepare Mr. Moses for the predetermination hearing the Union believed the employer was going to hold after the investigation of alleged HIPAA violations. By all accounts, the meeting was contentious.

The Union representatives determined that the result of the hearing with the employer would likely be Mr. Moses' termination, so at this meeting they presented Mr. Moses with two suggested options for how to proceed. The first was that he could negotiate a settlement with the employer. The Union representatives expressed to Mr. Moses that based on past negotiations for a similarly situated employee, they believed they could negotiate continued health insurance coverage for a couple of months and a financial settlement from the employer in exchange for his resignation and agreement not to sue. The alternative, they told Mr. Moses, was to go through with the disciplinary hearing, with the Union representing him, and then appeal the likely termination through the grievance process. Mr. Moses was given the weekend to think it over and decide.

At the November 13 meeting there were some points of disagreement between Mr. Moses and the Union representatives regarding, e.g., whether a current employee had continued to be employed despite having previously engaged in prohibited conduct and HIPAA requirements. Another issue of contention was Mr. Moses' opinion that Ms. Pebenito was talking about an event that she had no first-hand knowledge about and was therefore showing bias towards the employer's position – a characterization disputed by Ms. Pebenito. Both sides became agitated, with finger-pointing gestures and raised voices. At one point, Ms. Hebert said "Now see, Don Juan – that's the reason why the City is having trouble dealing with you." At another point, after Mr. Moses speculated that he might have a particular medical condition, Ms. Hebert asked if he had ever been diagnosed. Ms. Hebert testified that the purpose in asking this was to explore whether he should seek accommodation under the federal Americans with Disabilities Act, a course of action that she had found effective in resolving work performance issues in her representation of another employee. Mr. Moses spoke about his concern for the facility residents again during this meeting and the Union representatives told him their role was to prepare him for his upcoming hearing, and that there were other avenues available to advocate for the residents of the facility.

Mr. Moses ultimately declined to explore settlement with his employer and decided to move forward with the disciplinary hearing. On January 21, 2020, he served his initial prohibited practice complaint on the Union and filed it with the Board. Shortly thereafter, Mr. Moses met with Ms. Hebert at the Union's headquarters in Augusta. At that time, she asked if he still wanted the Union to represent him at his upcoming predetermination hearing, to which he answered that he did.

The Union represented Mr. Moses at his disciplinary hearing on February 5, 2020. During the hearing Mr. Moses was given an opportunity to respond to questions and explain his position. The Union also spoke up in Mr. Moses' defense.

After the hearing, the employer decided to terminate Moses' employment. The parties have stipulated to the fact that the Union then filed a timely grievance on Mr. Moses' behalf, challenging his termination. During the grievance proceeding, in June of 2020, the Union provided a defense of Mr. Moses, arguing that he was being persecuted for being an advocate for

patients. During the hearing, the Union played an audio clip at Mr. Moses' request and gave Mr. Moses the opportunity to add anything he wished. Mr. Moses indicated that everything had been covered. Mr. Moses was reportedly pleased with the representation, saying at one point that Ms. Hebert had "hit it out of the ballpark." The grievance was denied at this step, and the Union filed for a hearing at the next step in the grievance process, which was pending as of the date of the hearing in this case.

IV. Analysis

At all times relevant, the Union was a bargaining agent within the meaning of 26 M.R.S.A. § 962(2) and Don Juan Moses 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).

A union's duty of fair representation under Maine's collective bargaining laws has been well established for many years. See *Norman P. Whitzell v. Merrymeeting Educators' Ass'n*, No. 80-15, aff'd *Norman P. Whitzell v. Merrymeeting Educators' Assoc. and MLRB*, CV-80-124 (Me. Sup. Ct., Sagadahoc Cty., December 28, 1982). A union owes this duty to all of the employees in the bargaining unit to which it has been certified as the exclusive representative. See *Macomber v. Maine State Employees Ass'n*, No. 18-20, slip op. at 6 (September 28, 2018).

A union breaches its duty of fair representation, and thus violates § 964(2)(A) of the Act, only when the union's conduct towards a bargaining unit employee is arbitrary, discriminatory or in bad faith. *Lundrigan v. MLRB*, 482 A.2d 834 (1984). A union's conduct is considered arbitrary under this standard "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." *Jordan v. AFSCME, Council 93, AFL-CIO*, No. 07-15, slip op. at 16 (June 13, 2008) (quoting *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).[2] Discriminatory conduct violates the union's duty of fair representation if it is "invidious." *Id.* To establish that the union has acted in bad faith requires a claimant to prove the existence of "fraud, or deceitful or dishonest action." *Id.*

Examples of the types of conduct the Board has identified as "invidious" discrimination are racially motivated conduct, conduct motivated by intraunion politics or conduct motivated by the fact that the employee is not a union member. *Langley v. Maine State Employees Association, Local 1989, SEIU*, No. 00-14, at FN 6, slip op. at 26 (December 26, 2000), citing *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944); *Postal Service*, 272 N.L.R.B. 93, 104 (1984); *California Saw & Knife Works*, 320 N.L.R.B. No. 11 (1995). The Board has given an example of bad faith where a union president secretly negotiated an agreement with the employer that modified the collective bargaining agreement and then intentionally hid that agreement from the bargaining unit members. *Id.* citing *Lewis v. Tuscan Dairy Farms*, 25 F.2d 1138 (2nd Cir.) (1994).

As the party claiming that a prohibited practice has occurred, Mr. Moses 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). (The party making a prohibited practice claim bears the burden of proving the elements of the prohibited practice alleged.). The Board has held that "any review of the union's performance must be 'highly deferential' in order to allow the union the latitude necessary to manage its collective bargaining responsibilities." *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). There are limits to this broad discretion however, and the union must exercise "complete good faith and honesty of purpose" in carrying out its duties. *Lundrigan v. State Department of Personnel and Maine State Employees Association*, No. 83-03, slip op. at 7 (Feb. 4, 1983), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

While not limitless, the deference due to the Union's performance is high. For example, in *Lundrigan v. State Department of Personnel and Maine State Employees Association* an employee was unsuccessful in challenging his union's decision not to follow his wishes by raising certain issues or introducing certain types of evidence or line of argument during grievance arbitration. No. 83-03 (Feb. 4, 1983), 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). The union had also forbidden the employee from seeking certain documents from the State and had threatened to cancel the hearing if the employee tried to raise issues that strayed beyond the questions he was asked. The Board dismissed the complaint, finding adequate the union's position that the information and argument sought by the employee were irrelevant or not supported by evidence. *Lundigran* stands for the proposition that the Board will not second guess the Union's strategic decisions, absent evidence that the decisions were arbitrary or otherwise motivated by discrimination or bad faith.

In another case, a union successfully defended its decision to decline to file a grievance on behalf of an employee where the union had inquired of the employee's supervisor about the employee's work performance and discovered negative information prior to making its decision. *Langley v. Maine State Employees Association, Local 1989, SEIU*, No. 00-14, (December 26, 2000), aff'd *Langley v. Maine State Employees Association, Local 1989, SEIU*, No. AP-01-05 (Me. Super. Ct., Ken. Cty., July 12, 2001), aff'd 2002 ME 32, 791 A.2d 100 (Feb. 22, 2002). *Langley* demonstrates that the Union is entitled to make decisions that impact an employee based on all of the information available to it.

In this case, Mr. Moses has alleged that the Union failed to pursue certain lines of investigation in its representation and has also allegedly failed to follow up with important witnesses. Mr. Moses also alleges that the local Union president had a conflict of interest and was biased in favor of the employer due to her having previously worked at the facility for over 30 years. He points to hostility and unprofessionalism in both Union representatives' conduct towards him as evidence of the Union's bias against him in favor of the employer.[3] He also points to the Union,

in private consultation, crediting the employer's account of events over his own and dismissing his concerns about retaliation and conditions at the facility.[4]

Mr. Moses presented no evidence that any of the Union's conduct in its representation of Mr. Moses was so irrational as to be unlawfully arbitrary. To the contrary, the record demonstrates that the Union provided appropriate advice and representation to Mr. Moses based on reasonable considerations and information, including its own observations of his behavior and its knowledge of other disciplinary matters. There is insufficient evidence of discrimination in the Union's conduct towards Mr. Moses. The advice and the options given to Mr. Moses were not only based on similar advice given to similarly situated bargaining unit employees, they were sound. Likewise, there is a lack of sufficient evidence in this case of any fraudulent, deceitful or dishonest action on the part of the Union.

Based on the record, the at-times contentious interactions between the Union representatives and Mr. Moses appear to be based on interpersonal dynamics, Mr. Moses' passionate concern about conditions at the facility and the Union's attempts to focus their discussions with Mr. Moses on the alleged work performance issues that were the subject of the pending discipline proceeding, and not on any apparent bad motive on the part of the Union. Far from acting irrationally or with an improper purpose, the Union allowed Mr. Moses to offer his position as he saw fit during the disciplinary proceedings and spoke up in his defense.

Although not directly relevant to the conduct at issue in this case, it is worth noting that Mr. Moses has continued to seek, and has received, representation by the Union in the grievance challenging his termination. All evidence points to the Union advising Mr. Moses about his available options, then providing a good faith and vigorous defense of Mr. Moses at the disciplinary stage, continuing now through the grievance process.

V. Conclusion

The Union's credible explanations for its actions in advising and representing Mr. Moses leave no question that it has met its duty of fair representation. The evidence as a whole shows that the Union explored with Mr. Moses the possibility of reassignment or settlement and then, when Mr. Moses refused to exercise those options, the Union continued to advocate for him through the disciplinary and grievance processes. It is unclear what the Union could have done differently in order to more fairly represent Mr. Moses in this dispute with his employer.

VI. 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. 20-PPC-09 be, and hereby is, DISMISSED.

Dated this 8th day of September, 2020.

MAINE LABOR RELATIONS BOARD

/s/ Katharine I. Rand
Katharine I. Rand
Neutral Chair

/s/ Richard L. Hornbeck
Richard L. Hornbeck
Alternate Employer Representative

/s/ Amie M. Parker
Amie M. Parker
Employee Representative

The parties are advised of their right pursuant to 26 M.R.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] The Board's Employer Representative, Robert W. Bower, recused himself from the case to avoid any appearance of a conflict of interest based on his and his law firm's legal representation of the City of Portland and the Barron Center in other matters. The Executive Director appointed Mr. Hornbeck, as one of the Alternate Employer Representatives, to sit in Mr. Bower's place. Mr. Hornbeck notified the parties prior to the hearing, and again at the commencement of the hearing, that he has negotiated with AFSCME in the past when representing Maine employers in collective bargaining matters. Neither party had any objection to his sitting on the panel.

[2] The duty of fair representation under Maine law is comparable to the same duty under the National Labor Relations Act. *Jordan v. AFSCME, Council 93, AFL-CIO*, No. 07-15, slip op. at 16 (June 13, 2008).

[3] In analyzing Mr. Moses' challenge to the union's choice of representatives, the Board does not intend to imply either way whether such a decision is a subject of internal union business to which the duty of fair representation does not apply. See *Jordan v. AFSCME, Council 93, AFL-CIO*, No. 07-15, slip op. at 17 (June 13, 2008).

[4] At the hearing, Mr. Moses seemed to be arguing that the Union had also breached its duty of fair representation by

not properly informing him of his right to have a union representative accompany him to an investigatory interview or having provided him contact information for his local Union representative. Putting aside any issues of timeliness, this claim has not been supported by sufficient evidence.