STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 03-06
Issued: April 21, 2005

SHARRON V. A. WOOD, Complainant, v. MAINE EDUCATION ASSOCIATION and MAINE TECHNICAL COLLEGE SYSTEM (CMTC), Respondents.	DECISION AND ORDER

This is the second part of the bifurcated hearing on the prohibited practice complaint filed by Ms. Sharron Wood against both the Maine Community College System[1] and the Maine Education Association (MEA). The first part of the hearing dealt with the charge that the College violated §1027(1)(A) of the University of Maine System Labor Relations Act by interfering with Wood's exercise of the rights protected by the Act or by coercing her into abandoning such rights or coercing her into resigning.[2] In this Board's Interim Order dated June 14, 2004, the Board concluded that the Employer did not coerce Wood into abandoning her rights, nor did the Employer coerce her into resigning from her employment. The Board found that Wood resigned her position voluntarily in exchange for the benefit of having her negative evaluation destroyed. The Board concluded that she could have contacted her Union for assistance prior to resigning but did not do so and that the Employer did nothing to prevent her from

[1]Formerly called the Maine Technical College System.

[2]26 M.R.S.A. §1027(1)(A) prohibits an employer from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed in section 1023." Section 1027(2)(A) is the parallel prohibition for employees and bargaining agents.

seeking union assistance.

The purpose of the second part of the hearing was to take additional evidence on the question of whether MEA breached its duty of fair representation, thereby violating §1027(2)(A) and whether the Employer colluded with the Union in that breach. The evidentiary hearing was held on October 18, 2004, but there were a number of procedural issues raised prior to the start of the hearing.

The first procedural issue was the Complainant's request for permission for the Complainant's attorney to testify. This request was initially raised in advance of the prehearing conference of June 23, 2003, and was opposed by both Respondent Union and Respondent College. The prehearing officer set out a prerequisite to consideration of this request in the prehearing Memorandum and Order dated July 11, 2003, which involved the submission of the proposed testimony of Attorney Alexander in question and answer format 10 days in advance of the hearing.[3] Alexander submitted the information as requested, but the Board never had to rule on the request because by the end of the hearing, Alexander had withdrawn his request to testify. Nonetheless, the fact that the Complainant's attorney was directly involved in the events leading to this case and continued to represent the Complainant (his daughter) created some unusual evidentiary issues. For example, Complainant's exhibits include over 20 letters written by Complainant's attorney which make various assertions about what did or did not occur. Respondents objected to these exhibits to the extent that they were offered to prove the truth of the matters asserted in them. Irrespective of that objection, it would be problematic

[3]MRLB Rule Ch. 12 §16 states, "A party's representative may testify at the hearing but the Board may require the testimony to be in question and answer form." A party is not required to be represented by an attorney in any Board proceeding.

for the Board to consider these letters as evidence that something stated in the letter actually occurred because that would essentially be testimony by the Complainant's attorney. While this is not the first time the Board has had to distinguish between argument and evidence in the record, the challenge of this task was significant in this proceeding.

Other procedural issues were raised in the two motions the Complainant filed on September 29, 2004. The first motion requested that Board member Robert Piccone either remove himself from the case or be removed by the Executive Director in consultation with the remaining members of the Board. Complainant argued that Employee Representative Robert Piccone, having had a long career with the Teamsters Union, had a conflict of interest in continuing to serve as the employee representative. After consulting with Member Piccone, Neutral Chair Dawson denied the request in the Prehearing Order dated October 8, 2004. Member Dornish was unavailable for consultation at the time.

The second motion filed by the Complainant on September 29, 2004, sought a clarification of issues to be litigated in the upcoming hearing. In the same prehearing order of October 8, 2004, the Board Chair explained the legal and factual issues left to be presented to the Board. The Board Chair also reiterated that the Board's findings set forth in the Interim Order dated June 14, 2004, were final and not open to relitigation.

Complainant filed another motion on October 7, 2004, requesting a ruling on whether evidence of the Complainant's job performance would be considered relevant to the issues left to be litigated. In the first part of the hearing, the Board ruled that evidence regarding Wood's job performance was not relevant to that proceeding. With respect to the second stage of the proceeding, the Complainant argued that Wood's job performance was relevant to determining whether the Union acted properly in responding to her request for assistance. In the October 8,

2004, prehearing order, the Board Chair deferred ruling on this matter to give the other parties an opportunity to respond. Ultimately, the Board did not have to rule on this issue because in the course of the hearing the Complainant withdrew its request to present testimony on Wood's job performance.

The evidentiary hearing was held on October 18, 2004. Chair Peter T. Dawson presided over the hearing, with Employer Representative Karl Dornish, and Employee Representative Robert Piccone. Mr. Grover Alexander represented Ms. Sharron Wood, the Complainant, Mr. Donald Fontaine represented respondent Maine Education Association (MEA), and Ms. Linda McGill represented the Maine Community College System. The parties were given full opportunity to examine and cross-examine witnesses and to introduce documentary evidence. Briefs were filed by all parties, the last of which was received on January 4, 2005. The Board deliberated this matter on February 3, 2005.

JURISDICTION

The Board's jurisdiction to hear this case and issue a decision lies in 26 M.R.S.A. §1029. Respondent Maine Community College System is a technical college within the meaning of 26 M.R.S.A. §1022(1-C) and §1029. The Maine Education Association is a bargaining agent within the meaning of 26 M.R.S.A. §1022(1-B).

SUMMARY OF FINDINGS FROM INTERIM ORDER

The following is a summary of the Board's findings in the first part of the proceeding which provide a helpful background to understanding the issues in this second part of the proceeding.

Ms. Sharron Wood had been a probationary faculty member in the Nursing Department at the Central Maine Community College in Auburn for two years. The collective bargaining agreement

establishes a 3-year probationary period. On Friday, May 10, 2002,[4] she met with the Department Chair and the Dean for her annual performance evaluation. At that time, she was informed that the Chair would be recommending to the College President that Wood's contract not be renewed. Wood was upset and after considering the matter for a couple of hours and discussing it with two co-workers, Wood voluntarily resigned in exchange for the destruction of her negative performance evaluation.

Wood had been informed by the Department Chair the previous month that there were problems with her job performance. The Chair indicated that if the problems were not addressed in the coming year, Wood's contract would not be renewed following her third year of probation. There was no indication that non-renewal was being considered for the immediate year ahead. Soon after that meeting, Wood joined the Union. Wood had no further contact with the Union until a few days after she voluntarily resigned from her teaching position with the College.

Sometime after returning home on May 10th, the day she resigned from her position, Wood spoke with her father, Grover Alexander. Over the course of the weekend, Alexander called the Department Chair to tell her his daughter was withdrawing the resignation she had submitted. He called the Dean on Saturday with the same message and called her again on the following day to ask for the home phone number of the College System's counsel. The Dean said she did not know it but could provide it to him if he called her office first thing on Monday. On Sunday evening, Wood sent e-mails to various officials at the College indicating that she was withdrawing her resignation and would assert her rights under the collective bargaining agreement and through other civil remedies as necessary.

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[4]Unless otherwise noted, all dates mentioned in this order refer to the year 2002.

FINDINGS OF FACT

1. On Monday, May 13, Wood called the MEA Office and sent an e-mail to Mona Lothian, an MEA secretary, saying she was on the nursing faculty at CMTC. She wrote, "I have some concerns and questions as to my rights concerning my evaluation. I feel that I was mislead and intimidated and would like an opportunity to talk with you and/or the appropriate person about this matter." Lothian responded that she would relay the message to Tim Wooten.
2. Mr. Timothy Wooten had worked for MEA for about 4 years and was responsible for a territory involving 1600 employees and many different collective bargaining agreements. Wooten had 28 years of experience in collective bargaining including his prior employment with the Maine State Employees Association as a field representative, performing similar functions for various bargaining units of state employees. He was very experienced with a variety of collective bargaining agreements.
3. On May 14 or 15,[5] Wooten returned Wood's call. She told him that she had a performance evaluation and it had not gone very well and that she had essentially resigned in return for a ripped up evaluation. She said the evaluation was inaccurate and unfair. She wanted the Union's help to get her job back. She said she had been harassed into resigning. Wooten asked how long she had been employed and learned that she was finishing her second year of the three-year probationary period. Based on this response, Wooten told her he did not think there was much the Union could do for her because she had not yet attained the tenured status

[5]Whether this conversation occurred on the 14th or the 15th is not significant. For simplicity's sake, we will assume it was on the 15th.

which provides just-cause protection. He also discussed with her the problem created by the fact that she had resigned from her position. She had informed him that she had written a letter of resignation with the help of a colleague and that her father, an attorney, told her that resigning probably was not a good thing to do. Wooten told her that he would check the collective bargaining agreement and would do his best to get back to her.

4. Wooten made a note to himself concerning his initial phone conversation with Wood. It says she "resigned under pressure," her bad evaluation "needs to be removed," "no prior evals," "probationary instructor feels cheated," and that "Sue Jamison was there, helped write resignation letter." The note indicated "G. Alexander" was her father and her attorney and listed his phone numbers.

5. Later that same day, Wooten received a phone call from Wood's father, Grover Alexander. They spoke about his daughter's employment status, her position at the college and what had happened. Wooten stated that he had already spoken with his daughter. Wooten testified that Alexander began to tell him how the grievance should go forward, that she had withdrawn or was trying to withdraw her resignation, and that the evaluation was unfair and that they wanted to get her job back. Alexander wanted to help, but Wooten said it was his job to handle it and Alexander should stay in the background. Alexander assured Wooten that he could take the lead and that he just wanted to be kept informed.

6. Wooten testified that during this initial telephone conversation,

> [Alexander] vigorously insisted that in fact Mrs. Wood had just cause rights and that she could withdraw her resignation. I pointed out just as matter-of-factly as I'm pointing it out right now that I did not believe that

> to be the case, I did not believe that even the just-cause standard applied in any way, shape or form, and that there was nothing in the collective bargaining agreement that allowed an employee who had resigned to withdraw that resignation.

Wooten testifed that Alexander then told him that he "had successfully sued MEA before and [he wasn't] hesitant about doing it again."

7. After these two phone conversations, Wooten reviewed the collective bargaining agreement and confirmed that his initial view of the case was correct: Wood was a probationary employee and had no just cause protections under the collective bargaining agreement. Wooten knew that the absence of a just cause provision meant that the Employer did not have to provide a good reason for a discharge. He also confirmed that the agreement did not contain a provision allowing an employee to withdraw a resignation.

8. Wooten had never handled a case in his 28-year career dealing with a resignation where the collective bargaining agreement was silent on the issue of withdrawal of a resignation, nor was he aware of any case dealing with that issue.

9. Based on his initial assessment of the situation in light of Wood's status as a probationary employee and the fact that the collective bargaining agreement did not have a provision allowing for the withdrawal of a resignation, Wooten concluded that Wood did not have a very good chance of success with her grievance. Wooten called the shop steward to see if he had anything to add, but the shop steward did not know anything about Wood's case. He then called Ms. Kim Erhlich, the Human Resources Director for the Community College System, to find out what she knew about Wood's situation. The only thing that she stated was that she understood it to be a resignation.

10. Either that day or the next, Wooten spoke with Dean Vampatella. He did not speak with Ms. Schuettinger, the Department Chair, because the Dean is the first step of the grievance procedure. Dean Vampatella told Wooten that the meeting with Wood had been a difficult time. She had been with the Department Chair for the evaluation and they had agreed to allow Wood to resign in return for the destruction of the negative evaluation. Wooten did not inquire of Dean Vampatella if Wood was a good employee.
11. During this same phone call, Dean Vampatella told Wooten that she had received phone calls from Alexander over the weekend and that the Department Chair also received a phone call from him. Dean Vampatella went into "a litany of complaints" about Attorney Alexander and indicated that she and the Department Chair were angry that they were called by him over the weekend. Wooten testified that he was a little dumbfounded that Alexander would have called them. Wooten informed Dean Vampatella that he was going to grieve the case. She did not object, but simply said "that is your right."
12. Following his initial conversation with Alexander on May 15, Wooten chose not communicate with him further. Wooten testified that he did so because he preferred to do his work in a way in which he gets "the least interference from outside sources." He considered Alexander's behavior to be interference.
13. Wooten did not communicate with Wood regarding the status of her grievance until he had set up a first step meeting with Dean Vampatella. The first step of the grievance procedure requires the grievant to present his or her claim orally to the Vice President (in this case, the Dean). The meeting was scheduled for May 29, at 10:00 a.m. Wooten called Wood and left a message for her that the grievance meeting was

scheduled and that she should arrive one hour beforehand in order to discuss it with Wooten. Wood denied that she received any such message.

14. Wooten did not communicate with Wood prior to leaving the message about the informal first step meeting because he felt he did not have anything to report. His investigation of the case did not uncover any matters that contradicted anything that Wood had told him with respect to the essential facts of the case: she was a probationary employee, management's recommendation was for non-renewal of her contract, and she had resigned in exchange for the destruction of her evaluation.

15. It was Wooten's standard procedure to set up a first-step meeting and instruct the grievant to arrive an hour early so that he could discuss the case further with the grievant before the scheduled meeting. During this discussion, he would gather as much information as he could from the grievant. Then he and the grievant would meet with the management representative. Wooten described the first-step meeting of the grievance procedure as an informal process. At the meeting, Wooten would state their case and see if there could be some way to resolve it. After the meeting, he would discuss it with the grievant and talk about whether or not to proceed to the next level. The grievance procedure gives management a period of time to respond to the first step, so often there would be a waiting period.

16. The first step of the grievance procedure is referred to in the collective bargaining agreement as the "oral procedure," and requires the grievant to present his or her claim orally to the Vice President within 30 days of the event giving rise to the grievance. Then, within 5 days, the Vice President must discuss the grievance with the grievant and within five days of that discussion must give an oral

response to the grievant. The next step of the grievance procedure goes to the College President and it is at this step that the grievance must be put in writing on the grievance form.

17. In Wooten's practice, the grievant was always present at the first-step meeting. He had a long-standing practice of not permitting attorneys at lower-level grievance meetings and even most of the time at higher-level grievance meetings. He also had a practice of excluding relatives from the grievance process. Wooten did not inform Alexander that a first-step meeting had been scheduled.

18. On Saturday, May 25, Alexander called Wooten at his home. They spoke again about Alexander's theory of the case and Wooten's view to the contrary. Wooten indicated that whatever hopes Wooten had of prevailing upon management for a better outcome for Wood or for settling the case, Alexander "had managed to screw up" with his calls to the Dean and the Department Chair. Wooten testified:

> The discussion became more heated. You kept referring to those bitches at that college. You continued to argue with me about the nature of whether or not your daughter had a valid, just-cause grievance. I continued to reiterate my position that in fact she had both resigned and that she had not completed probation, and we finished the conversation when you said: Now, listen, you son of a bitch, I have sued MEA before and you are rapidly becoming the object of this litigation. And I said: Thank you, I don't have to take that, and I hung up.

19. During that conversation, Alexander insisted that he had a right to attend the meeting that was scheduled for May 29 and Wooten firmly told him that he would not be permitted to attend. Wooten had no intention of having a grievance meeting without Wood, but he would not let Alexander attend.

Wooten testified that initially Alexander had taken the position that Wooten could take the lead, but by this time Alexander's position changed to one where he insisted on attending meetings and serving as some sort of co-representative.

20. After Wooten hung up, Alexander immediately called back but only connected to Wooten's telephone answering system.[6] He left a brief message saying it was rude of him to hang up and that he needed to speak with him promptly. He called again a few minutes later and objected to his position that Alexander would not be allowed to attend the grievance meeting Wooten had scheduled with management. Alexander asserted that allowing both his daughter and him to attend the meeting was required by the Union's duty of fair representation. He also stated that he would regard a failure to return his call as a breach of the duty of fair representation and he would:

> . . . proceed to protect Mrs. Wood's rights. It's not a threat; it's a simple statement of . . . of fact. We cannot be treated this way. Please govern yourself accordingly. Thank you.

21. Alexander also left a message on Wooten's office machine later that same morning. In a raised voice,[7] he said there was no way Wooten could advocate on Wood's behalf without talking to her. He said,

> If you proceed without at least getting Sharron's point of view and <u>my</u> point of view as well I shall regard that as a breach of your duty of fair representation on behalf of Mrs. Wood. You cannot do that, and <u>I</u> can't permit it.

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[6]Someone from the MEA office transcribed the messages, which were admitted into evidence as C-63.

[7]The person transcribing the message indicated that Alexander was shouting.

22. Wooten called Wood on Tuesday, May 28 (Monday was a holiday) to tell her the May 29 meeting was postponed. He said that if her father was going to insist on being present, it would not be possible to have the meeting the next day. He did not specifically say that if she could get her father to stay away they could have the meeting without him.

23. Dean Vampatella testified that there was a notation on her calendar of a meeting with Tim Wooten and Sharron Wood that had been crossed out, indicating that the meeting had not taken place.[8]

24. On May 28, Wooten had a phone conversation with MEA's General Counsel, Shawn Keenan, about Wood's case. They discussed the thin nature of the grievance itself and the interference Wooten felt he was getting from Wood's father. It was not until this conversation that Wooten learned anything of the prior lawsuit Alexander had filed against MEA. Wooten asked about it because Alexander had mentioned it to him. Keenan told him that a University of Maine employee named Miller had filed a duty of fair representation claim against MEA in the courts and it eventually settled.[9] Wooten testified that this information did not really affect his view of the grievance but it confirmed to him that it would be "intensely hard for anyone to process it without feeling threatened." In his discussion with Keenan, Wooten mentioned an angry letter that he and Mark Gray received from Alexander, which Gray would forward to Keenan. (Mark Gray was MEA's executive director.) As a result of this discussion, Keenan and Wooten decided that

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[8]The Dean testified to this matter during the first part of the bifurcated proceeding. Tr. Day 2 at 402-3.

[9] In Miller v. Univ. of Maine, the Law Court dismissed the duty of fair representation claim and remanded a tort claim to the Superior Court. 1997 ME 152.

Keenan would handle the case. Keenan made a note to himself of what Wooten had told him in the conversation.

25. The angry letter referred to by Wooten was faxed to him on May 27 as well as to Mark Gray and Derek Langhauser, the Maine Community College System counsel. The 3-page letter addressed Alexander's concern that he had not been updated by Wooten on the status of the grievance, his account of the phone conversation with Wooten on the previous Saturday, and the various messages he left for Wooten following that call. His letter asserted that Wooten was not going to let either Alexander or Wood attend the grievance meeting, and that he regarded that as a breach of the duty of fair representation and that if MEA proceeded without them, he would commence litigation at the MLRB and in Superior Court seeking reinstatement and money damages.

26. Mark Gray received a call from Alexander in May, who gave him an overview of the case. Gray said he would follow up and have someone get back to him. Gray spoke with MEA's General Counsel, Shawn Keenan, and asked him to look into the matter.

27. Shawn Keenan had been the General Counsel for MEA since 1987. In that capacity, he gave legal counsel to numerous MEA locals through MEA's professional staff of Uniserve Directors regarding bargaining and contract administration. Over half of his time was devoted to the interpretation and application of collective bargaining agreements. He handled all appellate work for MEA. When an attorney threatened legal action against MEA, Keenan's responsibility was to defend MEA. Prior to his employment with MEA, he had been an attorney with the Maine State Employees Association since 1978 where he focused primarily on grievance evaluation and arbitration with respect to five different bargaining units.

28. Gray received another letter from Alexander dated June 4, and faxed to him on June 5. In this letter, Alexander stated that he had been trying to get a response from MEA for three weeks and was concerned about the impending time limit for filing a grievance. He provided considerable detail over a number of pages about how Wood was treated unfairly during the evaluation process and was coerced and duped into resigning. The letter also asserted other violations of the collective bargaining agreement, such as a failure to comply with its requirements on the appointment of the Department Chair and a claim that by shredding the evaluation, the Dean was tampering with Wood's personnel file. Alexander stated that if he did not hear from MEA by 9 a.m. on June 6, he would have Wood present her grievance by herself on June 7, the last day for filing. He closed with,

> If I am forced by MEA's actions to take the lead against CMTC, a civil suit in Superior Court for emotional distress, attorneys fees, punitive damages and other economic losses will be commenced forthwith without waiting until all the administrative procedures and remedies against CMTC and MEA have been exhausted . . . a course of action we have every right to pursue at this point if we so choose. Please govern yourselves accordingly.

The letter was faxed to Wooten, Gray and Langhauser.

29. On June 6, Keenan spoke with Langhauser at length about the facts of the case from the system's perspective. Keenan testified that there was very little disagreement on the essential facts described by the Complainant's attorney and the System's attorney: the grievant was a probationary faculty member, she was being recommended for non-renewal but no final decision had been made on that at the time she resigned, she had at least a couple of hours to consider

what her choices might be, she had conferred with more than one co-worker, and had signed her resignation in exchange for having her evaluation discarded. One point of disagreement was that the grievant's attorney stated that management had demanded that Wood sign the evaluation form, and that she had twice refused to do so.

30. Article 8 of the collective bargaining agreement establishes the grievance procedure. Section F(4) provides:

> 4. A faculty member shall be represented at any level of the grievance procedure only by himself/herself and/or by an Association designated representative, or professional staff or counsel of the Maine Education Association.

Section E governs the arbitration process. Only the Association may appeal a grievance to arbitration.

31. Article 16 of the collective bargaining agreement establishes the 3-year probationary period and states, "Non-renewal of contracts of probationary faculty members shall be at the discretion of the President" and that decision may be appealed to the System President "whose decision is final."

32. Article 20 of the collective bargaining agreement concerns the rights of the Association. Section A(1) grants representatives of the Association access to faculty members for the purpose of administering the agreement and processing grievances. Section A(2) requires the System President to supply the Association upon request with the names and college addresses of all faculty members each year.

33. Keenan testified that he decided to have MEA step aside and to designate Alexander as Wood's representative because they could not agree on even the fundamentals of her case and it would be impossible to speak with a unified voice if both

MEA and Alexander were participating. Although Keenan and Alexander had not spoken at this time, Keenan had spoken about the case with Wooten and Langhauser and had read the three rather lengthy letters that MEA had received from Alexander. From these sources, it was clear to Keenan that MEA and Alexander had some significant differences of opinion about the merits of the case. Alexander disagreed with MEA's position that a probationary employee did not have just cause protection and that the Employer had no obligation to allow a resignation to be withdrawn. Keenan's opinion was that even if there were irregularities in the evaluation procedure as Alexander claimed, a grievance would only achieve the destruction of the evaluation document (what Wood already obtained), not reinstatement. Finally, because Article 16 states that the System President's decision on the non-renewal of a probationary employee is final, an arbitrator would simply not have the authority to order reinstatement. There was also a significant disagreement on how to proceed with the grievance, particularly whether Alexander should be present at the grievance meeting.

34. Keenan testified that by designating Alexander as Wood's representative under the contract, he was trying to create a "pathway" for Alexander to process the grievance as Alexander wanted to. In Keenan's view, there was no question that Article 4(F) allowed Wood to pursue a grievance either unrepresented or represented by MEA. Keenan testified that it was uncertain whether the collective bargaining agreement allowed a personal representative or legal counsel to speak for her. Keenan did not secure the agreement of the college to let Alexander manage Wood's grievance prior to or after writing the June 7 letter.

35. Keenan's letter of June 7 to Alexander was his first communication with him. Keenan's June 7 letter to Alexander stated:

> Dear Mr. Alexander:
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> I represent the Maine Education Association. Your letter of May 27, 2002 addressed to UniServ Director Tim Wooten has been referred to me by Executive Director Mark L. Gray. Kindly address any further communications regarding MEA staff and leadership to my attention.
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> Mr. Wooten initiated a timely grievance on behalf of Mrs. Wood under the Oral Procedure in Article 8 of the Faculty Unit Bargaining Agreement. He scheduled a meeting with CMTC administrators for May 29, which Mrs. Wood would indeed have been permitted to attend. As Mrs. Wood's exclusive representative under the contract, however, Mr. Wooten rightfully objected to your insistence upon participating as her personal legal counsel. That meeting had to be cancelled.
>
> In the meantime, it has become apparent that neither you, nor Mrs. Wood, have sufficient confidence in MEA for us to effectively represent her at this time. To avoid any further conflicting messages over who is advocating for Mrs. Wood, we have concluded that you, as her attorney, should hereafter assume full responsibility for representing her. This arrangement is entirely appropriate under the bargaining law:
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> > "[A]ny university, academy or technical college employee may present at any time that employee's grievance to the employer and have that grievance adjusted without the intervention of the bargaining agent, if the adjustment is not inconsistent with the terms of any collective bargaining agreement then in effect and the bargaining agent's representative has been given reasonable opportunity to be present at any meeting of the parties called for the resolution of that

grievance." 26 M.R.S.A. § 1025(2)(E).

> Under Article 16 - Probation, a faculty member whose contract is non-renewed "shall have the opportunity to appeal the decision of the [CMTC] President to the [Technical College] System President whose decision shall be final." At the same time, both Article 4(E) and Article 8(B)(1)(b) contemplate that a dismissal grievance may be initiated with the System President. We have asked the System President, through his counsel, to hear the appeal and/or grievance of Mrs. Wood directly.
>
> To facilitate your ability to fully advocate for Mrs. Wood, therefore, MEA will designate you as her representative under the collective bargaining agreement. You will be solely responsible for investigating and prosecuting any appeal or grievance in accordance with its terms. Understand that only the MEA may appeal a grievance to arbitration, and we reserve the right to refuse arbitration of a claim on its merits.
>
> By copy of this letter to the System President's counsel, Mr. Langhauser, I am formally requesting that the grievance time limits be extended until a meeting can be scheduled between yourself, the System President, and Mrs. Wood, within 30 calendar days of the date of this letter. Although I expect to be present on behalf of MEA's interests, you should be able to freely and fully present your case unencumbered by us.

The letter was copied to Langhauser, Gray and Wooten.

36. Keenan thought that this designation would allow Alexander to investigate and present the grievance the way Alexander wanted to. Keenan testified that by designating Alexander as Wood's representative, he was not delegating any authority to act on behalf of MEA nor was he granting him any authority that the Union had under the contract or by virtue of its status as the exclusive bargaining agent under the statute.

37. Alexander spoke with Langhauser at least once during the first week following Wood's resignation and several times thereafter. During the initial telephone conversations, Alexander spoke of the possibility of bringing Wood's claims to Superior Court as a civil action, to the MLRB as an unfair labor practice or perhaps even a tort claim. Langhauser told him that if she were going to be bringing a contract claim, she would need to exhaust her internal remedies so the first step must be to determine if she had rights under the contract. It was not clear to Langhauser which route or forum Wood would choose.

38. Langhauser's position from the start was that Wood's resignation was voluntary and as a result there were no grievance rights that applied under Article 8 or rights to appeal a non-renewal under Article 16. Langhauser advised the System President not to entertain a grievance filed by either the Union or Alexander and advised the denial of Keenan's request that Alexander be granted an appeal meeting.

39. After receiving a faxed copy of Keenan's letter on June 7, Alexander wrote to Langhauser saying that MEA's withdrawal as Wood's representative was "totally unacceptable" to him and "should not be relied upon" until they had conferred. He went on to note that Wood had presented a written summary of her grievance to the Dean and that he was requesting certain information so that he could prepare for the next step of the grievance. His letter then presented 12 detailed requests for information touching on the various issues identified in the grievance.

40. Alexander spoke with Keenan on the phone extensively on June 10, and followed up with a letter telling him that MEA's withdrawal from the case was "totally unacceptable." He argued that MEA had a conflict of interest, as both Dean

Vampatella and Ms. Schuettinger, the Department Chair, were members of MEA. Alexander also asked Keenan to reconsider his position that Wood's grievance had no merit and to take the case to arbitration if requested. In the June 10 telephone conversation, Alexander said he would consider any relevant case law Keenan provided. On June 18, Keenan sent him cases on whether the non-renewal of a teaching contract for a probationary teacher must comply with the just cause standard, and he offered to meet with Alexander.

41. On June 21, Alexander wrote to Keenan stating, among other things, that MEA's withdrawal from the case had encouraged the College to take the position that the complaints were not grievable and "to shut Mrs. Wood out of the grievance process." Alexander wrote,

> . . . In fact, Mr. Langhauser has invoked ethical considerations to prevent direct contact with Schuettinger and Vampatella notwithstanding that MEA has delegated its investigatory responsibilities to me. Moreover, none of the information I have requested has been forthcoming. . . . I respectfully urge you to communicate with Mr. Langhauser immediately and advise him that MEA feels that Mrs. Wood's complaints are both meritorious and grievable within the meaning of Article 8. If you do this promptly, I am confident that Mr. Langhauser will reconsider his position. If MEA does not support Mrs. Wood on this issue, such a refusal will be a further breach of its duty of fair representation owing to Mrs. Wood.

42. On June 23, Alexander wrote to Langhauser asserting that MEA had granted him "full powers to investigate and prosecute grievances and appeals on [Wood's] behalf." He asked Langhauser to advise the college authorities that he "is to be granted access to the college facilities, the faculty members, the students and all pertinent departmental records, including addresses and telephone numbers, in order

to process Mrs. Wood's grievance effectively." He also asked Langhauser to comply with his prior requests for information and "other discovery". In addition, Alexander sought additional information regarding the specifics of Chair Schuettinger's teaching load over the past five years, an itemized account of the total compensation paid to her from July 1, 1999 to June 30, 2002; all credit courses, seminars and other continuing education completed by her over the past five years, and other information regarding Chair Schuettinger. A copy of the letter was faxed to MEA and Ms. Linda McGill, who had recently been retained as outside counsel for the Community College System.

43. On June 26, Keenan wrote the following letter to Alexander:

> This will respond to your letter of June 21, wherein you have urged me to communicate to CMTC counsel that "MEA feels that Mrs. Wood's complaints are both meritorious and grievable"; and that MEA's failure to do so "will be a further breach of its duty of fair representation". At the same time, you continue to adhere to your allegation by letter of June 10 that MEA has a "clear conflict of interest" to the detriment of Mrs. Wood.
>
> I have reviewed the factual and contractual claims made in your various letters to CMTC and MEA. On their face, I must say that you have failed to state a claim under the collective bargaining agreement upon which the relief you are seeking could be granted in arbitration. Mrs. Wood's resignation, while perhaps impulsive, was voluntarily submitted to CMTC officials in exchange for valuable consideration. She evidently intended her resignation to pre-empt any further review of her evaluation by CMTC officials, in lieu of the process afforded by contract.
>
> With respect to your justification for attempting to later withdraw the resignation on the basis of alleged fraud or duress, the facts you have offered failed to support that theory: You have described your client as a mature, well-educated professional woman with a substantial

employment history, including some managerial experience. While she apparently displayed enough steadfastness to resist an alleged demand to subscribe to the evaluation document, over a period of hours she conferred with two or three other people before executing a letter of resignation, with the expectation that her evaluation would be discarded.

Please note that Mrs. Wood never consulted with MEA before offering, negotiating or executing a resignation. Instead, she imputes to her supervisors the duty to advise her of her rights under the Union Agreement to challenge the evaluation and the non-renewal, and then accuses MEA of breaching our responsibilities after the damage is done.

I do not perceive that CMTC is under any contractual obligation to permit Mrs. Wood to now withdraw her resignation. Even if they did, her current probationary contract would still be subject to non-renewal at the discretion of the College President under Article 16, subject to final decision by the System President. Without "continuing contract status" within the meaning of Article 4, she has no right under the contract to be non-renewed only for just cause. On June 18, I mailed you several court cases regarding this subject, and offered to discuss them with you at your offices in person. Instead, you insist that I respond to your letters.

In your June 23 letter to Mr. Langhauser, and your June 21 letter to me, you have apparently misconstrued your authority under the collective bargaining agreement. My June 7 letter was intended to notify CMTC that MEA *would not object* to your appearance as Mrs. Wood's personal representative under Article 8(F)(4). MEA has never delegated to you its status as exclusive bargaining agent, particularly with respect to access to other faculty members under Article 20. To the extent that you would interpret my June 7 letter to the contrary, consider it revoked.

MEA will not represent Sharron Wood, nor demand arbitration on her behalf, because we believe in good faith that her claim under the bargaining agreement is without merit. MEA will not provide you with any file materials related to this case. Neither will we pay attorney's fees to yourself or any other counsel acting on Mrs. Wood's behalf.

> Please take the opportunity to find a reasonable basis for settling this matter.

44. On June 27, McGill wrote to Alexander informing him that her firm had been retained to represent the College in matters arising from Wood's resignation. Among other points made, McGill rejected his information demands by noting that he was not entitled to discovery and that the College would not respond to the interrogatory-type questions in his letter of June 23 or to his other demands for information. Her letter closed with:

> I concur with Mr. Langhauser's position that Ms. Wood has no grievable issues or other valid claims. She resigned her position voluntarily, a choice that was not negated by her later change of mind. Nevertheless, the College has offered her the opportunity to meet with Dr. Knapp so that he can review her employment status. Please contact me to confirm that you are interested in that meeting and to schedule a date and time.

45. On July 16, Alexander sent McGill a copy of the grievance he was going to file with Dr. Knapp, the President of Central Maine Community College. In his cover letter, Alexander stated,

> Mrs. Wood has chosen not to participate in any proceeding outside the grievance process. She wishes to preserve her rights to appeal to the System President and ultimately to arbitration under Article 8, Sections D and E if necessary.

Alexander signed this letter, as he signed all letters to the College or its attorney after Keenan's letter of June 26, as "Grover G. Alexander, Attorney for and the duly designated representative of Sharron V.A. Wood under the MEA Collective Bargaining Agreement."

46. Dr. Knapp received Alexander's letter containing a "formal written grievance" on July 23. McGill responded to this submission in her letter to Alexander of July 29, stating

that because Wood resigned, she was not entitled to grieve over her evaluation or non-renewal. She also wrote:

> . . . Moreover, under both law and contract, the MTCS recognizes and deals only with grievances brought by the Maine Education Association as the exclusive bargaining agent for faculty and instructors. Your representation that you are the "duly designated representative" under the MEA collective bargaining agreement is not sufficient to permit or obligate the MTCS to recognize you in that capacity.

47. Again on August 5, McGill asked Alexander for "confirmation that you are MEA's agent under the agreement. Until that occurs MTCS has no obligation to recognize you as such." Alexander responded on August 15 by referring McGill to Keenan's letter to him dated June 7, "wherein MEA appointed me to represent Mrs. Wood under the Collective Bargaining Agreement." Alexander faxed a copy of this letter to Keenan and to Langhauser.

48. On August 16, Keenan wrote to Alexander in response to the previous day's fax. Keenan wrote that in responding to McGill's request,

> . . . You referred her to my June 7, 2002 letter, but neglected to mention the clarification I made to you by letter of June 26 (enclosed) . . . If Ms. McGill should ask me to confirm whether you are the "agent" of MEA in this matter, I would have to answer that you are not now, and never have been. Rather, I think it would be better for you to advise Ms. McGill that the June 7 letter is, for all intents and purposes, obsolete.

49. The next day, Alexander wrote to Keenan telling him "I have no plans to further advise Ms. McGill of anything (I am confident you have or will shortly) relating to my representative capacity in this matter." He also stated that he felt he had complete authority and that MEA forfeited all right of control over the proceedings by

abandoning Wood at the outset.

50. On August 23, McGill wrote to Alexander stating,

> I have become aware of a June 26 letter from Shawn Keenan expressly informing you that his June 7 letter does not authorize you to act as Ms. Wood's exclusive representative or otherwise on behalf of the MEA. I reiterate to you that MTCS is obligated and authorized to deal only with MEA or its authorized representatives on collective bargaining matters, and I obviously am disturbed by your apparent attempt to mislead me and MTCS on this point.

51. By copies of letters to McGill dated August 31 and September 3, Alexander offered an explanation of the source of his representative capacity and requested that Keenan confirm his status. Keenan wrote to McGill on September 10, and quoted his letters of June 26 and August 16 in rejecting Alexander's claim of representative capacity.

52. Throughout the summer, Alexander attempted to present Wood's grievance first to the College President, then to the System President. At each step, the Community College System refused to respond on the grounds that her separation was not a grievable matter. McGill testified that the College's position during the initial stages of the grievance procedure was not based on Alexander's status.

53. Eventually, Alexander submitted an arbitration request to the American Arbitration Association to which McGill responded that the agreement authorized only MEA to demand arbitration. Keenan confirmed that Alexander was not authorized by MEA to pursue arbitration. AAA rejected the arbitration request on that basis.

DISCUSSION

The legal issue presented in this case is the scope of the duty of fair representation owed to Wood and whether the Maine Education Association breached that duty. Also at issue is whether Maine Central Community College colluded with the Association to commit a breach of the duty of fair representation.

As the exclusive bargaining agent for the Faculty Unit at the Community College System, it is undisputed that the Maine Education Association owes all unit employees the duty of fair representation. See 26 M.R.S.A. §1025(2)(E). 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. MLRB, 482 A.2d 834 (Me. 1984), Brown v. MSEA, 1997 ME 24, ¶7, 690 A.2d 956. See also Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903 (1967). A breach of the duty of fair representation is a violation of §1027(2)(A) of the University Act, which prohibits a union from "interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in section 1023."[10]

The duty of fair representation provided by Maine law is comparable to the duty of fair representation under the National Labor Relations Act. Langley v. MSEA, No. 00-14, at 25 (March 23, 2000), aff'd, 2002 ME 32, 791 A.2d 100; see also Hughes v. Univ. of Maine, 652 A.2d 97, 99 (1995). In both cases, a complainant

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[10]Section 1023 provides:

> No one may directly or indirectly interfere with, intimidate, restrain, coerce or discriminate against university, academy or community college employees or a group of university, academy or community college employees in the free exercise of their rights, hereby given, voluntarily to join, form and participate in the activities of organizations of their own choosing for the purposes of representation and collective bargaining, or in the free exercise of any other right under this chapter.

must show that the union's conduct was arbitrary, discriminatory or in bad faith. These three types of prohibited conduct are distinct:

> 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) (internal quotations and citations omitted).

To prove a breach of the duty of fair representation by union conduct that is "arbitrary," a Complainant must show something substantially more than that a grievance was poorly handled. In Brown v. MSEA, the Law Court noted that because of the duty of fair representation,

> the union may not ignore a meritorious grievance or process it in a perfunctory manner. Nevertheless, a 'wide range of reasonableness must be allowed' and 'mere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty of fair representation.'

1997 ME 24, ¶7, quoting Lundigran v. MLRB, 482 A.2d at 836 (citations omitted); also citing Vaca v. Sipes, 386 U.S. at 191 ("a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion").

We agree with the Complainant that Wood's failure to seek union assistance before resigning and the fact that this Board subsequently concluded that her resignation was voluntary does not absolve the Union of its duty of fair representation.[11] This

[11]We note that the Union has not argued that it had no duty to the Complainant. The Union argued that its conduct was not a breach of that duty.

is because the central issue raised by the Complainant was the allegedly coerced nature of the resignation and the Employer's failure to permit the withdrawal of the resignation. The voluntariness of the resignation was critical to the analysis of the prohibited practice complaints against the Employer addressed in our Interim Order of June 14, 2004. In the present analysis, however, the resignation is simply one relevant factor in the Union's assessment of the merits of the grievance.

A duty of fair representation case does not call for a ruling on whether the Union made the correct decision; the question is simply whether the Union's conduct was arbitrary, discriminatory or in bad faith. See John T. Abbott & Elaine Lacroix, et al. v. MSEA, No. 81-51, at 6 (Sept. 8, 1980). The test for arbitrary conduct is whether "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." Langley v. MSEA, No. 00-14, at 27, quoting Air Line Pilots v. O'Neill, 499 U.S. 65, 67 (1991), aff'd, Langley v. MLRB and MSEA, 2002 ME 32. To apply this standard in the present case, it is necessary to determine the "factual and legal landscape" at the time of the union's action. We will start with the initial handling of the grievance by Wooten.

In the telephone conversation of May 15 with Wooten, Wood described her situation, the negative evaluation that she had received which she thought was unfair, and the resignation she had written with the help of a co-worker. She stated that she had resigned under pressure in exchange for the destruction of the evaluation. Upon hearing her request for help, Wooten felt that Wood's case would be very difficult. He knew, based on his extensive experience, that a probationary employee without just cause protection had very little chance of prevailing on a discharge grievance. He also viewed Wood's resignation as a

factor further diminishing any chance of success. He explained his initial assessment to her. Wooten's initial investigation confirmed the essential facts that Wood had told him: that she was a probationary employee, she had received a bad evaluation that she thought was unfair, and after considering the matter she had resigned in exchange for the destruction of the negative evaluation. Wooten verified that the collective bargaining agreement did not provide just cause for probationary employees and that it was silent regarding the withdrawal of resignations. Even though Wooten's initial assessment was that it was a very weak case, Wooten told Dean Vampatella that he would file a grievance and they scheduled a first-step meeting. He left a message with Wood that she should arrive one hour early so that they could discuss the case further and gather more information.[12] His actions preserved whatever rights Wood had and set the groundwork for further processing of the grievance. Wooten handled the grievance in accordance with his standard practice based on his many years of experience and in accordance with the grievance procedure.

The Complainant asserts in her brief that "MEA did absolutely nothing to investigate and present the grievance" (Brief at 22) and "the handling of the grievance, to the extent it was handled at all, was at best perfunctory." (Brief at 24). The

[12]There is conflicting testimony about whether Wooten actually left a message for Wood notifying her of the May 29 first-step meeting: Wooten said he did, Wood said he did not. This particular point is not critical as there is no question that her attorney knew of the meeting on May 25th because much of his telephone conversation with Wooten on that day revolved around the fact that Alexander would not be allowed to attend. Even if Wooten had failed to leave a message and that failure had somehow extinguished her rights (which it did not), it still would not constitute a breach of the duty of fair representation as it would be, at most, simple negligence. See, e.g., Brown v. MSEA, 1997 ME 24, ¶7; Steelworkers v. Rawson, 495 U.S. 369, 372-373, 110 S.Ct. 1911 (1990) (mere negligence does not breach the duty of fair representation).

facts do not support these assertions. Wooten spoke with Wood, her father and attorney, the Dean, the shop steward, the Human Resources Director for the Technical College System, he consulted the collective bargaining agreement, and he made an appointment with the Dean for the first-step meeting of the grievance procedure. There was no written grievance filed because the first-step of the process is informal and contemplates the oral presentation of the grievance. Wooten did not have any further conversation with Wood because he had nothing to report and, in accordance with his standard practice, he would be meeting with her to discuss the case for an hour prior to the first step meeting. Wooten did not have any obligation to communicate with Wood's father. He chose not to speak with him because he considered Alexander's attempt to dictate to him how to present the grievance to be interference. Although Wooten's failure communicate more with the grievant or her father may have sent the wrong message to them, it was certainly not "so far outside the range of reasonableness as to be irrational". See Langley v. MSEA, No. 00-14, aff'd, 2002 ME 32.

Wooten's decision to postpone the first-step meeting was not a breach of the duty of fair representation because it was a rational response to Alexander's insistence on attending the meeting. Wooten knew that Alexander had very strong opinions about the merits of his daughter's grievance and how it should be presented. Alexander's interpretation of the contract was directly at odds with Wooten's opinion. Wooten's view was based on a wealth of experience administering numerous collective bargaining agreements. Wooten felt that Alexander had already jeopardized his daughter's chance of a successful resolution of her grievance by angering the Dean by calling her and the Department Chair at home on the weekend following Wood's resign-ation. Furthermore, by the time Wooten decided to postpone the meeting, he had witnessed Alexander's confrontational style

during their May 25 telephone conversation. Wooten had no statutory or contractual obligation to allow Alexander to attend the meeting. It was not irrational for Wooten to view Alexander's insistence on attending the meeting as interference: Alexander's confrontational style was at odds with Wooten's need to be able to negotiate and reason with management on behalf of Wood. Given all of these factors, there was nothing irrational about Wooten's decision to exclude Alexander from the first-step meeting.

Wooten testified that he had no intention of excluding Wood from the meeting and that his practice was always to have the grievant present at the first-step meeting. Wooten told Alexander in the May 25 telephone call that he would not be permitted to attend because the grievance involved Wood, the College and himself, but not Alexander. We credit Wooten's testimony that Wood was not being excluded from the meeting, as it is consistent with his practice and there is no contrary evidence in the record.[13] Perhaps some confusion could have been avoided if Wooten had made it clear in his message postponing the grievance meeting that he would be willing to go ahead with it only if the grievant attended without her father.

In summary, we conclude that Wooten's handling of Wood's grievance, up to and including the postponement of the first-step meeting, did not breach the Union's duty of fair representation. He considered the basis for the grievance to be very thin in light of her probationary status and lack of just cause protection. The case was further complicated by Wood's

[13]We note that in his letter of May 27 describing his version of that phone call (Complainant's Exhibit #20), Alexander asserts that Wooten said neither he nor his daughter would be able to attend the first-step meeting with the Dean. We cannot allow the Complainant's exhibits to be considered evidence of the truth of the statements made in them, because to do so would be equivalent to allowing testimony by the Complainant's attorney.

resignation. Nonetheless, he was prepared to present her grievance at the first-step meeting. It was Alexander's behavior in insisting on attending the meeting that prompted Wooten to postpone the meeting.

Our decision here is entirely consistent with prior Board decisions finding no breach of the duty of fair representation where the union refused to handle the grievance as demanded by the grievant. For example, in a case decided in 1982, the Board found no breach of the duty of fair representation where the union's conduct was based on a reasonable interpretation of the contract, even though the complainants' reading of the contract was reasonable as well. John T. Abbott, et al. v. MSEA, No. 81-51, at 7. More recently, the Board found no violation where the union refused to insist on the remedy sought by the grievant (reinstatement to her former job) and withdrew from arbitration after the grievant quit the comparable job to which she had already been reinstated. Ridge v. Cape Elizabeth Educ. Assoc., No. 98-02 (Sept. 8, 1998). In another case, the Board concluded that the union's decision to refuse to represent the employee at arbitration due to the employee's uncooperative behavior was not unreasonable. Casey v. Mountain Valley Educ. Assoc., No. 96-26, at 40 (Oct. 3, 1997). See also Lundrigan v. State Dept. Of Personnel and MSEA, No. 83-03 (Feb. 4, 1983), aff'd, Lundrigan v. MLRB, 1997 ME 24, 690 A.2d 956 (finding no breach when the union refused to present the arguments and evidence the grievant thought relevant and even threatened to stop the arbitration proceeding if the grievant raised those subjects).

Similarly, the Complainant has failed to prove that the Union breached its duty of fair representation after the case was taken over by the Union's General Counsel, Shawn Keenan. Once he became involved, Keenan conducted his own review and investigation of the case: he discussed it at length with Wooten, he read the voluminous correspondence written by Alexander

describing the details of his daughter's complaints, he reviewed the terms of the collective bargaining agreement and he spoke with the System's attorney to get its perspective on the case. Keenan observed that there was very little disagreement between the Employer, the Union and the employee as to the facts surrounding Wood's evaluation and resignation. On the other hand, it was apparent to Keenan that he and Alexander had fundamentally different views on both the merits of the case and how it should be presented. Given the circumstances at this point, Keenan's decision to remove MEA as Wood's advocate was not unreasonable. He communicated his decision in his letter to Alexander dated June 7. At the same time, Keenan attempted to give Alexander a status under the contract that would enable Alexander to be fully responsible for pursuing the grievance.

The collective bargaining agreement does not contain any language authorizing a grievant to be represented by a private attorney or other third party.[14] This is not unusual. Both management and labor have legitimate interests protected by such a position. The union has an interest in maintaining its status as exclusive representative of the bargaining unit and both parties benefit from consistent interpretation and administration of the bargaining agreement. Keenan indicated in his June 7 letter that permitting Alexander to represent his daughter was "appropriate" under 26 M.R.S.A. §1025(2)(E). That section authorizes, but does not require, the employer to adjust a grievance of an individual employee without the intervention of the bargaining agent as long as certain conditions are met. See AFT Local 3711, Sanford Federation of Teachers v. Sanford School

[14]Article 8(F)(4) allows a grievant to be represented only by himself or herself and/or by "an Association designated representative" (presumably this would include shop stewards), "or professional staff or counsel" of the MEA (presumably this would include both Wooten and Keenan).

Committee, No. 01-24, at 8-9 (Jan. 31, 2002) (interpreting comparable section of the Municipal Public Employees Labor Relations Law), citing Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 95 S.Ct. 977 (1975). Section 1025(2)(E) does not grant an individual employee any statutory right to be represented by a personal attorney or a third party, as that would be in direct conflict with the bargaining agent's status as the "sole and exclusive representative for all of the employees in the bargaining unit." 26 M.R.S.A. §1025(2)(B). As Keenan explained in his subsequent letter of June 26, the June 7 letter was intended to indicate that MEA would not object to Alexander serving as his daughter's personal representative under Article 8(F)(4).

Even though the collective bargaining agreement did not expressly authorize representation by a private attorney, Keenan thought Article 8(F)(4) might present an opportunity for Alexander to participate in the grievance procedure.[15] In his June 7 letter, Keenan designated Alexander as Wood's representative in an attempt to enable him to pursue her grievance under that portion of Article 8(F)(4) permitting representation by an "Association designated representative." Keenan also noted in his letter that the contract provides that both non-renewal appeals and dismissal grievances are initiated at the System President level. He requested that the College agree to extend the deadline so that Alexander could arrange a meeting with the System President to present Wood's appeal and/or grievance. Keenan made it clear in the June 7 letter, however, that only MEA could appeal a case to arbitration and the Union

[15]There is no evidence in the record that Keenan had ever attempted to designate a third party as a grievant's representative under this Article before, nor is there evidence that the Employer had ever agreed that the collective bargaining agreement permitted such a designation.

reserved the right to refuse to arbitrate a claim on its merits. While the letter ceded full responsibility for investigating and processing Wood's grievance to Alexander, it did not specifically grant to Alexander any power or authority the Union possessed as the exclusive bargaining agent.

Between the June 7 letter and his June 26 letter in which Keenan declared that MEA would not take Wood's case to arbitration, Keenan continued to assess the merits of the case and the grievant's arguments. Keenan spoke on the phone extensively with Alexander on June 10 about the facts of the case and the legal issues involved. Alexander indicated a willingness to consider any pertinent case law Keenan could provide. On June 18, Keenan sent him cases he had compiled in his research on discharge cases involving probationary employees and offered to meet and discuss the issues with Alexander. By June 26, Keenan had also read and considered the additional letters Alexander had written to the College and the Association.

In his June 26 letter, Keenan stated unequivocally that MEA would not take Wood's case to arbitration because MEA believed it was without merit. Keenan gave a detailed and well-reasoned explanation for arriving at that conclusion. He noted that Wood's resignation, "while perhaps impulsive, was voluntarily submitted . . . in exchange for valuable consideration," the destruction of her evaluation. Keenan considered the facts offered by Alexander regarding the resignation and concluded that they did not support the allegation of fraud or duress. Keenan could not find any contractual obligation for the College to let Wood withdraw her resignation. Even if they did let her withdraw it, any decision to non-renew was at the discretion of the College President, subject to final decision by the System President. She had no just cause protection because she was a probationary employee. Keenan's declaration in his letter of June 26 that MEA would not seek arbitration was not a breach of

the duty of fair representation because the decision was not "so far outside a 'wide range of reasonableness' . . . as to be irrational." Langley v. MSEA, No. 00-14, aff'd, 2002 ME 32.

The June 26 letter also addressed what Keenan considered to be Alexander's misinterpretation of his authority under the collective bargaining agreement. In a letter of June 23, Alexander had claimed to Langhauser that MEA granted him "full powers to investigate and prosecute grievances and appeals on [Wood's] behalf." He requested the College respond to his prior requests for information and other "discovery," and he requested that the college officials be advised that he had access to the college, the faculty, students and all departmental records, including addresses and telephone numbers, pursuant to Article 20(A)(1) and (2) of the collective bargaining agreement. Keenan responded to this claim in his June 26 letter stating, "MEA has never delegated to you its status as exclusive bargaining agent, particularly with respect to access to other faculty members under Article 20. To the extent that you would interpret my June 7 letter to the contrary, consider it revoked." This letter did not alter MEA's position on Alexander serving as his daughter's personal representative, but did clarify that he had not been granted any of the bargaining agent's authority.

Complainant's assertions in her brief that the Union granted Alexander "full power and authority to advocate on her behalf" and "sweeping powers to investigate" are incorrect. (Brief at 8 and 23.) While the June 7 letter could have been more explicit as to what MEA intended, the subsequent letter of June 26 clearly indicated that MEA had not delegated to Alexander its authority as bargaining agent or its authority under Article 20 to access faculty. Permission to serve as the grievant's personal representative is not the same as authority to function as MEA's agent. Short of hiring Alexander as an attorney to represent the

Union or creating some other form of agency relationship[16], it would not be possible for the Union to unilaterally grant any person or entity the authority conferred upon it by statute. If Alexander had been serving as the agent of MEA, as opposed to the representative of Wood, the Employer would indeed have a statutory obligation to provide information relevant to the processing of grievances.[17] See Sanford AFT, No. 01-24, at 14, citing Portland School Committee v. Portland Teachers Assoc., No. 93-27, at 16 (Feb. 17, 1994) and NLRB v. Acme Industrial Co., 385 U.S. 432, 436 (1967). In this case, however, MEA never authorized Alexander to act as its agent. See, e.g., Howell Insulation Company, Inc. and Intern'l Assoc. of Heat & Frost Insulators and Asbestos Workers Local 90, 311 NLRB 1355 (1993) (A union's statement that "it would not object" to third party filing a grievance does not make third party the union's agent thus it had no authority to obtain the information on behalf of the union). As soon as Keenan learned of Alexander's claim to possess the Union's authority to access faculty and investigate grievances, Keenan wrote to Alexander and told him he had no such authority. Far from being irrational, this step was a reasonable and responsible thing to do and not a breach of the duty of fair representation.

The Complainant argues that the Union joined and colluded with the College in "the erroneous, bad-faith contention that only MEA as the exclusive bargaining agent could compel or otherwise participate together with [the College] in the grievance process." (Brief at 9.) The Complainant's argument

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[16]Had Alexander been an agent of MEA, he would have had a duty to represent the individual grievant; however, an agent cannot perform that function in isolation but must continue to serve the interests of the bargaining unit as a whole.

[17]We offer no opinion on whether Alexander's requests for information would necessarily be considered relevant.

seems to be based on the blurring of two issues: 1) the Employer's position that Wood was not entitled to grieve and 2) the Employer's position that Alexander did not possess the bargaining agent's right to information related to the grievance and was not entitled to pursue arbitration. The first point had nothing to do with Alexander's status but the second point did. The Union did not agree with the Employer on the first point, but did agree on the second point.

The Employer was willing to consider Wood's claims outside the grievance procedure but took the position that her resignation foreclosed any opportunity to file a grievance over the evaluation and non-renewal recommendation and that the resignation itself was not a grievable matter. Langhauser testified that on this basis he advised the System President not to grant Keenan's June 7 request of an appeal meeting for Alexander, just as he advised him not to entertain Alexander's written grievances or even the Union's first oral grievance on the matter. There is no evidence in the record that the Employer changed its position on this issue.[18] The Union recognized that Wood's resignation complicated her case, but it never took the position that her resignation foreclosed the filing of a grievance.

McGill's testimony, that Alexander's claim of representative status had no bearing on whether the College would entertain Wood's grievance at the initial steps, is consistent with Langhauser's statements. In her letter of July 29 responding to the "formal written grievance" Alexander sent to the System President, McGill reiterated the System's position that Wood did not have a grievable claim. This was the basis for the System's refusal to entertain Wood's grievance. McGill went on to say

[18]Assertions made by Alexander in his letters and otherwise in this proceeding cannot be considered evidence.

that “moreover,” the College dealt only with MEA as the exclusive bargaining agent and, “Your representation that you are the ‘duly designated representative’ under the MEA collective bargaining agreement is not sufficient to permit or obligate the MTCS to recognize you in that capacity.” Although it is not extremely clear from the letter alone, we conclude that this latter statement was not the basis for the System’s refusal to hear the grievance but was a statement regarding the System’s position on Alexander’s status (or lack thereof) under the collective bargaining agreement. It is reasonable to conclude that McGill’s July 29 letter was responding not just to the “formal written grievance,” but to Alexander’s letter of July 16. Alexander had given McGill notice that he would be sending a written grievance to the System President in his letter of July 16, which was when he first asserted that he was Wood’s “duly designated representative” under the collective bargaining agreement.[19] He also stated in that letter that Wood wanted to preserve her rights under the grievance procedure and her “rights of appeal to the System President and ultimately to arbitration under Article 8, Sections D and E if necessary.” Given Alexander’s claim that Wood had a right to invoke arbitration and his use of the appellation “duly designated representative,” it is not surprising that McGill responded by referring to MEA’s status as the exclusive bargaining agent.

While MEA never took the position that only MEA could process a grievance, it is true that the College and MEA agreed that Wood was not entitled to take the grievance to arbitration. The collective bargaining agreement is very clear on this point. The fact that the College and MEA agreed on this point is not

[19]All of Alexander’s letters to the System attorneys after Keenan’s letter of June 26 were signed “Grover G. Alexander, Attorney for and the duly designated representative of Sharron V.A. Wood under the MEA Collective Bargaining Agreement.”

evidence of collusion. "Collusion" is defined as, "A secret agreement between two or more parties for a fraudulent, illegal or deceitful purpose." American Heritage Dictionary, Fourth Edition (2000). There is nothing secretive, deceitful or fraudulent about the Employer and the Union agreeing on the plain meaning of the collective bargaining agreement.

There was agreement between MEA and the College on the issue of whether Alexander was the agent of MEA or otherwise had access to faculty under the contract, but there was nothing collusive in that agreement. The College was under no obligation to accept Alexander's assertions that he had full authority to investigate the grievance. Contrary to the Complainant's assertions, MEA never granted Alexander any of its authority to investigate the grievance. Also contrary to the Complainant's assertions, the College was not obligated to agree with MEA's attempt to use Article 8(F)(4) to designate Alexander as Wood's representative. Finally, the College was not obligated to grant to a third party the statutory or contractual rights held by the exclusive bargaining agent absent confirmation that the third party was an authorized agent of MEA. To do so would be a clear violation of the statutory duty to bargain as it would be circumventing the bargaining agent.

The Complainant argues that the parties colluded to "stonewall" the Complainant because the Complainant's attorney had made various information requests and sought access to faculty. The Complainant claims that neither the Employer nor the Union wanted an aggressive outside attorney meddling in their affairs and consequently conspired to exclude him from the process. There is no merit to this argument. If it were true that the parties had actually changed their positions on anything in response to Alexander's requests for information (which they did not), one would think that they would have done so after his first request for information in his letter of June 7. It was

not until later when Alexander asserted he had “full powers to investigate and prosecute grievances” that Keenan reacted by clarifying MEA’s position on his status in his letter of June 26.

As a final argument, the Complainant claims that at some point Keenan provided McGill with a copy of his letter of June 26 so that she could “shoot down” Complainant. There is no evidence in the record on how McGill came to possess the letter. Even if Keenan did give her the letter, however, we can hardly see how that would prove collusion. It defies logic to conclude that the disclosure of a letter is “a secret agreement between two or more parties for a fraudulent, illegal or deceitful purpose” when the disclosure served to expose the misrepresentations of the letter’s recipient regarding its contents.

In addition to the assertion that MEA’s conduct was arbitrary, the Complainant asserts that the Union’s conduct was discriminatory and in bad faith. Although it is not entirely clear, the argument seems to be that MEA discriminated against the Complainant because she had an aggressive attorney. There is no evidence in the record to support this argument. The presence or participation of an attorney had no bearing on the Union’s assessment of the merits of the grievance. From the very first conversation with the Complainant, the Union noted the weakness of the grievance. It was the behavior and confrontational style of the Complainant’s attorney and his insistence on being present at the first step grievance meeting that prompted the Union to call off the meeting. The subsequent decision by Keenan that MEA would not take the case to arbitration was based on further review and his assessment that the grievance lacked merit.

Discriminating on the basis of a grievance’s merit is what unions are supposed to do. The Supreme Court has long recognized the importance of this process to the proper functioning of the collective bargaining system:

> Union supervision of employee complaints promotes settlements, avoids processing of frivolous claims, and strengthens the employer's confidence in the union. [Vaca v. Sipes], 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, 42 U.S. 442, 51, 99 S.Ct. 2121, 2127 (1979). This reasoning is consistent with the 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. See also Hughes v. Univ. of Maine, 652 A.2d at 99 (giving discretion to union to supervise grievance process assures that similar complaints are treated consistently and problem areas of contract interpretation resolved.)

The Complainant's assertion that the Union's acted in bad faith is without support in the record. Bad faith requires a showing of fraud, or deceitful or dishonest action, which the Complainant has failed to prove. Complainant's remaining arguments concerning the alleged prohibited practices and contract violations by the Employer were addressed in the Board's Interim Order of June 14, 2004.

In summary, we conclude that the Complainant has failed to show that the Union breached its duty of fair representation and has failed to demonstrate any evidence of collusion between the Union and the Employer in an attempt to deprive the Complainant of her statutory rights.

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. § 1029, it is hereby ORDERED:

1. That portion of the Complaint charging the Maine Education Association with violating 26 M.R.S.A §1027(2)(A) by breaching its duty of fair representation is dismissed.

2. That portion of the Complaint charging the Maine Community College System with violating 26 M.R.S.A. §1027(1)(A) by colluding with the Union in committing a breach of the duty of fair representation is dismissed.

Dated at Augusta, Maine, this day of April, 2005.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right pursuant to 26 M.R.S.A. §1029(7) 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.

_____
Peter T. Dawson
Chair

_____
Karl Dornish, Jr.
Employer Representative

_____
Robert L. Piccone
Employee Representative