STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 03-06
Issued: June 14, 2004

SHARRON V. A. WOOD,

Complainant,

v.

MAINE EDUCATION ASSOCIATION and MAINE TECHNICAL COLLEGE SYSTEM (CMTC),

Respondents.

INTERIM ORDER

This prohibited practice claim had its origins when the Complainant, a probationary instructor in the Nursing Department at Central Maine Community College, was informed that her contract would not be renewed. The complaint, filed on November 8, 2002, alleges that the employer interfered with the rights protected by 26 M.R.S.A. §1023 by coercing the Complainant into resigning her position, thereby violating §1027(1)(A) of the University of Maine System Labor Relations Act (the "Act"). The complaint further alleges that the employer and the bargaining agent colluded to deny her rights and that the union breached its duty of fair representation in violation of §1027(2)(A).

Grover G. Alexander, Esq., represented the Complainant, Donald F. Fontaine, Esq., represented Respondent Maine Education Association, and Linda S. McGill, Esq., represented the Maine Technical College System. Chair Peter T. Dawson presided over the evidentiary hearing with Employer Representative Karl Dornish and Employee Representative Robert Piccone.

In accordance with the Prehearing Order issued on July 11, 2003, the hearing was bifurcated. The issues to be presented at

the first stage of the hearing were limited to whether the employer interfered with the Complainant's exercise of the rights provided by the collective bargaining agreement or coerced her into abandoning such rights or coerced her resignation.

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.[1] The Maine Education Association is a bargaining agent within the meaning of 26 M.R.S.A. §1029(2).

FINDINGS OF FACT

1. On August 21, 2000, Sharron Wood began working at the Auburn campus of Central Maine Community College ("CMCC") as an Instructor in the Nursing Program. The collective bargaining agreement between the Maine Technical College System (of which CMCC is one part) and the Maine Education Association establishes a 3-year probationary period for faculty members. The events giving rise to this prohibited practice case arose during Ms. Wood's second year as a probationary faculty member, specifically during the spring of 2002.
2. The Nursing Department at Central Maine Community College is made up of six full-time faculty, including the Department Chair, along with several adjunct faculty members who are primarily responsible for clinical supervision of students. The faculty members report to the Department Chair, Ms. Anne Schuettinger. The Chair reports to the Dean of Academic

[1]P.L. 2003, C. 20, Part OO, effective on March 27, 2003, changed the name of the Maine Technical College System to the Maine Community College System. Central Maine Technical College (CMTC) became Central Maine Community College (CMCC). Both names are used here interchangeably.

Affairs, Ms. Patricia Vampatella, who reports to the President of CMCC, Dr. Scott Knapp.

3. Ms. Wood shared an office with Ms. Susan Jamison, a faculty member who had been employed there about five years. Ms. Kathy McManus, whose office was across the hall from Ms. Schuettinger's office, was in her first year as a faculty member at the college during the events at issue in this case.

4. The collective bargaining agreement between the Maine Technical College System and the Maine Education Association for the Faculty Unit had an effective date of July 1, 2001, and expired June 30, 2003.

5. Article 16 of the collective bargaining agreement covers probation. It states:

> A. All faculty members shall serve a probationary period of up to three (3) years. Contracts shall be issued annually. Non-renewal of contracts of probationary faculty members shall be at the discretion of the President. Probationary faculty members whose contracts are not renewed shall be given written notification of at least ten (10) weeks. Such faculty members shall have the opportunity to appeal the decision of the President to the System President whose decision shall be final.
>
> B. Faculty members who have completed their three (3) year probationary period shall receive six (6) months prior notice in the event that their contract is not renewed.

6. Article 6 of the collective bargaining agreement covers faculty evaluations. The relevant portions state:

> D. Evaluation programs at the various colleges will at a minimum contain the following:
>
> 1. Faculty members with continuing contract status shall be evaluated each year.
>
> 2. Probationary members shall be evaluated twice each year.

3. All monitoring or observation of faculty member for the purpose of evaluation shall be done with the knowledge of the faculty member.

4. A faculty member will be given a copy of a written report of his/her evaluation which shall be prepared by his/her evaluator within one (1) week of the evaluation and the faculty member may request a conference to discuss such evaluation report. The faculty member shall have the evaluation report at least one (1) day prior to any such conference. The faculty member may offer written comments in response to any evaluation report and such response shall be attached to the file copy.

. . .

7. Article 4 of the collective bargaining agreement covers discipline and states, in full:

A. No faculty member covered by this Agreement shall be reprimanded or suspended without just cause.

B. No faculty member with continuing contract status shall be discharged or suffer non-renewal of contract except for just cause.

C. No faculty member shall be suspended without pay or discharged without notice in writing.

D. A faculty member may meet with the President or his/her designee to discuss the action proposed or taken within three (3) days after receipt of the suspension or dismissal notice. The faculty member, if he/she chooses, may have a representative of the Association present to advise and/or represent him/her at this meeting.

E. Any faculty member suspended without pay or dismissed may grieve directly to the System President at Step 2 of the grievance procedure within fifteen (15) days after the faculty member becomes aware of such disciplinary action.

F. The Association shall be given prompt written notice of the discharge, suspension or non-renewal

of any faculty member.

G. A faculty member who is given a written reprimand shall be notified that a copy of the reprimand will be sent to the Association's steward if the faculty member requests it. The faculty member shall be given the opportunity to make this request when the reprimand is issued.

8. Article 8 of the collective bargaining agreement, setting forth the grievance procedure, defines "grievance" as "A dispute concerning the meaning or application of the specific terms of this Agreement." It defines "grievant" as "A faculty member, a group or class of faculty members or the Association."

9. The grievance procedure has various time constraints for filing a grievance, for responding, and for appealing to the next step. The first step is for the grievant to present the claim orally to the Vice President, the second step is a written grievance to the President of the College, the third step is a written appeal to the System President, and the final step is arbitration. The Association is the only party that may appeal the System President's decision to arbitration.

10. With respect to dismissals, Article 8(B)(1)(b) provides:

> Any faculty member suspended without pay or dismissed may grieve directly to the System President at Step D.3 of the grievance procedure within fifteen (15) days after the faculty member becomes aware of such disciplinary action.

11. All faculty members, whether probationary employees or non-probationary, are appointed to their positions for one-year terms. The President of the College has the sole authority to appoint or reappoint a faculty member.

12. At the end of her first year of employment at the College, Ms. Wood was evaluated by her supervisor, Ms. Schuettinger.

The evaluation was completed in May of 2001 and Ms. Wood was subsequently reappointed to her position as a probationary Instructor in the Nursing Department. Ms. Wood was not evaluated again until May 10, 2002.

13. Although the collective bargaining agreement states that probationary employees are to be evaluated twice each year, Ms. Wood did not receive a mid-year evaluation in either her first or her second year of employment. There was no evidence that she complained about this or filed a grievance regarding this omission on either occasion.

14. On April 10, 2002, Ms. Wood's supervisor, Ms. Schuettinger, counseled Ms. Wood on a number of performance issues concerning Ms. Wood's relations with other staff members and certain attendance issues. She informed Ms. Wood that the issues addressed would be summarized on her annual evaluation. Ms. Schuettinger told Ms. Wood that if the issues discussed were not addressed during the following academic year, then Ms. Schuettinger would not recommend that her employment be renewed beyond the third year of her probationary period.

15. After the April 10 meeting with Ms. Wood, Ms. Schuettinger wrote a summary of the issues discussed, describing the performance issues and the statement that Ms. Wood would have to correct the problems in order to obtain renewal beyond the upcoming academic year. Ms. Schuettinger also wrote that Ms. Wood said, "You don't want to get rid of me now because you don't want to have to replace me." Ms. Schuettinger did not give Ms. Wood a copy of the summary or any written documentation of their April 10, 2002, meeting.

16. Two of Ms. Wood's colleagues testified that in late April or early May, Ms. Wood asked them whom to contact about joining the union. Ms. McManus, who was a union member, gave

Ms. Wood the name of someone to ask. Ms. Jamison testified that Ms. Wood told Ms. Jamison she should probably join the union because she had had a conversation with Anne Schuettinger and that it had not gone well.

17. In a letter dated April 25, 2002, the Maine Education Association notified Ms. Wood that they had recently received and processed her application for membership in the Association. The letter indicates that a membership card was enclosed along with other materials.

18. Ms. Wood testified that although she had become a member of the union and was having either $25 or $40 a month taken out of her paycheck, she was unaware of the general notion that if she had a dispute with her employer, she could call on the union for assistance. Ms. Wood testified that she did not know what her union dues were for, but assumed she would eventually be told.

19. Ms. Schuettinger provides her annual performance evaluations for the faculty members during the final week of the school year which, in 2002, was the week of May 6 to 10. Her practice is to post a schedule for the performance evaluations, with the faculty members coming to her office at the scheduled time. Ms. Schuettinger posted the schedule sometime in the first half of that final week of school. It had two evaluation meetings scheduled for the morning of May 9, two for the afternoon of May 9, and Ms. Wood's evaluation scheduled for 9 a.m. on Friday, May 10.

20. Ms. Schuettinger's practice over the seven years she had served as Department Chair was to give a copy of the evaluation to the faculty member at the start of the meeting, discuss it, and then have the faculty member sign it to indicate that the faculty member had reviewed the evaluation. It was not her practice to give the faculty member an advance copy of the evaluation, but she would have

done so had such a request been made. Ms. Wood did not request a copy of the evaluation in advance of their meeting.

21. Ms. Wood arrived at Ms. Schuettinger's office at 9:00 a.m. on May 10th. Ms. Schuettinger informed Ms. Wood that Dean Vampatella would be joining them. Ms. Wood stated she thought it was unfair for two of them to be there. While they were waiting for Dean Vampatella to arrive, Ms. Schuettinger gave Ms. Wood copies of the student evaluations to review. The student evaluations were favorable.

22. When Dean Vampatella arrived shortly after 9 a.m., Ms. Wood again brought up the fact that she thought the situation was a "power thing" with both the Dean and the Department Chair present. Ms. Wood wanted to know why the Dean was there. Dean Vampatella replied that she was there to monitor the process for the benefit of both the faculty and the Chair. Ms. Wood stated she thought that it was unfair to have two of them while she was there without any support. Ms. Schuettinger said she thought Kathy McManus was across the hall and Ms. Wood could have her join them. Ms. Wood did not want to bring her in. Ms. Wood did not ask to call another faculty member or a representative of the union, even though by this point she had realized the meeting was not going to be a positive one.

23. Ms. Schuettinger began the evaluation process by handing Ms. Wood a copy of the evaluation and saying that even though her student evaluations were positive, she would be recommending that Ms. Wood's probationary contract not be renewed. Ms. Wood was shocked and visibly upset. She said she did not understand why they were doing this. She was crying and asked if she could take the evaluation somewhere to read in private.

24. Ms. Wood was allowed to leave Schuettinger's office so that she could read the evaluation in private. Neither Dean Vampatella or Ms. Schuettinger stated that the evaluation had to be signed that day, nor did they impose any sort of time limit on Ms. Wood or suggest that Ms. Wood had to return at any particular time. When Ms. Wood left Chair Schuettinger's office, she was visibly upset and unable to speak very clearly.

25. Ms. Wood went across the hall to the office of Kathy McManus, another nursing faculty member with whom Ms. Wood was friendly. She knocked and asked if she could come in. As soon as Ms. McManus saw that Ms. Wood was upset and crying, she said sure. Ms. Wood sat at the second desk in the office and Ms. McManus asked Ms. Wood what happened. Ms. Wood replied that they weren't going to renew her contract, and that "I can't believe this is happening again." Ms. McManus did not ask what Ms. Wood meant by this last statement.

26. Ms. Wood stayed and spoke with Ms. McManus for about a half an hour or forty-five minutes. At some point in the conversation, Ms. McManus asked Ms. Wood if she had talked to her husband or her father. Ms. McManus knew that Ms. Wood's father was an attorney.[2] Ms. Wood told her that she would speak with her father that night and that she had not been able to reach her husband yet.

27. During the conversation with Ms. Wood, Ms. McManus tried to help Ms. Wood deal with the bad news. Ms. McManus offered sympathy to Ms. Wood but does not recall discussing the content of the evaluation other than the fact that it was negative. They discussed Ms. Wood's plans for that summer, which included a trip to visit her daughter in Chicago and

[2]Ms. Wood's father, Grover Alexander, has been representing her throughout this proceeding.

included buying another house so that she and her husband could renovate it. They ended up talking about what options Ms. Wood had and brainstorming different ideas. One option mentioned was that she could do nothing. Another option was to "fight the thing." Ms. McManus testified that "I'm not even sure if either one of us knew what that meant at that time." When they were talking about doing nothing, it became apparent to them that the negative evaluation might make it difficult to find another teaching position. They discussed the fact that Ms. Wood has always wanted to teach, that she is a good teacher, and that she wanted to be able to teach at another institution. The idea came up of the possibility of resigning in order to keep the negative evaluation out of her record. Ms. McManus said she could serve as a reference and thought Ms. Wood would perform better at another institution where management styles did not collide as much as they did at CMCC. Ms. McManus offered to call Dean Vampatella to see if resignation and removing the evaluation was even a possibility that Ms. Wood could consider. Ms. Wood wanted her to make the phone call for her.

28. Ms. McManus called the Dean but did not reach her. She then went out in the hall to look around the office area to see if the Dean was there. Ms. McManus came back to her office and called Dean Vampatella again. This time, the Dean answered. Ms. McManus said Ms. Wood wanted to know if she resigned, could the negative evaluation be removed or destroyed. Dean Vampatella responded that it was a possibility, but she could not commit either way. Ms. McManus gave that information to Ms. Wood.

29. By this time, Ms. Wood had pulled herself together and was composed. Ms. Wood then left Ms. McManus's office. When Ms. Wood left, Ms. McManus thought she was going over to

find Dean Vampatella to discuss the possibility of resigning and having the evaluation removed from her personnel record. Ms. McManus fully expected Ms. Wood to resign if they could work that out.

30. Dean Vampatella and Chair Schuettinger remained in Ms. Schuettinger's office for about a half an hour after Ms. Wood left, in case Ms. Wood decided to return. After a while, Dean Vampatella looked around for Ms. Wood and checked to see that her car was still in the parking lot. Dean Vampatella had to return to her office across campus and told Ms. Schuettinger she could be reached there if needed. Ms. Wood did not return to Ms. Schuettinger's office.

31. Dr. Knapp, the President of the College, was aware of the fact that the Department Chair was going to recommend that Ms. Wood's contract not be renewed. Chair Schuettinger and Dean Vampatella had met with him briefly earlier that week to inform him that Ms. Schuettinger would probably be recommending non-renewal of Ms. Wood's contract. At that meeting, they did not discuss the details of Ms. Wood's evaluation or performance problems, as Dr. Knapp thought it was inappropriate for him to hear the substance of the evaluation at that stage. The meeting was brief.

32. Dean Vampatella received the phone call from Ms. McManus at about 9:45 a.m., but needed to check with Dr. Knapp before she could answer the question regarding a possible resignation. The Dean went to Dr. Knapp's office to ask whether she could accept Ms. Wood's resignation and destroy the evaluation. Dr. Knapp testified that he understood that the resignation request had originated with Ms. Wood. Dr. Knapp responded that it could be done only if Ms. Wood submitted a separate document acknowledging that she was resigning before the evaluation process had been completed.

Dr. Knapp authorized Dean Vampatella to accept Ms. Wood's resignation if it was accompanied by such a document and to shred her evaluation in turn.

33. Dean Vampatella conveyed this information to Ms. Wood, either through Ms. McManus or directly when Ms. Wood came to the Dean's office sometime later that morning. In either case, when Ms. Wood and Dean Vampatella met in the Dean's office, the Dean explained that if Ms. Wood resigned and submitted a separate document stating that she was resigning before the evaluation process was completed, then the Dean would shred her evaluation. The Dean did not state or suggest in any way that Ms. Wood had to resign. Dean Vampatella indicated that she would be available the rest of the day up until about a half an hour before the graduation ceremony. She did not say the resignation had to be submitted that day.

34. Susan Jamison shared an office with Ms. Wood. Ms. Jamison entered their office at about 11 a.m. on May 10th and saw that Ms. Wood looked distressed. Ms. Jamison asked her what was wrong. Ms. Wood asked if she could talk to her about it, shut the door, and then told her she had been fired.

35. Ms. Jamison and Ms. Wood went through portions of the evaluation discussing each item, with Ms. Jamison telling her what points she agreed with and which she did not understand. The conversation was not argumentative.

36. Ms. Jamison had submitted her resignation to the College in April. Ms. Wood knew this and commented that management must have really wanted Ms. Wood out if they were willing to deal with the loss of two instructors at once. At some point, Ms. Wood told Ms. Jamison that it would be bad to continue to work at CMCC because nobody really wanted her there. Ms. Wood also indicated that she and her husband had bought some land and she needed to have a job to be able to

pay for that house.

37. Ms. Wood told Ms. Jamison of a proposal made to her that she could resign and they would get rid of the evaluation and asked if she thought it was a good idea. Ms. Jamison said she should consider it. Ms. Wood did not specify who had made this proposal.

38. Ms. Wood received a phone call from her husband while she was discussing her evaluation with Ms. Jamison. Mr. Wood knew that his wife's evaluation was scheduled for the morning of May 10th. Ms. Wood had also told him about the April 10th meeting with Ms. Schuettinger and that she disagreed with her supervisor's views. Mr. Wood called his wife at about noon to see how things were going. Her voice was shaky and he could hardly hear her. She told him that she had been fired and she said "I can't talk, I've got to go meet with Pat, I'll call you later."

39. Ms. Wood told Ms. Jamison that she was too nervous to type the resignation and asked Ms. Jamison if she would do it for her. Ms. Wood told Ms. Jamison what words to type, but was not referring to any notes when doing so. Ms. Jamison testified that Ms. Wood was unsure what date to use because the resignation was supposed to be before the evaluation actually took place and she was planning on asking Dean Vampatella what date to use. Ms. Wood was waiting for a call from Dean Vampatella about what time she could meet with her. Ms. Jamison was under the impression that Ms. Wood wanted the documents typed to be ready for that meeting.

40. After they had typed up the resignation letters, Dean Vampatella called. When that call came in, Ms. Wood made copies of the letters and left. Ms. Jamison thought Ms. Wood was going to Dean Vampatella's office to resign.

41. Both of the resignation documents are directed to Anne

Schuettinger and signed by Sharron Wood. One says:

> On this date I am formally submitting my resignation from the CMTC nursing program as a full time faculty and will not be renewing my contract.

The other says:

> On this date I am formally submitting my resignation from the CMTC nursing program as a full time faculty member and will not be renewing my contract. I acknowledge that the resignation is prior to the evaluation process being completed.

Both documents are dated May 10, 2004, with the month and year in typeface and the “10" handwritten.

42. When Ms. Wood arrived at Dean Vampatella’s office for the second time, she handed the Dean the two resignation documents. Dean Vampatella reviewed them and concluded that they met the requirements set out by Dr. Knapp. They went into the next room to the shredding machine and shredded the evaluation. In response to Ms. Wood’s question, Dean Vampatella said she would make sure that if Ms. Schuettinger had kept a copy of the evaluation, it would be shredded as well.

43. Ms. Wood claims that Dean Vampatella told her not to worry about the date, because she would not be submitting them until Monday, anyway. Dean Vampatella denies making such a statement.

44. Ms. Wood left the campus right after she submitted her resignation and witnessed the Dean shredding her evaluation.

45. That evening, after speaking with her father, Ms. Wood attempted to withdraw her resignation. Her father called Dean Vampatella at her home on Friday evening and told her that Ms. Wood wanted to withdraw her resignation. The Dean responded that as she considered the resignation to already have been accepted, he would have to speak to the system’s

attorney. Mr. Alexander asked for his home phone number, but she did not know it. She said if he called her office first thing on Monday morning, she would give Mr. Alexander the attorney's number.

46. Mr. Alexander also called Ms. Schuettinger Friday evening to tell her Ms. Wood was withdrawing her resignation.

47. Mr. Alexander called Dean Vampatella again on Saturday, asking who else participated in the decision to shred the evaluation. Ms. Vampatella declined to answer.

48. Ms. Wood called Dean Vampatella on Sunday to tell her that she was withdrawing her resignation and would come by her office on Monday to pick up the resignation letter. Dean Vampatella replied that Ms. Wood should call her office first, because she could not return the resignation unless instructed to do so by the system attorney.

49. Late on Sunday evening, May 12, 2002, Ms. Wood sent e-mail messages to Ms. Schuettinger, Dean Vampatella, and Dr. Knapp stating that she was withdrawing her resignation. In two of the messages, Ms. Wood stated that her resignation was submitted under duress. Ms. Wood indicated that she would be pursuing her rights relating to the nonrenewal recommendation under the terms of the collective bargaining agreement "as well as all other applicable civil laws in the Maine courts."

50. The collective bargaining agreement does not include any provision authorizing the withdrawal of a resignation.

51. In a letter dated May 17, 2002, the System's General Counsel informed Mr. Alexander that the College viewed Ms. Wood's resignation as accepted and in effect until such time as the College was persuaded to act otherwise.

52. On June 7, 2002, Ms. Wood went to Dean Vampatella's office prepared to present an oral grievance which was summarized in a 3-page memo Ms. Wood had in hand. Ms. Wood gave her

the summary but Dean Vampatella did not want to discuss it and Ms. Wood left. The memo alleged that the College failed to comply with the collective bargaining agreement's provisions on 1) the annual appointment of the Nursing Department Chair, 2) the frequency of evaluations for probationary faculty, 3) notice requirements for monitoring of performance, 4) assuring academic freedom and cooperative efforts to achieve excellence in classroom instruction, 5) the appointment of a committee to create and update evaluation procedures for faculty, 6) provision of an advance copy of the evaluation, and 7) forcing a resignation and then tampering with her personnel file by shredding the evaluation.

53. In letters to Mr. Alexander dated June 27 and June 29, 2002, the System's attorney explained Ms. Wood's resignation was not a grievable matter concerning the meaning or application of a specific term in the collective bargaining agreement. The College also took the position that since Ms. Wood resigned her position, she was not entitled to grieve the issues regarding the evaluation and nonrenewal of her probationary contract.

54. Ms. Wood's father, asserting that he was acting as her representative with the permission of the MEA,[3] sent various letters purporting to be "formal grievances" to Dean Vampatella; the President of CMCC, Dr. Knapp; and the President of the Maine Community College System, Mr. Fitzsimmons, in an effort to have the issued addressed or, alternatively, move the case on to arbitration.

55. When the College communicated its position that the matter was not grievable, it offered Ms. Wood and her attorney the

[3]The nature of this permission, the scope of the authority delegated to Mr. Alexander, and whether that authority was revoked are not relevant issues in this part of this proceeding.

opportunity to meet informally with Dr. Knapp so that he could listen to her position and review her employment status. This offer was initially made in June and was scheduled in a letter dated June 29, 2002:

> . . . Dr. Knapp is willing to meet with Ms. Wood for the purpose of hearing and considering her position. This meeting will not be a formal hearing with trial-like procedures. Rather, the meeting will provide Ms. Wood an opportunity to explain her concerns and complaints to Dr. Knapp and, if appropriate, to explore resolution of her dispute. In short, the MTCS will, without waiver or concession, accord Ms. Wood the opportunity and process that would apply under the bargaining agreement at this step.

56. Ms. Wood's attorney rejected the offer in a letter dated August 2, 2002. That letter stated, in part:

> We must respectfully decline Dr. Knapp's "opportunity to meet" on August 13th for the simple reason that the dictatorial tone and terms imposed by your letter of July 29th create the impression that in order to be heard, a contrite Mrs. Wood must first kneel at the palace gates and beg forgiveness for her past transgressions before entry will be considered . . . and we do not like that feeling. Mrs. Wood feels she has done nothing wrong and we believe that it is Dr. Knapp who should seek forgiveness for his having permitted the conditions to exist at CMTC out of which this problem arose. C.M.T.C. is a public institution . . . not a personal fiefdom; there are not persons of royalty; there are no vested or proprietary interests held by anyone; nor is it empowered to deprive its employees of due process or to breach its private contracts at will.

DISCUSSION

The procedural background in this case is complex and involved a number prehearing conferences and various motions. Understanding this background is important to understanding the nature of the evidentiary hearing. Each preliminary ruling was geared to bring focus to the issues to be presented, limit those issues to matters within the Board's jurisdiction, and allow the presentation of evidence in an orderly manner.

The Executive Director reviewed the prohibited practice complaint and dismissed as insufficient the allegations that the College violated 1027(1)(B), (1)(C) and (1)(E).[4] The Executive Director rejected the College's argument that the surviving portions of the complaint merely asserted various contract violations, stating:

> . . . The thrust of the charge is that, through the alleged events of May 10, 2002, the employer interfered with the complainant's exercise of the rights provided by the collective bargaining agreement or coerced the employee into abandoning such rights and that the employer's conduct rose to the level of a statutory violation. . . . [The complaint] alleges that the employer took actions and made statements which effectively prevented the complainant from seeking bargaining agent representation and from individually pursuing the evaluation review and appeal process set forth in the collective bargaining agreement. In addition, the complaint charges that the employer and the bargaining agent colluded to deny the complainant the rights guaranteed by the Act. . . .

At a prehearing conference on April 16, 2003, the College renewed its motion to dismiss, claiming the motion presented a dispositive legal issue which would render a fact hearing unnecessary. See MLRB Rule Ch. 12, §10(7). The Prehearing Officer requested briefs and subsequently denied the Motion to

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[4]The Executive Director's reasoning was fully described in his letter of December 13, 2002. His action became official by letter of December 31, 2002, after the opportunity to amend the complaint had expired.

Dismiss in the Prehearing Order dated May 14, 2003. After quoting the language of the Executive Director cited above, the Prehearing Officer noted:

> The Executive Director was correct in stating that there are portions of the complaint that allege more than just employer violations of the collective bargaining agreement. There are three potentially viable charges contained in the complaint: that the employer interfered with the Complainant's exercise of the rights provided by the collective bargaining agreement or coerced the employee into abandoning such rights; that the employer and the union colluded to deny the Complainant the rights guaranteed by the Act; and that the union violated its duty of fair representation.

Before the next prehearing conference, the Prehearing Officer asked the parties to "be prepared to identify those exhibits that relate to the issue of whether the employer interfered with the Complainant's exercise of the rights provided in the collective bargaining agreement or coerced her resignation, the essence of the first of the three issues identified in the May 14, 2003 Prehearing Order."

The prehearing conference was reconvened on June 23, 2003. As part of its prehearing submission, the Maine Education Association requested the prehearing officer to identify in advance the fact issues for hearing. The Association also requested that the Prehearing Officer specifically order that three specific fact issues not be allowed to be presented at the hearing. The Complainant submitted a motion requesting permission for the Complainant's attorney to testify at the hearing.

On July 11, 2003, the Prehearing Officer issued a Prehearing Order that listed exhibits and objections, witnesses, responded to various subpoena requests, and established various prerequisites should Attorney Alexander desire to pursue his request to testify. Of particular note here, the Order also bifurcated the hearing so that the first portion would be on

"whether the employer interfered with the Complainant's exercise of the rights provided by the collective bargaining agreement or coerced the employee into abandoning such rights or coerced her resignation." The Prehearing Officer also agreed that the three factual issues identified by the Association were beyond the scope of the issues appropriately raised in the first portion of the bifurcated hearing. Those issues were whether Complainant's job performance was satisfactory, whether there was cause for non-renewal of her contract, and issues related to the size of the Department Chair's workload.

On October 8, 2003, the Complainant filed a "Motion for Clarification and to Amend the Supplemental Prehearing Conference Memorandum and Order, dated July 11, 2003."[5] That motion sought to expand the issues to be heard to include numerous alleged contract violations (regardless of whether they occurred during the 6-month statute of limitations period), the alleged personal animosity directed at the Complainant by the Department Chair and the Dean, and the merits of the Complainant's performance evaluation. The Motion also sought to have the Board order CMCC to disclose the name of the person consulted for authority to shred the Complainant's evaluation. The Prehearing Officer denied all but the final item of this Motion in the Supplemental Prehearing Memorandum and Order dated October 17, 2003.

In that Order, the Prehearing Officer gave a well-reasoned explanation for his denial of the Complainant's motion. We quote it below and affirm that it is an accurate statement of the law:

> In seeking to expand the issues to be presented during the first part of the bifurcated hearing, the Complainant argues that the employer "violated and thereby interfered with Complainant's ability to exercise her rights under Articles 2, 3, 4, 6, 7, 8, 13, 14, 16, 17, 19, 20, 22 and 25 of the collective

[5]The Complainant also filed a Motion in Limine seeking to limit the participation of the MEA in the evidentiary hearing. That motion was denied at the start of the hearing.

bargaining agreement in addition to coercing her into abandoning her rights under Articles 3, 4, 6, 8, 13, 16, 17, 19 and 25."

Complainant misconstrues the Board's jurisdiction. A violation of the contract is not by itself a prohibited practice. See Langley v. Dept. of Transportation, No. 00-14, (March 29, 2002) (Calling a contract violation interference with a "right to fully participate in the contract" does not transform it into a prohibited practice). There are instances in which a contract violation is relevant to the disposition of a prohibited practice complaint. See Id. In fact, two of the contract violations alleged in the current case are at the heart of this case: That the employer interfered with the complainant's exercise of the rights to file a grievance (Art. 8) by failing to provide her with a copy of the performance evaluation in advance of the conference as required by Article 6. The other contract violations alleged have no bearing on the Complainant's representational and collective bargaining rights within the meaning of section 1023.

Section 1027(1)(A) makes it unlawful for an employer to interfere with, restrain or coerce an employee in the exercise of rights guaranteed in §1023. Section 1023 states:

> No one may directly or indirectly interfere with, intimidate, restrain, coerce or discriminate against . . . technical college employees or a group of . . . technical 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.

The focus of §1023, which is labeled "Right of university, academy or technical college employees to join labor organizations," is on the rights of representation and collective bargaining granted by the Act. The test for a violation of Section 1027(1)(A) is whether the employer has engaged in conduct which "may reasonably be said to tend to interfere with the free exercise of employee rights guaranteed in 26 M.R.S.A. § 1023." Teamsters v. Univ. of Maine, No. 79-37 (Oct. 17, 1979), citing Teamsters v. Univ. of Maine, Nos.

> 78-16 and 78-20 at 8 (1979). Thus, the conduct must interfere with the representational and bargaining rights set forth in Section 1023.
>
> The statement in the various prehearing orders focusing on whether "the employer interfered with the Complainant's exercise of the rights provided by the collective bargaining agreement or coerced the employee into abandoning such rights" is not the same as asking whether the employer violated the contract. Filing a grievance, appealing a performance evaluation, or seeking union representation is how an individual exercises the representational and collective bargaining rights guaranteed by section 1023. Failure to adhere to a contract is not interference with rights guaranteed by the Act. The Board does not have jurisdiction to hear claims of contract violations when they are unrelated to a prohibited practice complaint.

The first stage of the bifurcated hearing occurred on October 28 and 29, 2003. The parties were allowed to present evidence, examine and cross examine witnesses on issues that were arguably related to "whether the employer interfered with the Complainant's exercise of the rights provided by the collective bargaining agreement or coerced the employee into abandoning such rights or coerced her resignation." Although there were differences of opinion on the relevance of evidence presented, the scope of the hearing was, for the most part, consistent with the limitations specified in the prehearing orders. The Complainant's brief is not quite so limited, but the arguments presented will be addressed point by point nonetheless.

Complainant's brief has, as its first argument, the claim that the employer "interfered with complainant's exercise of the rights provided by the collective bargaining agreement" by failing to evaluate Complainant's performance twice annually and by failing to provide an advance copy of the May 10, 2002, evaluation, both actions that Complainant alleges were required by Article 6 of the collective bargaining agreement. The essence of the argument is that if the employer had complied with these

provisions, the Complainant would have either improved her job performance or filed a grievance.

There are two problems with this argument. First, it ignores the distinction between interfering with the free exercise of representational or bargaining rights and violating a collective bargaining agreement. The Complainant's construction transforms every contact violation or inaction by the Employer into a prohibited practice. The failure to provide a performance evaluation two times a year is simply not interference with the free exercise of the representational or collective bargaining rights guaranteed by the Act. See Teamsters v. City of Calais, No. 80-29 (May 13, 1980), p. 7, (right to file a grievance is protected); and MSEA v. Dept. of Human Services, No. 81-35, p. 5 (June 26, 1981) (participating in bargaining is protected).

The Complainant also argues that the collective bargaining agreement requires that an employee be given a copy of the evaluation one day in advance and that the failure to do so interfered with her right to file a grievance or appeal the evaluation. Even if the Complainant's interpretation were a correct reading of the contract, which the evidence suggests is doubtful,[6] it cannot be said to interfere with her right to file a grievance.

There is no evidence in the record that Ms. Wood was prevented from filing a grievance over the failure of the Department Chair to evaluate her during the course of the year. She could have filed a grievance over the omission, but did not do so. Similarly, there is no evidence in the record that during any of the meetings on May 10, 2002, that the Complainant asked

[6]The Department Chair credibly testified that in her seven years as Chair, her practice was to give the employee the evaluation at the start of the meeting, not the day before. This was corroborated by the two other instructors who testified. In addition, the Association presented in its brief a credible reading of Article 6(D)(4) that does not result in a requirement that an advance copy always be provided.

for assistance from a union representative and was denied that opportunity. She could have asked to contact the union representative, but did not do so. The employer was under no obligation to inform her that she could contact the union representative for assistance. See AFT Local 3711 v. Sanford School Committee, No. 01-24, at 12 (Jan. 31, 2002).

The Complainant's argument that had the employer given her an advance copy of the evaluation, she would have had the opportunity to determine her rights and would have been prepared to file a grievance does not translate into a cognizable interference, restraint and coercion violation. The facts are that one month earlier, Ms. Wood was counseled on her job performance and warned that her contract would not be renewed the following year if the problems were not addressed. After that meeting, she told a co-worker that she may be needing the assistance of the union because the meeting with the Department Chair had not gone well. She then joined the union. By Sunday evening, May 12th, when she sent her e-mail messages attempting to withdraw her resignation, she had determined that she had some rights under the collective bargaining agreement. Ms. Wood's failure to determine her rights before the May 10th evaluation cannot be blamed on the employer.

The second argument presented by the Complainant is that the employer interfered with her right to file a grievance by refusing to accept and respond to grievances filed after the Complainant resigned from her position. The Complainant mistakenly relies on the language of §1025(2)(E) for the proposition that an employee has the right to file a grievance independent of the union. That provision merely protects the employer from a charge of circumventing the union if it chooses to adjust an individual employee's grievance without the intervention of the bargaining agent. See AFT Local 3711, Sanford Teachers Assoc. v. Sanford School Committee, No. 01-24 (interpreting the parallel provision

contained in the collective bargaining law covering municipal employees). The employer is under no obligation under Maine's collective bargaining laws to respond to grievances filed by individual employees. Id. In addition, an employer is under no obligation to arbitrate a grievance unless there is a written agreement to arbitrate. MSEA v. BOER, 652 A.2d 654, at 655 (Me. 1995), citing 14 M.R.S.A. §5927-5928. In this case, the collective bargaining agreement states that the Association reserves to itself the right to take a grievance to arbitration. Art. 8(E)(1)("If the grievant is not satisfied . . . , the Association may appeal the System President's decision to arbitration . . ." (Emphasis added)).

It appears that the basis for this argument is the Complainant's assertion that the resignation was coerced, therefore any actions by the employer relying on that resignation are invalid. The only coercion cognizable under the statutes enforced by this Board is coercion in the free exercise of the representational or collective bargaining rights protected by those statutes. The decisions of the National Labor Relations Board are instructive on this matter. Under the National Labor Relations Act, a resignation may be considered a constructive discharge in violation of Section 8(a)(3) and (1)[7] under either the traditional constructive discharge theory or the Hobson's Choice doctrine. As the NLRB explained,

> . . . a traditional constructive discharge occurs when an employee quits because his employer has deliberately made the working conditions unbearable and it is proven that (1) the burden imposed on the employee caused, and was intended to cause, a change in the employee's working conditions so difficult or unpleasant that the employee is forced to resign, and (2) the burden was imposed because of the employee's union activities.

[7]Section 8(a)(3) is comparable to §1027(1)(B) in prohibiting discrimination based on union activity and Section 8(a)(1) is comparable to the §1027(1)(A) interference, restraint and coercion prohibition.

> Grocers Supply Co., 294 NLRB 438, 439 (1989); and Crystal Princeton Refining Co., 222 NLRB 1068, 1069 (1976).
>
> Under the Hobson's Choice theory, an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. Hoerner Waldorf Corp., 227 NLRB 612, 613 (1976).

Intercon I (Zercom), 333 NLRB 223, at fn. 3 & 4 (2001). In the present case, there is no evidence that any of the actions by the employer were taken because Ms. Wood became a union member in April. Moreover, between that time and when she left the campus after submitting her resignation, Ms. Wood did not attempt to exercise any right protected by the Act.

Contrary to the Complainant's assertions, the employer was not obligated to accept Ms. Wood's withdrawal of her resignation nor was it obligated to process the grievances she attempted to file after she resigned. The College accepted Ms. Wood's resignation on May 10, 2002, when Dean Vampatella received the two documents from Ms. Wood in exchange for shredding her evaluation. The College did not allow Ms. Wood to later rescind her resignation. The employer's position that she could not file a grievance following her voluntary resignation was not an unreasonable reading of the contract.[8] When an issue is merely one of contract interpretation not implicating a prohibited practice, and the employer has a sound arguable basis for its interpretation of the contract, the Board has no business attempting to resolve the contract interpretation dispute. See NCR Corp., 271 NLRB 1212 (1984). To do so would be in violation of this Board's statutory mandate to oversee the collective bargaining process and not formulate contracts for the parties.

[8]CMCC did afford Ms. Wood the opportunity to meet with Dr. Knapp to review her employment status, which Ms. Wood declined.

See Caribou School Dept. v. Caribou Teachers Assoc. and MLRB, 402 A.2d 1279, 1287 (Me. 1979)(Board has no authority to make a contract for the parties).

The third argument is that the employer coerced the Complainant into abandoning her rights to seek union representation and file grievances and ultimately coerced her into resigning. The first part of the argument relies on the alleged statement of the employer that because of her probationary status there was nothing that she or the union could do. The second part of the argument is that it was Dean Vampatella's idea that Ms. Wood resign and she coerced Ms. Wood into agreeing by telling her she had no other options.

Ms. Wood testified that when she was first informed that her supervisor was recommending nonrenewal of her contract and she asked "Why are you doing this?", Ms. Schuettinger responded with "[B]ecause I can do it. You're a . . . probationary employee, and you don't have any rights and there's nothing either you or the union can do about it." Both Ms. Schuettinger and Dean Vampatella denied that Ms. Schuettinger made any such statement. After that meeting, Ms. Wood spent over an hour with two co-workers discussing the negative evaluation and her options. Neither of the two co-workers testified that Ms. Wood said Ms. Schuettinger told her that as a probationary employee she had no rights. It does not make sense that Ms. Wood would be told by her supervisor that she had no option, walk across the hall and speak with a co-worker extensively about her options and yet not mention what her supervisor had just told her. Given the absence of any corroboration from the co-workers with whom Ms. Wood discussed her options, we do not find Ms. Wood's testimony on this point credible.

Even if Ms. Schuettinger had made the statement, it is not interference, restraint or coercion. Probationary employees have very limited rights under the collective bargaining agreement to

contest nonrenewal of their contracts. Consequently, such a statement could easily be viewed as just a matter of opinion. In Langley v. DOT, the Board considered a very similar statement where an employee was told he was going to be discharged after taking unpaid and unapproved leave.

> Moreover, even if the manager told the union representative that he had "no alternative" but to dismiss Langley, it is no more interference, restraint or coercion of Langley's rights under the Act than is a simple contract violation. The "no alternative" statement is simply a reflection of the manager's reading of his options in dealing with Langley's impending absence from work. If Langley disagreed with the manager's conclusions, he had the right to file a grievance. There is no allegation that the employer's conduct interfered with Mr. Langley's ability to file a grievance over his discharge, Teamsters v. City of Calais, No. 80-29 (May 13, 1980), p. 7, (interfering or restraining an employee in the right to file a grievance is a prohibited practice). There is also no allegation that the employer's conduct interfered with Langley's ability to exercise a right granted by SELRA. See, e.g., MSEA v. Dept. of Human Services, No. 81-35, p. 5 (June 26, 1981) (participating in bargaining is one of the employee rights guaranteed by section 979-B).

Langley v. DOT, No. 00-14, at 4-5 (March 29, 2002).

Implicit in the Complainant's coercion argument is the allegation that the employer insisted that Ms. Wood take some action that day, by either signing the evaluation or resigning. Neither the Dean nor the Chair imposed a time limit on Ms. Wood for reviewing the evaluation. There is no evidence in the record, other than the testimony of the Complainant, that the Department Chair or the Dean insisted that the Complainant sign the evaluation or resign that day. We do not find credible the Complainant's assertions that during the May 10th meeting, Chair Schuettinger said over and over again, "Read it, sign it, I want it today." Over the next two hours, Ms. Wood discussed her situation extensively with two of her co-workers, Kathy McManus and Sue Jamison. Neither of those witnesses, who both gave

credible and consistent testimony, testified that Ms. Wood said anything to them about a statement made by either Dean Vampatella or Ms. Schuettinger that Ms. Wood had to act that day. Had the evaluation meeting really transpired as Ms. Wood claims, she certainly would have brought up this critical point in her conversations with Ms. McManus and Ms. Jamison.

Complainant also asserts that the idea of resigning in order to avoid the negative evaluation came from Dean Vampatella. Ms. Wood claims that she did not discuss the subject of resignation with Ms. McManus at all. We found Ms. McManus to be a very credible witness. To accept Ms. Wood's testimony on this point would require us to conclude that Ms. McManus made up an elaborate story about how their discussion led to the idea of a resignation. Ms. McManus had no stake in the outcome of this proceeding or other reason to fabricate a story. We therefore reject the Complainant's assertion that Dean Vampatella presented the idea of resignation as Ms. Wood's only option.

The Complainant's fourth argument is that the employer's refusal to comply with various articles of the contract amounts to a "repudiation of the collective bargaining agreement as it relates to the subject-matter of those articles." This argument is without merit. What makes a "repudiation of the collective bargaining agreement" a prohibited practice is that a wholesale repudiation of a major provision of the contract or the contract as a whole may be tantamount to a repudiation of the bargaining relationship or of the basic principles of collective bargaining. See Grane Health Care, 337 NLRB 432, at 435-6 (2002); Textron Inc., 310 NLRB 1209, 1211 at fn. 8 (1993). There is no such evidence in this case.

In summary, we conclude that the employer did not violate §1027(1)(A) by interfering, restraining or coercing Ms. Wood in the exercise of rights protected by the Act. The employer did

not coerce Ms. Wood into abandoning her rights nor did the employer coerce her into resigning from her employment. Ms. Wood resigned her position voluntarily after discussing her options with two co-workers and considering her situation for about two hours. She voluntarily resigned in exchange for the benefit of having the negative evaluation destroyed. She could have contacted her union for assistance prior to resigning but did not do so. The employer did nothing to prevent her from seeking assistance from the union.

We also conclude that the employer did not violate the Act by refusing to entertain the grievances filed by the Complainant after her resignation. When Ms. Wood resigned from her employment, the employer reasonably concluded that she had waived her contractual right to file a grievance. Section 1025(2) does not grant an employee a statutory right to present a grievance without the assistance of the union. Therefore, the employer's refusal to respond to Ms. Wood's grievance was not unlawful interference, restraint or coercion in the exercise the rights guaranteed in §1023.

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 the portion of the Complaint charging the Maine Community College System with violating 26 M.R.S.A §1027(1)(A) by coercing her resignation or coercing her into abandoning her rights is dismissed.

2. That the parties prepare to continue this proceeding on the issue of the scope of a union's duty of fair representation of a former employee who voluntarily resigned and whether the

Association breached that duty. The parties must meet and confer regarding the potential for creating a stipulated record and create such a record, to the extent possible.

Dated at Augusta, Maine, this 14th day of June, 2004.

MAINE LABOR RELATIONS BOARD

/s/_____
Peter T. Dawson
Chair

/s/_____
Karl Dornish, Jr.
Employer Representative

/s/_____
Robert L. Piccone
Alternate Employee Representative