
MAINE STATE EMPLOYEES)
ASSOCIATION, SEIU LOCAL 1989,)
)
Complainant,)
)
v.)
)
MAINE TURNPIKE AUTHORITY,)
)
Respondent.)

DECISION AND ORDER

The Maine State Employees Association, SEIU Local 1989 ("MSEA" or "Union"), filed this prohibited practice complaint with the Maine Labor Relations Board on October 27, 2011, alleging that the Maine Turnpike Authority ("MTA" or "Employer") violated the Municipal Public Employees Labor Relations Law (the "Act") by discriminating against Steve O'Leary for assisting his union and complying with instructions from Union counsel during the arbitration of his grievance. The Complaint further alleges that the MTA discriminated against Mr. O'Leary because his Union subsequently refused to withdraw his grievance from arbitration and otherwise interfered with the Union's right and ability to represent Mr. O'Leary in the arbitration process, in violation of §964(1) (A) (B) and (E)¹. The Complaint further alleges that the MTA's conduct interfered with, restrained and coerced Mr. O'Leary in the exercise of rights protected by §963, in violation of §964(1) (A) .

¹As MSEA did not present any argument on the alleged violation of §964(1) (E), we deem that allegation waived.

Throughout this proceeding, Anne F. Macri, Esq., represented the Maine State Employees Association, SEIU Local 1989; and William H. Dale, Esq., represented the Maine Turnpike Authority. An evidentiary hearing was held on July 31, 2012, at which time the parties were able to examine and cross-examine witnesses, and introduce documentary evidence. The parties submitted post-hearing briefs, the last of which was filed on October 16, 2012. On November 15, 2012, Board members Peter T. Dawson, Chair, Karl Dornish, Jr., and Robert L. Piccone met to deliberate this matter.

JURISDICTION

The Maine State Employees Association-SEIU Local 1989 is the bargaining agent within the meaning of 26 M.R.S.A. §962(2), and the Maine Turnpike Authority is the employer within the meaning of 26 M.R.S.A. §962(7). The jurisdiction of the Board to hear this case and to render a decision and order lies in 26 M.R.S.A. §968(5).

FINDINGS OF FACTS

1. Stephen O'Leary began his employment with the Maine Turnpike Authority in 1990. He has been an E-Z Pass Customer Service Representative for the past 14 years. O'Leary is very familiar with the collective bargaining agreement and the grievance process, having filed over 20 grievances over the course of his employment with the MTA.

2. The EZ pass group moved to a new facility in May of 2009, which was much noisier than the previous location. O'Leary sent several e-mails to various managers during the summer of 2009 asking for a seat assignment in a less noisy part of the room. His requests were rejected as were similar requests for new seat

assignments from other employees.

3. In the fall of 2009, O'Leary requested a change in seat assignment to a quieter work station as an accommodation for his hearing impairment under the Americans with Disabilities Act. Although the MTA made some efforts to address the noise issue, he was not assigned to a different seat. He filed a grievance on January 10, 2010, under the Non-Discrimination Article of the collective bargaining agreement over the failure to accommodate his disability and for the alleged retaliation of assigning him to a less attractive job. Subsection 3(a) of the Non-Discrimination Article (Art. 23) includes a procedural requirement that the employee must elect to pursue a complaint either through the grievance and arbitration procedures of the collective bargaining agreement or through the procedures available at the Maine Human Rights Commission.

4. O'Leary filed a complaint of employment discrimination with the Maine Human Rights Commission (MHRC) on July 6, 2010. His complaint charged a failure to accommodate his hearing disability, creation of a hostile work environment, and retaliation for requesting an accommodation. In light of the choice of forum requirement in the contract noted above, O'Leary also sent a notice to his Union representative that he was withdrawing the grievance he filed on January 10, 2010, so that he could pursue his MHRC complaint.

5. Around the time he filed the complaint at the MHRC, O'Leary was disciplined three times for raising his voice to a co-worker and for being rude and giving incorrect information to EZ-Pass customers contacting the call center.

6. On July 16, 2010, Brian Oelberg, the MSEA Field Representative, filed a grievance on O'Leary's behalf charging the MTA

with violating the collective bargaining agreement by: "Failure to make adequate ADA accommodation. Hostile work environment." The grievance stated the remedy sought was "Comply with request for accommodation. Cease hostile work environment. Remove and rescind related disciplines (7.16.10 reprimand)."

7. The grievance procedure established in the collective bargaining agreement's Article 13 consists of several steps, including grievance mediation and binding arbitration. The record is not clear on how the grievance was addressed in the initial steps, but it is undisputed that the parties established a tentative date for arbitration of June 29, 2011.

8. The complaint O'Leary filed at the Maine Human Rights Commission proceeded through that agency's investigation and conciliation efforts during the summer and fall of 2010. O'Leary represented himself in this process, including in the conciliation efforts. He testified that he consulted with an attorney on one occasion during the attempt to settle the complaint.

9. On March 15, 2011, the Executive Director of the MHRC issued the "Investigator's Report" which recommended that the Commission conclude that there were no reasonable grounds to find that the MTA discriminated against O'Leary. The charge addressed by the MHRC was:

Complainant, Steve O'Leary, alleged that Respondent failed to provide him with a reasonable accommodation for his disability (hearing loss), violated his right to medical confidentiality, asked for more information than was necessary to grant his accommodation request, and retaliated against him for requesting a reasonable accommodation by changing his assignment to repetitive work that had previously caused him to suffer a workers' compensation injury.

10. On April 27, 2011, the MHRC gave written notification to the

MTA that the Commission had not found reasonable grounds to believe that unlawful discrimination had occurred and dismissed O'Leary's complaint.

11. In May, the MTA's Human Resource Director, Lauren Carrier, contacted Oelberg and the parties' arbitrator about scheduling an arbitration date for O'Leary's grievance of July 16, 2010, as the previously-scheduled date of June 29, 2011, was no longer an option. After they settled on the date, Carrier notified Elizabeth Olivier, the attorney who had represented the MTA in O'Leary's case before the MHRC, that the arbitration would be held on September 27, 2011.

12. On September 19, 2011, just over a week before the scheduled arbitration, the MTA attorney (Olivier) e-mailed a letter to the arbitrator, with a copy to Oelberg, requesting that the demand for arbitration be denied on the grounds that the issue raised in the demand was not arbitrable. She relied on Art. 23 §3(a) of the collective bargaining agreement in arguing that no aspect of O'Leary's grievance could proceed because he had elected to pursue all of the same claims at the MHRC. In her letter, Olivier described various communications O'Leary had with the staff of the MHRC and referred to eight exhibits attached to her letter. The exhibits were all either memos or e-mail exchanges between O'Leary and staff at the MHRC regarding his complaint of July 6, 2010. Neither the MHRC Investigator's Report of March 15, 2011, or the April 27, 2011, decision of the Commission adopting that report were included as exhibits.

13. On Thursday afternoon, September 22, 2011, Olivier followed up with an e-mail to Oelberg and the arbitrator referring to her earlier letter "raising questions about whether this matter is properly subject to arbitration." She suggested a telephone

conference call to "decide how this issue will be addressed" offering the following day, Friday, or the coming Monday for the call. The arbitrator responded late that night, suggesting a time frame on Monday. Oelberg responded mid-day on Friday indicating he was fine with a conference call but would be in negotiations all day on Monday after 7 a.m.² He pointed out that they could address it at the start of arbitration. Olivier responded to that comment, stating that their purpose was "to define the issues, if any, that will be addressed on Tuesday, and identify witnesses and exhibits" needed with respect to those issues.

14. Late on Friday afternoon, September 23, 2010, Oelberg contacted MSEA's General Counsel, Tim Belcher, on his cell phone to tell him that the attorney for the MTA was raising an arbitrability question and was asking for a conference call with the arbitrator. Belcher was driving to Boston, where he was living at the time, having just returned to work for MSEA after a two-year absence. When Belcher arrived in Boston, he reviewed Olivier's electronic submissions.

15. Sometime on Friday evening, the parties set the conference call for Monday at 1:00 p.m. More e-mails were exchanged over the weekend to gather phone numbers to use for that call. When Oelberg indicated that MSEA's attorney Belcher needed to participate in the call, the plan fell through because bringing four people into a call was beyond the capacity of the arbitrator's phone. The arbitrator proposed that the MTA start with the arbitrability question at the arbitration hearing scheduled for that Tuesday.

²We note that the sequence of some of the e-mails in this exchange is confusing because at least one of the sender's computer clock or time-zone setting was incorrect.

16. Olivier responded with an e-mail suggesting that they start with the arbitrability question on Tuesday, and schedule another day for a hearing on the merits, if the arbitrator determines the matter is arbitrable. In this email, Olivier stated her concern about a hearing on the merits before resolving the arbitrability question. She wrote, "it is not clear to me what issues the Union is claiming are being arbitrated and/or survive the MHRC disposition of Mr. O'Leary's claim."

17. The arbitration hearing was scheduled to begin on the morning of September 27, 2011, at the MTA headquarters building. O'Leary had previously been granted leave to assist his union in processing his grievance, as allowed by the terms of the parties' collective bargaining agreement. The leave is referred to as administrative leave or "ad leave" by the parties, although that is not a term used in the agreement. The relevant provision of the bargaining agreement provides that an aggrieved employee or grievant's witness "shall not suffer any loss of pay or shall not be required to charge leave credits as a result of processing grievances during such employee's or witnesses' scheduled work hours..." Art. 13, §7(k).

18. O'Leary met with Oelberg and Belcher in a caucus room before the scheduled start of the arbitration. Prior to meeting with the grievant, Belcher was comfortable that they could litigate the arbitrability question that day. Upon meeting with the grievant, however, Belcher saw that O'Leary was very agitated and concerned that they had not had time to prepare more thoroughly for the arbitration. Belcher decided to approach the MTA's attorney about a continuance of the hearing.

19. Belcher left the caucus room, found Olivier and introduced himself. Olivier gave Belcher a stack of documents that he had

requested on the previous day. Olivier testified that some of the documents were related to O'Leary's grievance which Oelberg had probably seen, and some were documents from the MHRC proceeding which the Union probably had not seen. Belcher asked Olivier for a continuance of the hearing, citing the complicated nature of the issues presented as well as the need to review the stack of documents. Olivier refused his request for a continuance. Olivier told Belcher that she intended to call O'Leary as her first witness.

20. Belcher knew that Olivier's arbitrability argument rested on the claim that the issues in the grievance had already been addressed at the Maine Human Rights Commission. Since O'Leary had been a *pro se* litigant at the MRHC and Olivier had represented the MTA, Belcher considered her plan to question O'Leary about statements he made as to MRHC staff during settlement discussions as inappropriate and "playing hardball." Belcher did not want to provide her with an opportunity to "ambush" his grievant, so he returned to the caucus room and instructed O'Leary to leave the building and wait for their call. Oelberg took O'Leary's cell phone number so he could be reached when needed by the Union.

21. When the arbitrator arrived, the parties met in the MTA conference room. Belcher and Oelberg were present for the Union and Carrier, Olivier and Doug Davidson (an MTA division head) were present for management. Belcher presented his request for a continuance, arguing that the issues were complicated, he had not had adequate time to prepare, and it would not be fair to his client to proceed. The MTA countered that they had attempted to have a conference call to define the issues, and they had prepared their witnesses and were ready to go. The discussion of the continuance issue went on for several minutes. The

arbitrator denied Belcher's request for a continuance.

22. The discussion turned to the arbitrability question. When Belcher argued that it was improper for the MTA to call the grievant as a witness, the arbitrator stated that he thought the MTA had the right to call Oelberg as a witness on the arbitrability question.

23. Carrier testified that she left the conference room to go get O'Leary. When she got to the customer service area, she asked Richard Somerville, O'Leary's supervisor, where he was. O'Leary was not in the room, and they did not see either O'Leary's car or his truck in the parking lot. Carrier returned to the arbitration and informed everyone that O'Leary was not around. Carrier testified that there was no statement or indication made that Belcher had instructed O'Leary to leave, though Belcher, Olivier and Oelberg all testified to the contrary.

24. Olivier testified that during the discussions at the arbitration hearing, she somehow learned that O'Leary was no longer in the building and she was under the impression that he had been instructed to leave the building by Belcher. She could not recall the specifics of the conversation. Belcher testified that he explained to the arbitrator that he was trying to protect his client from being questioned inappropriately about the prior proceeding at the MHRC.

25. Oelberg testified that Belcher clearly stated that he had instructed O'Leary to leave the building. At that time, neither Belcher nor Oelberg knew O'Leary's exact location but knew that he was not in the building and had been instructed to remain nearby.

26. Olivier, Belcher and the arbitrator met in a separate room to discuss the issue of the absent witness further. When Olivier asked Belcher if he knew where O'Leary was, he testified that he honestly replied "No." He was not asked if he knew how to reach O'Leary. Olivier was trying to determine what she should do, and she mentioned the possibility of getting a subpoena. Olivier testified that she did not pursue that idea as it was apparent to her that Belcher was not going to help locate O'Leary. She eventually decided not to go ahead with their case because she thought it would be prejudicial to proceed without O'Leary as a witness on the arbitrability issue. The parties scheduled another hearing date in mid-November and the arbitration meeting ended.

27. After the arbitration hearing ended, Olivier and Carrier went to Carrier's office. Olivier testified that they were both upset by the action of the Union in making their first witness unavailable. Olivier testified unequivocally that she was "outraged" by the Union's action in making O'Leary unavailable to her. Olivier testified that she and Carrier discussed what had happened and how to handle the case going forward. They also talked about having the rest of the arbitration picked up by Michael Messerschmidt, another attorney at Olivier's law firm who had done several arbitrations for the MTA.

28. Carrier testified that, generally, a grievant would be present at an arbitration, but it is not unheard of for the grievant to be absent, as the grievant's presence is not a requirement.

29. When the arbitration hearing ended, Belcher and Oelberg called O'Leary and learned that he was sitting in a nearby donut shop. They joined him there and discussed the status of his case

with him. Belcher told him that the MTA was upset with their tactic of making him unavailable and that he should be careful when he returned to work. They told him to go straight back to his work station and to refer any questions the MTA had about what had happened to Oelberg or Belcher. Belcher assured him that he had every right to comply with their directives.

30. O'Leary returned to work. When he got to his work station, his supervisor, Richard Somerville, asked him, "Where have you been?" O'Leary responded "With my union". Somerville said, "No, I mean just now." O'Leary said he was with his union. O'Leary did not say anything further. He did not refer the question to the Union, as Belcher had instructed him, nor did he indicate to Somerville that he wanted union representation.

31. Somerville knew that O'Leary had not been in the room where the MSEA representatives were handling the arbitration proceeding nor had he seen O'Leary near the arbitration, so he called Carrier. He repeated the conversation he had just had with O'Leary and Carrier asked him to repeat it. At some point later that day, Carrier went to Doug Davidson, the division head who was Somerville's manager, to fill him in on the situation.

32. The following day, September 28, 2011, Oelberg sent an email to Olivier and Carrier (with a copy to Belcher) stating, "Betty and Lauren: Please direct all communications re Steve O'Leary directly to MSEA general counsel Tim Belcher. Thanks, Brian."

33. Carrier sought clarification in a responding email, asking "In what respect? Do you mean just the arbitration hearing or all day-to-day issues at work? Thanks, Lauren." The email was directed to Oelberg and copied to Belcher and Olivier.

34. Belcher responded to Carrier, (with copies to Oelberg and

Olivier), "I'm not interested in participating in day-to-day supervision. Any communications relating to the arbitration including any matter relating to Mr. O'Leary's actions while on union leave to support the union's advocacy during the hearing should go through me. Tim Belcher."

35. At no point after Somerville's conversation with O'Leary on September 27, 2011, did any manager or supervisor ask O'Leary for further clarification of his responses or seek an explanation of his whereabouts during the arbitration, nor were any questions on this subject directed to Belcher or Oelberg.

36. Mike Messerschmidt worked at Preti Flaherty with Olivier and had previously handled many labor arbitration cases for the MTA. Messerschmidt took over O'Leary's grievance arbitration. After consulting with Olivier on the matter, Messerschmidt wrote to Belcher on October 7, 2011, explaining the Authority's position that O'Leary's grievance was not arbitrable because the issues had been addressed at the MHRC. Messerschmidt asked Belcher to withdraw the arbitration request and pointed out that they would both save money by withdrawing the demand for arbitration before the point at which a cancellation fee would be imposed.

37. On October 11, 2011, Belcher replied to Messerschmidt's letter agreeing that some of the issues raised in the grievance were addressed in the MHRC complaint and were therefore not arbitrable. He refused to withdraw the arbitration request, pointing out that the discipline imposed on July 16, 2011, had not been formally presented to the MHRC, had not been addressed in the MHRC investigative report or by the Commission itself. Belcher considered it a proper subject for arbitration. Belcher also pointed out that the MTA's challenge to arbitrability relied on statements made by O'Leary during settlement discussions at

the MHRC which could not be used in the subsequent arbitration proceeding.

38. On Wednesday, October 12, 2011, Carrier wrote a letter that was hand delivered to O'Leary stating, in full:

By this letter please be advised that it is the intent of the Maine Turnpike Authority to suspend you without pay for a five (5) day period commencing October 24, 2011. This action is a result of you leaving the jobsite on September 27, 2011 without notifying your supervisors and for making knowingly false statements to your supervisor.

A meeting with Management has been scheduled on Monday, October 17, 2011, at 10:00 a.m. at MTA Headquarters to discuss the facts and circumstances surrounding this intent to suspend. At the meeting you will be given the opportunity to present any new information that you believe is relevant to the allegations against you. You are entitled to representation by the Maine State Employees Association at such meeting, if you so choose. If, as a result of this effort, any dispute between you and the Maine Turnpike Authority Management regarding this decision is not resolved you will then be disciplined in accordance with this notice.

A copy of this correspondence is being placed in your personnel file.

39. A copy of this letter was hand delivered to O'Leary at his workstation in a sealed envelope on either October 12 or October 13, 2011. The notation at the bottom of the letter indicates copies were sent to Peter Mills, the MTA Executive Director; Davidson, the MTA division manager; Somerville, the supervisor; MSEA, and to "Personnel File."

40. The October 17, 2011, meeting³ was postponed until Friday,

³Holding this pre-suspension meeting complied with the directives of the U.S. Supreme Court's decision in Cleveland Board of Education v. Loudermill, which requires such a meeting prior to the suspension or termination of a public sector employee having a property interest in his or her continued employment. The purpose of such a meeting is

October 21, 2011, at the request of MSEA Field Representative Oelberg.

41. Carrier testified that the period of time between the September 27 incident giving rise to the discipline and the actual imposition of the discipline nearly one month later was not an inordinate period. The letter indicating their intent to impose discipline was dated October 12, 2011, a little over two weeks following the incident. Carrier testified that they made the decision based on that fact that O'Leary did not tell the truth and did not have authorization to leave the building, and she emphasized that "we did not have factual evidence of what had happened that day and we didn't get it really up until the hearing [on October 21st]."

42. Carrier testified that after she initially informed Davidson, the Division Manager, of O'Leary's statements of his whereabouts during the arbitration, she and Davidson agreed to have a further meeting to talk about it and try to sort it out. There is no further testimony on whether this meeting occurred or what was said.

43. At the October 21, 2011, "Loudermill" meeting, when Carrier offered O'Leary the opportunity to give his side of the case, he said only that his Union would speak for him. O'Leary did not speak after that. Oelberg told Carrier that Belcher had instructed O'Leary to leave the building immediately before the start of the arbitration hearing. Oelberg stated that because O'Leary was under the direction and control of the union, where O'Leary was actually located at the time was irrelevant. Carrier asked why, when asked where he was, O'Leary said he was with his

not a full evidentiary hearing, but merely "an initial check against mistaken decisions." 470 U.S. 532, 545, 105 S.Ct. 1487 (1985).

Union rather than he was told by his attorney to leave the building. Carrier testified that Oelberg never answered that question, but only emphasized that O'Leary was under the union's control. Carrier testified that she had not known until this meeting that Belcher instructed O'Leary to leave the building.

44. When it became apparent that the MTA would not alter its conclusion on the discipline, Oelberg handed Carrier a copy of a grievance contesting the suspension and a copy of a prohibited practice complaint that he intended to file with the Maine Labor Relations Board. The prohibited practice complaint stated that O'Leary was acting on the instruction of the MSEA attorney when he left the building before the start of the arbitration hearing on September 27, 2011. At the close of the meeting, Carrier affirmed that the suspension would be imposed as scheduled.

45. The week-long suspension began on Monday, October 24, 2011. On Wednesday, October 26, 2011, the MTA received the formal filing of the prohibited practice complaint that had been given to Carrier the preceding Friday in draft form. Carrier testified that when they "had written confirmation that he was in fact directed to leave the premises" they were still unsure what to do because it was the first time it had happened and, in their view, O'Leary had lied. Carrier testified that she "had a conversation with Richard Somerville and then we called counsel," but she did not indicate when these conversations occurred.

46. In a letter to Oelberg dated Thursday, October 27, 2011, Carrier informed Oelberg that the MTA was rescinding the discipline imposed on O'Leary. Her reason for rescinding the suspension was that the draft prohibited practice complaint that Oelberg gave her during the meeting the previous Friday contained "new information" that O'Leary was directed to leave the premises

by MSEA's Counsel. The letter was copied to D. Davidson and "File," but no one else.

47. Carrier testified that she telephoned Oelberg and told him of the decision to rescind the suspension on the same day she wrote the letter, October 27, 2011. Oelberg had no specific recollection of that conversation, noting that he had many conversations with Carrier. Carrier testified that she did not contact O'Leary directly because she claimed that she had been instructed by the Union not to communicate directly with O'Leary.

48. O'Leary served the full suspension with the understanding that it was a suspension without pay. One co-worker testified that O'Leary told him he had been suspended for complying with the union attorney's instructions during an arbitration hearing.

49. O'Leary returned to work on Monday, October 31, 2011. His supervisor brought him into his office and informed him that they had rescinded the discipline and he would suffer no loss of pay. O'Leary testified that it was the first notice he received that the MTA had rescinded his suspension. O'Leary testified that he did not receive a copy of the letter dated October 27, 2011, rescinding his suspension until the Union provided it to him much later.

50. The arbitration hearing that was postponed on September 27, 2011, was held in mid-November, and the issue was limited to whether there was just cause to reprimand O'Leary in June and July, 2011. The parties agreed that the other issues raised in the grievance had been addressed by the MHRC complaint and were therefore not arbitrable.

DISCUSSION

The initial question presented is whether the Employer suspended Stephen O'Leary for one week as a form of retaliatory discrimination for engaging in an activity protected by the Act, thereby violating §964(1)(B) and, derivatively, violating §964(1)(A). The conduct alleged to be protected activity occurred shortly before the start of an arbitration of O'Leary's grievance when O'Leary complied with the Union attorney's instruction to leave the building. The Union further alleges that the Employer's decision to impose the discipline was a discriminatory act that was retaliation against the employee for the Union's refusal to withdraw the demand for arbitration as requested by the MTA attorney. The Union also alleges that the conduct of the Employer independently violated §964(1)(A) because it interfered with, restrained, or coerced employees in the exercise of the rights guaranteed by the Act. The Employer raises the final issue of the effect of the Employer's rescission of O'Leary's suspension on the Board's analysis.

Section 964(1)(A) of the Act prohibits an employer from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed in section 963." Section 963, in turn, protects the right of public employees 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 legal analysis of whether a public employer's conduct violates section 964(1)(A) by "interfering with, restraining or coercing employees in the exercise of the rights guaranteed by section 963" is well established:

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

Sanford Police Assoc. v. Town of Sanford, No. 09-04 Interim Order at 5 (Jan. 29, 2009), quoting Duff v. Town of Houlton, No. 97-20 at 21 (Oct. 19, 1999), and citing MSEA v. State Development Office, 499 A.2d 165, 169 (Me. 1985) (Law Court citing this standard with approval).

Interference, restraint or coercion violations are either derivative or independent violations. A derivative violation occurs when the employer violates the Act and that illegal conduct, in turn, has the effect of restraining employees in the exercise of their §963 rights. An independent violation of §964(1) (A) occurs when the conduct itself directly interferes with the exercise of rights granted under the Act. Examples of independent violations occurring in an established union setting include an attempt to interfere with the employee's right to serve on the union's bargaining team, MSEA v. Dept. of Human Services, No. 81-35, at 5 (June 26, 1981), a supervisor's statement to an employee not to go to the "wrong people" and get "bad advice," Ouellette v. City of Caribou, No. 99-17, at 10 (Nov. 22, 1999), a supervisor's threatening conduct toward grievants interfering with their right to file and process grievances, William Single and Sanford Police Assoc. v. Town of Sanford, No. 85-04, at 4 (Oct. 18, 1984).

Section 964(1)(B) of the Act prohibits an employer from "encouraging or discouraging membership in any employee organization by discrimination in regard to hire or tenure of employment." In order to support a §964(1)(B) discrimination claim, the Union has the burden of proving that: (i) the employee engaged in protected activity; (ii) the decision-makers knew of the employee's participation in protected activity; and (iii) there is a relationship, or "causal connection," between the protected activity and the adverse employment actions against the employee. Litchfield Educational Support Assoc. v. Litchfield School Committee, No. 97-09, at 22 (July 13, 1998) citing Casey v. Mountain Valley Educ. Assoc. and SAD 43, Nos. 96-26 & 97-03, at 27-28 (Oct. 30, 1997) and Teamsters Union Local #340 v. Rangeley Lakes School Region, No. 91-22, at 18 (Jan. 29, 1992).

We turn first to the question of whether O'Leary engaged in protected activity. We conclude the O'Leary's conduct of leaving the building just prior to the start of the arbitration of his grievance was protected activity because he was following a directive of his Union's attorney that was made as part of the attorney's tactical decision on how to handle the arbitration. While this maneuver may have been unusual and unprecedented for these parties, there is no basis for concluding that the Attorney's decision was not protected conduct.

The MTA attorney's letter to the arbitrator of September 19, 2011, was an attempt to get the entire grievance dismissed.⁴ The

⁴Contrary to the MTA's assertions in its briefs, Olivier's letter to the Arbitrator dated September 19, 2011, did not seek to "clarify the scope of the grievance" before the arbitration (MTA Reply Brief at 5), it sought to have the entire grievance dismissed as not arbitrable based on the assertion that the same issues had been addressed in the MHRC proceeding. The first clear statement Olivier made of a need to clarify what issues had not been addressed at the MHRC and thus might

MTA's attorney had the right to present an arbitrability argument to the arbitrator and to employ tactics in making that presentation that might be considered "playing hardball," as the Union described it. Similarly, the Union attorney had the right to protect the grievant from what the Union attorney considered improper questioning by the MTA attorney. The exhibits Olivier attached to her letter of the preceding week clearly indicated that her argument was based on statements made by O'Leary during the MHRC conciliation and settlement discussions, a proceeding in which O'Leary was *pro se* and Olivier represented the MTA. Belcher considered it improper to solicit testimony about settlement discussions at the MHRC proceeding,⁵ a concern that was heightened by the fact that O'Leary was not represented by an attorney in that forum. In light of Olivier's direct involvement with the MHRC case, Belcher was concerned that she would try to solicit testimony about settlement discussions on direct examination before an objection could be lodged. The Union was not trying to prevent the MTA from presenting its arguments on arbitrability, it was just not going to make it easy for the MTA to use the grievant to make their case. In light of these circumstances, Belcher's decision to tell O'Leary to leave the building and wait for their call was a valid tactical decision concerning a complicated arbitrability question and designed to protect the grievant from what Belcher felt would be improper questioning. See, e.g., Lundrigan v. MLRB, No. CV-83-81 (Me. Super. Ct., Ken. Cty., July 25, 1983) at 4 ("The attorney must

remain for arbitration came in her email of Sunday, September 25, 2011, two days prior to the arbitration.

⁵Citing 5 M.R.S.A. §4612 (1) (A), setting forth the procedures at the MHRC for compromise settlement negotiations, which states "...statements made in compromise settlement negotiations, . . . may not be disclosed . . . nor used as evidence in any subsequent proceeding, civil or criminal . . ."

use his discretion and professional judgment in determining how to proceed with and present a grievance."), aff'g Lundrigan v. State Dept. of Personnel and MSEA, No. 83-03 (Feb. 4, 1983); aff'd, 482 A.2d 834 (Me. 1984).

Evidently, it had not occurred to the MTA attorney that the grievant might not be available as a witness to give testimony supporting their effort to get the entire grievance dismissed. Olivier testified that she had denied Belcher's request for a continuance because "we had prepared our witnesses and were ready to go." This proved not to be the case. After Olivier discovered that O'Leary was not in the building, she felt she had to postpone the hearing because "the MTA's case would be prejudiced" if they could not call O'Leary as their first witness. Presentation of evidence and arguments on the arbitrability question could have proceeded, albeit not as Olivier had envisioned. MTA's case depended upon the testimony of an adverse witness, but they did not protect against the possibility that O'Leary would not show up voluntarily. Once the arbitration began, Olivier chose not to seek a subpoena or an order from the arbitrator to compel the attendance of O'Leary. It appears that Olivier did not have a back-up plan and thus felt compelled to postpone the arbitration.

The MTA has not presented any discernable argument that the Union's tactical decision in this case is somehow beyond the protection of the Act. Instead, the MTA argues that the actions for which O'Leary was disciplined was his abuse of the administrative leave by not actively participating and assisting in the processing of his grievance. While this line of reasoning might eventually be relevant in the analysis of a discrimination charge under §964(1)(B), it is wholly irrelevant to determining whether O'Leary's compliance with the attorney's instruction to leave the

building was protected activity. Similarly, the MTA's various arguments that the terms of the contract regarding leave for grievance processing dictate whether the employee is engaged in protected activity are without merit⁶.

Having concluded that O'Leary's act of leaving the MTA building shortly before the start of the arbitration as instructed by the Union attorney was protected activity, the second element of a §964(1)(B) discrimination charge requires that we determine whether the employer knew of this protected activity. There was a substantial amount of inconsistent or imprecise testimony in this case about who knew what when. Olivier, the MTA's attorney, testified credibly that as the situation unfolded in the arbitration, it was her impression that the grievant had left the building at the direction of Belcher, the union attorney. Carrier, the Human Resource Director, testified without equivocation that there was no discussion of such an instruction to O'Leary nor was there any discussion of the possibility of asking for a subpoena to compel his attendance. It is undisputed, however, that Carrier was absent from the room while she was looking for the grievant. Furthermore, much of the discussion about the situation occurred between the two attorneys and the arbitrator in a separate room behind closed doors. It is quite possible that Carrier was simply mistaken or did not consider the fact that statements were made while she was out of the room or while the attorneys were conferring with the arbitrator.

⁶The arbitration cases the MTA cites (Brief at p. 5, fn. 8) in support of its assertion that "employees who abuse leave are not engaged in protected activity" hold nothing of the sort--they merely state that an employer may impose appropriate discipline for abuse of leave.

We find the evidence insufficient to conclude that Carrier, who appears to be the primary decision maker on the discipline issue,⁷ knew at the time the decision to initiate the discipline of O'Leary was made that O'Leary was following the instructions of his attorney. To conclude that she did would require a significant degree of speculation and inferences. Thus, the Union has failed to prove that the decision maker had knowledge of the protected activity, the necessary second element of a discrimination claim under §964(1)(B).

We note that the Employer did have an arguable basis for considering discipline at that time. It is not unreasonable for one to interpret an employee's statement to his supervisor that he was "with the union" or "with union representation" as a "false statement" in these circumstances. Carrier knew that O'Leary was not in the arbitration room and the Supervisor, Somerville, had not seen O'Leary in the room with the union officials either. On the face of it, there were legitimate reasons to initiate the discipline of O'Leary.

The Union further argues that the decision to proceed with discipline made on October 12, 2011 was a discriminatory act taken against O'Leary in retaliation for his Union's refusal of the previous day to withdraw its demand for arbitration. Carrier was copied on the MTA attorney's initial request to drop the arbitration, but there is no evidence that she was informed of Belcher's response. Even if there were evidence of that knowledge, we do not find a violation of 964(1)(B) because there is no showing of causation. We have previously held that a temporal coincidence is not enough to prove causation,

⁷Carrier signed the only documents in evidence regarding O'Leary's discipline. She apparently obtained the concurrence of Doug Davidson, the manager, but there is no evidence of their interactions.

explaining:

While it is necessary in every discrimination case to prove that unfavorable treatment followed protected activity, the Board has determined that timing alone is generally an insufficient basis to support a finding of discriminatory motivation. Teamsters Union Local #340 v. Rangeley Lakes School Region, No. 91-22, at 20, (Jan.29, 1992); Maine State Employees Association v. State Development Office, No. 84-21, at 11, (July 6, 1984), aff'd, 499 A.2d-165 (Me. 1985) (the fact that the conduct cited in the complaint happened to coincide with the employee's protected activity does not, without more, establish a prima facie case of discrimination).

UPIU v. Winthrop School Department, 98-11 at 3, Decision on Respondent's Motion to Dismiss, (April 22, 1998). We suspect that the Employer welcomed the opportunity to discipline O'Leary and was not particularly interested in finding reasons not to discipline him. We are unable to say, however, that the evidence shows that the reason for the discipline was either his protected activity on the day of arbitration or in retaliation for the Union's right to reject the MTA's request to drop the demand for arbitration.

Before turning to the subsequent events, we must observe that the behavior of most of the people involved in this dispute leaves much to be desired. O'Leary's response to Somerville's question on his whereabouts was misleading, disingenuous, and directly contrary to the instructions given to him a few minutes early by his union attorney to refer all questions about the arbitration to them.⁸ Had O'Leary referred the question to his

⁸O'Leary testified repeatedly that he responded to Somerville's questions asking where he was by saying "I was with the Union." The same question was asked and answered three times. Upon re-cross examination, O'Leary responded to the question of whether he told Somerville that Belcher told him to leave the premises with, "No, I didn't, because I told him that they should contact the union." We do

union, a discussion between management and the union may have forestalled the decision to discipline. Had O'Leary asked for union representation at that time or informed his union of the supervisor's questioning that evening, again, the decision to discipline might have been avoided.

The Union officials knew that management was upset with the events that had occurred at arbitration and followed up with the e-mail the following day to Carrier and Olivier. The oblique wording of Belcher's email could have been more direct and more informative. In addition, the Union might have headed off the discipline if they had followed up with O'Leary that same day to inquire about any conversations he had had with management about the arbitration. We also question the Union's judgment in postponing the Loudermill meeting until the very last workday before the suspension was scheduled to begin.

With respect to Carrier's conduct, the better course of action would have been to investigate the matter or pick up the phone and speak to the MTA counsel. Belcher's e-mail the following day that all inquiries about what happened at the arbitration should go through him, the legal counsel for the MSEA, should have been a red flag to Carrier to look into the possible legal repercussions of discipline. Her failure to investigate the matter in even a cursory manner may have been due to her eagerness to discipline O'Leary. Once she found a reason for discipline, it appears that she pursued that objective with blinders on.

The final decision to suspend O'Leary was made on October 21,

not find this last statement credible, as it is inconsistent with his earlier statements and not corroborated by any other testimony. In any event, it has no direct bearing on our analysis of this case.

2011, at the Loudermill meeting. It is undisputed that at that meeting, Oelberg told Carrier that O'Leary was following the Union attorney's direction when he left the building shortly before the start of the September 27, 2011, hearing. There is no question Carrier understood that MSEA considered it within their rights to do so, as Oelberg asserted that O'Leary was under their control while he was on leave for grievance processing. Carrier testified that she was taken aback by Oelberg's statement that O'Leary had been instructed to leave the arbitration and asked him to repeat it. Nonetheless, toward the end of the meeting, Carrier stated that they would impose the discipline as described in their intent-to-discipline letter of October 12, 2011. Oelberg handed Carrier a copy of a notarized Prohibited Practice Complaint which specifically described Belcher's instruction on the date of the arbitration and asserted that the MTA's action suspending O'Leary interfered with, restrained and coerced O'Leary in the exercise of his rights, in violation of §964(1)(A).

Applying the three-part test for determining whether the adverse employment action was discriminatory in violation of §964(1)(B), O'Leary's compliance with the Union attorney's instruction was protected activity and there is no dispute that Carrier was told of that activity during the Loudermill meeting. Looking strictly at the Employer's decision on Friday, October 21, 2011, to go ahead with the one-week suspension, we do not see the requisite causal connection to conclude that a §964(1)(B) violation occurred. Carrier had never encountered a situation like what she was facing and was unsure what to do. On the other hand, she felt that the Union attorney's instruction did not alter the fact that O'Leary had lied to his supervisor and had left the work site without notifying management, the stated reasons for the discipline. Thus, we conclude that the actual

imposition of the suspension was not a violation of 964(1)(B). See MSEA v. State Development Office, 499 A.2d 165 (Me. 1985) (affirming Board's decision based on its basic factual finding that there was no causal connection between employee's protected activity and any of the State's actions). We view Carrier's failure to reconsider the discipline or to consider putting the suspension on hold while investigating the matter further⁹ to be a lapse of judgement,¹⁰ but we find no causal connection to O'Leary's protected activity.

As previously noted, a violation of section 964(1)(A) does not turn on the employer's motive, or whether the coercion succeeded or failed, but on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." See, e.g., Jefferson Teachers Assoc. v. Jefferson School Committee, No. 96-24, at 25 (August 25, 1997). The Employer's course of conduct over the days following the Loudermill meeting leads us to the conclusion that the delay in deciding to rescind the discipline and the failure to notify O'Leary of that rescission until even later was an interference, restraint and coercion in violation of §964(1)(A).

Carrier had no explanation as to why it took so long after the Friday Loudermill meeting to come to the conclusion that the

⁹Carrier could have put O'Leary on administrative leave while investigating the matter, as contemplated by Article 9 §8 of the Collective Bargaining Agreement, which states, "An employee may be placed on administrative leave with pay in order to conduct an investigation which may result in termination, suspension without pay or discipline."

¹⁰Ignoring the evidence presented at the meeting seems inconsistent with the whole purpose of a Loudermill meeting which is to guard against mistaken decisions. See Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 545, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

discipline should be rescinded. There is no specific testimony on when Carrier contacted the other MTA managers to discuss the situation nor when she contacted MTA counsel to seek advice. There was no testimony suggesting that there was any sort of investigation of what actually happened on the day of arbitration. All we really know is that it was not until the following Thursday, the fourth day of O'Leary's five-day suspension, that Carrier decided to rescind the suspension. Her letter on that Thursday suggests that receipt of the "written confirmation" of the attorney's instruction contained in the prohibited practice complaint was somehow significant as "new information," but does not explain why it took six days to act. The letter specifically refers to the MTA's receipt the previous day of MSEA's formal filing of the Prohibited Practice Complaint, the same complaint that Carrier had received the preceding Friday. Was the filing of the PPC with the Maine Labor Relations Board the impetus for Carrier to rescind the discipline? We do not know. What we do know is there is no evidence that the MTA made any effort to correct quickly or prospectively what they realized was an "unfair" discipline. By letting the matter hang for six days, other employees would reasonably view the discipline of O'Leary as harsh treatment sending a message that employees may suffer if they follow the instructions of their union's attorney.

Our conclusion is further buttressed by the fact that the MTA did not notify O'Leary that the discipline was being rescinded until after he completed the suspension, five days after the decision was made. The Thursday, October 27, 2011, letter rescinding the discipline was addressed to Oelberg, and had nothing in it suggesting that O'Leary could come back to work immediately. The letter was copied to the MTA Division Director Davidson and to "File," but no copy was provided for O'Leary or

Belcher. This is in stark contrast to the wide distribution of the intent-to-discipline letter, which was addressed to O'Leary and copied to Peter Mills (the Executive Director of the MTA), Davidson, Somerville, "Personnel File", and MSEA. Carrier's claim that a copy was sent to O'Leary even though there was no indication in the "cc" line is not credible, is not supported by any corroborating evidence, and is contradicted by O'Leary's testimony on when he first saw the letter and when he first learned that the suspension was rescinded.

Finally, Carrier testified that she called Oelberg on the same day the letter was written and told him of their decision. She also claimed that she told Oelberg to inform O'Leary of the decision, but there is no evidence to support this.¹¹ We are reluctant to believe that she would rely on a union representative to provide the grievant with this important information without, at the very least, making some reference to that expectation in the letter to that union official explaining the decision.

Carrier's purported reason for not notifying O'Leary of the rescission when it was made was her claim that the Union said she should not communicate directly with O'Leary. The Union's request on this point was that all communication should go through Belcher. Carrier's assertion that she was only complying with the Union's request is inaccurate since she did not communicate with Belcher or even copy him on the letter.

O'Leary testified credibly that he did not learn that the suspension was rescinded until he returned to work on Monday and

¹¹Oelberg did not have any specific recollection of a conversation with Carrier about rescinding the discipline. O'Leary testified he did not hear anything about the rescission until he returned to work.

was told of the decision by Somerville. Thus, even though O'Leary did not lose any pay, he had to spend a week away from work thinking that he was at the next to last step of the discipline process. Each step in the MTA's handling of his discipline compounded the harm done and, together, make it abundantly clear that the MTA's conduct constituted an interference, restraint and coercion violation: First, the Employer failed to promptly investigate the matter, then there was the inexplicable delay in deciding to rescind the discipline, and finally there was the glaring failure to promptly notify O'Leary of the decision to rescind the discipline. This course of events would reasonably be seen by O'Leary and other employees in the department as a message that the MTA could and would restrain employees in the free exercise of their rights. An employee would think twice about following the instructions of their Union's attorney in the face of disagreement or opposition from the MTA attorney. Consequently, we conclude that the MTA's course of conduct constitutes a violation of §964(1)(A).

The MTA's argument that there should be no violation because the MTA rescinded the discipline is without merit. The fact that O'Leary did not lose any pay does not alter the fact that MTA violated §964(1)(A) of the Act. The chilling effect of the message sent by the Employer's conduct is not expunged by the rescission of the discipline. In a similar vein, we have often held that execution of a collective bargaining agreement does not render moot a complaint of bad faith bargaining because "subsequent acts of the parties do not mitigate prior unlawful conduct." Teamsters Local 48 v. City of Bangor, No. 79-29 at 1 (March 2, 1979); see also Winthrop Educators Assoc. v. Winthrop School Committee, No. 80-05 at 5 (Feb. 8, 1980). This is particularly true in this case, where there was no effort to repudiate the conduct or undo the harm done other than restoring

O'Leary's pay for the week of the suspension. See, e.g., Teamsters v. Town of Orono, No. 91-03 at 9-10 (Jan. 31, 1991) (Employer may be able to remedy what would be a violation of §964(1)(A) by a manager by effectively disavowing the manager's conduct and promptly correcting any resulting harm).

Upon finding that a party has engaged in a prohibited practice, we are instructed by Section 968(5)(C) of the Act to order the party "to cease and desist from such prohibited practice and to take such affirmative action . . . as will effectuate the policies of this chapter." A properly designed remedial order seeks "a restoration of the situation, as nearly as possible, to that which would have obtained" but for the prohibited practice, Caribou School Dept. v. Caribou Teachers Association, 402 A.2d 1279, 1284 (Me. 1979). We will order the Turnpike Authority to cease and desist from interfering with the employee's right to follow the Union's instructions with respect to processing a grievance and will order the Turnpike Authority to post the attached notice.

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. §968(5), it is hereby ORDERED:

1. That the Maine Turnpike Authority cease and desist from interfering with the employee's right to follow the Union's instructions with respect to processing a grievance.
2. That the Maine Turnpike Authority shall post for thirty (30) consecutive days copies of the attached notice to employees which states that the Maine Turnpike Authority will cease and desist from the

actions set forth in paragraphs one and will take the affirmative action set forth in paragraphs three and four.[fn]10 The notice must be posted in conspicuous places where notices to Maine Turnpike Authority employees are customarily posted, and at all times when such employees customarily perform work at those places. Copies of the notice shall be signed by the Executive Director of the Maine Turnpike Authority prior to posting and shall be posted immediately upon receipt. The Executive Director shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by other materials.

3. That the Maine Turnpike Authority shall notify the Board by affidavit or other proof of the date of posting and of final compliance with this order.

4. That Complainant's remaining allegations are dismissed.

Dated at Augusta, Maine, this 12th day of February, 2013.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right pursuant to 26 M.R.S.A. Sec. 968(5)(F) to seek review of this decision and order by the Superior Court by filing a complaint in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

/s/ _____
Karl Dornish, Jr.
Employer Representative

/s/ _____
Robert L. Piccone
Employee Representative

Chair Peter T. Dawson participated in the hearing and deliberation of this case and concurred with the decision of the Board but died before the written decision was finalized.

NOTICE TO EMPLOYEES

POSTED PURSUANT TO AN ORDER OF THE MAINE LABOR RELATIONS BOARD

AFTER A HEARING IN WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT EVIDENCE, IT HAS BEEN DETERMINED THAT WE HAVE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE MAINE LABOR RELATIONS BOARD AND ABIDE BY THE FOLLOWING:

WE WILL CEASE AND DESIST from interfering with the employees' right to follow the instructions of a Maine State Employees Association representative with respect to processing a grievance.

WE WILL post this notice of the Board's Order for 30 days.

WE WILL notify the Board of the date of posting and final compliance with its Order.

Date

Peter Mills, Executive Director
Maine Turnpike Authority

This Notice must remain posted for 30 consecutive days as required by the Decision and Order of the Maine Labor Relations Board and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to:

STATE OF MAINE
MAINE LABOR RELATIONS BOARD
STATE HOUSE STATION 90
AUGUSTA, MAINE 04333 (207) 287-2015

THIS IS AN OFFICIAL GOVERNMENT NOTICE
AND MUST NOT BE DEFACED.