
JEFFREY L.MACOMBER,)
)
)
 Complainant,)
)
 v.)
)
 MAINE STATE EMPLOYEES)
 ASSOCIATION, SEIU LOCAL 1989,)
)
 Respondent.)

ORDER ON APPEAL OF
EXECUTIVE DIRECTOR'S
DISMISSAL OF COMPLAINT

I. Statement of the Case

This prohibited practice complaint (Complaint) alleges a union violated its duty of fair representation to a bargaining unit employee by, in large part, failing to correct a procedural defect during the processing of a grievance. This error resulted in an arbitrator ruling against the employee. After reviewing the sufficiency of the Complaint, the Executive Director of the Maine Labor Relations Board (Board) dismissed it for failure to state a claim upon which relief may be granted by the Board. Upon review of the Executive Director's determination, we uphold the Complaint's dismissal.

II. Background and Executive Director's Dismissal of Complaint¹

Jeffrey L. Macomber (Macomber or Complainant) is employed by the State of Maine, Department of Corrections (Employer). Prior to March 12, 2015, Macomber was promoted to a Captain/JFOS position. On March 12, 2015, the Maine State Employees

¹ The facts stated in this Order derive from the Complaint, as originally filed and amended.

Association, SEIU Local 1989 (Union) filed a grievance (Grievance) on Macomber's behalf alleging that the Employer violated the parties' collective bargaining agreement (Contract) by failing to place Macomber in the appropriate pay step following his promotion.² In part, the Grievance expressly asserted that the Employer violated the Contract's Seniority provisions.

On June 1, 2015, the Union filed a Demand for Arbitration for the Grievance.³ Although the Demand for Arbitration included a description of the nature of the dispute at issue, this description failed to include any reference to the Contract's Seniority article. Arbitrator James M. Litton, Esq., was selected to conduct the Grievance arbitration.

On July 14, 2016, Arbitrator Litton issued an award for a grievance filed by the Union, but for a matter unrelated to Macomber or his Grievance.⁴ In part, the Arbitrator determined he was precluded from analyzing a particular claim raised by the Union because the Union had not referred to the related contract article in its demand for arbitration.

Following the issuance of Arbitrator Litton's July 2016 award, the Union failed to take corrective steps to include the

² While not specifically alleged in the Complaint, the Board assumes for the purposes of this Order that Macomber is a member of a bargaining unit for which the Union is the certified, exclusive bargaining agent per 26 M.R.S. § 979-F.

³ Article 34 of the Contract provides the parties' grievance procedure. Per Article 34, Section 1, employees have the right to present grievances. If a grievance is unresolved by step 3 of the process, Article 34, Section 2.4, Step 4(a) provides, in part that "MSEA-SEIU may submit the grievance to arbitration by submitting a request for Arbitration...as well as a statement of the grievance specifying the Article, section or clause of the contract alleged to have been violated..." In the event the parties proceed to arbitration, Article 34, Section 2.4, Step 4(c), requires the parties share the cost of arbitration equally.

⁴ At the time of the July 2016 award's issuance, the Macomber Grievance remained pending arbitration.

Contract's Seniority provisions in its Demand for Arbitration in Macomber's case while the Grievance remained pending arbitration.

On December 4, 2017, Arbitrator Litton issued his award for the Grievance. The Arbitrator found that the Union failed to include the Contract's Seniority article in its Demand for Arbitration, per Article 34 of the Contract.⁵ Thereafter, the Union did not pursue any appeal of the award, nor did it notify Macomber that it would not pursue appeal. The Union also did not inform Macomber there was a 90-day deadline to file an appeal per the Maine Uniform Arbitration Act, 14 M.R.S. § 5938.

On May 29, 2018, Macomber filed this Complaint alleging that the Union violated the State Employees Labor Relations Act (Act), 26 M.R.S. § 979, et seq., by failing to include the Contract's Seniority article in its Demand for Arbitration and by failing to inform Macomber of the 90-day deadline to appeal the award.⁶

On June 14, 2018, the Board's Executive Director notified Macomber, in writing, of potential deficiencies in the Complaint including a possible failure to state a claim upon which relief may be granted.

On June 29, 2018, Macomber filed an amended Complaint.⁷ In part, the amended Complaint reiterated the original allegations,

⁵ While not alleged in the Complaint, we will assume for the purposes of this Order that the Arbitrator rendered a decision adverse to Macomber and that the Union's failure to include the Seniority provisions in its Demand for Arbitration was a determinative factor in the Arbitrator's decision.

⁶ The Complaint, as originally filed, mistakenly alleged a violation of the sections of the Act that address prohibited practices by employers as compared to unions. On June 13, 2018, per MLRB Rule Chapter 12, § 8, the Union filed a Motion for a Ruling on Sufficiency of the Complaint noting the apparent erroneous citation to the Act.

⁷ The amended Complaint corrected the sections of the Act cited to include only those that address prohibited practices by unions.

but also expanded upon those allegations by further describing the Union's knowledge of Arbitrator Litton's July 2016 award as well as the Union's failure to correct the Demand for Arbitration to include the Seniority article. Macomber summarized his allegations as follows:

The duty of fair representation was breached in three ways:

1. Failure to review/correct the Demand for Arbitration on behalf of all grievants after being informed on July 14, 2016 in another case...of the importance of particularity in the Demand for Arbitration.
2. Failure to file a Motion to Vacate the Arbitration Award within 90 days of the decision...
3. Failure to communicate with the Grievant, before the Motion to vacate the Arbitration Award deadline, regarding the decision of the Union not to pursue a Motion to Vacate the Arbitration Award, thereby causing any Motion filed by grievant himself or outside Counsel to be time-barred.

See Amended Complaint in Case No. 18-20. (Edits supplied).

On July 12, 2018, the Executive Director dismissed the Complaint for failure to state a claim upon which relief may be granted. With regard to the Union's failure to include the Seniority article in its Demand for Arbitration, and its failure to review all pending demands for arbitration to ensure that all issues had been included, the Executive Director noted while the Union's actions might be evidence of negligence or poor judgment, said conduct does not constitute a violation of the Union's duty of fair representation under the applicable Maine Law Court precedent. In connection to the Union's failure to inform Macomber of the 90-day deadline to file a motion to vacate the arbitration award, and its decision to not pursue such a motion, the Executive Director concluded that a successful motion was

unlikely given the circumstances. He also observed that Macomber, as an individual, lacked standing to appeal the arbitration award because the Maine Uniform Arbitration Act limits the right to appeal to only a party to the arbitration, which, in this case, was the Union by operation of Article 34 of the Contract.⁸

Macomber timely filed with the Board a Motion to Review the Executive Director's dismissal of the Complaint. Through the Motion, Macomber reiterated his allegations against the Union and asserted that the Union processed the Grievance in a perfunctory manner. He also argued that any conclusion that the Union's conduct was merely negligent is premature given the potential for similar cases to have arisen since July 2016. Finally, he asserted the Union's conduct denied him his constitutionally guaranteed right to due process.⁹

III. Analysis and Conclusions

With regard to the Board's jurisdiction in this matter, because the Complainant is employed by the State of Maine, Department of Corrections, he is considered a State employee as defined in Section 979-A(6) of the Act. Likewise, the Union was a bargaining agent within the meaning of Section 979-A(1) of the Act at all times relevant to this complaint. Accordingly, the jurisdiction of the Board to render a decision and order lies in Section 979-H of the Act.

⁸ 14 M.R.S. § 5938 reads in part: "Upon application of a *party*, the court shall vacate an award where..." (Emphasis supplied).

⁹ Given the Board lacks the authority to adjudicate a specific claim that alleged conduct violates the U.S. Constitution, this Order will not address this particular allegation further. *E.g. Sanford Police Association*, No. 09-04 (January 28, 2009).

Upon the filing of a prohibited practice complaint, the Act requires the Board's Executive Director to review the complaint to determine whether the facts as alleged constitute a violation of the Act, i.e. whether there is a basis for which relief may be granted by the Board. 26 M.R.S. § 979-H(2); MLRB Rule Chapter 12, § 8. Further, the Act mandates the dismissal of the charge if it is determined that the alleged facts do not, as a matter of law, constitute a violation. *Id.*¹⁰

In determining whether this Complaint, as amended, alleged facts sufficient to state a claim upon which relief may be granted, the Board must treat the material allegations of the Complaint as true and must consider the complaint in the light most favorable to the Complainant. *Neily v. State of Maine and Maine State Employees Ass'n*, No. 06-13, slip op. at 5-6 (MLRB May 11, 2006), *aff'd* No. Mem. 07-89 (Me. May 15, 2007). However, the Board is not obligated to accept as true legal conclusions asserted in the Complaint. *MSAD No. 46 Education Ass'n v. MSAD No. 46*, No. 02-13, at 2 (Nov. 27, 2002), *citing Bowman v. Eastman*, 645 A.2d 5, 6 (Me. 1994).

In this case, the Complaint alleges the Union violated its duty of fair representation to Macomber. The statutory duty of fair representation is established through Section 979-F(2)(E) of the Act which generally requires a union to represent all of the employees in its bargaining unit. In turn, a union violates Section 979-C(2)(A) of the Act if it breaches its duty of fair representation.

¹⁰ "If it is determined that the facts do not, as a matter of law, constitute a violation, the charge *must* be dismissed by the executive director, subject to review by the board." 26 M.R.S. § 979-H(2). (Emphasis supplied).

This Board and the Maine Law Court have held that the duty of fair representation is breached only when a union's conduct toward a bargaining unit member is arbitrary, discriminatory, or in bad faith. *Lundrigan v. MLRB*, 482 A.2d 834 (Me. 1984), *Brown v. MSEA*, 1997 ME 24, ¶7, 690 A.2d 956. See also *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903 (1967).

In this case, the Complainant alleges, in effect, that the Union's conduct was arbitrary.¹¹ A "union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." *Langley v. MSEA et al.*, 2002 ME 32 ¶9, 791 A.2d 100 (Feb. 22, 2002) quoting *Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 67 (1991). It is well established that "[m]ere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty of fair representation." *Lundrigan* at 836, quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 686 (1953). However, a "union may not ignore a meritorious grievance or process it in a perfunctory manner." *Lundrigan* at 836, citing *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967).

Here, the facts as alleged are insufficient to state a claim upon which the Board could grant relief. Specifically, even though the Union failed to ever include the Seniority article in its Demand for Arbitration--despite the fact that Arbitrator Litton ruled against the Union for a near-identical mistake while the Grievance remained pending arbitration--Macomber fails to allege any facts from which one could conclude that this error was anything but mere negligence or ineptitude as compared to

¹¹ The Complaint makes no evident allegation that the Union's conduct was discriminatory or in bad faith.

conduct that is so far outside a wide range of reasonableness as to be irrational. *C.f. Graf v. Elgin, Joliet & Eastern Ry.*, 697 F.2d 771 (7th Cir. 1983)(union did not violate its duty of fair representation despite committing a potentially negligent procedural error that prevented the processing of a grievance).

Additionally, where it is undisputed that the Union invoked arbitration and brought the matter before an arbitrator, at financial cost to the Union, such facts weigh against finding that the Union ignored a meritorious grievance or treated the Grievance in a perfunctory manner.

As to the Union's decision to forgo appeal, Macomber fails to plead any facts to suggest the Union's conduct was so unreasonable as to be irrational given the circumstances of the Arbitrator's decision and the seeming questionability of a successful appeal.¹² *E.g. William H. Slavick v. The Associated Faculties of the University of Maine*, No. 85-16 (May 31, 1985) at 4-5 (union did not violate its duty of fair representation by declining to file a grievance that was likely to be denied). Additionally, where the language of the Maine Uniform Arbitration Act limits the right of appeal to a "party," and in light of the Contract's apparent designation of the Union as the named party bringing the matter to arbitration, the Union's failure to notify the Complainant of the appeal period, thus precluding the Complainant from filing his own appeal was, again, not so unreasonable as to be irrational.

¹² Under the Maine Uniform Arbitration Act, an arbitration award may only be vacated on the specific grounds enumerated in 14 M.R.S. § 5938(1). *HL1, LLC v. Riverwalk, LLC*, 2011 ME 29, 15 A.3d 725.

Given the above, the Complaint failed to state a claim upon which relief may be granted by the Board and is therefore subject to dismissal.

IV. Decision

For the foregoing reasons, we affirm the Executive Director's dismissal of the Complaint.

Dated this 28th day of September 2018

MAINE LABOR RELATIONS BOARD

Katharine I. Rand
Chair

Robert W. Bower, Jr.
Employer Representative

Dennis E. Welch
Employee Representative

The parties are advised of their right pursuant to 26 M.R.S.A. § 979-H(7) to seek a review of this decision and order by the Superior Court. To initiate such a review, an appealing party must file a complaint with the Superior Court within fifteen (15) days of the date of issuance of this decision and order, and otherwise comply with the requirements of Rule 80(C) of the Rules of Civil Procedure.