STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 24-PPC-06
Issued: December 2, 2024

MSAD NO. 51 EDUCATION ASSOCIATION, Complainant, v. MSAD NO. 51 BOARD OF DIRECTORS, Respondent.	DECISION AND ORDER

I. Statement of the Case

MSAD No. 51 Education Association (Union) filed this prohibited practice complaint against MSAD No. 51 Board of Directors (School) alleging the School violated the Municipal Public Employees Labor Relations Law (Act) by discriminating against a bargaining unit employee in retaliation for the filing of a contractual grievance and the use of union representation at meetings in violation of 26 M.R.S.A. § 964(1)(A) and (B).

II. Procedural History

The Union filed its complaint with the Maine Labor Relations Board (Board or MLRB) on November 30, 2023, and an amended complaint on January 22, 2024. After a sufficiency determination by the Board's Executive Director, the Board Chair, Sheila Mayberry, Esq., conducted a prehearing conference with the parties on February 26, 2024, and issued a Prehearing Conference Memorandum and Order the following day. The Board held an evidentiary hearing on May 14, 2024. The hearing was presided over by Sheila Mayberry, Esq., Board Chair, Roberta de Araujo, Esq., Employee Representative and Michael Miles, Employer Representative. The Union was represented by Peter Mancuso, Esq., and the School was represented by Connor Schratz, Esq. The parties were given a full opportunity to examine and cross-examine witnesses, introduce evidence and make their arguments. The parties were also permitted to file post-hearing briefs, which they submitted on June 28, 2024.

III. Findings of Fact

The bargaining unit member at the center of this dispute was an occupational therapist, contracted by the school to work as a salaried .8 Full-Time Equivalent (FTE) employee for both the 2022-2023 and the 2023-2024 school years. The .8 FTE status meant that the salary and benefits she earned were 80% of what a similarly situated full-time employee earns under the collective

bargaining agreement (CBA). The occupational therapist has been employed by the school department for approximately twenty years. Her performance evaluations prior to April 2023 had all been very positive and had not indicated any issues with scheduling, including her evaluation dated June 2, 2022.

In August of 2022, the occupational therapist contacted the Director of Special Services to complain that her case load for the upcoming 2022-2023 school year was too high given her part-time status and requested to be moved to a full-time position. The Director of Special Services notified the occupational therapist that the school was hiring for a new full-time position and that she was welcome to apply. The occupational therapist did not apply for the full-time position.

The School's Assistant Director of Instructional Support emailed the occupational therapist on October 4, 2022, to check in regarding the occupational therapist's concerns about her schedule and caseload. She asked to review a copy of the occupational therapist's current schedule and list of students. The occupational therapist replied later that day that she was "okay right now" and that she would be out on leave the next two days. The administrator replied that they could discuss her schedule in more detail when she returned to school.

After filling the full-time position, at the beginning of the school year, the School had removed and reassigned 4.5 hours of caseload time from the occupational therapist's schedule. However, in December of 2022 the new employee resigned.

The School's Assistant Director of Instructional Support had a meeting with the occupational therapist in January of 2023 to discuss the possibility of the occupational therapist taking on some of the additional caseload caused by the new employee's resignation. The occupational therapist brought a Union representative with her to the meeting. After the meeting, the occupational therapist was not assigned any additional caseload.

The Assistant Director of Instructional Support requested a follow-up meeting with the occupational therapist in March of 2023. The occupational therapist brought two other employees with her to the meeting, including another Union representative. After the meeting, on March 14, 2023, the Assistant Director of Instructional Support referenced the January 2023 meeting in an email to the occupational therapist, writing, in part: "You did not give me the courtesy of letting me know that you were asking union representation to attend that meeting which changed the dynamic of the meeting."

On April 6, 2023, the occupational therapist filed a grievance asserting that the workload assigned by the School required her to work more hours than warranted by her part-time position and that the School's failure to pay her for this work violated the CBA. The School's Director of Finance, Human Resources, and Operations denied the grievance at Level 1. In his letter issued April 28, 2023, he included a chart breaking down the occupational therapist's basic schedule based on a 30-hour week, indicating that the occupational therapist should have no difficulty completing her assigned duties within those 30 hours. After the Union escalated the grievance, the School's Superintendent issued a Level 2 denial on May 15, 2023. The Superintendent's denial letter similarly determined that the time allotted to the occupational therapist's position was adequate.

He also stated that it "is a professional responsibility to work within the parameters of your employment" and concluded that "none of us have the ability to extend our work unilaterally with an expectation that this unauthorized extension justifies compensation." The grievance proceeded to Level 3, and it was denied by the School Board on June 13, 2023. In its written decision, the School took the position that "the FTE terminology associated with any given position relates to the pay for that position (as a percentage of steps on the salary scale in the [CBA]), not the schedule for that position." In other words, the occupational therapist was not bound to fit her work within a 30-hour week and was not owed extra compensation for any additional hours required to complete her work. After the School's Level 3 denial, the Union advanced the grievance to arbitration. [1] There was testimony at the hearing that this was the first grievance to go beyond Level 2 in at least seven years.

On September 6, 2023, the occupational therapist emailed the Middle School Principal with more concerns about being unable to accommodate her caseload within her part-time hours, ending "I am open to any thoughts/suggestions you might have." The Middle School Principal passed the occupational therapist's concerns along to the Director of Finance, Human Resources, and Operations. This administrator reached out to the occupational therapist by email on September 10, 2023, acknowledging the concerns she had expressed to both the Middle School and High School principals regarding her schedule and notifying her that he had assigned the Assistant Director of Instructional Support to meet with her to help "prepare a schedule with you." The next day the occupational therapist replied that she would like to bring a Union representative with her to the meeting to which the administrator responded, "You are welcome to have a rep there if you like."

The occupational therapist and Assistant Director of Instructional Support met several times and exchanged emails in a detailed review of the occupational therapist's schedule. At the hearing the Assistant Director of Instructional Support testified that, after reviewing the occupational therapist's schedule, she became concerned that the occupational therapist was overserving students, which implicated potential compliance issues under State and federal law. Over several weeks, the Assistant Director of Instructional Support provided the occupational therapist with a total of eight different versions of a schedule, attempting to accommodate the occupational therapist's assigned caseload within her part-time schedule. The occupational therapist had significant concerns with each schedule prepared by the Assistant Director of Instructional Support. She explained her concerns in detail in emails and meetings with the Assistant Director of Instructional Support, who at least partially incorporated the occupational therapist's comments in her attempts to adjust the schedule. At the hearing the occupational therapist testified that she considered these schedules to be mandatory and the Assistant Director of Instructional Support confirmed that she also considered them to be directives.

During this time, while following the mandated schedules provided to her by the Assistant Director of Instructional Support, the occupational therapist missed several services for students. She notified school administrators by email of the missed services on September 27, 2023, and noted that she was documenting the missed services for the sake of her occupational therapist licensure. Prior to her time following the mandated schedules, the occupational therapist had not missed any student appointments during her time with the School. At a scheduling meeting the

next day, the Assistant Director of Instructional Support made a comment to the occupational therapist regarding student reactions to the removal of a yoga group with the occupational therapist that the therapist found to be rude. On October 20, 2023, the occupational therapist emailed the Assistant Director of Instructional Support asking for advice on how to handle student progress reports regarding the missed appointments, as "it was out of the students' and my control."

Subsequent to this, the Assistant Director of Instructional Support conferred with the School's Director of Finance, Human Resources and Operations. She testified that she told him that the schedules were not working and that she wanted to "get out of the schedule making business." After these discussions, the Director of Finance, Human Resources and Operations, issued a "Letter of Instruction" to the occupational therapist on October 24, 2023. The letter included a new schedule and included the following passage:

> "At this point, we are confident that your current schedule will allow you to complete all of your duties. Consequently, the latest iteration of the schedule included with this letter, is the schedule that you should follow moving forward unless, of course, you believe that a change is necessary and can make that change while still providing necessary services to students within the schedule, since you ultimately have the flexibility and responsibility of scheduling sessions for your caseload."

The letter also stated the School's expectation that there would be no further missed sessions. It closed with a warning that "failure to follow the schedule that has been provided and/or further missed sessions may result in discipline, up to and including termination."

After receiving the letter, the occupational therapist reached out separately to the Director of Finance, Human Resources, and Operations, and the Assistant Director of Instructional Support, with additional concerns about her schedule. The administrators both essentially responded that they felt confident the latest version of the schedule should be sufficient. They also each said that the occupational therapist was free to make any changes to her schedule, but that if it resulted in her working outside the regular school day, that would be up to her. In her email, the Assistant Director of Instructional Support also offered to set up a meeting with the occupational therapist if she wanted to discuss anything further.

Prior to the Letter of Instruction, on October 16, 2023, the Assistant Director of Instructional Support and another administrator had challenged the occupational therapist's recommendations during a meeting about a student with the students' parents and other professional staff present. Similarly, on October 23, 2023, during a meeting about a student with the parents, other professional staff, and outside service providers present, the same two administrators again questioned her recommendations. The occupational therapist felt these interactions were hostile. The occupational therapist's recommendations with respect to the first meeting were ultimately adopted, and her recommendations at the second meeting were partially adopted.

IV. Analysis

At all times relevant, the Union was a bargaining agent within the meaning of 26 M.R.S.A. § 962(2) and the School was a public employer within the meaning of 26 M.R.S.A. § 962(7). The Board's jurisdiction to hear this case and to issue a decision and order derives from 26 M.R.S.A. § 968(5).

A. Discrimination

The Act prohibits public employers, their representatives and their agents from encouraging or discouraging membership in any employee organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. 26 M.R.S.A. § 964(1)(B). To prevail in a discrimination claim, a complainant has the burden of proving by a preponderance of the evidence that (1) the employee engaged in protected activity, (2) the decision-makers knew of the employee's participation in protected activity and (3) there is a relationship, or causal connection, between the protected activity and the adverse employment action taken against the employee. *Maine State Law Enforcement Association v. Maine Office of State Fire Marshal*, No. 23-PPC-07, slip op. at 9 (December 18, 2023). A complainant can establish the causal connection element by putting forward sufficient evidence to support an inference that protected activity was a "substantial or motivating factor" in the adverse employment action. *Lisbon Education Association v. Lisbon School Committee*, No. 23-PPC-18 & 19, slip op. at 5 (May 23, 2024); see also, *Teamsters Union Local #340 v. Rangeley Lakes School Region*, No. 91-22, slip op. at 18 (Jan. 29, 1992) (quoting *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400, 103 S.Ct. 2469, 2473, 76 L.Ed. 2d 667 (1983)).

Evidence of unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Lisbon School Committee*, No. 23-PPC-18 & 19, slip op. at 5. Examples of circumstantial evidence of unlawful motivation are anti-union animus, disparate treatment and inconsistent or less-than-credible explanations for the action. *Id.*; See also, *Maine State Law Enforcement Association and Timothy McLaughlin v. State of Maine, Maine Department of Corrections*, No. 13-15, slip op. at 9-10 (October 31, 2013). Although it is necessary for a complainant to establish that an adverse employment action came after protected activity, evidence of this timing alone is generally insufficient evidence of employer motivation. *Lisbon School Committee*, No. 23-PPC-18 & 19, slip op. at 10; See also, *MSEA v. Maine Turnpike Authority*, 12-08, slip op. at 23-24 (February 12, 2013).

If a complainant succeeds in putting forward a prima facie case for discrimination, the burden shifts to the respondent to prove by a preponderance of the evidence that the adverse employment action was based on unprotected activity as well, and that the complainant would have suffered the adverse employment action regardless of the protected conduct. *Lisbon School Committee*, No. 23-PPC-18 & 19, slip op. at 5-6. Even if the respondent meets this burden, the complainant may still prevail if it can demonstrate by a preponderance of the evidence that the reasons offered by the employer for the adverse action are merely pretextual. *Id.* A pretext is an excuse put forward to conceal an illegal act. *State of Maine, Maine Department of Corrections*, No. 13-15, slip op. at 14.

The Union makes two claims of discrimination, one based on the School's issuance of the Letter of Instruction and the other based on a "hostile work environment." Applying the test for discrimination, it is clear that the occupational therapist engaged in protected activity when she availed herself of Union representation at the January and March 2023 meetings and when she filed a grievance regarding her scheduling issues in April 2023. The record also supports that the School administrators involved were aware of this protected activity.

1. Adverse Employment Action

The Act does not prohibit all forms of discrimination. An important threshold is whether the employer action in question can be considered an "adverse employment action." No claim for discrimination may lie without an adverse employment action. *Fraternal Order of Police v. York County*, Nos. 18-10 & 19-02, slip op. at 21 (July 24, 2019).

The Board has never formally adopted a definition of what constitutes an adverse employment action, but it has referred to a definition used by the federal courts and the National Labor Relations Board--"actions that reduce a worker's prospects for employment or continued employment, or worsen some legally cognizable term or condition of employment." *York County*, No. 18-10 & 19-02, slip op. at 22 (citing *Bellagio, LLC v. Nat'l Labor Relations Bd.*, 854 F.3d 703, 709-10 (D.C. Cir. 2017); See also, *Ne. Iowa Tel. Co.*, 346 NLRB 465, 476 (2006). The School's actions at issue in this case are the Letter of Instruction it issued to the occupational therapist and the School's alleged creation of a "hostile work environment."

Letter of Instruction

The Union argues that the Letter of Instruction issued to the occupational therapist is clearly disciplinary in nature, as it contains a directive and a threat of termination. The School argues that the Letter of Instruction is not an adverse employment action, because the School did not consider it to be disciplinary and would have issued a Letter of Reprimand if it had intended so. The School also argues that the Letter of Instruction is not adverse employment action based on an analogous case applying discrimination under the federal National Labor Relations Act. In *Bellagio, LLC v. NLRB*, the School points out, the court found that a suspension and a form notifying an employee that he may be subject to disciplinary action was not actionable adverse employment action. 854 F.3d 703, 709-10 (D.C. Cir. 2017). The form in that case notified the employee that he was being suspended from work pending the outcome of an investigation, the results of which could lead to the imposition of discipline. *Id.* at 710. The form also stated that the suspension was not disciplinary, the employer did not use suspensions as part of a progressive discipline system and there was no evidence that the suspension had any negative impact on the employee's employment situation or job prospects. *Id.*

In other cases, the National Labor Relations Board (NLRB) and reviewing courts have found disciplinary warnings to be sufficient adverse employment action upon which to base a discrimination claim. See e.g., *Tasty Baking Co. v. N.L.R.B.*, 254 F.3d 114, 125 (D.C. Cir. 2001) ("It is well settled that an employer violates the [National Labor Relations Act] by taking an

adverse employment action, such as issuing a disciplinary warning, in order to discourage union activity."); *Fortuna Enterprises, LP v. N.L.R.B.*, 665 F.3d 1295, 1303 (D.C. Cir. 2011) (Where the court enforced a ruling of the NLRB, finding that an employer's written warnings to employees regarding a violation of company policy was sufficient adverse employment action: "There is no question that the warnings … adversely affected the terms or conditions of their employment."); *Gold Coast Rest. Corp. v. N.L.R.B.*, 995 F.2d 257, 265 (D.C. Cir. 1993), *amended*, No. 91-1533, 1993 WL 444597 (D.C. Cir. Oct. 25, 1993) (Where the court found written warnings issued to a waiter to be part of the basis for upholding a discrimination finding of the NLRB); See also, *Promedica Health Systems, Inc.*, 343 NLRB 1351,1351-52; 1369, enforced in relevant part, 206 F. App'x 405, 408 (6th Cir. 2006) (Where the NLRB found an employer's counseling or "coaching" of employees to be adverse employment action, regardless of whether they were formal or informal, as they could be considered by the employer as a basis for increased discipline up to and including termination.); *Extendicare Homes, Inc.*, 348 NLRB 1062, 1062 n.4, 1079 (2006) (Where the NLRB found a verbal reprimand sufficient adverse employment action even though not part of the employer's progressive discipline system, when the object of the reprimand was essentially the employee's assistance to the union); *Trover Clinic*, 280 NLRB 6, 16 (1986) (finding discrimination where the employer reprimands at issue were being used as "a foundation for future disciplinary action").

In *Lancaster Fairfield Cmty. Hosp.*, the NLRB analyzed two potential adverse employment actions, a "conference report" and a written warning. 311 NLRB 401 (1993). The conference report made clear that it was not disciplinary and noted that noncompliance could lead to a formal oral reminder under the first step of the employer's disciplinary process. *Id.* at 403. The NLRB found the report to be in essence a counseling that was insufficient adverse action to support a discrimination claim, finding it did not affect any term or condition of employment. *Id.* at 404. In contrast, the NLRB assumed that a written warning issued to that same employee threatening further disciplinary action if she engaged in similar conduct was sufficient adverse action, denying the discrimination claim only on the issue of the employer's motivation. *Id.* at 405.

MLRB case law does not shed much light on the dividing line between mere counseling and actionable adverse employment action. In *Maine Association of Police v. Town of Pittsfield*, the Board found a Letter of Counseling to constitute adverse employment action. No. 20-PPC-07, slip op. at 9 (December 31, 2020). However, it is worth noting that the letter in that case had been issued only after a police chief's initial issuance of a suspension and Letter of Reprimand was overturned through a grievance. A discrimination allegation in *Maine State Law Enforcement Association v. Maine Office of State Fire Marshal*, involved the issuance of a counseling memorandum. No. 23-PPC-07 (December 18, 2023). However, the Board in that case dismissed the charge based on insufficient evidence linking the action to protected activity, without addressing whether the memorandum in question was adverse employment action.

In *MSEA v. Maine Dept. of Marine Resources*, the Board found no discrimination violation where the actions at issue involved a verbal counseling and a written memorialization of the counseling. No. 94-41, slip op. at 22 (July 3, 1995). The employee in that case was informed at the outset of the meeting at issue that it was for the purpose of counseling and that no discipline would result. *Id.* at 4. The Board noted that the counseling did not fall within the collective bargaining

agreement's definition of discipline and was a corrective tool frequently used by the employer. *Id.* at 22. Additionally, the Board noted that the counseling had not led to the employee unlawfully missing any promotional opportunity. *Id.* Perhaps most influential to the Board's decision in that case though was the fact that the complainant had not included any discrimination allegation in its complaint. *Id.*

Despite some ambiguity in the case law, the Board finds the Letter of Instruction in this case to be sufficient adverse employment action. The letter contained a severe warning of discipline, essentially threatening the occupational therapist's job, and was clearly intended to establish a "foundation for future disciplinary action." *Trover Clinic*, 280 NLRB 6, 16 (1986). If the letter had been merely a letter of instruction or counseling, without the threat of discipline, this may well have not met the threshold for adverse employment action; however, that is not the case here.

Hostile Work Environment

The other basis for the Union's discrimination claim is what it characterizes as the School's creation of a "hostile work environment" with respect to the occupational therapist. There are several actions the Union credits for creating the alleged hostile work environment in this case. First, the October 16 and 23, 2023, meetings where the Assistant Director of Instructional Support and another administrator challenged the occupational therapist's recommendations. The Union also points out a September 28, 2023, comment made by the Assistant Director of Instructional Support in a conversation with the occupational therapist regarding student reactions to the removal of a yoga group with the occupational therapist that the therapist found to be rude. A more substantial claim regarding the working environment is the administrators' heightened scrutiny and intensive management of the occupational therapist's schedule. The Union also argues that the Letter of Instruction contributed to the hostile work environment.

In its brief, the Union cites to interpretations of adverse employment action made by federal courts, in the context of Title VII of the Civil Rights Act of 1984, the Maine Human Rights Act and the Maine Whistleblower Protection Act, [2] to support its contention that a hostile work environment is sufficient adverse employment action upon which to predicate a discrimination claim. These rulings are not binding on the Board, and in this case, it is not necessary for the Board to opine whether or to what extent a hostile work environment could be tantamount to the discrete adverse employment action the Board has traditionally required. Suffice it to say, other than the Letter of Instruction, the conduct discussed above does not sufficiently implicate any "term or condition of employment" such as to meet the threshold for adverse employment action under Board law. [3] Thus, the only actionable conduct that did occur in this case is the issuance of the Letter of Instruction, discussed separately above.

2. Employer Motivation

The Union cites to *Teamsters Local 48 v. Town of Jay*, for the proposition that an act will violate 26 M.R.S.A. § 964(1)(B) if simply one of the motivating factors for the act was an unlawful one. Nos. 79-11 and 79-19, slip op. at 3 (February 27, 1979). While this misstates the standard used by the Board for the last 42 years with its adoption of the *Wright Line* test, described above, it is

true that the third element of this test requires that anti-union animus only be a motivating factor for the employer's adverse employment action and not necessarily the sole or dominant reason. See, e.g., *St. Louis Cardinals, LLC & Joe Bell*, 369 NLRB No. 3 (Jan. 3, 2020) (Noting that an employer's admission to being motivated "a little bit" by protected activity was insufficient in itself to establish a discrimination violation, as the *Wright Line* test provides the employer the opportunity to demonstrate that it would have taken the same action regardless of the protected activity.)

As is often the case, there is no direct evidence that the School's action was motivated by the occupational therapist's protected activity. However, a majority of the Board finds sufficient circumstantial evidence that anti-union animus was a motivating factor in the School's issuance of the Letter of Instruction. The Assistant Director of Instructional Support's March 14, 2023, email statement to the occupational therapist, "[y]ou did not give me the courtesy of letting me know that you were asking union representation to attend the meeting which changed the dynamic of the meeting," communicated discomfort with and disapproval of the occupational therapist's involvement of the Union. In the context of this case, we find this statement to be circumstantial evidence of anti-union animus. [4] The majority of the Board finds the Letter of Instruction to be an extension of this anti-union animus, as it was largely motivated by and based upon input from the same administrator who made the comment, the Assistant Director of Instructional Support. As the School points out in its brief, at no point was the occupational therapist ever denied union representation at a meeting. And while this appears to be the case, the email still sheds light on the School's underlying attitude regarding the Union, regardless.

The timing of the letter provides additional evidence of unlawful motivation. The occupational therapist was clearly treated differently after the April 2023 grievance was filed than at any other time in her career. Prior to the filing of her grievance, the occupational therapist's performance reviews had all been extremely positive and the School had never indicated any problems with her managing her own schedule. It was not until after the grievance was filed that the School began closely managing the occupational therapist's schedule, providing a succession of what proved to be unworkable schedules, and then issuing the disciplinary warning letter. While evidence of timing alone is generally an insufficient basis for a discrimination claim, in the context of the entire record in this case, the evidence of timing is a compelling addition to the other indicia of anti-union motivation. [5]

Another indicator of unlawful motivation is found in the letter's convoluted, inconsistent messaging. The occupational therapist had been clear in her communications with the administrators that it was due to following the mandated schedules that she had missed student appointments. She had not missed any student appointments prior to following the School's mandated schedules. While the School challenged the cause of at least one missed appointment, it acknowledged in the letter that at least to some extent the mandated schedules were to blame for the missed appointments. Nonetheless, the School threatened discipline, up to and including termination, 1) if the occupational therapist did not follow the attached schedule (developed by administrators without input from the occupational therapist), and/or 2) if the occupational therapist missed any further student appointments. These directives were contradictory and seemingly impossible to comply with, which the School knew or should have known based on its

express understanding of the ongoing scheduling issues. The letter's statement that the occupational therapist could make a change to the schedule "if you believe that a change is necessary and can make that change while still providing necessary services to students within the schedule," is again contradictory and does not weaken or negate the letter's closing threat of discipline for failing to follow the provided schedule. [6] The threat of discipline here is also illogical given that there is no evidence the occupational therapist had not been following the School's directives when she was issued the warning letter. Based on the nature of this letter, one can reasonably make an inference that its justification is less-than-credible and thus further evidence of unlawful motivation.

The heart of the occupational therapist's grievance was that she could not perform her duties within a .8 FTE position. The School, through its heavy-handed approach in managing her schedule and in its eventual issuance of the Letter of Instruction, sought to challenge that assertion. This is further evidence of a causal link between the occupational therapist's exercise of protected activity and the School's adverse employment action.

3. Employer Justification

A majority of the Board having found a sufficient prima facie case for discrimination, the burden shifts to the School to demonstrate a legal basis for its issuance of the Letter of Instruction and that it would have happened regardless of the occupational therapist's protected activity. The School argues that it had an interest, dating back to at least October of 2022, in helping the occupational therapist schedule her work to fit within the .8 FTE position. It reads the occupational therapist's email of September 6, 2023, as a request for help managing her schedule, which the School claims it provided through the Assistant Director of Instructional Support's interventions. The School also justifies its mandated schedules by citing concern with the occupational therapist's potentially overserving students. It argues that once it became clear that managing the occupational therapist's schedule was not working, it decided to "get out of the schedule making business" and issue the Letter of Instruction. The School maintains the letter was not disciplinary, and that it was intended to communicate that the School would no longer be providing schedules, that the occupational therapist could fit her duties within a .8 FTE schedule and that no further student appointments should be missed.

The record supports the School's claim that it was motivated in part by a good faith interest in resolving the scheduling issues with the occupational therapist and avoiding further missed appointments. However, the School has not met its additional burden to prove by a preponderance of the evidence that it would have issued the Letter of Instruction to the occupational therapist even if she had not engaged in her protected conduct. The letter was heavy-handed, convoluted, contradictory and illogical, as discussed earlier in the section regarding the employer's motivation. The School's approach in the letter is inconsistent with a good faith effort to address scheduling and missed appointments, especially in the context of working with a twenty-year employee who had not previously been required to follow schedules that she did not prepare herself and who had never missed student sessions before following the mandated schedules. Under the circumstances,

the majority of the Board accordingly finds that the School engaged in unlawful discrimination in retaliation for the occupational therapist's protected activity in violation of 26 M.R.S.A § 964(1)(B).

4. Evidence of Pretext

Even if the School had sufficiently met its burden to establish that it had legitimate reasons for issuing the letter and that it would have issued it regardless of the occupational therapist's protected activity, the record contains sufficient additional evidence that the School's justifications are mere pretext, and that the real reason for its issuance of the Letter of Instruction was retaliation for the occupational therapist's protected activity. One of the School's ostensible reasons for issuing the Letter of Instruction was to give the occupational therapist a final schedule to follow. This justification is undermined because, as the School ultimately made clear in its Level 3 denial of the occupational therapist's grievance, the occupational therapist was already required to provide services for her assigned students regardless of her .8 FTE status. In other words, whether or not she worked within the schedule provided to her was irrelevant to her employment, provided she was carrying her assigned workload. To threaten discipline for any future failure to adhere to the mandated schedule makes little sense in this context.

The School had also cited concern about the occupational therapist's potential overserving of students as one of the reasons for the intensive managing of her schedule that led to the issuance of the Letter of Instruction. As the Union argues, this justification is undermined by the School's abandoning its effort to continue managing the occupational therapist's schedule with the letter. If potential overserving of students had been such a real and serious concern to the School, it is unclear how ceasing to manage the occupational therapist's schedule, while giving her discretion to adjust her schedule as she wished, addressed that concern.

Other evidence concerning the School's conduct towards the occupational therapist, discussed earlier in regard to the employer's motivation, also demonstrates that the Letter of Instruction was unreasonable. There is no evidence that the occupational therapist had not been following the School's directives when it issued the disciplinary warning in its letter. In addition, the letter did not make sense.

The Board's analysis of pretext does not necessarily turn on whether or not an employer's adverse action could be considered just or fair. See *Teamsters v. Town of Kennebunk and Lt. Michael LeBlanc*, No. 80-30, slip op. at 7 (July 3, 1980); *Teamsters v. Town of Kennebunk and MLRB*, CV-80-413, slip op. at 4 (Me. Sup. Ct., Kennebec Cty., October 18, 1985) ("[I]t is possible that a discharge could be 'unjust' (by being overly harsh) but still serve a valid business purpose."). However, where, as here, an employer's action is outside the range of reasonableness, it can raise legitimate questions about the employer's real motivation. Cf., *Town of Kennebunk and Lt. Michael LeBlanc*, No. 80-30, slip op. at 7 (Finding that an employer's action did not indicate an improper motive when it was "well within the range of reasonableness").

In *Rangeley Lakes School Region*, the Board noted that: "Although it is not our place, independently, to determine whether the [employer's] disciplinary measures are appropriate in the

abstract, suitably arrived at, or applied, we are required to determine whether alleged discriminatory measures are either so inappropriate to the related offense or, though appropriate, are so inappropriately arrived at that an inference of pretext for unlawful discrimination may reasonably be drawn.". No. 91-22, slip op. at 26. Here the School's letter was both inappropriate as to the alleged offense and inappropriately arrived at, such that an inference of pretext is persuasive. Thus, even if the School had been able to sufficiently support an affirmative defense regarding the legitimacy of its issuance of the letter, the Board's majority finds that the Union has put forward sufficient evidence that the School's justifications were pretextual, further supporting the Board majority's finding that the School has violated 26 M.R.S.A § 964(1)(B).

B. Interference, Restraint or Coercion

A public employer is prohibited under the Act from interfering with, restraining or coercing employees in the exercise of rights granted by the Act. 26 M.R.S.A. § 964(1)(A). An employer violates this provision when they have "engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Maine Association of Police v. Town of Pittsfield*, No. 20-PPC-07, slip op. at 6. This is an objective standard, and "does not depend upon the employer's motive or success." *Id.* The question can be framed as whether a reasonable employee would be deterred from participating in union activities or otherwise asserting that employee's rights under the Act based on the employer's actions. See *York County*, Nos. 18-10 & 19-02, slip op. at 34.

A claim of unlawful interference, restraint or coercion can be either derivative or independent. A derivative violation is based on conduct that violates another provision of the Act that also has the effect of interfering with, restraining or coercing the employee in the exercise of their rights. See *MSEA v. Maine Turnpike Authority*, No. 12-08, slip op. at 18 (February 12, 2013); *International Brotherhood of Teamsters Local No. 340 v. Aroostook County*, No. 03-09, slip op. at 19 (February 2, 2004). If the Board finds the alleged violation underlying a derivative claim to be without merit, the Board will dismiss the derivative claim as well. See *Duff v. Town of Houlton*, 97-20, slip op. at 24 (Oct. 19, 1999). An independent violation occurs when the conduct itself directly interferes with the exercise of rights granted under the Act. *MSEA v. Maine Turnpike Authority*, No. 12-08, slip op. at 18 (February 12, 2013).

The Union claims both a derivative and independent basis for its claim of unlawful interference, restraint or coercion. The success of the derivative claim is dependent on the success of the underlying discrimination claim analyzed above. A majority of the Board having found that the School engaged in discrimination, the majority also finds that the School has engaged in unlawful interference, restraint or coercion based on this violation of the Act.

As for the independent interference claim, the foundation of the Union's argument is the statement that the Assistant Director of Instructional Support made to the occupational therapist in her March 14, 2023, email: "[y]ou did not give me the courtesy of letting me know that you were asking union representation to attend the meeting which changed the dynamic of the meeting." This statement, the Union argues, was intended to shame the occupational therapist for exercising her union rights and to prevent her from asserting her rights in the future. The Board is prevented

from assessing the merits of this claim, however, because it involves conduct that occurred more than six months prior to the filing of the complaint. [7] So while the Board has considered this email statement as possible circumstantial evidence of anti-union animus in the context of the Union's discrimination claim, due to the necessarily strict application of the limitations period, this conduct may not form the basis for a stand-alone claim.

V. Conclusion

A majority of the Board finds that the School discriminated against the occupational therapist in retaliation for her protected activity when it issued its Letter of Instruction, in violation of 26 M.R.S.A. § 964(1)(B). A majority of the Board finds that this violation of the Act also constituted unlawful interference, restraint or coercion, in violation of 26 M.R.S.A. § 964(1)(A). The Board is unanimous in finding no independent violation of unlawful interference, restraint or coercion due to the alleged violation occurring outside the six-month limitations period and accordingly this claim is dismissed.

VI. Order

On the basis of the foregoing discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 M.R.S.A. § 968(5), it is ORDERED:

1. That the MSAD 51 Board of Directors, and its representatives and agents cease and desist in any like or related manner from discrimination or retaliation against employees for engaging in protected union activity, pursuant to 26 M.R.S.A. § 964(1)(B); and

2. That the MSAD 51 Board of Directors, and its representatives and agents, cease and desist in any like or related manner from interfering, restraining or coercing employees in the exercise of protected union activity, pursuant to 26 M.R.S.A § 964(1)(A); and

3. That the MSAD 51 Board of Directors shall rescind the October 24, 2023, Letter of Instruction referenced in this Decision and Order and shall remove it from the affected employee's personnel file.

Dated this day, December 2, 2024.

MAINE LABOR RELATIONS BOARD

/s/
Sheila Mayberry, Esq.
Board Chair

/s/
Roberta de Araujo, Esq.
Employee Representative

The parties are advised of their right pursuant to 26 MR.S.A. § 968(5) to seek a review of this decision and order by the Superior Court. To initiate such a review, an appealing party must file a complaint with the Superior Court within fifteen (15) days of the date of issuance of this decision and order, and otherwise comply with the requirements of Rule 80C of the Maine Rules of Civil Procedure.

---

1. Per the Union, as of the filing of post-hearing briefs the arbitration decision was still pending.

2. The Union cites to *Noviello v. City of Boston*, 398 F. 3d 76, 90 (1st Cir. 2005) and *Ardito v. Solvay, S.A.*, No. 1:21- cv-00142-JAW, 2022 U.S. Dist. LEXIS 105622 at *69-70 (D.Me. June 14, 2022).

3. 26 M.R.S.A. § 964(1)(B) (Public employers, their representatives and their agents are prohibited from "[e]ncouraging or discouraging membership in any employee organization by discrimination in regard to hire or tenure of employment or any term or condition of employment.").

4. See e.g., *Teamsters Local 340 v. Baker Bus*, No. 79-70, slip op. at 7 (March 3, 1980) (Finding circumstantial evidence of anti-union animus in an employer's statement to a union representative that "you are the cause of all my trouble.").

5. See *Teamsters Union Local #340 v. Rangeley Lakes School Region*, No. 91-22, slip op. at 20 (Jan. 29, 1992).

6. Similarly, the subsequent emails from the administrators indicating that the occupational therapist was free to make changes to her schedule do not effectively undermine the formal warning of discipline in the letter regarding the consequences should the occupational therapist fail to follow the provided schedule.

7. 26 M.R.S.A. § 968(5)(B) ("…a hearing may not be held based upon any alleged prohibited practice occurring more than 6 months prior to the filing of the complaint with the executive director."). The Board has held that the limitations period in the Act, like other statutes of limitations in Maine, must be construed strictly. See *Duren v. MEA*, No. 09-06, slip op. at 7-8

(June 25, 2009).

Employer Representative Michael Miles filed a separate opinion, dissenting in part.

OPINION

While I agree with my fellow Board members that the Union has put forward sufficient evidence to establish that the School employee in this case engaged in protected activity, that her employer was aware of this activity and that she received adverse employment action, I must respectfully dissent from the view expressed in the Board's decision that the School's action was motivated by anti-union animus.

Based on my review of the record, I do not find sufficient evidence of discriminatory motivation in the School's issuing of the Letter of Instruction. It is clear that this letter encapsulates a struggle between supervisors and a subordinate. However, I see this conflict as having to do with the work itself and not involving any underlying anti-union animus. The occupational therapist's supervisors took steps to help her with scheduling issues, which she herself had identified. This assistance was met with opposition from the occupational therapist, as evidenced by the numerous emails and meetings that ensued whenever a new schedule was proposed. The administrators were clearly frustrated that the process was not working, and so they issued the Letter of Instruction to "get out of the schedule making business." Even if the letter may have been ill-conceived, and heavy-handed, it is not sufficient evidence of anti-union animus given the record in this case.

I similarly don't see the Assistant Director of Instructional Support's March 2023 email statement that "[y]ou did not give me the courtesy of letting me know that you were asking union representation to attend that meeting which changed the dynamic of the meeting" as sufficient evidence of anti-union animus. The administrator was clearly expressing some frustration with Union involvement in the meeting, but the emphasis here is on not receiving prior notice, not on the Union's involvement itself. At no time did any School representative deny the occupational therapist Union representation, and in fact, in another email exchange with the Director of Finance, Human Resources, and Operations on September 11, 2023, the occupational therapist was expressly welcomed to bring Union representation with her to a meeting. In this context, I find the March 2023 email statement relatively benign.

Having not found any discrimination violation, I likewise do not find any derivative interference, restraint or coercion violation. As for the independent interference claim, I am in agreement with the rest of the Board that this claim is foreclosed by the statutory six-month limitations period and must be dismissed.

/s/
Michael Miles
Employer Representative