

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL**

Pamela Mercer,)	
)	
Charging Party)	
)	
and)	Case No. L-CB-13-008
)	
American Federation of State, County and Municipal Employees, Council 31,)	
)	
Respondent)	

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL**

On May 17, 2013, Executive Director Melissa Mlynski dismissed a charge filed by Pamela Mercer (Charging Party) on July 31, 2012, which alleged that the American Federation of State, County and Municipal Employees, Council 31 (Respondent or AFSCME), engaged in unfair labor practices within the meaning of Section 10(b) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), as amended.¹ The charge stated that AFSCME failed to adequately represent Correctional Sergeant Mercer in her grievance against joint employers County of Cook and Sheriff of Cook County.

The Executive Director dismissed the charge on the basis that Mercer failed to present evidence which raised any issues of fact that AFSCME intentionally took action against Mercer because of her status or personal animosity towards her.

¹ In relevant part, Sections 10(b) of the Act provides as follows:

It shall be an unfair labor practice for a labor organization or its agents:

- (1) to restrain or coerce public employees in the exercise of the rights guaranteed in this Act, provided,

- iii. that a labor organization or its agents shall commit an unfair labor practice under this paragraph in duty of fair representation cases only by intentional misconduct in representing employees under this Act.

On May 29, 2013, the Charging Party filed an appeal of the Executive Director's dismissal pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240, arguing that the Executive Director failed to adequately investigate the charge and thereby failed to give the Charging Party the opportunity to present the "extensive evidence" of AFSCME's intentional and retaliatory conduct. Specifically, the Charging Party asserts that the Executive Director wrongly "presuppose[d] that the Charging Party [had] submitted the full meter of all the evidence" she possessed concerning the allegations in the charge.

For the reasons set forth below, we reject the Charging Party's exceptions and affirm the Executive Director's dismissal.

1. Material Facts

On July 1, 2012, Mercer provided four hours of lunch relief for correctional officers at the county jail. After working those hours, Mercer applied for premium pay to which she was entitled under the collective bargaining agreement entered between AFSCME and the County. Department of Corrections Acting Director Edward Bryne denied Mercer's request. On July 3, 2012, Mercer grieved this denial. The County appointed Bryne to hear the grievance at the first step. Mercer objected to Bryne's appointment, arguing that he could not be impartial since he was the very individual she had accused of violating the contract. Mercer notified AFSCME of Bryne's appointment and refused to appear at the hearing. Bryne denied Mercer's grievance by default because she did not appear.

On July 19, 2012, Mercer contacted AFSCME Representative Sergeant Vernon Brandon and asked him to arrange to reinstate the grievance so that it could be heard by a neutral officer. AFSCME Staff representative John DiNicola contacted Mercer and informed her that Brandon

would assist in the appeal and would advance her grievance. Mercer contends that Brandon never subsequently contacted her. AFSCME contends that Brandon offered Mercer assistance, but that Mercer rejected his offer.²

On July 29, 2012, Mercer filed her charge with the Board. Mercer named attorney Michael Greco as her representative on the charge form. The Board served Greco with a copy of the charge shortly after Mercer filed it. On December 19, 2012, a Board agent sent a letter to Greco asking him to submit his notice of appearance and to respond to the Board agent's investigation of the charge on the Charging Party's behalf. Greco failed to file a notice of appearance and failed to respond to the Board agent's request for information. On May 29, 2013, attorney Greco filed an appeal of the dismissal.

2. Discussion and Analysis

We find that the Executive Director adequately investigated the charge because the Board agent contacted the Charging Party's named representative for additional information to support the charge and allowed him sufficient time to respond.

The Board's rules state that the "Board or its agent shall investigate the charge." 80 Ill. Admin. Code 1220.40(a)(1). An investigator has the responsibility to conduct an objective and thorough investigation and to memorialize all findings in a detailed final investigative report which includes a "statement of both parties' positions, *if possible*, as well as an analysis of the investigator's findings." Am. Fed'n of State, Cnty. and Mun. Empl. Council 31 (Hanna), 7 PERI ¶ 3002 (IL LLRB 1990) (emphasis added). Yet, the Rules do not place any minimum requirements on the scope of the investigation. Rather, the Executive Director, or her agent, is required only to conduct sufficient investigation to determine whether the charge states an issue

² The Executive Director properly construed all facts in a light most favorable to the Charging Party.

of law or fact requiring the issuance of a Complaint. Ill. Fed'n of State Office Educators, Local 3236, IFT/AFT, 22 PERI ¶ 124 (IL ELRB 2006) (interpreting similar rules of the Illinois Educational Labor Relations Board); see also Comm. Cons. School Dist. No. 59 (Turcki), 1 PERI ¶ 1158 (IL ELRB 1985) (same).

Most importantly, Section 1220.40(a)(1) of the Board's Rules provides that "the Charging Party shall submit to the Board or its agent all evidence relevant to or in support of the charge." 80 Ill. Admin. Code 1220.40(a)(1). Thus, "[i]f the charging party does not comply with the agent's requests for information and documents, the agent may recommend dismissal of the charge." 80 Ill. Admin. Code 1220.40(a)(1); See also SEIU Local 880 (Kirk), 12 PERI ¶ 2006 (IL SLRB 1995), aff'd by unpub. order, 13 PERI ¶ 4008 (Ill. App. Ct., 4th Dist., 1996), and State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Rehabilitative Servs.), 12 PERI ¶ 2005 (IL SLRB 1995), aff'd by unpub. order, 13 PERI ¶ 4008 (Ill. App. Ct., 4th Dist., 1996). For this reason, the Board does not consider evidence or allegations on appeal which the charging party could have raised — but did not raise — during the initial investigation. Am. Fed'n of State, Cnty. and Mun. Empl., Council 31, 18 PERI ¶ 2036 (IL LRB-SP 2002) (Noting this rule, but remanding where Board agent made no contact with the pro se charging party at all).

In light of these rules, the Board has identified particular circumstances which indicate that the Executive Director conducted an inadequate investigation. For example, the Board has found investigations inadequate where the Executive Director failed to address the primary basis of the charge,³ where the Board agent stated a specified deadline for the Charging Party's submission of information yet closed the file prior to that stated date,⁴ where the Executive

³ Public Serv. Empl. Union Local 46 (Harlan), 7 PERI ¶ 3018 (IL LLRB 1991).

⁴ Cnty. of Rock Island and Sheriff of Rock Island Cnty., 12 PERI ¶ 2033 (IL SLRB 1996).

Director failed to consider evidence which the Charging Party presented in support of its charge,⁵ where the dismissal itself raised questions that showed there were issues of fact for hearing,⁶ and where the case file contained no evidence documenting any conversation or contact between the Board agent and the Charging Party.⁷

Here, the Executive Director committed none of these cited errors and conducted an adequate investigation of the charge. The Board agent properly requested additional information from the Charging Party's attorney and granted him ample time to produce it. The Board agent first contacted the Charging Party's attorney, Greco, by mail on December 19, 2012, and asked him for a response which would shed light on the charges. During the subsequent five-month period, Greco neglected to file a notice of appearance or any supporting evidence in response to that request. On appeal, Greco asserts that the Board failed to grant the Charging Party an opportunity to provide information relevant to the charge, but does not deny that he was the Charging Party's attorney throughout the investigation process or that he received the above-referenced correspondence from the Board agent during that time. Under these circumstances, we will not grant Greco a second opportunity to provide the Board with the Charging Party's evidence when the Board's investigator solicited it from him earlier, to no avail, and when the Charging Party has articulated no other purported flaws in the investigative process.

Thus, we affirm the Executive Director's dismissal and adopt her rationale.

BY THE LOCAL PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ Robert M. Gierut
Robert M. Gierut, Chairman

⁵ State of Ill. Dep't of Cent. Mgmt. Servs. (Dep't of Public Aid), 13 PERI ¶ 2028 (IL SLRB 1997).

⁶ City of Harvey, 15 PERI ¶ 2010 (IL SLRB 1999).

⁷ Am. Fed'n of State, Cnty. and Mun. Empl., Council 31, 18 PERI ¶ 2036 (IL LRB-SP 2002).

/s/ Charles E. Anderson
Charles E. Anderson, Member

/s/ Richard A. Lewis
Richard A. Lewis, Member

Decision made at the State Panel's public meeting in Chicago, Illinois on August 6, 2013, written decision issued in Chicago, Illinois on August 28, 2013.

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CORRECTED DISMISSAL¹

On July 31, 2012, Charging Party, Pamela Mercer, filed a charge with the Local Panel of the Illinois Labor Relations Board (Board) in the above-captioned case, alleging that Respondent, American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Union), violated Section 10(b) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010), *as amended*. After an investigation conducted in accordance with Section 11 of the Act, I determined that the charge fails to raise an issue of law or fact sufficient to warrant a hearing and issue this dismissal for the reasons set forth below.

I. INVESTIGATORY FACTS AND POSITION OF THE PARTIES

At all times material, Mercer was a public employee within the meaning of Section 3(n) of the Act, employed by the County of Cook, Sheriff of Cook County (Employer), in the rank or job classification of Correctional Sergeant. Respondent is a labor organization within the meaning of Section 3(i) of the Act, and the exclusive representative of a bargaining unit (Unit) comprised of certain of the Employer's employees, including those in the rank or job

¹ The original Dismissal, which was issued on May 13, 2013, erroneously listed March 13, 2013 as the issue date.

classification of Correctional Sergeant. At all times material, Mercer was a member of the Unit. The Employer is a public employer within the meaning of Section 3(o) of the Act and subject to the jurisdiction of the Local Panel of the Board pursuant to Sections 5(b) and 20(b) thereof. The Employer and AFSCME are parties to a collective bargaining agreement (CBA) for the Unit, which provides for a grievance procedure culminating in arbitration.

Since at least 2007, Mercer has filed numerous complaints, grievances, charges, and lawsuits in federal court, against the Employer, its supervisory personnel, and other employees. These actions concern various allegations, including racial discrimination, sexual harassment, improper denial of overtime, corruption, and unlawful directives or orders. In the first eight months of 2011, she filed at least fifteen such complaints, grievances, or charges.

On July 1, 2012, Lieutenant Jerry Camel, under orders from Acting Director Edward Byrne, ordered Mercer to provide four hours of lunch relief for Correctional Officers at various secure positions within the county jail. Under the CBA, a Correctional Sergeant who provides lunch relief for Correctional Officers is entitled to premium pay for the time spent providing lunch relief. At the conclusion of her lunch relief duty, Mercer applied for premium pay as allowed under the CBA. Byrne denied her request. On or about July 3, 2012, Mercer filed a grievance alleging that Byrne violated the CBA by denying her premium pay for the lunch relief duty.

Even though the grievance was based on the actions of Byrne, the grievance was set for hearing before Byrne on July 18, 2012. Mercer objected to this, notified the Union, and refused to appear at the hearing contending that it was impossible for Byrne to be impartial. When Mercer failed to appear at the hearing, Byrne denied the grievance by default. On July 19, 2012, Mercer contacted AFSCME Representative, Sergeant Vernon Brandon, to arrange to reinstate

the grievance and place it before a neutral officer. Mercer complains that she has not heard anything from the Union since receiving a letter from AFSCME Staff Representative, John DiNicola, advising Mercer that Sergeant Brandon will assist in the appeal and advance her grievance. Mercer contends that, in general, the Union does not adequately pursue her grievances. AFSCME denies it violated the Act, and asserts that Brandon offered his assistance to resolve the matter, but Mercer rejected the offer.

II. DISCUSSION AND ANALYSIS

Section 10(b)(1) of the Act provides “that a labor organization or its agents shall commit an unfair labor practice . . . in duty of fair representation cases only by intentional misconduct in representing employees under this Act.” In duty of fair representation cases, a two-part standard is utilized to determine whether a union has committed intentional misconduct within the meaning of Section 10(b)(1) of the Act: (1) that the union's conduct is intentional and directed at the employee; and (2) that the union's intentional action occurred because of and in retaliation for some past activity by the employee or because of the employee's status (such as his or her race, gender, or national origin) or animosity between the employee and the union's representatives (such as that based upon personal conflict or the charging party's dissident union practices).

To prove intentional misconduct, a charging party must first show that the union's actions were intentional and directed at her. Murry and AFSCME, Local 1111, 14 PERI ¶3009 (IL LLRB 1998), aff'd sub nom. Murry v. AFSCME, Local 1111, 305 Ill. App. 3d 627, (1st Dist. 1999). Second, she must show that action was retaliatory and occurred because of some past activity or animosity between the charging party and the union. Id. To establish the second element, a charging party must show: (1) she engaged in activities likely to cause the animosity of the union or that the employee's mere status, such as race, gender, religion or national origin

may have caused animosity; (2) the union was aware of her activities and/or status; (3) she suffered an adverse representation action; and (4) the union had a discriminatory motive. Metro. Alliance of Police v. Ill. Labor Relations Bd., Local Panel, 345 Ill. App. 3d 579, 588-89 (1st Dist. 2003) (citing Robertson and AFSCME, Council 31, 18 PERI ¶ 2014 (IL SLRB 2002)). There must be a causal connection between the employee's activities and the union's discriminatory act. Id. at 589.

In this case, even if I assume that Sergeant Brandon never contacted Mercer regarding her grievance, there is no evidence that AFSCME intentionally took any action either designed to retaliate against Mercer or due to her status. Mercer made no showing that she was treated differently than other similarly situated AFSCME members. Other than uncorroborated assertions that AFSCME failed to do enough on her behalf, Mercer tendered nothing in support of her claim. Under Section 6(d) of the Act, the exclusive representative has a wide range of discretion in handling such matters, and as the Board has previously held, a union's failure to take all the steps it might have taken to achieve the results desired by a particular employee does not violate Section 10(b)(1), unless as noted above, the union's conduct appears to have been motivated by vindictiveness, discrimination, or enmity. Outerbridge and Chicago Fire Fighters Union, Local 2, 4 PERI ¶3024 (IL LLRB 1988); Parmer and Service Employees International Union, Local 1, 3 PERI ¶3008 (IL LLRB 1987). As there is no evidence indicating that the Union was so motivated, Charging Party has failed to present grounds upon which to issue a complaint for hearing.

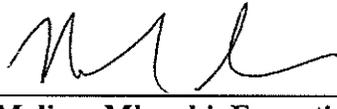
III. ORDER

Accordingly, the instant charge is hereby dismissed. Charging Party may appeal this corrected dismissal to the Board at any time within 10 calendar days of service hereof. Any such

appeal must be in writing, contain the case caption and number, and be addressed to the Board's General Counsel, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103. Appeals will not be accepted in the Board's Springfield office. In addition, any such appeal must contain detailed reasons in support thereof, and the party filing the appeal must provide a copy of its appeal to all other persons or organizations involved in this case at the same time the appeal is served on the Board. The appeal sent to the Board must contain a statement listing the other parties to the case and verifying that a copy of the appeal has been provided to each of them. An appeal filed without such a statement and verification will not be considered. If no appeal is received within the time specified herein, this corrected dismissal will become final.

Issued in Springfield, Illinois, this 17th day of May, 2013.

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Melissa Mlynski, Executive Director