

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

Richard Sanabria,)	
)	
Charging Party)	
)	
and)	Case No. L-CB-13-029
)	
Fraternal Order of Police, Lodge 7,)	
)	
Respondent)	

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

On March 21, 2013, Executive Director Melissa Mlynski dismissed charges filed in the above-captioned case by Charging Party, Richard Sanabria, against Respondent, Fraternal Order of Police, Lodge 7, alleging Respondent had failed its duty of fair representation and thus violated Section 10(b)(1) of the Illinois Public Labor Relations Act, 5 ILCS 315/10(b)(1) (2010), in the manner in which it had handled grievances relating to the failure of Sanabria’s employer to place him on injured-on-duty status. Charging Party timely filed an appeal pursuant to Section 1200.135 of the Board’s Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240. Respondent did not file a response.

Upon a review of the record and the appeal, we affirm the dismissal of the charges. As the Executive Director notes, violation of the duty of fair representation requires intentional misconduct. That is a requirement explicitly stated in Section 10(b)(1): “A labor organization or its agents shall commit an unfair labor practice . . . in duty of fair representation cases only by

intentional misconduct.” See Murry v. AFSCME, Local 1111, 305 Ill. App. 3d 627, 632-33 (1st Dist. 1999).¹

Because of the intentional misconduct standard, demonstration of a breach of the duty to provide fair representation and a violation of Section 10(b)(1) requires a charging party to “prove by a preponderance of the evidence that: (1) the union’s conduct was intentional, invidious and directed at him; and (2) 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 race, gender, or national origin), or animosity between the employee and the union’s representatives (such as that based upon personal conflict or the employee’s dissident union practices).” Metro. Alliance of Police v. Ill. Labor Relations Bd., Local Panel, 345 Ill. App. 3d 579, 588 (1st Dist. 2003). To prove unlawful discrimination, which is necessary to establish the second element of a Section 10(b)(1) violation, a charging party must “demonstrate[e] by a preponderance of the evidence that: (1) the employee has engaged in activities tending to engender the animosity of union agents 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 the employee’s activities and/or status; (3) there was an adverse representation action taken by the union; and (4) the union took an adverse action against the employee for discriminatory reasons, *i.e.*, because of animus toward the employee’s activities or status.” Id. at 588-89.

The Executive Director found that Sanabria failed to raise an issue for hearing under the intentional misconduct standard, and Sanabria’s appeal fails to demonstrate any error in the

¹ This standard originated in Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981), a case cited by the Executive Director. Hoffman is no longer applied by the court which originated that standard, Ooley v. Schwitzer Div., Household Mfg. Inc., 961 F.2d 1293, 1302 (7th Cir. 1992), and our need to apply the intentional misconduct standard arises directly from Section 10(b)(1), not through application of federal precedent in Hoffman.

Executive Director's application of that standard. Sanabria primarily focuses on the perceived lack of merit for that standard, arguing that it is stricter than the standards applied in other states for duty of fair representation allegations, thus causing police officers represented by unions in Illinois to be treated differently than police officers in other states. Whether or not there is any truth to these perceptions, we must apply the Act as it is written, not as it might have been written, Am. Fed'n of State, Cnty. & Mun. Empl., Council 31 and Ill. State Bd. of Elections, No. S-RC-11-122 at 7, 28 PERI ¶70 (IL LRB-SP 2011),² certification subsequently revoked, No. S-RC-11-122, ___ PERI ¶___ (IL LRB-SP May 16, 2013),³ and thus we must affirm the dismissal of the charges.

BY THE LOCAL PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

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

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

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

Decision made at the Local Panel's public meeting in Chicago, Illinois on July 9, 2013; written decision issued in Chicago, Illinois on July 19, 2013.

² Available at <http://www.state.il.us/ilrb/subsections/pdfs/BoardDecisions/S-RC-11-122.pdf>

³ Available at <http://www.state.il.us/ilrb/subsections/pdfs/boarddecisions/S-RC-11-122-02.pdf>

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DISMISSAL

On January 22, 2013, Richard Sanabria (Charging Party) filed a charge in Case No. L-CB-13-029 with the Local Panel of the Illinois Labor Relations Board (Board), in which he alleged that the Fraternal Order of Police, Lodge 7 (Respondent) engaged in unfair labor practices within the meaning of Section 10(b) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), *as amended* (Act). 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 following reasons.

I. INVESTIGATORY FACTS AND POSITION OF THE CHARGING PARTY

The City of Chicago (Employer or City) employed the Charging Party as a police officer. As such he was included in a bargaining unit represented by the Respondent. The Employer and Respondent are parties to a collective bargaining agreement (Agreement) setting out terms and conditions of employment for employees in the Unit, including the Charging Party.

In the charge, Williams asserts that the Respondent violated the Act by failing to advance to arbitration a grievance concerning a dispute over his payroll status. The Charging Party suffered a stroke in November 2011, apparently while on duty. His physician termed the stroke as “work related.” The Charging Party requested the City place him on duty injury status, and he

asserts that the Employer denied the request in February 2012. Thereafter, he contacted the Respondent to request that it file and process a grievance concerning the City's decision.

The Charging Party details a number of negative interactions that he experienced in contacts with the Respondent's representatives. His initial contacts concerned an attempt to clarify the information on the grievance form, as it gave the incorrect date of the injury. The Charging Party clearly found these communications to be rude and unprofessional.

In April 2012, the Charging Party received correspondence from the Respondent, indicating that the grievance committee voted to recommend that he get a statement from his physician concerning the injury, affirming that it was work-related. The Charging Party obtained a statement that he viewed as responsive to the recommendation, and forwarded it to the Respondent. Sanabria indicated that he called Respondent's offices on numerous occasions thereafter, but failed to receive further information or communication regarding the status of his grievance.

In the position statement filed in support of the charge, Sanabria indicates that in July 2012, he requested the opportunity to address the grievance committee concerning this issue. He indicated that an administrative assistant, Pat Mushaki, assured him that he would receive advance written notice of the time, date and place of the committee's meeting. Clearly, the Charging Party believed that he would receive the opportunity to address the committee in person.

On September 12, 2012, the Charging Party sent a letter to William Dougherty, 1st vice-president of the Respondent. Dougherty replied by letter dated September 19. Sanabria's correspondence outlines his dissatisfaction with the progress of the case. Dougherty's response takes issue with many of the Charging Party's assertions. It also advised the Charging Party that the matter was going to be reviewed by the grievance committee on September 20, 2012.

Charging Party notes that the correspondence was postmarked September 20, 2012. He contends that the delay was intentional, designed to ensure that he could not address the committee in advance of their reconsideration of the grievance.

By letter dated October 25, 2012, Dougherty advised the Charging Party that the grievance committee had voted to withdraw the grievance. The letter indicated that Sanabria could elect to address the issue at a Board of Directors' meeting. He addressed the Board of Directors on November 6, 2012, and apparently, received direction to solicit a "stronger" letter from his physician. Again, the Charging Party obtained a communication from his physician, and again, made repeated calls to Respondent's offices concerning the matter. He then, on January 7, 2013, composed a letter to Respondent's president, Michael Shields. Counsel for Respondent replied by letter dated January 10, 2013, requesting, for a third time, confirmation from his physician that job events or stressors caused the stroke. Charging Party forwarded this correspondence to his physician, and shortly thereafter, filed the instant charge.

By letter dated January 23, 2013, the Board agent assigned to the case requested the Charging Party file additional information in support of the charge. This letter requested evidence in support of an inference of intentional misconduct within the meaning of Section 10(b)(1) of the Act. The correspondence requested evidence that the person(s) processing his grievance had some sort of bias or personal issue with the Charging Party, and any evidence that other employees with the same issue received different treatment from the Respondent's agents.

The Charging Party responded by letter dated January 30, 2013. This correspondence reiterated some of the Charging Party's experiences with Respondent's agents, and supplied additional anecdotal evidence in this regard. Sanabria specifically claims that Dougherty's transmission of the letter on September 20, the date the committee was to consider his case, as a *per se* example of intentional misconduct. He characterizes Dougherty's treatment of him as

“contemptuous.” Finally, he notes the information provided by his physician, and asserts that this is sufficient to meet the Respondent’s requirements for medical information.

II. DISCUSSION AND ANALYSIS

In duty of fair representation cases, a two part standard is used to determine whether a union has committed intentional misconduct within the meaning of Section 10(b)(1) of the Act. Under that test, a charging party must establish that the union’s conduct was intentional and directed at charging party, and secondly, that the union’s intentional action occurred because of and in retaliation for charging party’s past actions, or because of charging party’s status (such as his or her race, gender, or national origin), or because of animosity between charging party and the union’s representatives (such as that based on personal conflict or charging party’s dissident union support). The Board’s use of this standard, based on Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981), was affirmed by the Illinois Appellate Court in Murry v. American Federation of State, County and Municipal Employees, Local 1111, 305 Ill. App. 3d 627, 712 N.E.2d 874, 15 PERI ¶4009 (1st Dist. 1999), aff’g American Federation of State, County and Municipal Employees, Local 1111 (Murry), 14 PERI ¶3009 (IL LLRB 1998). See also, American Federation of State, County and Municipal Employees, Local 2912 (McGloin), 17 PERI ¶3001 (IL LRB LP 2000); Amalgamated Transit Union, Local 308 (McLaurin), 16 PERI ¶3015 (IL LLRB 2000).

In the instant matter, the Charging Party relies heavily upon the substance and tone of the Respondent’s communications with him as support for this claim. However, there is no evidence or assertion that Charging Party had any issue or dispute with any agent of the Respondent that predated the instant grievance. Further, while the Charging Party asserts that he has received different treatment from the Respondent than other employees, he offers no details concerning the other employees. There is no evidence that Respondent has processed other grievances

similar to the one at issue in this case, let alone that it has processed those differently from the Charging Party's case.

The most significant circumstance in support of the Charging Party's claim concerns the September 2012 grievance committee meeting. Charging Party asserts that he had received assurances that he would be allowed to address the grievance committee in advance of the reconsideration of the grievance; he also claims that the letter advising him of the committee's schedule was postmarked the day of the meeting. Charging Party claims that this is *per se* intentional misconduct. Respondent has certainly tested the Board's standard if all of the facts are as Charging Party alleged. However, the Board's caselaw requires some showing of an improper motive in order to raise an issue for hearing, and such evidence is absent in this case.

I note that Respondent's procedures allowed for Charging Party to thereafter raise the issue before the Board of Directors. I also note that Respondent may yet be considering further action on the grievance, as it has continued to communicate with Charging Party even after the grievance committee apparently decided to withdraw the matter. It is, therefore, not clear whether Respondent has made a final decision concerning the matter.

In the end, the Charging Party's evidence is insufficient to raise an issue for hearing. While the Respondent may have given Charging Party reason to be frustrated, it remains the Respondent's decision to determine the viability of the underlying grievance. Charging Party may believe that the grievance is clearly meritorious, and that he is entitled to arbitration of the case. However, the Board's review of fair representation cases is concerned with evidence of unlawful motive in the disposition of the grievance, not an assessment of the merits by either of the parties involved.

III. ORDER

Accordingly, the instant charge is hereby dismissed. The Charging Party may appeal this dismissal to the Board any time within 10 days of service hereof. Such appeal must be in writing, contain the case caption and number, and must be addressed to the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois, 60601-3103. The appeal must contain detailed reasons in support thereof, and the Charging Party must provide it to all other persons or organizations involved in this case at the same time it 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 the appeal has been provided to them. The appeal will not be considered without this statement. If no appeal is received within the time specified, this dismissal will be final.

Issued in Springfield, Illinois, this 21st day of March, 2013.

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Melissa Mlynski, Executive Director