

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

Joseph S. McGreal,)	
)	
Charging Party)	
)	
and)	Case No. S-CB-13-003
)	
Metropolitan Alliance of Police,)	
Chapter #159,)	
)	
Respondent)	

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

On April 30, 2013, Executive Director Melissa Mlynski dismissed an unfair labor practice charge filed by Charging Party, Joseph S. McGreal, against Respondent, Metropolitan Alliance of Police, Chapter #159 (MAP), alleging Respondent violated Section 10(b)(1) of the Illinois Public Labor Relations Act, 5 ILCS 315(b)(1) (2010). Charging Party timely filed an appeal of the dismissal pursuant to Section 1200.135 of the Board’s Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240 (Board’s Rules). MAP did not file a response. After a review of Charging Party’s appeal and the record, we affirm the Executive Director’s dismissal.

Factual background

The essential facts concern the means used by McGreal’s employer, the Village of Orland Park, and MAP to resolve a number of grievances relating to McGreal’s termination from the Village of Orland Park Police Department. McGreal was a police officer in that department, and was also an active and visible advocate for MAP, the exclusive representative of all of the

Village's peace officers below the rank of sergeant. To resolve the grievances, the Village and MAP consolidated them and obtained a list of arbitrators from the Federal Mediation and Conciliation Service. They then took turns striking names from the list, and ultimately agreed upon an arbitrator.

The arbitrator presided over 16 days of arbitration over a 15-month period stretching from January 2011 through April 2012, but very early on gave an indication to McGreal and MAP's attorney, Steve Calcaterra, that he was not favorably inclined toward McGreal's position. In light of that indication, in April 2011 MAP asked the arbitrator to recuse himself, but the arbitrator declined. Subsequently, nine months into the arbitration proceedings, McGreal discovered that the arbitrator selected was not a member of the National Academy of Arbitrators (NAA). For that reason, his selection was inconsistent with Section 5.3(a) of the Respondents' collective bargaining agreement, which provides:

The parties shall attempt to agree upon an arbitrator within five (5) business days after receipt of the notice of referral. In the event the parties are unable to agree upon an arbitrator within five (5) day period, the parties shall jointly request the Federal Mediation and Conciliation Service to submit a panel of five (5) arbitrators *who shall be members of the National Academy of Arbitrators* residing in the Midwest region. Each party retains the right to reject one panel in its entirety and request that a new panel be submitted. The party requesting arbitration shall strike the first name; the parties shall then strike alternatively until only one person remains. (emphasis supplied).

On January 10, 2012, McGreal attempted to file a grievance alleging the arbitrator was contractually ineligible to serve as an arbitrator of the prior grievances. The Village denied the grievance, reasoning that McGreal was no longer an employee with the right to file a grievance. In fact, on February 1, 2012, MAP advised the Police Commander and the Village Manager to take no action on the grievance since McGreal was no longer a member of MAP and no longer afforded the protections of the collective bargaining agreement. In April 2012, near the final

days of the arbitration hearings and after having failed to convince MAP to do so, McGreal filed his own motion to stay the arbitration proceedings, a motion opposed by both the Village and MAP, and a motion denied by the arbitrator. In November 2012, the arbitrator found the Village had terminated McGreal for just cause, found the Village had not retaliated against McGreal due to his union and protected activity, and denied the grievances.

In addition to these events, half-way through the arbitration proceedings, in November 2011, McGreal filed charges with the Attorney Registration and Disciplinary Commission (ARDC) alleging that a different attorney for MAP and an attorney for the Village had attempted to suborn perjury. This concerned a traffic accident involving one of McGreal's cars while he was off-duty, the witness's cell phone communication with McGreal that evening, and whether McGreal had admitted to the witness that he had been the driver of the car that evening.

McGreal's unfair labor practice charge against MAP, filed July 2, 2012 and amended July 24, 2012, alleged a violation of Section 10(b)(1) of the Act¹ in that: 1) on April 9, 2012 MAP refused to prosecute two grievances for McGreal in retaliation for his filing complaints with the ARDC that attorneys for both MAP and the Village attempted to suborn perjury; 2) MAP failed to return four of his calls made after April 9; 3) MAP refused to allow him access to the arbitration transcripts causing him to spend thousands of dollars to obtain them (the Executive Director found he was given copies of the initial transcripts, and was able to review copies of others in MAP's attorney's office but did not do so for the final three days of hearings);

¹ (b) 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, (i) that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein or the determination of fair share payments and (ii) 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[.]

and 4) MAP eliminated his involvement in preparing post-hearing briefs in the arbitration. As relief, he wanted the Board to: 1) determine the arbitrator's authority; 2) determine whether the CBA's arbitration clause was enforceable; 3) declare the arbitration award null and void; 4) require MAP to post a copy of the Board's decision; 5) require MAP to pay costs and attorney fees; 6) order other relief deemed just and reasonable; and 7) order that McGreal be reinstated with back pay, seniority and benefits to make him whole.

Applicable law

With respect to McGreal's charges against MAP, Section 10(b)(1) provides: "A labor organization or its agents shall commit an unfair labor practice . . . in duty of fair representation cases only by intentional misconduct." 5 ILCS 315/10(b)(1) (2010). 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, 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.

Executive Director's analysis

The Executive Director addressed each of McGreal's sets of allegations, first finding that the inconvenience of not having personal copies of hearing transcripts did not constitute an adverse representation action, and also finding there was no evidence of a discriminatory motive when MAP's executive board told Calcaterra that it did not generally provide copies of transcripts to individual members and Calcaterra instead allowed McGreal to review MAP's copies of the transcripts in MAP's office.

The Executive Director provided some more detail concerning the allegations of suborned perjury. MAP attorney Calcaterra had attempted to enter into evidence at the arbitration proceeding an affidavit of the witness upon which McGreal's allegations of an attempt to suborn perjury was based. The Village attorney objected to its introduction as hearsay (and denied its content) and the document was never entered into evidence. Calcaterra contacted the other MAP attorney who also denied any attempt to procure false testimony. Calcaterra did not call that attorney as a witness at the arbitration hearing. The Executive Director found the charge untimely with respect to this incident. McGreal had the affidavit in hand in October 2011 and filed ARDC charges in December 2011, yet did not file his charge until July 2012, outside the six-month limitation in the Act.

As far as seeking ouster of the arbitrator, the Executive Director noted there likely would be considerable cost of re-doing the many days of hearings, and that our sister agency, the Illinois Educational Labor Relations Board, has found cost to be a factor unions may properly consider in determining whether to proceed to arbitration. Jones v. Ill. Educ. Labor Relations

Bd., 272 Ill. App. 3d 612 (1st Dist. 1995). Other than proximity in time between the filing of ARDC charges and the MAP's refusal to support the Charging Party's attempt to oust the arbitrator for lack of jurisdiction, the Executive Director saw little evidence of a connection between the two. In a portion of her analysis later referenced in abbreviated fashion in Charging Party's appeal, the Executive Director stated: "[T]his is not a jurisdictional question as much as a question of how the Village and the Union administer their CBA.... Whether the Village and the Union consciously chose to waive the contractual NAA requirement or whether it was an oversight is immaterial. Ultimately, it was an issue of discretion as to how the Village and Union administer the contract."

Finally, with respect to Charging Party's assertions that Calcaterra stopped returning McGreal's phone calls and did not allow McGreal to help prepare post-hearing briefs, the Executive Director noted that unions have considerable discretion in determining whether and how to carry out their duties including processing grievances, and there was no support for the position that an individual bargaining member may substitute his judgment for that of the union.

Charging Party's appeal

McGreal argues that the failure of the arbitrator to be a member of the NAA was not merely a matter of procedural jurisdiction, but a matter of subject matter jurisdiction and as such could not be waived by the parties. He argues that the methods used to select the arbitrator were integral to the contractual arbitration clause and cites an Illinois Supreme Court case, Carr v. Gateway, 241 Ill. 2d 15 (2011), for the proposition that failure to follow the specified protocol causes the agreement to arbitrate to fail.² He claims the Executive Director's decision abrogates

² Carr does not support Charging Party's position as he supposes. There, the issue was whether use of a particular arbitration service, "NAF", was so integral to the consumer sales contract that the court could

Section 3 of the Uniform Arbitration Act, 710 ILCS 5/3,³ and that the arbitrator's award is a nullity. For these reasons, he appeals the dismissals and requests a hearing.

Analysis and conclusion

None of Charging Party's arguments on appeal warrant reversal of the Executive Director's dismissals. Charging Party assumes this Board reviews arbitration awards, but unlike the Illinois Educational Labor Relations Act, our Act does not make failure to implement an arbitration award a distinct unfair labor practice and thus, unlike the IELRB, this Board has no mechanism for generally reviewing such awards. Compare 115 ILCS 5/14(a)(8) & (b)(6) (2010) with 5 ILCS 315/10(a) & (b) (2010). Indeed, Sections 7 and 8 of our Act provide that grievance arbitration should be subject to the Uniform Arbitration Act, and the Uniform Arbitration Act provides for review in the circuit courts. 710 ILCS 5/11, 12 & 13 (2010).

In essence, Charging Party wants us to find that his union (and his employer in related Case No. S-CA-13-001 also decided today) committed unfair labor practices by implementing

not use Section 5 of the Federal Arbitration Act to select a different arbitrator when NAF became unavailable. The court stated: "To find that the designation of the NAF as the arbitral forum is integral to the agreement to arbitrate, we must be able to conclude that the choice of the NAF was so central to the agreement to arbitrate that the unavailability of the NAF brought the agreement to an end." 241 Ill. 2d at 33. The court found the forum designation was integral based on the fact that the contract provided a penalty provision for using any other forum. Id. McGreal points to no similar penalty provision in the parties' collective bargaining agreement. Absent such a penalty provision or some similar sort of indicia within the contract, it is doubtful the Illinois Supreme Court would have found designation of NAA membership was so critical to the CBA arbitration provision to have "brought the agreement to an end."

³ Section 3 of the Uniform Arbitration Act provides:

§ 3. Appointment of arbitrators. If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, any method of appointment of arbitrators agreed upon by the parties to the contract shall be followed. An arbitrator so appointed has all the powers of one specifically named in the agreement. When an arbitrator appointed fails or is unable to act, his successor shall be appointed in the same manner as the original appointment. If the method of appointment of arbitrators is not specified in the agreement and cannot be agreed upon by the parties, the entire arbitration agreement shall terminate.

their collective bargaining agreement in a manner satisfactory to each, but not to Charging Party's liking. However, the Board has long held that it will not police the parties' collective bargaining agreement. Village of Creve Couer, 3 PERI ¶ 2063 (IL SLRB 1987).

Considering the merits of the dismissals outside the limited bases raised in the appeal, we conclude that the Executive Director was right to dismiss the charges filed against MAP. While MAP was aware that this particular arbitrator was not likely to rule in McGreal's favor, and there was a possibility it could have tried to disqualify him on the basis that he was not a member of the NAA, there likely would have been consequences for reversing course on its prior agreement to use him. Even if it succeeded in disqualifying him, re-doing the days of arbitration hearings before another arbitrator would have significantly added to its considerable expense in pursuing the grievances, and, having seen the Village's case and made most of its own presentation, it had ample opportunity to assess McGreal's chances before a different arbitrator. The controlling point is that this Board does not second guess a union's decisions about whether and how to pursue a grievance under the guise of examining an allegation of a Section 10(b)(1) violation. Beyond that, we can see MAP expended considerable effort on McGreal's behalf, and that there is insufficient evidence to suggest that McGreal's ARDC charge caused a 180 degree change of direction in its efforts. The Executive Director was right to dismiss the charge against MAP, and we affirm.

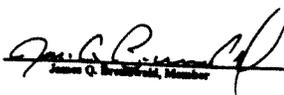
BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD



John Bertoni, Chairman



Paul S. Brown, Member



James G. Bradford, Member



Michael G. Cell, Member



Albert Washington, Member

Decision made at the State Panel's public meeting in Springfield, Illinois on June 11, 2013;
written decision issued in Chicago, Illinois on June 28, 2013.

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

Joseph S. McGreal,

Charging Party

and

Metropolitan Alliance of Police, Chapter #159,

Respondent

Case No. S-CB-13-003

DISMISSAL

On July 2, 2012, Charging Party, Joseph S. McGreal, filed a charge with the State Panel of the Illinois Labor Relations Board (Board) in the above-captioned case alleging that Respondent, Metropolitan Alliance of Police, Chapter #159 (Respondent, Union or MAP), violated Section 10(b)(1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), as amended (Act). On July 24, 2012, Charging Party amended its unfair labor practice charge. 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 & POSITION OF THE CHARGING PARTY

At all times material, McGreal has been a public employee within the meaning of Section 3(n) of the Act, employed by the Village of Orland Park in the Orland Park Police Department (Village or Employer) as a police officer since 2005. The Village is a public employer within the meaning of Section 3(o) of the Act and subject to the jurisdiction of the State Panel of the Board pursuant to Section 5(a-5) and 20(b) of the Act. Respondent is a labor organization within the

meaning of Section 3(i) of the Act, and the exclusive representative of a bargaining unit (Unit) consisting of all peace officers employed by the Village of Orland Park Police Department, below the rank of sergeant, as certified by the Board on January 26, 1998, in Case No. S-RC-98-047. Respondent and the Village are parties to a collective bargaining agreement (CBA) which provides for a grievance procedure culminating in arbitration.

McGreal was elected by the membership of MAP to serve as its Executive Secretary in 2008. At all times material, McGreal has been an active and visible advocate for MAP and has made Freedom of Information Act requests in connection to negotiations, filed grievances and has assisted other Unit employees in asserting their rights and protections under the CBA.

II. BACKGROUND

The genesis of the instant charge began in the fall of 2009 after the Village commenced disciplinary action against Charging Party alleging various and multiple acts of misconduct and insubordination. McGreal filed grievance number 2009-06 on December 18, 2009, claiming the Village had created a hostile work environment and was harassing him. Shortly thereafter, on December 24, 2009, the Union filed an unfair labor practice charge with the Board on behalf of Charging Party, Case No. S-CA-10-167, alleging the Village had retaliated against Charging Party because of his union and/or protected activities. The Union hired Attorney Steve Calcaterra to represent McGreal in the unfair labor practice case and on the grievances filed by him. On January 29, 2010, McGreal filed grievance number 2010-03 alleging his right to privacy was violated by the Village when it gathered and recorded his off-duty associations.

In April or May 2010, the Village and the Union agreed to arbitrate the grievances and requested that the Federal Mediation and Conciliation Services (FMCS) provide them with a panel of arbitrators from which to select an arbitrator to hear the grievances. On or about May 5,

2010, McGreal filed grievance no. 2010-05 alleging the Village violated the CBA by not allowing him an opportunity to discuss the Village's contemplated discipline during a pre-disciplinary meeting. On or about May 28, 2010, FMCS provided the parties with a panel of seven names from which the parties could select an arbitrator. FMCS also included a biographical sketch on each arbitrator on the panel, listing their areas of expertise, affiliations and professional associations.

In or around June of 2010, the Village commenced disciplinary action seeking to discharge Charging Party based upon numerous allegations of misconduct. On or about June 8, 2010, the Union amended the unfair labor practice charge to include retaliatory termination of Charging Party. On or about June 10, 2010, McGreal filed grievance number 2010-06 alleging that the disciplinary action taken against him was in retaliation for his Union activity. On July 22, 2010, the Executive Director of the Illinois Labor Relations Board deferred the unfair labor practice charge to arbitration in accordance with its long standing deferral practice.

In late August of 2010, Calcaterra and the Village's attorney exchanged emails in which they agreed that due to the overlap of issues presented by the deferral of the unfair labor practice charge and the numerous grievances, all the issues would be presented to the same arbitrator. In early September of 2010, the parties alternately struck the names of arbitrators from the FMCS panel provided to them in May of 2010, until one arbitrator's name remained. This person was selected to serve as Arbitrator.

On January 26, 2011, the arbitration hearing commenced. The parties gave their opening statements and argued their respective positions. The Village called two witnesses but did not conclude its case in chief by the end of the day. The Union did not put on any evidence the first day of hearing. On February 8, 2011, prior to the start of the second day of arbitration, the

Arbitrator met with the attorneys for both parties, and in an off-the-record discussion, encouraged them to consider the possibility of settlement rather than proceed with what the Arbitrator opined would be a lengthy and expensive arbitration. Following the discussion, Calcaterra met with McGreal to discuss the Arbitrator's suggestion to consider settling the dispute. The Arbitrator then met with Calcaterra and McGreal to discuss settlement prior to proceeding with the arbitration. McGreal asserts that the Arbitrator's comments were disconcerting in that they appeared to have prejudged McGreal's guilt. McGreal asserts that the Arbitrator conveyed his belief that McGreal was not being truthful regarding certain issues and that he could not foresee a scenario in which he would reinstate McGreal to his former position.

On February 11, 2011, Calcaterra wrote to McGreal outlining McGreal's options regarding how to proceed in light of the Arbitrator's comments. Calcaterra wrote he had never before been approached by an arbitrator that had expressed such strong opinions that an officer should be terminated. In addition, Calcaterra stated that the Arbitrator has made it "very clear" that if Charging Party proceeded with the hearing, McGreal's chances of success were "extremely low." Calcaterra then went on to state "you need to reassess this case. I believe that you have an opportunity to try and settle this case with the Village, but that the settlement will likely be in the \$5,000 - \$10,000 range along with a neutral letter of reference. Although this is far lower than what you are looking for, this may be better than receiving no money and having an arbitral decision indicating that you lied and should not be a police officer." McGreal did not want to settle and urged Calcaterra to seek to have the Arbitrator removed.

In April of 2011, in accordance with McGreal's desire to remove the Arbitrator, Calcaterra filed a written motion requesting the Arbitrator recuse himself from the case. Calcaterra argued that the Arbitrator had violated his obligation to be fair and impartial by

prejudging McGreal's guilt without providing him a fair opportunity to present evidence of his innocence. On April 26, 2011, in a written decision, the Arbitrator denied the motion and set forth the reasons for his denial. The arbitration proceedings then continued, concluding on April 23, 2012.¹

McGreal received copies of the arbitration transcripts from Calcaterra early in the proceedings. It is unclear how many transcripts Calcaterra provided McGreal, and how many were sent hard copy or by electronic mail, but, at some point, Calcaterra stopped providing McGreal with his own personal copy. On July 21, 2011, McGreal sent a letter to the Union's Board of Directors requesting a copy of the hearing transcripts, which was denied. Thereafter, McGreal would periodically request copies or electronic copies of the transcripts to review and each time his requests were denied. However, McGreal was allowed to review the transcripts that were kept at Calcaterra's office and did so on numerous occasions. In July of 2012, Calcaterra advised McGreal that the Union had purchased the transcripts and if he wanted an electronic copy he could purchase it directly from the court reporter. McGreal did not review the transcripts for the last three days of hearing.

A portion of the unfair labor practice charge in this case relates to an affidavit provided by Village Police Officer Thomas Antkiewicz. In order to understand this charge, certain background information is necessary. A vehicle owned by McGreal was involved in an accident on February 22, 2010. McGreal was off duty at the time of the accident. Supervisory staff within the Village's Police Department attempted to reach McGreal the night of the accident and left a voice mail on his cell phone directing him to immediately call into the Department.

¹ In total, there were sixteen (16) days of arbitration: January 26, 2011; February 8, 2011; July 6, 19, and 27, 2011; August 8, 2011; September 6, 2011; October 10 and 17, 2011; November 7, 2011; December 13, 2011; January 23, 2012; February 9, 2012; March 2, 2012; and April 10 and 23, 2012. There were 15 joint exhibits, 70 Village exhibits and 96 Union exhibits entered in to evidence during the arbitration.

McGreal did not contact the Department until the next morning claiming he had only received the message that morning. The Department believed Officer Antkiewicz, who was working his shift the night of the accident, called McGreal from his personal cell phone warning him the Department was looking for him.

The Village ordered Antkiewicz to provide a complete and accurate record of his cell phone from February 22, 2010 to March 26, 2010. Antkiewicz provided a redacted copy of his records for this period. The Village also ordered McGreal to provide a copy of his cell phone records. When McGreal failed to comply with the order, the Village subpoenaed his cellular phone records for the period that included the night of February 22, 2010, the date his vehicle was involved in an accident. Cell records revealed Antkiewicz telephoned McGreal the night of the accident and was on the phone for a period of time. Cell phone records also revealed McGreal had accessed his phone the night of the 22nd when the Department attempted to reach him.

The Village determined that it did not have sufficient evidence to prove that McGreal was the person driving his vehicle on the night of the accident; therefore, no charges were brought alleging that he was the driver. However, included in the 19 formal disciplinary charges that were brought against McGreal was a charge alleging he was insubordinate for not calling the Department the night of the accident as had been directed. The Village also charged him with lying for claiming he had not received the Department's message to call-in the night of the accident.

According to the arbitration transcripts provided to the Board agent during this investigation, Antkiewicz testified at the arbitration hearing on September 6, 2011. Antkiewicz testified that McGreal told Antkiewicz that he was not driving the car on the night of the

accident. Thereafter, Antkiewicz signed an affidavit on October 17, 2011, which he gave to McGreal. In the affidavit, Antkiewicz states:

I was advised by [MAP attorney] that he had spoken to the [Village attorney]. [Village attorney] informed [MAP attorney] that the department did not believe that Officer McGreal did not admit to me that he was driving his vehicle on February 22, 2010, even though I never spoke directly to anyone in the department regarding the incident involving Officer McGreal's vehicle or my conversation with Officer McGreal. [MAP attorney] further stated that [Village attorney] advised that if I would testify in front of an arbitrator that Officer McGreal admitted to me that he was driving his vehicle during the incident, that I would not be interrogated.

McGreal contends the affidavit is evidence of MAP and the Village attempting to bribe Antkiewicz to lie under oath to receive a lesser discipline.

In September or early October of 2011, McGreal commenced a background search on the Arbitrator's qualifications and eventually discovered he was not a member of the National Academy of Arbitrators (NAA), a contractual prerequisite to arbitrate in accordance with Article 5.3(a) of the parties' collective bargaining agreement. Article 5.3(a) of the CBA reads:

The parties shall attempt to agree upon an arbitrator within five (5) business days after receipt of the notice of referral. In the event the parties are unable to agree upon an arbitrator within five (5) day period, the parties shall jointly request the Federal Mediation and Conciliation Service to submit a panel of five (5) arbitrators who shall be members of the National Academy of Arbitrators residing in the Midwest region. Each party retains the right to reject one panel in its entirety and request that a new panel be submitted. The party requesting arbitration shall strike the first name; the parties shall then strike alternatively until only one person remains.

On December 13, 2011, McGreal filed charges of attorney-misconduct with the Attorney Registration and Disciplinary Commission (ARDC) against the MAP and the Village attorney

referenced in the affidavit filed by Antkiewicz, claiming they had attempted to bribe Antkiewicz to provide false testimony against McGreal.²

On or about January of 2012, McGreal informed Calcaterra that he had discovered the Arbitrator was not a member of NAA and requested Calcaterra seek the Arbitrator's disqualification. McGreal claims Calcaterra told him once again that due to the cost of the arbitration, the Union would not seek to dismiss the Arbitrator. Calcaterra informed McGreal that he should file a new grievance.

On January 10, 2012, McGreal filed a grievance alleging the Arbitrator was not, nor had he ever been, a member of the NAA and therefore was contractually ineligible to serve as arbitrator for the grievances he had been arbitrating. The Village Police Commander, Thomas Kenealy, denied the grievance asserting McGreal was terminated from employment and therefore no longer an employee of the Village with standing to file the grievance. On February 1, 2012, MAP sent a letter to the Chief of Police and the Village Manager informing them to take no action on the grievance filed by McGreal because he was not an employee of the Village as of the date he was terminated in June of 2010, and therefore he was not a current member of MAP afforded the protection of the CBA.

When the Union refused to allow McGreal to file a grievance seeking to dismiss the Arbitrator, McGreal requested Calcaterra take action. On April 9, 2012, Calcaterra refused Charging Party's email request to file a motion challenging the Arbitrator's jurisdiction. During the April 10, 2012 arbitration proceeding, McGreal filed his own motion to stay the arbitration, which both the Village and the Union opposed. The Arbitrator denied the motion and proceeded with the arbitration.

² On August 3, 2012, the ARDC indicated that it was not going to proceed with the attorney misconduct charge.

On November 14, 2012, the Arbitrator issued his decision finding the Village terminated McGreal with just cause. Moreover, the Arbitrator denied the grievances and found the Village did not retaliate against McGreal due to his union and protected activity.

Charging Party alleges the Union breached its duty of fair representation in violation of Section 10(b)(1) of the Act. The acts McGreal alleges as violations of Section 10(b)(1) transpired during the 16 day arbitration hearing, conducted over a span of approximately 22 months. Specifically, Charging Party asserts the Union violated the Act by: (a) not providing Charging Party with a copy of arbitration transcripts; (b) not presenting evidence that a Unit police officer had been bribed by both the Union and Village attorney to falsely testify in a fashion contrary to Charging Party's interest; (c) refusing to challenge the Arbitrator's qualifications to conduct the arbitration under the terms of the CBA; (d) not returning telephone calls and ignoring Charging Party's desire to assist in the preparation, review or editing of the post-hearing brief.

III. 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 him. 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, he 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) he 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 his activities and/or status; (3) he 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 the instant case, Charging Party alleges that the Union engaged in a series of intentional, retaliatory acts that breached the duty of fair representation. Each of these allegations will be addressed below.

a) Charging Party alleges the Union failed to provide him with copies of the arbitration transcripts.

During the early stages of arbitration, Charging Party acknowledges he worked closely with Calcaterra in preparing for and advocating his case. During this time, Calcaterra provided McGreal with some copies of the transcripts, either as hard copies or via electronic mail. However, after a few months, the MAP Executive Board informed Calcaterra that it was not their

practice to provide a member with transcripts and to cease providing them to McGreal. McGreal contends that refusing his requests for a free personal copy of the transcripts significantly impacted his ability to assist in his defense and violated the Union's duty of fair representation.

Essentially, McGreal argues the Union hampered his ability to defend himself by not providing him with a copy of the hearing transcript. However, the mere fact that he was not provided with a copy of the transcript does not prove that the results would have been different had he had his own personal copy. Grovner v. Georgia-Pacific Corp., 625 F.2d 1289, C.A.Ga., (1980).

Moreover, McGreal attended every day of the arbitration and was able to hear all of the testimony and see all of the evidence presented. He also had access to the arbitration transcripts in Calcaterra's office. In fact, he took full advantage of such access by reviewing transcripts on July 25th, August 29th, October 14th and 31st, November 1st, and December 9th of 2011, and February 13th, 14th and 28th of 2012. The inconvenience caused to McGreal by not having a personal copy of the transcript falls short of establishing that he suffered an adverse representation action. In addition, there is no evidence that the Union acted with a discriminatory motive or that the Union treated McGreal differently than other Unit members by not providing a copy of the transcripts.

b) Charging Party alleges that the Union failed to present evidence at the arbitration hearing that a Unit police officer had been bribed, by both an attorney for the Union and an attorney for the Village, to provide false testimony against the Charging Party.

Calcaterra produced the Antkiewicz affidavit at the October 17, 2011 arbitration. According to the arbitration transcripts provided to the Board agent during this investigation, the Village's attorney objected to the document as hearsay and denied he ever had a conversation with MAP to induce Antkiewicz to lie about whether McGreal admitted he was driving the

vehicle the night of the accident. The affidavit was not entered into evidence. Later, Calcaterra contacted the MAP attorney alleged to have been involved. The MAP attorney denied he had ever communicated to Antkiewicz that, in exchange for false testimony, he would receive more favorable treatment regarding discipline. Calcaterra did not call the MAP attorney to testify at the arbitration hearing.

McGreal asserts that the Antkiewicz affidavit establishes that the Village and the Union attempted to bribe Antkiewicz to provide false testimony against McGreal, and that Calcaterra should have done more to investigate the matter and present this information to the Arbitrator. It should be noted that an objective reading of the affidavit does not support McGreal's assertion of unethical conduct; however, any further inquiry into this allegation is unnecessary as the charge is untimely.

Pursuant to Section 11(a) of the Act, "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board...unless the person aggrieved thereby did not reasonably have knowledge of the alleged unfair labor practice." The six month limitations period begins to run when an employee has knowledge of the alleged unlawful conduct or reasonably should have known of it. Moore v. ISLRB, 206 Ill. App. 3d 327, 564 N.E.2d 213, 7 PERI ¶4007 (1990); Service Employees International Union, Local 46 (Evans), 16 PERI ¶3020 (IL LLRB 2000).

No later than October 17, 2011, McGreal had the affidavit in his possession because that is the date he gave the affidavit to Calcaterra. If not October 17, 2011, then certainly by December 13, 2011, McGreal believed there was attorney misconduct because that is the date he filed charges with the ARDC. However, McGreal did not file this unfair labor practice charge

until July 2, 2012, more than six months later. Therefore, the Board lacks jurisdiction to hear this charge.

- c) **The Charging Party alleges that the Union refused to process a grievance challenging the Arbitrator's qualifications and/or refused to stay the arbitration to contest the Arbitrator's qualifications.**

There is no dispute that Article 5.3(a) of the CBA states that “the parties shall jointly request the Federal Mediation and Conciliation Service to submit a panel of five (5) arbitrators who shall be members of the National Academy of Arbitrators...” There is also no dispute that the Arbitrator selected by the Union and the Village was not a member of the NAA.

As stated above, the Union did not support Charging Party's effort to file a grievance challenging the Arbitrator's authority and the Union did not support the Charging Party's motion to dismiss the Arbitrator. Charging Party alleges the Union violated its duty of fair representation by refusing to seek the Arbitrator's dismissal. The Charging Party alleges that the Union was improperly motivated by the financial cost for a new arbitration.

As noted above, the arbitration proceedings in this case were quite lengthy and involved many days of hearing and many exhibits. There were approximately 3800 pages of transcript. There is no question that the arbitration proceedings were costly to the Union and the Village, and that any new proceeding would result in additional costs to all parties.

However, even if the Union chose not to seek the Arbitrator's dismissal because of concerns over the cost of a new arbitration, this conduct does not violate the Act. In analyzing the identical “intentional misconduct” standard found in the Illinois Educational Labor Relations Act (115 ILCS 5/14(b)(1)), the Illinois Appellate Court has held the cost of prosecuting a grievance to arbitration is a factor that a union may take into account when determining whether to pursue a grievance. The court stated that a union can legitimately consider the following

factors: “the perceived merit of the complaint, the likelihood of success in any action based thereon, the cost of prosecuting such an action, or the possible benefit to the union membership as a whole.” See Jones v. Ill. Educ. Labor Relations Bd., 272 Ill. App. 3d 612, 650 N.E.2d 1092 (1st Dist. 1995). Thus, even assuming that the Union’s decision not to seek a dismissal of the Arbitrator was based upon the potential cost of a new arbitration hearing, this does not establish intentional misconduct in violation of the duty of fair representation. A union has discretion in deciding how far to pursue an employee’s complaints as long as there is no evidence of intentional misconduct. Jones, 272 Ill. App. 3d 622-23, 650 N.E.2d 1099; Moore, 206 Ill. App. 3d 327, 564 N.E.2d 213.

McGreal also alleges that Charging Party refused to seek the Arbitrator’s dismissal because McGreal had filed an ARDC complaint against a MAP attorney.³ To evaluate Charging Party’s allegation that the Union did not seek the Arbitrator’s removal because of animosity that was created by his filing of the ARDC charge, it is necessary to review the circumstances surrounding the Arbitrator’s appointment.

The Arbitrator selected to hear this case was not a member of the NAA, nor did he ever claim to be a member of the NAA. Despite the contractual language in Article 5.3(a), it appears that the Village and the Union did not specifically request NAA membership when they requested a panel of arbitrators from the FMCS.⁴ It further appears that the Village and the Union did not make NAA membership a requirement when they struck names off the panel and ultimately chose an arbitrator to hear the McGreal grievances.

McGreal argues the Arbitrator did not have jurisdiction to hear the dispute due to lack of the NAA membership. However, this is not a jurisdictional question as much as a question of

³ As noted above, McGreal also filed a charge with the ARDC against the Employer’s attorney.

⁴ Of the seven arbitrators assigned to the panel for the McGreal grievances, five were members of the NAA and two were not.

how the Village and the Union administer their CBA. Parties can negotiate specific provisions and procedural requirements to be included in their grievance procedure, and the parties can also mutually agree to waive those provisions and procedural requirements. In the instant case, the Village and the Union agreed to arbitrate the McGreal grievances and did so, albeit with an arbitrator that did not have membership in the NAA. The Arbitrator did not misrepresent his qualifications. Whether the Village and the Union consciously chose to waive the contractual NAA requirement or whether it was an oversight is immaterial. Ultimately, it was an issue of discretion as to how the Village and the Union administer the contract.

The selection of an arbitrator who lacked NAA membership took place long before McGreal filed his ARDC charge. However, McGreal's attempt to remove the Arbitrator by filing a grievance (and later a motion to dismiss), and the Union's decision not to support those attempts, came approximately one month after the ARDC charge. However, other than timing, McGreal has provided insufficient evidence to support a causal connection between the ARDC charge and the Union's decision not to seek or support the removal of the Arbitrator.

The Board has previously held that 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. See Metropolitan Alliance of Police v. State of Illinois Labor Relations Board, 345 Ill. App. 3d 579, 803 N.E.2d 119 (2003).

In the instant case, the available evidence indicates that the Union aggressively advocated on Charging Party's behalf throughout the lengthy arbitration proceedings. It simply cannot be said that the Union's decision not to seek removal of the Arbitrator, after what was at that point

12 months of arbitration proceedings, is indicative of an adverse representation action motivated by vindictiveness, discrimination, or enmity.

d) Charging Party alleges that the Union violated the Act by not returning his telephone calls and ignoring his desire to assist in the preparation, review or editing of the final arbitration brief.

McGreal argued that at some point toward the end of arbitration, Calcaterra violated Section 10(b)(1) of the Act when he stopped returning his telephone calls. Even assuming Calcaterra did not return his calls, such action, in and of itself, is not an adverse representation action and is not a violation of the Act.

McGreal also alleges a violation of the Act in that Calcaterra did not allow him to assist in the preparation of the post-hearing brief. Charging Party has failed to provide, and I am unable to find, support in the law for the existence of a right for a union member to assist in the preparation of the post-hearing brief.

Accompanying the intentional misconduct standard is the fact that a union has considerable discretion in evaluating and deciding the proper course of action in carrying out its duties and responsibilities. ATU (Lawrence), 14 PERI ¶3011 (IL LLRB 1993); LIUNA Local 2 (Mazzie), 10 PERI ¶3004 (IL LLRB 1993); Moore v. Ill. State Labor Relations Bd., 206 Ill. App. 3d 327, 564 N.E.2d 213 (4th Dist. 1990). Section 6(d) of the Act provides that unions under the Act are accorded significant discretion when processing grievances. There is no support in Board case law or in the Act for an individual bargaining unit member to substitute his judgment for that of the Union when it comes to grievance handling. McGreal's argument that the Union violated its duty of fair representation by not allowing him to contribute in the preparation of the post-hearing brief is without merit.

IV. 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 thereof. 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, at 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 30th day of April, 2013.

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



**Melissa Mlynski
Executive Director**