

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

Ana Campos,)	
)	
Charging Party)	
)	
and)	Case No. S-CB-13-045
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Respondent)	

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

On August 26, 2013, Executive Director Melissa Mlynski dismissed charges filed in the above-captioned case by Charging Party, Ana Campos, against Respondent, American Federation of State, County and Municipal Employees, Council 31, alleging Respondent had failed its duty of fair representation and, thus, violated Section 10(b) of the Illinois Public Labor Relations Act, 5 ILCS 315/10(b) (2012),¹ by failing to obtain a reasonable accommodation from Charging Party’s employer, the Illinois Department of Children and Family Services (DCFS).

¹ The charge, completed by Charging Party’s counsel, alleges a violation of Section 10(b)(3), which makes it an unfair labor practice for a labor organization “to cause, or attempt to cause, an employer to discriminate against an employee in violation of subsection (a)(2).” Section 10(a)(2), in turn, makes it an unfair labor practice for an employer “to discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization.” There are no factual allegations suggesting Respondent was attempting to have DCFS mistreat Charging Party in order to encourage union support for Respondent or discourage union support for another labor organization, and the Executive Director rightfully treated the charge as an allegation of violation of Section 10(b)(1), which makes it an unfair labor practice for a labor organization to restrain or coerce public employees in the exercise of the rights guaranteed in this Act, provided, ... 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.

Charging Party filed a timely appeal pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135. Respondent did not file a response. Upon a review of the record and the appeal, we affirm the dismissal of the unfair labor practice charge.

The charge arises from a reorganization implemented by DCFS after reaching an agreement with Respondent in November 2012. Charging Party has had work restrictions ever since an on-the-job automobile accident in 1989. DCFS had been able to accommodate those work restrictions from 1989 through the date the reorganization was implemented in March 2013. At that time, DCFS allowed Charging Party to remain in her position for a three-month period and allowed her to bid on two other positions, but Charging Party felt the new positions could not accommodate her restrictions. At the time of the Executive Director's dismissal in August 2013, Charging Party was not working, but Respondent was scheduled to have a meeting with DCFS to discuss her situation.

Noting there was no evidence of animosity by the Respondent or its agents toward Charging Party, and likening the situation to an allegation that a union had violated its duty of fair representation merely because it lost in arbitration, the Executive Director found no basis for issuing a complaint under the intentional misconduct standard set out in Section 10(b)(1) as elaborated upon in Metro. Alliance of Police v. Ill. Labor Relations Bd., 345 Ill. App. 3d 579, 588 (1st Dist. 2003).²

² This case holds that, under the intentional misconduct standard a charging party must prove (1) that the union's conduct was intentional, invidious and directed at the charging party and (2) this intentional conduct 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). Id. at 588. The second element, unlawful discrimination, requires (1) that the employee has engaged in activities tending to engender the animosity of union agents or that her mere status (race, gender, religion, national origin) may

In her appeal, Charging Party, represented by counsel, provides a more detailed explanation of the course of events, yet reveals a fundamental misunderstanding that a union's duty of fair representation is not the equivalent of a fiduciary duty of a personal legal representative. As she had in her charge, Charging Party again claims a violation of Section 10(b)(3), but then attempts to analyze the situation under the intentional misconduct standard of Section 10(b)(1). It points out that Respondent cooperated with her employer in fashioning the reorganization and, in doing so, overlooked her need for work accommodations. Moreover, she states she was initially allowed to keep her work title, though she had moved to a different unit. The employer changed this to a three-month temporary assignment only after someone else had filed a grievance about the situation.

Some of Charging Party's assertions hint at the difficulties unions face in layoff and reorganization situations: efforts in the interest of some employees often are at the expense of other employees, often within the same bargaining unit. Charging Party often suggests that her needs were "overlooked," which if literally true (and it may have been) could not constitute intentional misconduct. Conversely, at another point, she states Respondent's failure "to grieve the matter on Ms. Campos' behalf was intentional, purposeful and knowing," but the Board has repeatedly noted that it is loathe to second guess a union's decisions whether to grieve a matter. E.g. Joseph S. McGreal and Metro. Alliance of Police Chapter 159, 30 PERI ¶29 (IL LRB-SP 2013) ("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

have caused animosity; (2) the union was aware of the employee's activities or status; (3) adverse representation action was taken by the union; and (4) animus led to the adverse action. Id. at 588-89.

10(b)(1) violation.”). Indeed, in discounting the fact that Respondent was now pursuing a grievance on Campos’s behalf, Charging Party notes: “[i]n making the initial decision not to grieve the adverse employment action taken by DCFS against Ms. Campos, the presumption is that Respondent must have carefully evaluated the matter and decided that the matter was not worth pursuing.” This Board would be hard pressed to find intentional misconduct at this point in time, while Respondent is pursuing a grievance, or at an earlier point in time when it was not pursuing a grievance whether through mere oversight or out of a careful evaluation.

The Executive Director focused on another point: that there was no evidence of animosity by Respondent or its agents toward Charging Party. In her appeal, Charging Party suggests it was her status as a person in need of work accommodations that was the root of Respondent’s disparate treatment of her. However, there still is no evidence of animosity arising out of that situation. Indeed, prior to the re-organization accommodations were made, Respondent is currently working on her behalf to find accommodations or some other form of relief, and any suggestion that Respondent’s participation in reaching an agreement with respect to the reorganization was a mere ruse to force Charging Party out of her position would be fantastical.

Finding no allegations sufficient to sustain a violation of the duty of fair representation, we affirm the Executive Director’s dismissal.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett

John J. Hartnett, Chairman

/s/ Paul S. Besson

Paul S. Besson, Member

/s/ James Q. Brennwald
James Q. Brennwald, Member

/s/ Michael G. Coli
Michael G. Coli, Member

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois on November 5, 2013;
written decision issued in Chicago, Illinois on February 14, 2014.

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DISMISSAL

On June 4, 2013, Ana Campos (Charging Party) filed a charge in Case No. S-CB-13-045 with the State Panel of the Illinois Labor Relations Board (Board), alleging that the Respondent, American Federation of State, County and Municipal Employees Council 31, (AFSCME or Union) 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

Charging Party claims that the Union has breached its duty to represent her by failing to obtain a reasonable accommodation from her employer, the State of Illinois, Department of Children and Family Services (DCFS). Ms. Campos is employed by DCFS as a Spanish speaking Child Welfare Specialist II and is a member of a bargaining unit represented by the Respondent. Charging Party states that on December 7, 1989, she was involved in a car accident

while on duty that resulted in permanent medical restrictions. Ms. Campos presented detailed medical documentation to substantiate those medical restrictions and claims that since that on the job injury, she continued to perform her primary duties and responsibilities with some accommodations.

On or about November 21, 2012, DCFS and AFSCME 31 reached an agreement on a reorganization plan. In March of 2013, as part of the reorganization plan, Campos was temporarily accommodated as a Spanish speaking Child Welfare Specialist for a period not to exceed three (3) months. Apparently, Campos was then given the opportunity to bid on two other DCFS positions that were included in the reorganization plan. However, Campos believed that she was unable to perform all of the duties and responsibilities of those positions given her medical restrictions. For example, Campos claims that these new positions would have required her to transport clients, which she cannot do because of her medical restrictions. At the present time, Campos is not working but the Respondent has scheduled a meeting with the employer to discuss her situation.

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.” 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 charging party; and (2) the union’s intentional action occurred because of and in retaliation for some past activity by the employees 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. IL. Labor Relations Board, Local Panel, 345 Ill. App. 3d 579, 588 (1st Dist. 2003). To provide unlawful discrimination, which is necessary to establish the second element of a Section 10(b)(1) violation, a charging party must demonstrate, by a preponderance of evidence, that: (1) the employee has engaged in activities tending to endanger 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 reason, i.e. because of animus towards the employee's activities or status. Id. at 588-89.

The Charging Party alleges that the Respondent has discriminated against her due to their failure to obtain a reasonable accommodation for her during a DCFS reorganization. Charging Party claims the Respondent has breached its duty to fairly represent her by not obtaining an accommodation similar to the one she had since suffering a work related injury in 1989. However, the substance of her charge appears to be a decision made by DCFS. Specifically, as a result of an agency reorganization, Charging Party's former position and accommodation was discontinued and she was instead allowed to bid on two other positions. Charging Party found these two other positions unacceptable as she did not believe they offered her a reasonable accommodation for her medical restrictions.

There is no evidence that the Respondent or any of its agents had any animosity against the Charging Party. There are no statements, actions or other circumstantial evidence that agents of the Respondent harbored any type of animus. The only assertion that such discrimination may

be present in this case comes from the Charging Party herself – that the Respondent has breached its duty to fairly represent her by not obtaining a reasonable accommodation in a reorganization agreement with the Employer.

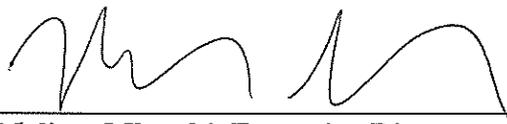
The failure of the Union to obtain a satisfactory position for the Charging Party during the DCFS reorganization is akin to a union’s failure to obtain a favorable outcome in a grievance matter. Absent some evidence of discriminatory motive, the failure alone is not considered to be a violation of the Act.

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 reason 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 26th day of August, 2013.

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Melissa Mlynski, Executive Director