

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

Larreese Bennett,)	
)	
Charging Party)	
)	
and)	Case No. S-CB-14-010
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Respondent)	

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

On March 26, 2014, Executive Director Melissa Mlynski issued a dismissal of an unfair labor practice charge filed by Charging Party, Larreese Bennett, against Respondent, the American Federation of State, County and Municipal Employees, Council 31. The charge, filed on January 29, 2014, alleged that Respondent violated Section 10(b) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) (Act), by withdrawing a grievance concerning Charging Party's discharge in lieu of a negotiated voluntary resignation.

On April 3, 2014, Charging Party filed a timely appeal of the dismissal pursuant to section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135. Respondent did not file a response. After a review of Charging Party's appeal, the Dismissal and the record, we affirm the Executive Director's Dismissal.

The Executive Director found that Charging Party was employed as a Mental Health Technician II at the Illinois Department of Human Services-Ludeman Developmental Center (Center) and was a member of a bargaining unit represented by Respondent. On August 17,

2009, Charging Party allegedly had non-accidental physical contact with a resident of the Center. As a result, the resident suffered serious injuries and Charging Party was placed on administrative leave pending investigation. In the course of the investigation, the resident admitted that Charging Party and he had a fight during which Charging Party struck the resident several times. Charging Party denied any knowledge of the incident. The investigation resulted in criminal charges being placed against Charging Party and in October 2010, the Center suspended Charging Party pending the outcome of the case. At that same time Respondent filed a grievance on behalf of Charging Party, claiming the suspension was unjust.

In August 2011, Charging Party was found not guilty of the criminal charges and in September 2011 he returned to work where he was placed on duties with no client contact pending the outcome of an internal administrative investigation. Based on the results of that administrative investigation the Center determined that Charging Party had violated several rules and regulations relating to the treatment of residents. It notified Respondent and Charging Party of its decision to discharge Charging Party. Respondent continued to process Charging Party's grievance to arbitration.

In May 2013, Respondent examined the available evidence concerning Charging Party's discharge in preparation for arbitration and concluded that it could not prevail at arbitration. Respondent notified Charging Party of its decision to withdraw the grievance, as well as its success in negotiating a voluntary resignation in lieu of discharge and the removal of all references to his discharge as well as the incident leading to that discharge from his personnel records. Charging Party signed the resignation agreement, but now claims that Respondent's handling of his grievance was not in his best interest.

The Executive Director considered the facts as stated above, applied the Board's long-established intentional misconduct standard for duty of fair representation claims, 5 ILCS 315/10(b)(1) (2012), and found Respondent had not breached its duty. In particular, the Executive Director noted that Charging Party failed to demonstrate that Respondent's conduct towards him was intentional, arising out of some personal animosity between them, or in retaliation for some of his past activity or his status such as his race, gender, religion or national origin, as Board law requires of charging parties. Metro. Alliance of Police v. Ill. Labor Relations Bd., 345 Ill. App. 3d 579, 588 (1st Dist. 2003).¹

The Executive Director considered Charging Party's argument that the outcome of the criminal investigation should have presaged a positive outcome of his grievance, but found the argument had no merit given that the standard of proof in a criminal trial is much higher than that for an administrative hearing. The Executive Director concluded that, after Respondent had reviewed the available evidence in support of Charging Party's grievance, it determined that it could not prevail at arbitration and exercised its lawful discretion to withdraw the grievance. Finding no evidence to support a claim that Respondent breached its duty of fair representation as defined by the Act, the Executive Director found no issue of law or fact sufficient to warrant a hearing and dismissed the charge.

Charging Party's appeal ignores the rationale of the Executive Director's decision and fails to demonstrate any failure by the Respondent to represent him in the manner required by the

¹ Metro. Alliance of Police 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 his mere status (race, gender, religion, national origin) may 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.

Act. Metro. Alliance of Police, 345 Ill. App. 3d at 588. Charging Party asserts that Respondent did not proceed with his grievance in accordance with the terms of the grievance procedure as expressed in the relevant collective bargaining agreement. However, Charging Party offers no evidence that Respondent's alleged failure to do so was motivated by personal animus towards Charging Party, or in retaliation against Charging Party for some action he had taken, or because of some element of his status such as his race, age or union activity. Charging Party claims that Respondent's motivation for withdrawing the grievance was to retaliate against him for having insisted on defending himself against the criminal charges rather than accepting a voluntary resignation, and that Respondent conspired with his employer to punish him for doing so by denying him the back pay he was owed upon receiving a favorable verdict in the criminal trial. Charging Party presents no evidence in support of this claim, other than his interpretation of the grievance procedure, a statement of how he thinks Respondent should have represented him, and the mistaken belief that because he was exonerated of the criminal charges he necessarily should have been exonerated in his employer's internal administrative investigation.

In short, Charging Party's appeal offers no grounds for reversing the Executive Director's determination, and for this reason, the Executive Director's Dismissal is affirmed.

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 May 13, 2014; written decision issued at Chicago, Illinois, June 20, 2013.

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

Larreese Bennett,)	
)	
Charging Party)	
)	
and)	Case No. S-CB-14-010
)	
American Federation of State, County, and Municipal Employees, Council 31,)	
)	
Respondent)	

DISMISSAL

On January 29, 2014, Charging Party, Larreese Bennett, filed a charge with the State 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 (2012), *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 CHARGING PARTY'S POSITION

Respondent is a labor organization within the meaning of Section 3(i) of the Act, and the exclusive representative of a bargaining unit (Unit) composed of State of Illinois, Department of Central Management Services, Department of Human Services-Ludeman Developmental Center (Employer or DHS) employees including those employees in the job title or classification of Mental Health Technician II. At all times material, Bennett was a public employee within the meaning of Section 3(n) of the Act, employed by DHS in the title or classification of Mental

Health Technician II, and a member of the Unit. The Employer and AFSCME are parties to a collective bargaining agreement (CBA), which provides for a grievance procedure culminating in arbitration.

On or about August 17, 2009, Bennett engaged in non-accidental physical contact with a resident of the Ludeman Developmental Center. This encounter resulted in serious injury and bruising to the head, neck, and arms of the resident. The resident's injuries were visible and observed by medical staff assigned to the center who reported the resident's injuries. On August 20, 2009, Bennett was placed on administrative leave while the incident was reported to the Office of the Inspector General (OIG), and the Illinois State Police Internal Investigation division (ISP) for investigation by each agency. On August 24, 2009, OIG reported the incident to ISP to conduct an investigation into possible criminal violations.

ISP interviewed the resident who, at first, was reluctant to cooperate, but later admitted that he and Bennett did engage in a punching match and that Bennett struck him about the head and chest twenty times resulting in swelling to his face and bruising on his arms. ISP also interviewed Bennett who expressed no knowledge of the August 17 incident and denied any unlawful contact with the resident. On or about September 17, 2010, the ISP investigation determined that there was sufficient cause to file criminal charges of Facility Resident Abuse and Official Misconduct against Bennett. On October 4, 2010, the Employer suspended Bennett pending the outcome of the criminal case. On October 22, 2010, the Union filed a grievance on behalf of Bennett claiming the suspension was unjust, and deprived Bennett of his livelihood.

On or about August 30, 2011, Bennett was found not guilty, and on September 22, 2011, the Employer returned Bennett to work, but placed him on "non client contact duties" pending the outcome of the OIG administrative investigation. On or about June 6, 2012, based on the

completion of the OIG investigation which determined that Bennett violated a series of rules and regulations relating to the mistreatment and abuse of mental health center residents, the Employer notified the Union and Bennett of its decision to terminate Bennett's employment. The Union continued to process its grievance on behalf of Bennett and advanced it through the CBA's grievance procedure to arbitration.

On or about May 15, 2013, the Union convened a pre-arbitration meeting to review the available evidence provided by Bennett and the Employer to prepare for arbitration. Following this review, based on the facts and evidence available and the intractable position taken by the Employer to terminate Bennett's employment, the Union determined that it could not prevail at arbitration. On September 4, 2013, the Union notified Bennett of its decision to withdraw the grievance. Also on September 4, 2013, however, the Union negotiated a voluntary resignation for Bennett, by which the Employer agreed to remove all references to the August 2009 incident and subsequent termination from his personnel record, provided Bennett signed the voluntary resignation agreement by September 16, 2013. Bennett claims in this charge that the action taken by the Union was not in his best interest thus violating Section 10(b)(1) of the Act.¹

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 employee

¹ Bennett also claims he is owed significant back pay because of the so-called improper suspension and termination.

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, by a preponderance of 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 towards the employee's activities or status. Id. at 588-89.

Nothing in the information provided by the Charging Party demonstrates any unlawful action by the Union, or any intentional misconduct in violation of the Act. Bennett asserts that the outcome of the criminal case should have had a positive influence on the administrative investigation conducted by OIG. However, as OIG noted in its report, the standard of proof in a criminal case is "beyond a reasonable doubt," whereas in an administrative action proof is demonstrated by the "preponderance of evidence." The preponderance standard is met if the evidence demonstrates that the proposition is more likely to be true than not true. After reviewing the case, the Union determined that it could not prevail on the Charging Party's grievance, and exercised its right under Section 6(d) of the Act, which allows a union to refuse to process grievances that are unmeritorious. Without evidence of intentional misconduct as described above, this charge must be dismissed.

III. ORDER

Accordingly, the instant charge is hereby dismissed. Charging Party may appeal this 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 dismissal will become final.

Issued in Springfield, Illinois, this 26th day of March, 2014.

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



**Melissa Mlynski
Executive Director**