

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

Monica Barry,)	
)	
Charging Party)	
)	
and)	Case No. S-CB-15-002
)	
American Federation of State, County and)	
Municipal Employees, Council 31,)	
)	
Respondent)	

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

On November 17, 2014, Executive Director Melissa Mlynski issued a Dismissal, dismissing a charge filed by Monica Barry (Charging Party) in Case No. S-CB-15-002. Barry alleged that her union, the American Federation of State, County and Municipal Employees, Council 31 (Respondent), violated Section 10(b)(1) of the Illinois Public Labor Relations Act, 5 ILCS 315/10(b)(1) (2012) in that its failure to attain a medical accommodation for her constituted a failure to provide fair representation.

Charging Party filed a timely appeal of the Executive Director's Dismissal pursuant to Section 1200.135(a) of the Illinois Labor Relations Board's Rules and Regulations, 80 Ill. Admin. Code Section 1200.135(a). Respondent timely filed a response. After reviewing the appeal, the response and the record, we affirm the Executive Director's Dismissal for the reasons articulated in that document.

BY THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL

/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 held by video conference in Chicago, Illinois and Springfield, Illinois, on January 13, 2015; written decision issued in Chicago, Illinois on January 26, 2015.

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Respondent)	

DISMISSAL

On July 24, 2014, Monica Barry (Charging Party) filed a charge in Case No. S-CB-15-002 with the State Panel of the Illinois Labor Relations Board (Board), in which she alleged that the American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Respondent) engaged in unfair labor practices within the meaning of Section 10(b) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), *as amended* (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 reasons set forth below.

I. INVESTIGATORY FACTS AND POSITION OF THE CHARGING PARTY

Charging Party claims that the Respondent breached its duty to represent her by failing to obtain a reasonable accommodation from the State of Illinois, Department of Corrections (DOC). Barry is employed as a Correctional Officer at the Logan Correctional Center and is a member of a bargaining unit that is represented by the Respondent. DOC and the Respondent are parties to a collective bargaining agreement that includes a grievance procedure culminating in final and binding arbitration.

Charging Party states that on or about July 18, 2013, she was unable to work due to asthma, a non-occupational illness. Because of this condition, the Charging Party requested a medical leave of absence. Charging Party subsequently provided a physician's statement from Dr. Eagleton, dated July 18, 2013, which indicated that the patient was suffering from asthma and allergies, but that the patient's condition would substantially improve with asthma medication and preventive exposure to "triggers." In his remarks, Dr. Eagleton states:

Patient informs me pepper spray is being used in her work environment and this poses a potential serious reaction to her asthma.... It seems reasonable she should avoid working in an environment where pepper spray is being used and should be off work until reassigned.

On July 29, 2014, Charging Party's physician went on to state that the patient's "improvement is episodic but would be expected with no exposure to pepper spray" and that she can work, but should not be exposed to pepper spray.

Charging Party states that in September of 2013, she filed a grievance seeking a reasonable accommodation in order to return to work with a gas mask. In the grievance, Charging Party asserts that the Illinois Corrections Administrative Code¹ requires the administration and use of gas masks by DOC employees when chemical agents, including pepper spray, are used. This grievance was processed and reached Step 3 of the contractual grievance procedure. At a Step 3 discussion, DOC and Respondent agreed that the dispute was a medical issue and thus should be submitted for an American's with Disabilities Act (ADA) determination.

On July 29, 2013, Barry submitted a formal request for a reasonable accommodation due to her asthma. In her initial accommodation request, Barry asked for a transfer to Lincoln Correctional Center or to be permanently assigned to the towers, mailroom, or main gate. She also submitted her physician's statement that recommended that she be reassigned in order to

¹ Section 501.60, General Use of Chemical Agents and Section 501.70, Use of Chemical Agents in cells.

avoid exposure to pepper spray, that she is to avoid work areas where pepper spray is being used or that she is to wear an appropriate gas mask. The Warden of Logan Correctional Center denied Barry's initial accommodation request on August 1, 2013. Vickie Fair, an Affirmative Action Administrator, concurred with the Warden's denial because Correctional Officers are required to work in a myriad of assignments and none of the assignments Barry requested guaranteed that she will not be exposed to pepper spray. With regard to the request that she be allowed to have a gas mask, Fair denied that request as well and stated that according to the agency medical director, a gas mask will not provide full protection from pepper spray.

Barry appealed the initial denial of her request to the DOC ADA Coordinator and asked for reconsideration of her request to be reassigned or wear a gas mask. After an investigation, the ADA Coordinator concluded that Barry's requests were not feasible. The ADA Coordinator informed Barry that Correctional Officers must change assignments on a rotating basis, that the locations she requests to be assigned would not insulate her from pepper spray exposure, that she cannot be assigned to the mailroom because it would be a violation of the collective bargaining agreement, and that a gas mask would be a threat to safety and security. Therefore, in a letter dated October 1, 2013, the ADA Coordinator denied Barry's request for accommodation and notified her of her right to appeal this decision to the Director of DOC. Barry's attorney, Bill Siders, subsequently sent a letter of appeal to the Director.

On or about February 26, 2014, DOC Director S.A. Godinez denied the Charging Party's appeal for an ADA accommodation. This denial was based upon the medical documentation that made it clear that the Charging Party has limitations which would affect her performance as a Correctional Officer.

At some point the Charging Party was offered other positions within DOC but she indicated she could not afford the loss of pay associated with those assignments/positions.

Charging Party was also offered to work the third shift, which would lessen the possibility of exposure to pepper spray because most inmates are confined to their cells and sleeping during that shift. Charging Party rejected that offer and instead requested a permanent assignment to either the tower or front gate. That request was again rejected by the DOC.

The Charging Party had also requested to transfer to the Lincoln Correctional Center because, in her opinion, it was less likely she could be exposed to pepper spray at that location. Apparently this request was also denied by the DOC.

Ultimately, Charging Party's ADA accommodation appeal was denied by DOC. On or about April 2, 2014, the Charging Party sent correspondence to AFSCME District Representative Roger Griffin, requesting that the union file a second contractual grievance on her behalf. AFSCME rejected her request because her initial grievance, pertaining to the same issue, had been resolved by submitting the dispute to the ADA accommodation process.

II. DISCUSSION AND ANALYSIS

The Charging Party asserts that the Respondent has breached its duty to fairly represent her by failing to file grievances or seek an acceptable resolution of certain issues on her behalf. However, the Charging Party has failed to present any evidence or an assertion that any agent of the Respondent was involved in intentional misconduct as defined by the Act.

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

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.

Charging Party alleges that the Respondent has discriminated against her due to its failure to obtain a reasonable accommodation for her medical condition. She further claims the Respondent breached its duty to represent her by refusing to submit a second grievance on her behalf. However, the action that forms the substance of her charge is actually a decision by the DOC to reject her request for an accommodation for her asthma. While Respondent could advocate on behalf of the Charging Party in the grievance process, it had no control over DOC's ultimate decision not to grant an accommodation.

Clearly the Charging Party believes that Respondent should have continued to pursue an accommodation on her behalf. However, Section 6(d) of the Act states that nothing in the Act "shall be construed to limit an exclusive representative's right to exercise its discretion to refuse to process grievances of employees that are unmeritorious." Accordingly, a union must be accorded substantial discretion in deciding whether, and to what extent, a particular grievance

should be pursued. As the Board has previously held, a union's failure to take all the steps it might have taken to achieve the results desired by a particular employee does not violate Section 10(b)(1), unless as noted above, the union's conduct appears to have been motivated by vindictiveness, discrimination, or enmity. Outerbridge and Chicago Fire Fighters Union, Local 2, 4 PERI ¶3024 (IL LLRB 1988); Parmer and Service Employees International Union, Local 1, 3 PERI ¶3008 (IL LLRB 1987). Unless there is compelling evidence of intentional misconduct, the Board will not second guess a union's administrative decision regarding grievances handling. See Benny Eberhardt and International Brotherhood of Teamsters, Local 700, 29 PERI ¶77 (ILRB-SP 2012); Amalgamated Transit Union, 2 PERI ¶3021 (IL LLRB 1986).

In the instant case, AFSCME determined that the Charging Party's grievance could best be addressed through an ADA accommodation. When the ADA accommodation was eventually denied by the DOC, AFSCME chose not to file another grievance. It was certainly within AFSCME's discretion, under Section 6(d), to proceed in this manner. Absent any evidence that the Respondent acted with bias or with a discriminatory motive, this charge fails to raise an issue for hearing.

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 17th day of November, 2014.

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A handwritten signature in black ink, appearing to read 'Melissa Mlynski', written over a horizontal line.

Melissa Mlynski, Executive Director