

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

Brad Herbst,)
)
Charging Party,)
)
and) Case No. L-CB-22-021
)
Fraternal Order of Police, Lodge 7,)
)
Respondent.)

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

On December 16, 2022, Executive Director Kimberly Stevens dismissed a charge filed by Charging Party Brad Herbst on April 28, 2022. The charge alleged that Respondent Fraternal Order of Police, Lodge 7 (Union) engaged in unfair labor practices within the meaning of Section 10(b) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315/1 *et seq.*, when it refused to pursue a grievance over his discharge from his position as a probationary officer with the City of Chicago, Police Department (Employer).

The Executive Director dismissed the charge on grounds Charging Party failed to provide evidence indicating Respondent acted with improper motive or otherwise engaged in intentional misconduct. The Executive Director observed there was no evidence Respondent held any animosity toward Charging Party, discriminated against him, or refused to pursue his grievance based on anything other than the merits of the grievance, noting that under Section 6(d) of the Act, unions have wide discretion in contract interpretation and grievance handling. She further noted that under Board precedent, a union's failure to achieve a desired result by a particular employee does not violate the Act.

The Executive Director then determined that Charging Party failed to provide any indication that Respondent engaged in intentional misconduct by refusing to pursue the grievance in question. Moreover, the Executive Director found that to the extent Charging Party's allegations involved objections to the terms of the collective bargaining agreement between the Employer and the Union, Charging Party lacked standing to pursue such objections through an unfair labor practice charge.

On December 23, 2022, Charging Party, who is not represented by counsel, timely filed an appeal of the Executive Director's dismissal. The Union timely responded.

In his appeal, Charging Party contends the Executive Director incorrectly interpreted the extent of a union's discretion in pursuing grievances under Section 6(d) of the Act. He claims that under Section 6(d), such discretion may only be exercised in "unmeritorious" cases, and thus, Union could not properly exercise discretion because the Union refused to pursue his grievance based on "disproportionate, hypocritical, and completely arbitrary" reasons, i.e., his status as a probationary officer precludes termination grievances, not because his claims are "unmeritorious." In support, Charging Party provides a transcript of his investigatory interview which he claims demonstrates the Union's intentional misconduct. Also included is an excerpt of an arbitration award Charging Party contends demonstrates that probationary employees are covered by the just cause provisions of the collective bargaining agreement.

Upon review of the dismissal order, the record, the appeal and response thereto, we find the appeal without merit and affirm the dismissal of the charge for the reasons stated by the Executive Director. The Executive Director's determinations were correct, and the appeal offers no feasible basis to overturn the dismissal. Charging Party's claim that the Executive Director misinterpreted the extent of a union's discretion under Section 6(d) of the Act is merely a bald

assertion lacking merit. Notwithstanding Charging Party's disagreement with the Executive Director's interpretation of Section 6(d), the materials provided with the appeal indicate the Union's refusal to pursue Charging Party's discharge grievance was based on the inability to challenge the discharge under the contractual grievance process, not for arbitrary reasons claimed by Charging Party. As the Union correctly points out, the arbitration award Charging Party provides in support of his contention that probationary employees are covered by the collective bargaining agreement, only serves to undermine Charging Party's claims. Although the award indicates that probationary officers have some coverage under the contract, the award found that termination grievances for any police officer, including probationary officers, are not arbitrable, which supports the Union's reasons for refusal to pursue the grievance.

Moreover, Charging Party's appeal fails to identify any evidence indicating the Union's failure to pursue his grievance was due to any unlawful motive or intentional misconduct sufficient to warrant reversal of the Executive Director's dismissal. To establish intentional misconduct, a charging party is required to establish that (1) a union conduct was intentional, invidious, and directed at charging party; and (2) the intentional action occurred because of and in retaliation for some past activity by the charging party or because of the charging party's status, or animosity between the charging party and the union's representatives. Metro. Alliance of Police v. Ill. Labor Relations Bd., Local Panel, 345 Ill. App. 3d 579, 588 (1st Dist. 2003).

Although Charging Party points to the transcript of his investigatory interview in which he claims an attorney for the Union falsely stated that probationary employees had no "contractual protections" as evidence of the Union's intentional misconduct, the alleged dishonesty of that statement fails to raise an issue of fact or law regarding any of the factors required to establish intentional misconduct on the part of the Union in its refusal to pursue Charging Party's grievance.

There is no indication in the materials provided by Charging Party that the Union's attorney intentionally made this alleged false statement, which at most was a blanket statement that may not have been entirely accurate, due to the Union's animosity or hostility toward Charging Party. Indeed, the context in which the statement was made demonstrates otherwise. The attorney appears to have informed the interviewer about the lack of contractual protections for probationary officers in an effort to underscore the significance of Charging Party's constitutional rights. Accordingly, the Executive Director correctly dismissed the charge on grounds that the Charging Party failed to demonstrate that Respondent engaged in unlawful activity, and thus, failed to raise an issue of fact or law for hearing.

For the above reasons, we affirm the Executive Director's dismissal for the reasons stated therein.

BY THE LOCAL PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ Lynne O. Sered

Lynne O. Sered, Chairman

/s/ Charles E. Anderson

Charles E. Anderson, Member

/s/ Angela C. Thomas

Angela C. Thomas, Member

Decision made at the Local Panel's public meeting in Chicago, Illinois, on February 9, 2023; written decision approved at the Local Panel's public meeting in Chicago, Illinois, on March 9, 2023, and issued on March 9, 2023.

This Decision and Order is a final order of the Illinois Labor Relations Board. Aggrieved parties may seek judicial review of this Decision and Order in accordance with the provisions of Section 11(e) of the Act and the Administrative Review Law. Petitions for review of this Decision and Order must be filed within 35 days from the date the Decision and Order is served upon the party affected by the decision. 5 ILCS 315/11(e).

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

Brad Herbst,

Charging Party

and

Case No. L-CB-22-021

Fraternal Order of Police, Lodge 7,

Respondent

DISMISSAL

On April 28, 2022, Brad Herbst (Charging Party) filed an unfair labor practice charge in Case No. L-CB-22-021 with the Local Panel of the Illinois Labor Relations Board (Board), in which he alleged that the Fraternal Order of Police, Lodge 7 (Respondent) engaged in unfair labor practices within the meaning of the Illinois Labor Relations Act, 5 ILCS 315 (2014). 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. I hereby dismiss this charge for the following reasons.

I. INVESTIGATION

The Chicago Police Department (Employer) employed Charging Party in the job classification or job title of Probationary Officer¹. Respondent and the Employer are parties to a collective bargaining agreement (CBA) for the Unit that includes a grievance procedure

¹The applicable collective bargaining agreement contains the following language: "ARTICLE 2 — RECOGNITION The Employer recognizes the Lodge as the sole and exclusive collective bargaining representative for all sworn Police Officers below the rank of sergeant (herein referred to as "Officer") excluding probationary officers employed by the Employer in its Department of Police, provided said probationary period shall not extend beyond an eighteen (18) month period."

culminating in final and binding arbitration. Charging Party alleges that Respondent violated the Act when it refused to pursue a grievance regarding his discharge due to his status as a probationary employee. Charging Party contends that Respondent's actions violated terms outlined in the CBA, terms defined by the Illinois Appellate Court, and conditions set forth in an arbitration award.

On May 16, 2017, the Employer hired Charging Party. Sometime before November 15, 2018, the Employer commenced an investigation into a harassment allegation brought against Charging Party. Charging Party claims that Respondent failed to advise him of his rights, specifically, rights outlined in Appendix P of the CBA, which outlines the benefits granted to probationary employees after they complete 12 months of the 18-month probationary period. Moreover, Charging Party alleges that Respondent processed his grievance as if he was an “at-will” employee.

On or around November 15, 2018, the Employer discharged Charging Party from his employment. Sometime thereafter, Charging Party sought support from Respondent. Charging Party claims that Respondent advised him to seek legal counsel and sue the Employer. Sometime thereafter, Charging Party pursued legal action against the Employer.

At some point, Charging Party discovered that termination/separation appeals were within the Police Board's jurisdiction. As such, on or around November 15, 2021, Charging Party spoke with Respondent about appealing his termination to the Police Board.

On February 16, 2022, Charging Party argued his case before Respondent's Board in order to get the Board's approval for his discharge to be reviewed by the Police Board. In response, Respondent allegedly informed Charging Party that, as a probationary employee, he was not eligible for a this review process before the Police Board.

On May 6, 2022, the Board agent assigned to this charge sought additional information to clarify the charge and to determine whether Section 10(b)(1) of the Act was violated. In response to the inquiry, Charging Party stated that the CBA contains a “black hole” because discharges cannot be grieved and must be heard before the Police Board. Moreover, Charging Party argues that the court’s decision in his court case, in addition to two arbitration awards regarding discharge appeals, give Respondent an obligation to pursue his discharge appeal. As such, Charging Party contends that Respondent’s failure to pursue his discharge appeal before the Police Board violates the Act and the aforementioned decisions.²

On May 13, 2022, via telecommunication, Charging Party claimed that Respondent contested the discharges of two other probationary employees but failed to pursue his matter in a similar fashion. Moreover, Charging Party claimed that his status as a probationary employee created a “loophole” in the CBA. The Board agent attempted to clarify Charging Party’s claims and discovered that Charging Party was a probationary employee when he was discharged. Moreover, Charging Party told the Board agent that there was no evidence of bias or animus on the part of Respondent. Further, Charging Party stated that Respondent never changed its explanation for refusing to pursue his matter.

II. DISCUSSION AND ANALYSIS

Charging Party did not present any evidence that Respondent’s actions were motivated by anything other than its assessment of the merits of his case, specifically his status as a probationary employee. Under Section 6(d) of the Act, a labor organization has a wide range of discretion in contract interpretation and grievance handling. Accordingly, as the Board has previously held, a

² Charging Party was informed that allegations that Respondent violated a court order or arbitration awards are best resolved through the entities that issued the order or awards. The ILRB lacks authority to enforce or police other policies, acts, or decisions.

union's failure to take all the steps it might have taken to achieve the results desired by a particular employee does not violate the Act unless 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).

In addition, Charging Party did not provide evidence of intentional misconduct on the part of Respondent, nor did Charging Party provide any indication that he engaged in activity that would engender the animosity of union representatives. 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 unit member or because of the unit member's status (such as race, gender, or national origin), or animosity between the unit member 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) he or she has engaged in activities tending to engender the animosity of union agents or that his or her mere status, such as race, gender, religion or national origin, may have caused animosity; (2) the union was aware of his or her activities and/or status; (3) there was an adverse

representation action taken by the union; and (4) the union took an adverse action against him or her for discriminatory reasons, i.e. because of animus towards a unit member's activities or status.

Id. at 588-89. In this case, Charging Party did not provide evidence that he undertook action that would engender animosity or bias toward him by Respondent, nor did he even allege that Respondent held any such animus or bias toward him.

Second, Charing Party failed to provide evidence to sustain the allegations that Respondent engaged in misconduct when it advised him to retain counsel and pursue legal action against the Employer, when Respondent contested the discharges of two other probationary employees, or when Respondent failed to inform him of his CBA rights. To have a viable claim under Section 10(b)(1) of the Act, a charging party should allege this unlawful motive with a showing of fraud, deceitful actions or dishonest conduct by the Union. Am. Fed'n of State, Cnty., and Mun. Empl. Council 31 (Hughes), 20 PERI ¶ 88 (IL LRB-SP 2004); IBEW, Local 134 (Daniels), 7 PERI ¶ 3030 (IL LLRB 1991), citing Hoffman v. Lonza, Inc., 658 F. 2d 519 (7th Cir. 1981). In this case, even assuming these allegations are accurate, Charging Party failed to show that Respondent had an unlawful motive. Additionally, regarding Charging Party's allegation that Respondent failed to inform him of his CBA rights, a union's failure to promptly and accurately communicate with an employee is not sufficient to establish a causal connection between any alleged animosity and an adverse representation action. Amalgamated Transit Union, Local 241 (Spratt), 31 PERI ¶ 121. Moreover, the duty of fair representation "does not require the [Union] to provide information or suggest options that [a] [c]harging [p]arty should have access to or be aware of. Village of Riverdale, 35 PERI ¶ 153 (IL LRB-SP 2019). Therefore, Charging Party has not presented evidence that supports a finding that Respondent violated the Act in this regard.

Lastly, the crux of Charging Party's complaint alleges that Respondent failed to enforce the CBA, or, in the alternative, that Respondent improperly agreed to a CBA that does not support probationary employees. However, Charging Party, as an individual, does not have standing to allege such a violation. See, e.g., Teamsters Local 726 (Goins), 18 PERI ¶3009 (IL LRB LP 2002), citing State of Illinois, Central Management Services, 15 PERI ¶2047 (IL SLRB 1999; Illinois Toll Highway Authority, 9 PERI ¶2005 (IL SLRB 1993)).

In this charge, Charging Party did not provide evidence showing that Respondent committed intentional misconduct and therefore has not established that Respondent violated the Act. Moreover, Charging Party does not have standing to allege a contractual breach before the Board. Lastly, aspects of this charge related to the enforcement of court orders or arbitration awards are not within the Board's jurisdiction. As such, the available evidence does not raise an issue of fact or law for hearing, and this charge must be dismissed.

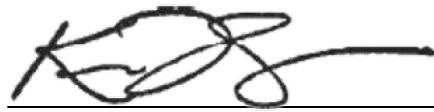
III. ORDER

Accordingly, this charge is hereby dismissed. The Charging Party may appeal this dismissal to the Board any time within 10 calendar days of service of this dismissal. Such appeal must be in writing, contain the case caption and numbers, 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 or filed electronically at ILRB.Filing@Illinois.gov in accordance with Section 1200.5 of the Board's Rules and Regulations, 80 Ill. Admin. Code §§1200-1300. 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. Please note that the Board's Rules and Regulations do not allow electronic service of the other persons or organizations involved in this case. 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 at Springfield, Illinois, this 16th day of December, 2022.

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



**Kimberly F. Stevens
Executive Director**