MAY 08 2007

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

Kimberly Bottom,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. L-CB-06-013
	)	
Licensed Practical Nurses Association of Illinois,	)	
	)	
	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

I. BACKGROUND

On September 27, 2006, Kimberly Bottom (Charging Party or Bottom) filed an unfair labor practice charge against the Licensed Practical Nurses Association of Illinois (Respondent or Union or Association). Following an investigation, the Illinois Labor Relations Board's (Board) Executive Director issued a Complaint for Hearing alleging that the Union violated Section 10(b)(1) and (6) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2004), as amended. The parties appeared before the undersigned for a hearing on this matter on February 8, 2007. At the hearing, both parties were represented by counsel and had the opportunity to call, examine, and cross-examine witnesses, introduce documentary evidence and present arguments. Both parties filed post-hearing briefs.

II. FINDINGS OF FACT

At the hearing on this matter, two witnesses testified on behalf of the Charging party: Bottom; and Nora Mitchell (Mitchell), President of Division I of the Union. Two witnesses testified on behalf of the Union: Mitchell[1]; and Sadie Lewis (Lewis), Union Representative. After full consideration of the parties' stipulations, evidence, arguments and briefs, and upon the entire record of the case, I make the following findings:

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[1] Mitchell testified on behalf of both the Charging Party and the Union.

The Board has jurisdiction to hear this matter pursuant to Sections 5(a) and 20(b) of the Act. The County of Cook, John H. Stroger Hospital (Employer) is a public employer within the meaning of Section 3(o) of the Act. The Union is a labor organization within the meaning of Section 3(i) of the Act. At all times material, Bottom has been a public employee within the meaning of Section 3(n) of the Act. The Union is the exclusive representative of a bargaining unit composed of all Licensed Practical Nurses of the Employer (Unit). At all times material, the Union and the Employer have been parties to a collective bargaining agreement (CBA) governing the Unit, which contains a grievance procedure culminating in final and binding arbitration (grievance procedure).

Bottom is employed by the Employer as a Licensed Practical Nurse and is part of the Unit. On or about July 8, 2005[2], Bottom was suspended for violating several of the Employer's personnel rules, arising out of a physical altercation with co-worker and fellow Unit-member Sadie McGee (McGee). In a letter dated July 11, the Employer notified Bottom that a pre-disciplinary hearing had been scheduled for her regarding the altercation with McGee. After Bottom received the pre-disciplinary hearing notice, she approached Mitchell and requested Union representation at the pre-disciplinary hearing. Mitchell previously had agreed to represent McGee during her pre-disciplinary hearing regarding the altercation. For that reason, she assigned Lewis to represent Bottom. Lewis provided Bottom with Union representation at the July 11 pre-disciplinary hearing. After the hearing, Bottom turned to Lewis and complained about the quality of representation Lewis had provided. On or about July 21, the Employer notified Bottom that the result of the pre-disciplinary meeting was that she was terminated retroactive to July 8.

On or about July 21, Bottom approached Mitchell and requested Mitchell file a grievance on her behalf challenging her termination. Bottom indicated to Mitchell that she did not feel that she had received fair representation from the Union. Mitchell told Bottom that she would not

[2] All dates are presumed to have occurred within 2005 unless otherwise specified.

participate in her grievance and asked whether Bottom had spoken to Lewis. Mitchell testified that the reason she refused to participate in Bottom's grievance was that she was representing McGee in the matter, but that Bottom had Lewis to represent her. Bottom requested Mitchell sign her grievance form. Mitchell refused to sign the form because it was blank. Subsequently, Bottom independently filed her grievance.[3] Lewis was unable to attend Bottom's grievance hearing due to a doctor's appointment, so Mitchell attended in her stead. During the hearing, Bottom indicated that she did not want Mitchell present. Mr. Dyson, from the Employer's Department of Human Resources, informed Bottom that, as the Union, Mitchell had a right to be there. Mitchell told Bottom that she was there for the Union, not for Bottom and sat back and took notes during the hearing. The grievance was subsequently denied.

In a letter to Union President Marie Burris (Burris) dated September 27, Bottom complained about the representation she had been receiving from the Union, specifically Mitchell. That same day, Bottom filed the instant unfair labor practice charge against the Union.

Between August 26 and September 20, Bottom approached Mitchell and asked her if she would help her with next step of the grievance procedure. Mitchell refused. On September 20, Bottom independently initiated the next step of the grievance procedure. Bottom retained her own attorney to assist her in the grievance process. On January 24, 2006, Bottom attended a grievance hearing accompanied by her attorney. No representative from the Union attended the hearing. In a decision dated February 9, 2006, the hearing officer ordered that Bottom return to work without back pay and be placed on probation for six months. Bottom faxed Mitchell a copy of the hearing officer's decision on March 6, 2006, in hopes that Mitchell would have a change of heart and assist her in appealing the portion of the decision refusing to award her back pay and placing her on probation.

On March 13, 2006, Bottom's attorney sent the Employer a letter appealing the hearing officer's decision to the extant that it did not award her back pay and requesting arbitration. On

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[3] There are four steps to the grievance procedure.

March 20, 2006, the Employer replied, refusing to proceed to arbitration because, under the CBA, only the Union was allowed to initiate an appeal to arbitration. Bottom sent another letter to Burris dated March 15, 2006, requesting the Union arbitrate her grievance. Bottom did not receive a response from the Union.

In a letter to Mitchell dated March 27, 2006, Bottom's attorney requested that the Union arbitrate Bottom's grievance. The letter further provided, in relevant part:

> During my conversation with you on March 13, you denied that Ms. Bottom was a member of the Association, and stated that because Ms. Bottom had filed an Unfair Labor Practice Charge against the Association based on its refusal to represent her, you would not take any action on her behalf.

However, during her testimony, Mitchell specifically denied making such a statement. Mitchell took Bottom's request for arbitration to the Union's Board. After discussing Bottom's request, the Board did not believe they would be successful if they arbitrated Bottom's grievance and did not have the money to proceed to arbitration. For those reasons, the Union declined Bottom's request. Mitchell testified that in the past ten years, no reinstated bargaining unit member has been awarded back pay and no arbitrations have been held to obtain back pay. During that time, the Union has never arbitrated a grievance. In a letter to Bottom's attorney dated April 11, 2006, the Union's attorney declined Bottom's request to arbitrate her grievance.

III. DISCUSSION AND ANALYSIS

A. 10(b)(1)

Bottom alleges that the Union violated Section 10(b)(1)[4] of the Act. Under Section 10(b)(1) of the Act, a labor organization violates its duty of fair representation only by intentional misconduct in representing employees. To demonstrate intentional misconduct by a union within

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[4] Section 10(b)(1) of the Act provides that "It shall be an unfair labor practice for a labor organization or its agents .. to restrain or coerce public employees in the exercise of the right 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."

the meaning of Section 10(b)(1) of the Act, a charging party must meet a two-part test: First, she must prove that the union's conduct was intentional, individious and directed at her. Second, she must establish that the intentional action occurred because of and in retaliation for some past activity, or because of her status (such as race, gender, or national origin), or animosity between herself and the Union's representatives (such as that based upon personal conflict or her dissident union practices). Murry v. American Federation of State County and Municipal Employees, Local 111, 305 Ill. App. 3d 627, 712 N.E.2d 874 (1999); AFSCME, Council 31, 20 PERI ¶88 (IL SLRB 2004); AFSCME (Drain), 16 PERI ¶2012 (IL SLRB 2000); AFSCME Council 31 (Segrest), 16 PERI ¶2003 (IL SLRB 1999). Accompanying this standard is the union's right to exercise reasonable discretion in carrying out its duties and responsibilities. ATU (Lawrence), 14 PERI ¶3011 (IL LLRB 1998); LIUNA, Local 2 (Mazzie), 10 PERI ¶3004 (IL LLRB 1993). Under the intentional misconduct standard, unions are accorded significant discretion in deciding whether to pursue a grievance. Moore v. Illinois State Labor Relations Board, 206 Ill. App. 3d 327, 564 N.E.2d 213 (1990); FOP Lodge 7 (Majeske, et. al.), 10 PERI ¶ 4008 (1994) (unpublished First District Appellate Court Order affirming FOP Lodge 7 (Majeske, et. al.), 9 PERI ¶ 3017 (IL LLRB 1993)).

In order to establish the second element of a Section 10(b)(1) violation, the charging party must prove unlawful discrimination. In duty of fair representation cases, to prove unlawful discrimination, the charging party must establish a *prima facie* case by demonstrating by a preponderance of the evidence that (1) the employee has engaged in activities tending to engender animosity of union agents[5] or that the employee's mere status, such as race, gender, religion or national origin, may have caused animosity; (2) that the union was aware of the employee's activities and/or status; (3) that there was an adverse representation action by the union; and (4) that the union took the adverse action against the employee for discriminatory reasons, i.e.,

[5] The employee may show, for example, that he or she has engaged in activities deemed dissident by union leaders, or that union agents harbored personal animosity toward her. AFSCME, Council 31, 20 PERI ¶88.

because of animus toward the employee's activities or status. Metropolitan Alliance of Police v. Illinois Labor Relations Board, Local Panel, 345 Ill. App. 3d 579, 803 N.E.2d 119 (2003); AFSCME (Robertson), 18 PERI ¶2014 (IL SLRB 2002). To prove the requisite causal connection between the employee's protected activities and the adverse representation action, the charging party should submit direct or circumstantial evidence establishing the union's unlawful motive. AFSCME (Robertson), 18 PERI ¶2014.

Once the charging party establishes its *prima facie* case, the burden shifts to the union to demonstrate that it would have taken the same action in absence of the animus. Chief Judge of the Tenth Judicial Circuit, 18 PERI ¶2014 (IL SLRB 2002). Stated another way, the union can escape liability if it proffers a legitimate explanation for its adverse representational actions that is determined is not merely pretextual. Id.

In this case, Bottom has satisfied the first prong of her *prima facie* case because she engaged in activities tending to engender animosity of union agents by her complaints to Lewis after the pre-disciplinary hearing, by her July 21 conversation with Mitchell during which she indicated that she didn't feel the union was adequately representing her, and by her September 27, 2005 letter to the State President of LPNAI in which she criticized Mitchell and the representation she had been receiving from the Union. Bottom satisfies the second prong of her *prima facie* case because the record evidence establishes that the Union was aware of her activities. In regard to the third prong of Bottom's *prima facie* case, I find that the Union took adverse representation action against Bottom only by its decision not to arbitrate her grievance. I do not find that Mitchell's refusal to sign Bottom's grievance form to be adverse representation action because Mitchell was not refusing to assist Bottom in the grievance procedure. Rather, Mitchell was simply refusing to sign a blank form. Nor do I find that the quality of the Union's representation during the pre-disciplinary hearing and grievance hearing to amount to adverse representation action. At best, the Union's conduct can be described as negligence. However, intentional misconduct cannot be inferred from mere negligence. Public Service Employees

Union Local 46 (Perry), 15 PERI ¶ 3016 (IL LLRB 1999). Thus, Bottom has satisfied the third prong of her *prima facie* case.

I find that Bottom failed to establish the forth prong of her *prima facie* case, that the Union refused to arbitrate her grievance because of their animosity toward her, where the Union has not arbitrated a grievance in 10 years. Additionally, the Union's decision not to arbitrate Bottom's grievance was based upon its belief that the grievance would not succeed at arbitration and upon the cost of arbitrating the grievance. As discussed above, the Union has a great deal of discretion in deciding whether or not to pursue a particular grievance. Moore, 206 Ill. App. 3d 327, 564 N.E.2d 213. A union may take into account the following factors when determining the merits of a claim: perceived merit of the complaint, likelihood that the union will prevail, the cost of pursuing the grievance, or the possible benefit to membership. Norman Jones, 272 Ill. App. 3d 612, 650 N.E.2d 1099 (1995). Thus, the Union's decision not to arbitrate Bottom's grievance does not establish intentional misconduct because the Union has discretion in deciding how far to pursue employees' complaints. Norman Jones, 272 Ill. App. 3d 622-23, 650 N.E.2d 1099; Moore, 206 Ill. App. 3d 327, 564 N.E.2d 213.

Furthermore, assuming *arguendo*, that the Charging Party had established her *prima facie* case, the Union has demonstrated that it would have refused to arbitrate her grievance even in absence of the alleged animus, where the Union has not taken a member's grievance to arbitration in the past ten years.

Accordingly, I find that Bottom has failed to establish a *prima facie* case that the Union violated Section 10(b)(1) of the Act.

B. 10(b)(6)

The next issue in this case is whether the Union violated Section 10(b)(6)[6] of the Act. To establish a violation of Section 10(b)(6), a charging party must show by a preponderance of the evidence that a labor organization took adverse action against an employee because of her involvement in proceedings before the Board. AFSCME, Council 31, 20 PERI ¶88.

As discussed above, the Union's refusal to arbitrate Bottom's grievance constitutes adverse action. However, the record evidence does not establish that the Union took such action because of her involvement in proceedings before the Board. In Bottom's attorney's March 27, 2006 letter to Mitchell, Bottom's attorney alleged that Mitchell stated to him during their March 13 conversation that the Union would not take any action on Bottom's part based, in part, on her filing the instant unfair labor practice charge. During the hearing on this matter, Bottom did not present any testimony to support the allegation in the March 27 letter that Mitchell made this specific statement. However, during her testimony in the hearing Mitchell specifically denied making such a statement. Because I find Mitchell to be a credible witness and there is no conflicting testimony, I credit Mitchell's testimony that she never made such statement. Thus, there is no credible evidence in the record to establish that the Union's decision not to arbitrate Bottom's grievance was based upon Bottom filing the instant charge. Accordingly, I find that Bottom has failed to establish a *prima facie* case that the Union violated Section 10(b)(6) of the Act.

IV. RECOMMENDED ORDER

In light of the above findings and conclusions, I recommend that the complaint be dismissed in its entirety.[7]

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[6] Section 10(b)(6) of the Act provides that "It shall be an unfair labor practice for a labor organization or its agents … to discriminate against any employee because he has signed or filed an affidavit, petition or charge or provided any information or testimony under this Act."

[7] During the hearing on this matter, counsel for the Union made a Motion to Dismiss. I indicated that I would not rule on the Motion at that time. Because I recommend that the complaint be dismissed in its

V. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules and Regulations (Rules), 80 Ill. Admin. Code §§1200-1240, the parties may file exceptions to this recommendation and briefs in support of those exceptions no later than 30 days after service of this recommendation. Parties may file responses to any exceptions, and briefs in support of those responses, within 15 days of service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed, if at all, with the Board's General Counsel, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. Exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois, this 4th day of May 2007.

Ellen Maureen Strizak
Administrative Law Judge
Illinois Labor Relations Board

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entirely based upon my finding that Bottom has failed to establish that the Union violated either Section 10(b)(1) or 10(b)(6) of the Act, I need not rule on the Union's Motion.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

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AFFIDAVIT OF SERVICE

I, Melissa L. McDermott, on oath state that I have this 4th day of May, 2007, served the attached **ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER** issued in the above-captioned case on each of the parties listed hereinbelow by certified mail service upon the following persons, addressed to them at the following addresses.

Ms. Sally A. Stix
Stix Law Offices
700 Rayovac Drive
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Mr. Christopher N. Mammel
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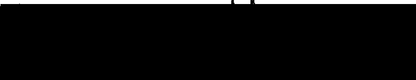

Melissa L. McDermott, Illinois Labor Relations Board