ALASKA LABOR RELATIONS AGENCY
1016 WEST 6TH AVENUE, SUITE 403
P.O. BOX 107026
ANCHORAGE, ALASKA 99510-7026
(907) 269-4895
Fax (907) 269-4898

DEE NELSON,)
)
Complainant,)
)
vs.)
)
MID-LEVEL MANAGEMENT)
ASSOCIATION,)
)
Respondent.)
)

CASE NO. 05-1335-ULP

DECISION AND ORDER NO. 279

The ALRA Board (Chair, Gary P. Bader, and Members Dennis Niedermeyer and Matthew R. McSorley) heard this unfair labor practice complaint on April 7, 2006 in Anchorage. Dee Nelson, represented herself and Randy Bonnell represented Mid-Level Management Association. Hearing Examiner Mark Torgerson presided. The record closed after deliberations were held on May 12, 2006.

Digest: Complainant Dee Nelson failed to prove under AS 23.40.110(c) that the Mid-Level Management Association committed an unfair labor practice. The Association's representation of Nelson, after her termination by the Matanuska Susitna Borough School District, was not arbitrary, discriminatory, or in bad faith.

DECISION

Statement of the Case

Complainant Dee Nelson was discharged while she was in probationary status with the Matanuska-Susitna Borough School District. Nelson sought assistance from the Mid-Level Management Association, which represents her bargaining unit. Nelson alleges that the Association violated the duty of fair representation by failing to represent her fairly when she filed a grievance with the District. The Association denies the charges and contends it did represent her as required.

Jean Ward, the Agency's Hearing Officer conducted an investigation and found probable cause that the Association committed a violation of the duty of fair representation. The case was then scheduled for hearing. The Board heard this charge on April 7, 2006, in Anchorage, Alaska. The record closed on May 12, 2006.[1]

Issue

Did the Mid-Level Management Association commit an unfair labor practice by failing in its duty to represent the employee fairly after she was discharged during her probationary period?

Findings of Fact

1. The Mid-Level Management Association (Association) is a small bargaining unit representing mid-level management employees in the Matanuska-Susitna School District (District). The unit does not collect dues from any of its members.

2. The District hired Dee Nelson as supervisor of the District's payroll department on March 25, 2002. (Hearing Exh. 5, at 2). Nelson's bargaining unit is the Association.

3. Under the parties' collective bargaining agreement, Nelson was a probationary employee for one full year after her hire date. (Exh. 3, at 13)

4. The District discharged Nelson on February 6, 2003, while she was still in probationary status.[2]

5. After her discharge, Nelson met with Randy Bonnell, the Association's representative. Nelson wanted the Association to file a grievance with the District regarding her discharge. Nelson submitted a letter to Bonnell notifying him that she was "exercising my right as stated in Article IX Section 2 under the MLMU[3] contract to file a grievance for wrongful termination." (Exh. 1).

6. Bonnell reviewed the collective bargaining agreement along with Nelson's personnel file, and he discussed the discharge with Paula Harrison, Director of Human Resources and Labor Relations for the District. (Exh. 6) Harrison pointed out that Nelson was a probationary employee, and Article 8 of the collective bargaining agreement provides that probationary employees are "at will" employees "who may be terminated at any time during the probationary period for any reason

[1] Board member Dennis Niedermeyer was unable to attend the hearing in person. He subsequently listened to the hearing tape and reviewed the record. The Board panel deliberated and decided the case during the executive session following its semi-annual business meeting on May 12, 2006. The record closed on that date. On May 19, 2006, the Agency issued a bench order notifying the parties of the panel's decision and informing it would later issue this formal decision and order.

[2] Nelson testified that she was discharged on her birthday.

[3] "MLMU" is Mid-Level Management Unit.

deemed adequate by the district." (Exh. 3, at 4).

7. Bonnell met with Nelson and discussed Article 8. He told Nelson something to the effect that he did not know what to do for her, or he did not feel qualified to help her. Nelson interpreted this to mean that Bonnell had no clue what to do for her. Bonnell testified that he meant he did not see any information that led him to believe he could help her get her job back. He asserted that his statement had nothing to do with professional qualifications. Nelson told Bonnell that she would talk to an attorney and get her own representation.

8. Bonnell did not file a grievance because he did not believe, after completing his investigation, that there was a violation of the collective bargaining agreement. However, he did recommend to Nelson that she file a Level 1 grievance. In addition, he contacted the District on three separate occasions and requested that the District expunge Nelson's employment record. (Exh. 7). His requests were denied.

9. Believing that Bonnell did not know how to go about helping her, Nelson retained an attorney. The collective bargaining agreement allows an employee to file a grievance without union participation,[4] and Nelson filed a grievance on her own. (Exh. 3 at 5).

10. The District denied the grievance at both Level 1 and Level 2. Bonnell offered to show up with Nelson for the Level 2 hearing, but Nelson declined the offer.

11. At the Level 2 proceeding, the District retained attorney Theresa Hennemann as Superintendent Bob Doyle's designee, to hear Nelson's grievance, in accordance with Article 9, Subsection 2 of the parties' collective bargaining agreement. Nelson was represented by attorneys Doug Parker and Theresa Hillhouse, and the District was represented by attorney Saul Friedman. (Exh. 5).

12. Hennemann took testimony and received documents from the parties. Hennemann concluded that Nelson filed her grievance timely, she was a probationary employee at the time of discharge, and under the parties' collective bargaining agreement, probationary employees may be discharged at any time based on the District's personal judgment; in other words, probationary employees are "at will" employees. (*Id*. at 4-9). Hennemann upheld the District's discharge.

13. Nelson filed an unfair labor practice against both the District and the Association. In a July 5, 2005, "Statement of the position" regarding the complaint against the Association, Nelson asserted in pertinent part:

> My position is that the union in no way represented my case. There was no investigation and no representation. I was told directly by my union representative that they could not adequately represent me and therefore I spent over $12,000.00 in attorney fees . . . .

[4] Either the union or the employee may file a grievance on behalf of the employee.

> I feel that due to the fact that Mr. Bonnell was not qualified to represent me that he used the district resources to do any and all work on my case[;] therefore it will not be unbiased.
>
> I feel that the union failed to represent me in this entire battle based on the sole discretion that I was "probationary". The letter of termination specifically states that I had "actions": that led to termination therefore the reason for termination was not probation status but issues that should have been investigated by the union in my case.

(Exh. 4) (punctuation in original).

ANALYSIS

Did the Mid-Level Management Association commit an unfair labor practice by failing in its duty to represent the employee fairly after she was discharged while on probation?[5]

Nelson contends that the Association committed an unfair labor practice by failing in its duty to represent her after the District terminated her. She specifically asserts that the Association's representative, Bonnell, should have, but did not file a grievance on her behalf after the District discharged her. Bonnell contends he represented Nelson as required by the duty of fair representation.

The duty of fair representation that a labor organization owes to members of the bargaining unit is set forth by the Alaska Supreme Court in Kollodge v. State, 757 P.2d 1028 (1988). This Agency analyzed the issue in Munson v. Alaska State Employees Ass'n, AFSCME Local 52, Decision & Order No. 161A (Aug. 23, 1993), affirmed Henry T. Munson v. State, No. 3AN-93-8752 (Anch. Super. Ct., Sept. 13, 1994). The United States Supreme Court has long recognized that a union has an implied statutory duty of fair representation under the National Labor Relations Act.[6] Likewise, there is a duty of fair representation implied in the Public Employment Relations Act.

The duty is one of general fairness -- the labor organization is prohibited from acting in a manner that is arbitrary, discriminatory, or in bad faith. This Agency noted that "in Kollodge the [Alaska Supreme] Court identified three elements of the duty of fair representation: (1) all unit members must be treated without hostility or discrimination; (2) the labor organization must exercise its discretion in good faith and honestly; and (3) the labor organization may not act arbitrarily."

[5]As we pointed out to the parties, the issue for decision here is limited to whether the Association committed an unfair labor practice under 8 AAC 97.225(b)(2). We do not decide whether the District wrongly discharged the employee. The facts presented regarding the discharge are provided for background information.

[6]Although the National Labor Relations Act (NLRA) does not explicitly articulate this duty, the U.S. Supreme Court has held that the duty is implied from the NLRA. *Lucas v. National Labor Relations Board*, 333 F.3d 927 (9th Cir. 2003), *citing Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 87 (1989).

Munson v. Alaska State Employees Ass'n, AFSCME Local 52, Decision & Order No. 161A, at 11. The labor organization may properly refuse to process a grievance so long as it meets those criteria. Moreover, the labor organization is permitted a "wide range of reasonableness" within which to act. Ford Motor Company v. Huffman, 345 US 330 (1953), 31 L.R.R.M. (BNA) 2548 (April 6, 1953). Conduct is not considered arbitrary unless it is so far removed from a wide range of reasonableness as to be irrational. Airline Pilots v. O'Neill, 499 US 65 (1991), 136 L.R.R.M. (BNA) 2721 (March 19, 1991). Courts generally have "assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation . . . ." *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 373 (1990). The Supreme Court endorsed this view in *Rawson*, and we adopt this view here.

In determining whether a violation occurred, we examine whether or not the Association evaluated the employee's termination in a good faith, non-arbitrary manner, and without hostility or discrimination, before deciding that filing a grievance would likely be futile. If the Association did not represent her because it lacked experience handling grievances and feared it could not provide adequate representation, the outcome under the duty of fair representation could be different than if the Association refused to file the grievance because it investigated the facts and determined that the grievance lacked merit.

Failure to pursue a grievance that the Association believes lacks merit generally would not violate the duty of fair representation. The labor organization is allowed a "wide range of reasonableness" within which to operate. *Ford Motor Company v. Huffman*, 345 US 330 (1953), 31 L.R.R.M. (BNA) 2548 (April 6, 1953). According to Patrick Hardin and John E. Higgins, Jr. in *The Developing Labor Law*, "[a] union need not process an employee's grievance if the chances for success in arbitration are slight. The probability of success on the merits is a judgment made by the union to which the courts have generally deferred." *The Developing Labor Law*, 1457 (3d. ed. 1992).

On the other hand, a union may violate the duty of fair representation by failing to take a meritorious grievance, or by processing the grievance in a perfunctory manner. The Alaska Supreme Court has stated,

> A union breaches its duty of fair representation when its "conduct toward(s) a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Furthermore, a union does not breach its duty of fair representation merely by refusing to bring an employee's grievances to arbitration: Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. To hold otherwise would greatly undermine the settlement machinery agreed to by the union and the employer as contained in the collective bargaining agreement.

Kollodge v. State, 757 P.2d at 1034 (citations omitted).[7]

The grievance procedure in the Association/District contract provides in relevant part that at Level 1, "The grievant shall present the grievance in writing to the grievant's immediate supervisor with ten (1) working days of the employee's knowledge of the grievance to receive use of this grievance procedure." The definitions for the grievance procedure define the "grievant" as "the party filing the complaint (i.e.: employee, employees, Union, or Employer.)" Thus, under the contract, either Nelson or the Association could have filed the Level 1 grievance. At Level 2, the contract states in part that "the Union shall forward the grievance to the Superintendent within ten (10) working days of the Union's receipt of the level one response. Within fifteen (15) working days after the receipt of the level two grievance, the Superintendent or designee shall meet with the Union and the grievant and attempt to resolve the grievance. The Superintendent shall provide a written response to the level two grievance no later than ten (10) working days after the meeting."

We find that Nelson has failed to prove that a violation occurred here. Bonnell, on behalf of the Association and Nelson, did review Nelson's personnel file and consult with the District. Bonnell also offered to attend the Level 2 hearing. Finally, he requested, several times, that the District expunge Nelson's employment record. Nelson appears to view this action as a biased investigation, but the evidence shows that Bonnell drew his conclusions on whether or not to represent Nelson only after he spoke with both Nelson and a representative of the District, and after he reviewed the collective bargaining agreement along with Nelson's personnel file. Bonnell could reasonably conclude that proceeding on Nelson's allegations through the grievance process would in all likelihood be pointless. The preponderance of evidence shows that Bonnell's review of Nelson's case was not arbitrary, discriminatory, or in bad faith.

Unlike many duty of fair representation cases where the employee has been precluded from using the grievance process because the union declined to file a grievance or take the grievance to arbitration, in this case Nelson was able to utilize the first two levels of the grievance procedure. However, the Association did not represent her. In order to have a representative, she claims she was forced to hire an attorney due to the Association's inexperience in pursing grievances. An issue is whether the Association can meet its obligations under the duty of fair representation standard by allowing the bargaining unit member access to the grievance procedure, but failing to provide any representation.

The duty of fair representation is especially important when a grievance for wrongful termination is involved. The Fourth Circuit Court of Appeals has held that "[a] union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge - - the industrial equivalent of capital punishment." *Griffin v. Auto Workers*, 469 F.2d 191 (4th Cir. 1970). In *N.LR.B. v. Amalgamated Industrial Union, Local 76B*, 290 NLRB 51, 1988 WL 213907 (N.L.R.B), the NLRB stated that, "Moreover, it is also clear that the duty of fair

[7] Nevertheless, the Court in *Kollodge v. State*, 757 P.2d 1028 (Alaska 1988), pointed out that "a breach of the duty of fair representation is not established by proof that the underlying grievance was meritorious . . . ." *Id.*, 757 P.2d at 1035, *citing Vaca v. Sipes*, 386 U.S. 171, 195 (1967).

representation extends to the investigation and representation of a grievance (FN54)." A failure to provide any representation at all could violate the duty of fair representation unless the Association made a good faith, non-arbitrary evaluation before deciding not to pursue Nelson's claim.

In this case, we find the Association met its duty to represent Nelson fairly. Bonnell investigated and reviewed Nelson's case before deciding the Association would not file a grievance. The evidence shows that Bonnell made a good faith evaluation and had a rational reason for not pursuing the grievance. When Bonnell told Nelson that there was nothing he could do for her, he was essentially informing her that he believed the case lacked merit. He developed this belief after investigation and therefore was not required to take Nelson's case. Although Bonnell's representation of Nelson was not ideal, the duty of fair representation standard does not include such a requirement. Moreover, Nelson did not provide evidence of arbitrary, discriminatory, or bad faith behavior on the part of the Association. Accordingly, Nelson has failed to prove her claim by a preponderance of the evidence, and the complaint is dismissed.

CONCLUSIONS OF LAW

1. The Mid-Level Management Association is an "organization" as defined by AS 23.40.250(5), and Dee Nelson is a public employee under AS 23.40.250(6).

2. The Alaska Labor Relations Agency has jurisdiction to consider a duty of fair representation charge under 8 AAC 97.225(b)(2).

3. Complainant Dee Nelson has the burden to prove each element necessary to her cause by a preponderance of the evidence.

4. Dee Nelson failed to prove her case by a preponderance of the evidence.

5. The Mid-Level Management Association did not violate the duty of fair representation when it declined to represent Dee Nelson as a result of her discharge.

ORDER

Dee Nelson's complaint in this case is denied and dismissed.

Dated: July 25, 2006.

ALASKA LABOR RELATIONS AGENCY

_____
Gary P. Bader, Chair

_____
Matthew R. McSorley, Board Member

_____
Dennis Niedermeyer, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of mailing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of *Dee Nelson vs. Mid-level Management Association,* Case No. 05-1335-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 25th day of July, 2006.

_____
Sherry Ruiz
Administrative Clerk III

This is to certify that on the 25th
day of July, 2006, a true and correct copy of
the foregoing was mailed, postage prepaid to:
Dee Nelson, Complainant
Randy Bonnell, Mid-Level Management Ass'n

_____
Signature