STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Charles Jones,	)	
	)	
Charging Party,	)	
and	)	
	)	Case No. S-CB-15-035
American Federation of State,	)	
County and Municipal Employees,	)	
Council 31,	)	
	)	
Respondent.	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On June 30, 2016, Executive Director Melissa Mlynski, issued an order dismissing the above-captioned charge (Dismissal). On July 14, 2016, Charging Party, Charles Jones (Jones), filed a timely appeal of the Dismissal along with a *Request for Appointment of Counsel*.[1]

On May 27, 2015, Jones filed an unfair labor practice charge with the State Panel of the Illinois Labor Relations Board (Board) 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, 5 ILCS 315/1, *as amended*, (Act). Specifically, Jones alleged that AFSCME plotted with his employer, the Illinois Department of Children and Family Services (DCFS or Employer) to seek Jones' discharge, and that AFSCME generally failed to properly represent Jones in grievance/discipline-related matters.

Charging Party contends that the Employer historically has treated him poorly. Indeed, DCFS terminated Jones in 1997 and 2008; however, AFSCME represented Jones, resulting in his reinstatement in both instances.

[1] Jones' *Request for Appointment of Counsel* was made jointly in the above-captioned case and in the related case, *Charles Jones and State of Illinois, Department of Central Management Services (Children and Family Services)*, Case No. S-CA-15-149.

Jones claims that after transferring from a suburban DCFS office to a Chicago office in 2013, DCFS increased its efforts to terminate him again. The Employer suspended Jones on a number of occasions. In at least two instances, AFSCME was able to negotiate a reduction in his suspensions. The suspension reduction was from 7 to 5 days in one instance and from 15 to 10 days in another.

Jones and Union Steward Patrick Armstrong (Armstrong) met on May 8, 2015, regarding another pre-disciplinary hearing that Jones was facing. Following that meeting, Armstrong filed an Unusual Incident Report (UIR) indicating that Jones had made threats of violence against a DCFS supervisor; Jones contends that it was Armstrong who threatened him.

As a consequence of Armstrong's UIR, DCFS placed Jones on paid administrative leave, prohibited him from coming onto DCFS properties without prior approval, and required that he notify the Employer if he were away from his home during working hours. In contravention of that directive, Jones went to DCFS' Human Resources Department, after which DCFS brought charges against him for failing to abide by the directive, making threats against his supervisor and failing to timely perform his duties.

Subsequently, the Employer discharged Jones. AFSCME grieved the discharge and advanced the grievance to Step 4; however, the Union ultimately declined to take the matter further based on the merits of the case.

The Executive Director characterized Jones' claims as purported violations of Section 10(b)(1) and (b)(3) of the Act, and concluded that Jones raised insufficient evidence to warrant hearing on either violation. We concur.

The Executive Director correctly determined that Charging Party failed to establish a *prima facia* case that the Union had breached its duty of fair representation. Section 10(b)(1)

provides that a labor organization commits an unfair labor practice in duty of fair representation cases only by intentional misconduct. Under this intentional misconduct standard, in order to establish a violation, a charging party must

> 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 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).

Metro Alliance of Police v. Ill. Labor Relations Bd., Local Panel, 345 Ill. App. 3d 579, 588 (1st Dist. 2003).

Further, to prove unlawful discrimination, as required to satisfy the second element for a Section 10(b)(1) violation, a charging party must demonstrate 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, religion or national origin, may have caused animosity; (2) the union was aware of the employee's activities and/or status; (3) there is 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 the employee's activities or status.

Id. Even assuming that AFSCME took adverse representation actions against Jones when Armstrong submitted the UIR and the Union failed to pursue the grievance to arbitration, Jones allegations do not warrant hearing because he failed to provide any evidence that AFSME or its representatives harbored a bias against him or otherwise treated him in a discriminatory manner. To the contrary, Jones' historical relationship with AFSCME is characterized by numerous examples of AFSCME's effective representation on Jones' behalf.

Similarly, the Executive Director determined that Jones failed to establish sufficient evidence to support his Section 10(b)(3) claim, which proscribes a labor organization from

causing or attempting to cause an employer to discriminate against an employee. Although it is undisputed that Armstrong reported Jones for alleged threats against a DCFS supervisor, the record is devoid of evidence of improper motivation by Armstrong. Moreover, AFSCME representatives other than Armstrong handled Jones' termination grievance and were instrumental in the decision not to pursue the matter to arbitration. Similarly, there is nothing in the investigatory record to suggest bias or improper motive by any Union representatives involved in challenging Jones' termination.

Jones filed a lengthy but very disjointed appeal purporting to assert legal theories such as breach of contract and constructive discharge that are wholly irrelevant to the Union's alleged violation of the Act. In general, Jones' appeal failed to address, much less successfully challenge, the Executive Director's analysis and conclusion. Moreover, the failed nature of Jones' claim bears heavily on the disposition of his request for appointment of counsel.

Jones' Request for Appointment of Counsel:

> Board Rule 1220.105[2] Appointment of Counsel provides in pertinent part as follows:
>
> a) A charging party may file a request for appointment of counsel simultaneously with or after filing a charge. The request shall be on a form developed by the Board. It shall be accompanied by an affidavit attesting to the charging party's *inability to pay or inability to otherwise provide for adequate representation.* (Section 5(k) of the Act) It shall also be accompanied by affidavits, documents or other evidence supporting the charge. (Emphasis in the original)
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> ***
>
> e) If the Board or its designated representative determines that the charging party is unable to pay or is otherwise unable to provide for adequate representation [pursuant to "Adjusted Income" Standards for Appointment of Counsel as set out in Section 1220.Table A], and that the charge is not clearly

[2] The appointment of counsel provision was formerly set forth in Board Rule 1220.30, which was later renumbered to Section 1220.105 at 27 Ill. Reg.7393, effective May 1, 2003.

> without merit, the charging party shall select counsel from a list of attorneys maintained by the Board.

As demonstrated by the plain language of the Rule, a charging party has no entitlement to appointment of counsel. Rather, this matter is within the discretion of the Board or its designated agent. In some instances, the Executive Director, as Board agent, may resolve a request for appointment that is made during the investigatory phase of the charge. However, in this instance, Jones first made this request after the Executive Director issued the Dismissal, at which time this matter was "pending before the Board." Accordingly, the request is properly presented to the Board for determination.[3]

As an initial matter, we note that Jones has not satisfied the basic requirements of the Rule because he has not submitted the requisite affidavit attesting to his inability to pay or otherwise provide for adequate representation. However, rather than focus on this technical, and arguably remediable, shortcoming, we address more substantive concerns.

This Board has previously declined to appoint counsel in the investigative stage of its labor practice procedures because the investigative stage does not involve legal formalities. *Carl Hamilton and American Federation of State, County and Municipal Employees, Council 31*, 28 PERI ¶ 139 (SP ILRB 2012). The Board applied that same rationale denying a request for appointment of counsel even after charging party had appealed the Executive Director's dismissal. We do not choose to depart from this established standard, or otherwise conclude that the context in which Jones' request for appointment of counsel is not free of technical

[3] *See Patrick Nelson and Chief Judge of the Circuit Court of Cook County*, 31 PERI ¶ 74 (SP ILRB 2014)(the Board upheld the Executive Director's dismissal of an unfair labor practice and denied charging party's request for appointment of counsel; *Laura Foster and Chicago Transit Authority*, 31 PERI ¶ 40 (LP ILRB 2012)(following charging party's appeal, the Board upheld the Executive Director's dismissal of an unfair labor practice and denied charging party's request for appointment of counsel).

formalities. We note, however, that in either event Jones' request for appointment of counsel would still properly be denied because his charge is clearly without merit. Although the language of the Rule is somewhat oblique, the only reasonable interpretation of the Rule, taking into consideration the language in sub-section (e), is that appointment of counsel is predicated on the Board's making two determinations: 1) that charging party satisfies the means test established by Sections 1220.105 (b) (c) and (d), and 2) "that the charge is not clearly without merit."

Even assuming that the Board determined that Jones has or can satisfy the means test, based on our careful review of the Executive Director's discussion and analysis, as well as the content of the investigatory file, we find that the charge is clearly without merit. While any *pro se* party's submissions or communications to the Board are likely to be improved to some degree if the party is represented by counsel, in this instance, the assistance of counsel could not remedy the substantive deficiencies of Jones' claims so as to affect the current determination that Jones' charge is entirely without merit.

Although not expressly stated in either the Act or the Rule, it is reasonable to infer that the articulated prerequisite pertaining to merit (or lack thereof) recognizes the financial costs associated with appointment of counsel and, empowers the Board to make a decision that implicitly includes some measure of cost/benefit analysis. If the allocation of financial resources associated with appointment of counsel were not implicitly intended to be a factor affecting the ultimate determination of whether to grant a request for appointment, the Rule need only have articulated the means test. Because the Rule also includes this reference to merit, we interpret and apply the Rule in such a way that does not ignore this language or otherwise render it superfluous. Further, we believe that the Board is entitled to be especially

judicious in assessing the question of merit as the cost of appointing counsel is high and Board resources are extremely limited, notwithstanding that in this case, the question of lack of merit is not a close question.

Accordingly, after reviewing the record and appeal, we uphold the Executive director's Dismissal for the reasons stated in that document. Further, for all of the reasons stated herein, we deny Charging Party's request for appointment of counsel in this matter.

BY THE STATE OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett
John J. Hartnett, Chairman

/s/ Michael G. Coli
Michael G. Coli, Member

/s/ John R. Samolis
John R. Samolis, Member

/s/ Keith A. Snyder
Keith A. Snyder, Member

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois on September 7, 2016; written decision issued in Chicago, Illinois on September 30, 2016.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Charles Jones, Charging Party and American Federation of State, County and Municipal Employees, Council 31 Respondent	Case No. S-CB-15-035

DISMISSAL

On May 27, 2015, Charging Party, Charles Jones (Charging Party) 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 violated Section 10(b) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2014), *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. INVESTIGATION

At all times material, Jones has been a public employee within the meaning of Section 3(n) of the Act, employed by the Illinois Department of Children and Family Services (Employer or DCFS) in the title of Office Associate Option 2. Jones began his employment with DCFS on January 12, 1995. Respondent is a labor organization within the meaning of Section 3(i) of the Act, and the exclusive representative of a bargaining unit (Unit) that includes the title of Office

Associate Option 2. Respondent and Employer are parties to a collective bargaining agreement (CBA) for the Unit that provides for a grievance procedure culminating in final and binding arbitration. In this unfair labor practice charge, Jones alleges Respondent has plotted with the Employer to seek his discharge and has generally failed to represent him in disciplinary and grievance matters.

Charging Party states the Employer has had a history of treating him poorly. The Employer terminated Jones' employment in 1997 and 2008 accusing him of falsifying his job application and criminal record, and being unfit to work in an agency whose mission involves the protection of children. The Union successfully represented Jones and resolved the two terminations with Charging Party's return to work.

In December 2013, Charging Party transferred from the DCFS Deerfield Office to the DCFS Chicago Office at 1911 S. Indiana. Since transferring to the Chicago office, Charging Party claims the Employer increased its efforts in seeking his termination. Charging Party asserts the Employer has:

- assaulted him;
- manipulated or removed a substantial amount of work stored on his computer which would have exonerated him from being falsely accused of failing to properly and adequately perform his job duties;
- improperly suspended him;
- refused to allow him to use sick time;
- failed to properly investigate a charge filed against him that would have proved he had not threatened management.

The available evidence indicates the Employer suspended Charging Party on a number of occasions. On one occasion, the Union was able to negotiate a reduction in the suspension from 7 days to 5 days. On another occasion, the Union was able to negotiate a reduction in the suspension from 15 days to 10 days.

On May 8, 2015, Steven Minter, a DCFS supervisor, contacted Glendora Marshall, Local AFSCME Steward, seeking to schedule a pre-disciplinary (pre-d) meeting with the Union and Jones. On May 11, 2015, Marshall asked Union Steward Patrick Armstrong to handle the Jones pre-d matter on behalf of the Union. When Armstrong and Jones met later that day, Jones claims Armstrong threatened him, telling him to leave the building or resign or someone will take him out. During this conversation, Jones informed Armstrong that he did not want him representing him and walked away. When Armstrong returned to work after his conversation with Jones, he filed an Unusual Incident Report (UIR) reporting that Jones had made a threat of violence against Steve Minter. Armstrong wrote the following on the UIR:

> As I was talking to cj about a leave of absence, n the pending pre-d. He said that I should tell steve to resign, I said what u say, then he said don't worry about it, I WILL HAVE SOMEONE TAKE HIM OU, I said WHAT YOU SAY!!!, and cj REPEATED IT AGAIN, I said, WHAT YOU SAY. Then he said, I will have someone from eeoc escort him out of the building. Then cj accused me and steve of being friends, and walked away.

The UIR that Armstrong wrote led the Employer to discipline Jones. During the afternoon of May 11th, Minter and another employee gave Jones a memorandum placing him on paid administrative leave. Jones refused to sign for receipt when served with the memorandum. The memorandum prohibited Jones from coming onto DCFS properties without express approval. On paid administrative leave he was required to be available and accessible during normal work hours and to notify the Employer if he was away from his home during work hours.

On May 12, 2015, Jones went to the DCFS Human Resources Department to ask questions about, and to check on the authenticity of, the document that placed him on administrative leave and to obtain a copy of his last pay stub. Jones also contacted the Department of Human Rights to follow up on charges that he had filed against the Employer and also to file new charges. On May 27, 2015, the Employer held a pre-disciplinary meeting and provided a Statement of Charges against Jones. The Charges included:

- making threats of bodily harm against DCFS Supervisor Minter;
- failure to abide by leave of absence requirements set forth in the May 11th memorandum and violating the terms of his Administrative Leave and reporting to DCFS without approval on May 12th
- being away from his home during work hours without prior approval while on paid administrative leave;
- failure to follow supervisory directives;
- refusing to participate in a scheduled training;
- failing to perform duties in a timely fashion.

AFSCME representative David Dover represented Jones during this pre-d meeting. On July 14, 2015, DCFS terminated Jones' employment based upon the Statement of Charges. On that same date, the Union filed a grievance at Step 3 of the grievance procedure claiming Jones was discharged in violation of the CBA's just cause provision. On August 8, 2015, the Employer denied the grievance and the Union subsequently advanced the grievance to Step 4 of the grievance procedure on September 1, 2015. AFSCME employee Ron Hudson handled the grievance at Step 4.

On March 8, 2016, the Union informed Charging Party that based upon the merits of the case it would not be pursuing the grievance further. The Union furthered informed Jones that it had persuaded the Employer to drop all reference to the discharge from his record in exchange for his voluntary resignation. Charging Party did not resign.

II. DISCUSSION AND ANALYSIS

Although Charging Party failed to identify the Section of the Act allegedly violated by the Respondent, the arguments made by Charging Party would best fit those alleging a violation of Section 10(b)(3) and a 10(b)(1) of 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 III. 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 has arguably presented evidence that the Union took adverse representation actions against him when (1) Armstrong submitted the UIR accusing Jones of threatening Minter and (2) AFSCME refused to advance his discharge grievance to arbitration. However, Charging Party has failed to provide sufficient evidence that AFSCME or any of its representatives, including Armstrong, harbored a bias or a grudge against him or treated him in a discriminatory manner. In fact, the evidence suggests that AFSCME has consistently provided Jones with effective representation, including successfully challenging two prior terminations and obtaining reductions in at least two prior suspensions issued by DCFS. Jones' claims that AFSCME provided him with

inferior representation based on Armstrong's alleged friendship with Minter are simply not supported by the available evidence.

Without some evidence that AFSCME and/or Armstrong took action against Jones for a discriminatory reason, this aspect of the charge fails to raise a question for hearing. It is not a *per se* violation of the Act for a union steward to report alleged misconduct of a bargaining unit member. Nor is it a *per se* violation of the Act for a labor organization to choose not to advance a grievance to arbitration. In fact, under the Act, labor organizations have substantial discretion in deciding whether, and to what extent, a particular grievance should be pursued. 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." 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). There is no such compelling evidence in this case.

Turning to Section 10(b)(3), this section of the Act tracks the language in Section 8(b)(2) of the National Labor Relations Act (NLRA), which prohibits discrimination based on the exercise of employee rights which tends to encourage or discourage union membership. A union commits an unfair labor practice under Section 8(b)(2) of the NLRA when it causes or attempts to cause an employer to discriminate in order to retaliate against an employee for protesting the union's policies,

questioning the official conduct of union agents, or incurring the personal hostility of a union official. Radio Officers v. NLRB, 347 U.S. 17 (1954). Section 10(b)(3) of the Act provides that it is an unfair labor practice for a labor organization "to cause, or attempt to cause, an employer to discriminate against an employee in violation of..." Section 10(a)(2).[1]

It is undisputed that Armstrong, a Union steward, reported Jones for allegedly threatening a DCFS supervisor. Charging Party asserts that this action violated the Act because it put the Union at odds with its duty to fairly represent Jones. The National Labor Relations Board (NLRB) has previously recognized the "inherent conflict" that can occur when a union representative reports misconduct of its unit members. In Graphic Communications, 337 NLRB No. 100 (N.L.R.B.), 337 NLRB 662 (2002), the NLRB held that a union had violated Section 10(b)(2) by reporting that an employee had sexually harassed another employee thereby causing the employer to commence an investigation of the alleged harassment. The NLRB held that the true reason behind the union initiating the employer investigation was to retaliate against the accused employee for engaging in dissident protected activity rather than a genuine belief that the employee had engaged in the misconduct of sexual harassment.

In the instant case, Armstrong reported Jones for allegedly threatening a DCFS supervisor. There is no evidence that Armstrong's motivation for reporting Jones was improper or that it was a pretextual. Further, any potential conflict of interest presented by Armstrong's report was alleviated when AFSCME assigned representatives other that Armstrong to represent Jones in the subsequent disciplinary and grievance procedures. As noted above, AFSCME representative David Dover represented Jones during the pre-d meeting and AFSCME employee Ron Hudson handled the grievance at Step 4, the point at which AFSCME determined not to proceed with the grievance.

[1] Section 10(a)(2) makes it an unfair labor practice for a public employer "to discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization."

There is simply insufficient evidence that Armstrong or AFSCME caused or attempted to cause the employer to discriminate against Jones in violation of Section 10(a)(2). As such, there is insufficient evidence to raise a question for hearing under Section 10(b)(3).

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 30th day of June, 2016.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Melissa Mlynski, Executive Director