



ROBERT GREEN,	)	Petition for Review of the
	)	Order from the Illinois
Petitioner-Appellant,	)	Labor Relations Board,
	)	Local Panel
v.	)	
	)	
ILLINOIS EDUCATION LABOR RELATIONS BOARD,	)	
ILLINOIS EDUCATIONAL LABOR RELATIONS	)	
BOARD EXECUTIVE DIRECTOR VICTOR	)	
BLACKWELL, and RONALD F. ETTINGER, GILBERT	)	No. 12-CB-0005-C
F. O'BRIEN, MICHAEL H. PRUETER, MICHAEL K.	)	
SMITH, Board Members and LOCAL 604, IFT/AFT	)	
PRESIDENT DICK MANLEY, TREASURER ARLIE	)	
FENDER, and LOCAL PRESIDENT CRAIG RHODES,	)	
	)	
Respondents-Appellees,	)	

JUSTICE REYES delivered the judgment of the court.  
Justices Hall and Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held:* The Illinois Labor Relations Board's determination dismissing petitioner's unfair labor practice charges against the District and the Union are affirmed as petitioner failed to establish a *prima facie* case.

¶ 2 Petitioner, Robert Green (Green), brings this action for direct administrative review of a decision by the Illinois Educational Labor Relations Board (Board)<sup>1</sup>, dismissing unfair labor practice charges filed by him against East Aurora School District 131 (the District) and Illinois

<sup>1</sup> The Board is represented on appeal by the Attorney General of the State of Illinois (State).

Federation of Teachers / American Federation of Teachers (IFT/AFT) Local 604 (the Union). Green asserted before the Board that the District committed an unfair labor practice by discharging him from his teaching position for filing grievances, a union activity. Green further alleged that the Union committed an unfair labor practice by declining to represent him at his termination hearing. The Board's Executive Director found Green failed to establish his *prima facie* case and dismissed both unfair labor practices charges. The Board upheld the Executive Director's determination. On appeal, Green contends he presented sufficient grounds to establish an unfair labor practice against the District under sections 14(a)(1), (3) of the Illinois Educational Labor Relations Act (Act) (115 ILCS 5/14(a)(1), (3) (West 2012)), and against the Union under section 14(b)(1) of the Act (115 ILCS 5/14(b)(1) (West 2012)). For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On September 21, 2010, Green filed unfair labor practice charges with the Board against the District and Union after being terminated from his teaching position. Green's petition alleged the District terminated him in retaliation for filing grievances and that the Union breached its duty of fair representation by denying his request for representation at the hearing before the Illinois State Board of Education (ISBE). Green claims the District violated sections 14(a)(1), (3) of the Act and further maintains the Union violated section 14(b)(1) of the Act. 115 ILCS 5/14(a)(1), (3), (b)(1) (West 2012).

¶ 5 A. Underlying Facts Regarding Greens Charges

¶ 6 Upon Green's filing of the unfair labor practices claim, an investigation into those

allegations was commenced by a designated Board agent. The District and the Union filed position statements with respect to the charges. Green, in turn, filed responses to the position statements. The parties' submissions established the following facts.

¶ 7 *Facts Relating to Charge Against the District*

¶ 8 Green was a tenured physical education instructor and coach employed by the District. During the course of his employment, Green was alleged to have engaged in instances of inappropriate physical contact with students and teachers. Two of these incidents were deemed so severe that the District issued Green Notices of Remedial Warning (Notice to Remedy). The first was issued on December 5, 2000, for "use of inappropriate physical contact and excessive physical force in disciplining a student during a physical education class." The notice also asserted Green's "use of inappropriate language and conduct towards a student \*\*\* including, but not limited to making statements encouraging a student to initiate a fight with [a] teacher." Green was ordered to cease and correct the aforementioned deficiencies. The notice warned of dismissal from the District if the alleged conduct was repeated.

¶ 9 The second Notice to Remedy was issued on November 20, 2006, for unsatisfactory professional conduct during the 2005-2006 and 2006-2007 school years. The notice stated Green "engaged in a pattern of inappropriate contact/communication with colleagues and students." The notice set forth conditions for Green to follow including only "necessary, appropriate, non-aggressive physical contact with students." The notice to remedy cautioned Green that failure to comply with the terms in the notice could result in a discharge from employment.

¶ 10 On March 1, 2010, Green filed a grievance with the Union against the District in which

he complained of the District's improper maintenance of the notices to remedy contained in his personnel file. Specifically, Green sought to have the notices cured and removed from his file.

This was the seventh grievance filed by Green against the District since 1995.

¶ 11 On March 3, 2010, a physical education class was in progress as other classes were being dismissed. Approximately 30 to 50 students entered the stairwell and hallway leading to the gymnasium. Green attempted to prevent the students from entering the gymnasium by standing in the doorway with outstretched arms. Two students confronted Green and attempted to get past him to gain access to the gymnasium. Both students pushed at Green's outstretched arms and he pushed them back. One student was pushed backward into a wall, striking his head, and the other student was pushed into an individual, but did not fall down.

¶ 12 On March 4, 2010, the District placed Green on leave with pay. On April 5, 2010, the District terminated Green because he failed to correct the deficiencies in the notices to remedy previously issued by the District and he continued to engage in inappropriate physical contact with students as indicated by the March 3, 2010, incident.<sup>2</sup>

¶ 13 *Facts Relating to Charge Against the Union*

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<sup>2</sup> Thereafter, Green requested a termination hearing before the ISBE, arguing his termination was improper because he did not employ corporal punishment with the two students. The ISBE hearing officer found Green's actions did not violate the 2006 Notice to Remedy, and directed the District to reinstate Green's employment. The record is devoid of any evidence relating to whether or not Green was reinstated. The parties did not argue before the Board or on appeal whether Green had standing to bring his unfair labor practices charge against the District after his employment was reinstated.

¶ 14 Following Green's termination from the District, he appealed to the ISBE under the Teacher Tenure Act (Tenure Act) (105 ILCS 5/24-14 (West 2010)). Green then requested the Union represent him in that proceeding. In a letter dated April 12, 2010, the Union declined Green's request for representation due to an adversarial relationship between the Union and Green based on Green's multiple lawsuits against the Union, which created a conflict of interest. The letter further indicated the Union owed a duty of fair representation only to issues associated with the collective bargaining agreement, and had no duty to represent Green with respect to claims arising under the Tenure Act.

¶ 15 B. Executive Director's Recommended Order and the Board's Determination

¶ 16 On December 15, 2011, following an investigation of Green's charges, the Board's Executive Director dismissed the charges against the District and the Union. The Executive Director determined Green failed to establish his *prima facie* case, as there was insufficient evidence that the District terminated Green based on the protected activity of filing grievances. The Executive Director further determined that the Union was not obligated to represent Green because his claim arose under the Tenure Act, and the duty of fair representation did not extend to matters in forums outside the grievance mechanism. In addition, the Executive Director found that the Union did not have an obligation to represent Green even if it represented other teachers in Tenure Act proceedings before the ISBE. The Executive Director further stated Green presented no evidence of intentional misconduct. The Executive Director concluded Green did not meet his burden as the evidence did not establish a *prima facie* case that the Union violated the Act.

¶ 17 On December 27, 2011, Green exercised his right to file exceptions to the December 15, 2011, order. In his exceptions, Green claimed the improper motivation for his dismissal was demonstrated by the inconsistent reasons asserted by the District for his termination. On April 11, 2012, the Board affirmed the Executive Director's determination and dismissed the unfair labor charges against the District and the Union. The Board stated the applicable test under the Act to establish a *prima facie* case requires proof of improper motivation by the employer. The Board concluded Green provided no evidence of the District's use of retaliation for union activity as the reason behind his termination. The Board noted that although Green's discharge occurred shortly after he filed a grievance, timing alone is insufficient to establish antiunion animus. Ultimately, the Board determined Green failed to meet his burden as he did not set forth any evidence that the District adversely terminated him for engaging in union activities.<sup>3</sup> Regarding the Union, the Board reached the same conclusions as the Executive Director and the charge was dismissed.

¶ 18 On May 17, 2012, Green filed a timely judicial review of the Board's decision directly to the appellate court, in accordance with section 16 of the Act (115 ILCS 5/16 (West 2012)) and Illinois Supreme Court Rule 335. Ill. S. Ct. R. 335 (eff. Feb. 1, 1994).

¶ 19 ANALYSIS

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<sup>3</sup> One member of the Board dissented in part with respect to the charges against the District. The member found Green presented evidence to establish a *prima facie* violation of the Act based on the fact that the District did not immediately reinstate Green's employment upon the determination of the ISBE ALJ. The record is devoid of facts supporting this statement.

¶ 20 Initially, we note that Green's *pro se* brief violates Illinois Supreme Court Rule 341(h)(6) (eff. July 1, 2008), as the statement of facts contains statements that are not accurately and fairly presented without argument or comment. Additionally, no appendix was attached to Green's brief in violation of Illinois Supreme Court Rule 342 (eff. Jan. 1, 2005). More importantly, Green failed to include any citations to authority in violation of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). When violations of supreme court rules hinder or preclude review, we will strike a brief. *Department of Central Management Services v. Illinois Labor Relations Board*, 2011 IL App (4th) 090966, ¶ 16. We find, however, that Green's violations of the Illinois Supreme Court Rules do not hinder our review and, therefore, we will consider the issues he raises on appeal.

¶ 21 On appeal, Green contends he presented sufficient grounds to establish an unfair labor practice against the District under sections 14(a)(1), (3) of the Act (115 ILCS 5/14(a)(1), (3) (West 2012)), and against the Union under section 14(b)(1) of the Act (115 ILCS 5/14(b)(1) (West 2012)). Green sets forth the same arguments he presented to the Board, that the District fired him based on his filing of grievances and the Union had a duty to represent him in his Tenure Act claim. Green asserts that the actions of the District and the Union constitute unfair labor practices and therefore he has established his *prima facie* case.

¶ 22 Respondents assert the Board's determination was correct because Green failed to establish a *prima facie* case.<sup>4</sup> In particular, the State contends Green failed to put forth sufficient

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<sup>4</sup> The State of Illinois, the District, and the Union filed response briefs in this matter.

evidence the District fired Green because he had engaged in a protected union activity, such as the filing of grievances. The State asserts the District terminated Green's employment based on the March 3, 2010, incident. The State maintains Green's conduct on that day was in violation of the Notices to Remedy. Additionally, the State asserts the charge against the Union was properly dismissed because the Union did not have a duty to represent Green in his Tenure Act claim. The Union also notes that Green failed to include in his appellate brief citations to the record and citations to authority in violation of Illinois Supreme Court Rule 341 (eff. July 1, 2008). Additionally, the Union further argues Green's brief violates Illinois Supreme Court Rule 342(a) (eff. Jan. 1, 2005), as it failed to include an appendix and the order upon which his appeal is based.

¶ 23 A. Standard of Review

¶ 24 Section 15 of the Act (115 ILCS 5/15 (West 2012)) requires the Board to investigate charges of unfair labor practices. When investigating such a charge, the Board is analogous to a grand jury. *Murry v. American Federation of State, County & Municipal Employees, Local 1111*, 305 Ill. App. 3d 627, 633 (1999) (discussing a similar provision in the Illinois Public Labor Relations Act (5 ILCS 315/11 (West 1996))). Like a grand jury, the Board assesses the credibility of witnesses; draws inferences from the facts; and, in general, decides whether there is enough evidence to support the charge. *Id.* If the Board finds an issue of law or fact sufficient to warrant a hearing, the Board will issue a complaint setting forth the issues that warrant a hearing. 115 ILCS 5/15 (West 2012); 80 Ill. Adm. Code 1220.40(a)(3) (2013). The Board, however, will

dismiss the charge if the charge fails to state a claim on its face or the investigation reveals no issue of law or fact sufficient to warrant a hearing. 80 Ill. Adm. Code 1220.30(a)(4) (2013).

¶ 25 When deciding whether there is enough evidence to justify a hearing, the Board must exercise its discretion or judgment. *Michels v. Illinois Labor Relations Board*, 2012 IL App (4th) 110612, ¶ 45. It is within the sound discretion of the Board to dismiss an unfair labor practice charge. *Id.* Thus, if the Board decides there is not enough evidence and dismisses the charge, we ask whether it abused its discretion. *Id.* "The Board abuses its discretion only where its decision to dismiss the charge is clearly illogical." *Id.* We now consider each unfair labor practices charge in turn.

¶ 26 A. The District

¶ 27 Green contends he presented sufficient grounds to establish the District terminated his employment for engaging in union activity, which is protected by sections 14(a)(1) and 14(a)(3) of the Act. The District argues Green failed to establish that the termination of his employment was motivated by his filing of grievances.

¶ 28 Section 14(a) of the Act provides, in relevant part:

"Educational employers, their agents or representatives are prohibited from:

(1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act.

\* \* \*

(3) Discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee

organization." 115 ILCS 5/14(a)(1), (3) (West 2012).

Section 14(a)(1) of the Act covers adverse employment action based on other protected concerted activity, whereas section 14(a)(3) applies to discrimination based on union activity. *Bloom Township High School Dist. 206, Cook County v. Illinois Educational Labor Relations Board*, 312 Ill. App. 3d 943, 957 (2000). Where, as here, an alleged violation of section 14(a)(1) is based on the same conduct as an alleged violation of section 14(a)(3), the section 14(a)(1) violation is essentially a derivative violation. *Id.* Thus, we apply the test applicable to section 14(a)(3) of the Act. *Id.* A *prima facie* case of a section 14(a)(3) violation is made by presenting evidence showing the employees were engaged in activity protected by that section, the District was aware of the activity, and the District took adverse action against the employees for engaging in that activity. *Board of Education, City of Peoria School District No. 150 v. Illinois Educational Labor Relations Board*, 318 Ill. App. 3d 144, 150 (2000); *Bloom Township High School District 206*, 312 Ill. App. 3d at 957. The third element is met when the employee demonstrates the protected activity was a substantial or motivating factor in the employer's adverse action against the employee. *Pace Suburban Bus Division of Regional Transportation Authority v. Illinois Labor Relations Board*, 406 Ill. App. 3d 484, 495 (2010). An employer's antiunion motivation for discharging an employee may be demonstrated by:

"an employer's expressed hostility towards unionization, together with knowledge of the employee's union activities [citation omitted], proximity in time between the employees' union activities and their discharge [citation omitted], disparate treatment of employees or a pattern of conduct which targets union supporters for adverse employment action

[citations omitted], inconsistencies between the proffered reason for discharge and other actions of the employer [citation omitted], and shifting explanations for the discharge [citations omitted]."

*City of Burbank v. Illinois State Labor Relations Board*, 128 Ill. 2d 335, 346 (1989).

¶ 29 The parties concede Green satisfied the first two elements of the test, therefore, we turn to consider whether the Board abused its discretion in dismissing Green's unfair labor practice charge. The Board concluded Green had not established a *prima facie* case under section 14(a)(1) and 14(a)(3) of the Act because the District offered a credible justification for Green's discharge. The record demonstrated Green had a history of inappropriate conduct evidenced by the notices to remedy and that on March 3, 2010, Green engaged in inappropriate physical conduct with students. The record established Green's behavior was contrary to the permissible conduct acknowledged in the notices. The Board determined the District had grounds to discharge Green after he was issued the notices to remedy and then subsequently engaged in inappropriate physical contact with two students. See *Board of Education of School Dist. No. 131 v. Illinois State Board of Education*, 82 Ill. App. 3d 820, 825 (1980) ("If, following a notice to remedy, a remedial deficiency is not corrected within a reasonable period of time, it may be grounds for discharge.").

¶ 30 Moreover, the Board determined Green presented no evidence to establish antiunion motivation on behalf of the District. See *Speed District 802 v. Warning*, 242 Ill. 2d 92, 145 (2011), citing *City of Burbank v. ISLRB*, 128 Ill. 2d 335, 345-46 (1989). Antiunion motivation is demonstrated through factors such as: expressions of hostility toward unionization, together with

knowledge of the employee's union activities; timing; disparate treatment or targeting of union supporters; inconsistencies between the reason offered by the employer for the adverse action and other actions of the employer; and shifting explanations for the adverse action. *Id.* Green relies on the coincidental timing of his dismissal and the submission of a grievance on March 1, 2010. Although Green filed a grievance a month prior to his termination on April 5, 2010, timing alone is not enough to prove the District retaliated against him. *Board of Education of Schaumburg Community Consol. School District v. Illinois Labor Relations Board*, 247 Ill. App. 3d 439, 462 (1993) (reversing the Board's determination that the employer violated the Act because the coincidence in timing as the causal link between the employee's activities in connection with the employer's evaluations and the decision to reassign her was not evidence of a discriminatory motive on the part of the employer). The decision reached by the District is reasonable in light of the evidence contained in the record on appeal. Therefore, we conclude the Board did not abuse its discretion in dismissing the unfair labor practice charge against the District.

¶ 31 B. The Union

¶ 32 Green argues the Union violated section 14(b)(1) of the Act by refusing to represent him in his proceeding before the Illinois State Board of Education (ISBE) under the Tenure Act. 115 ILCS 5/14(b)(1) (West 2012); 105 ILCS 5/24-14 (West 2012).

¶ 33 In response, the Union's argument, in its entirety, is that "the IELRB decision held that as a matter of law the Respondent Union had no duty to represent Green in his law suit. Green never argues that the decision was legally erroneous. For this reason, Green has advanced no grounds for this appeal."

¶ 34 Section 14(b)(1) of the Act expressly requires that an employee organization commit intentional misconduct for an unfair labor practice based on a breach of the duty of fair representation to arise:

"(b) Employee organizations, their agents or representatives or educational employees are prohibited from:

(1) Restraining or coercing employees in the exercise of the rights guaranteed under this Act, provided 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." 115 ILCS 5/14(b)(1) (West 2012).

"The duty of fair representation 'proceeds directly from the union's statutory role as exclusive bargaining agent,' " *Jones v. Illinois Educational Labor Relations Board*, 272 Ill. App. 3d 612, 619 (1995), quoting *Air Line Pilots Association International v. O'Neill*, 499 U.S. 65, 74 (1991). The duty of fair representation extends only to activities connected with the union's duties as such and would not extend to obligations outside of the grievance mechanism of the collective bargaining agreement. *Id.* at 622. The Union has discretion in determining how far to pursue members' complaints and "exercise of that discretion would properly be based on criteria such as the perceived merit of the complaint, the likelihood of success in any action based thereon, the cost of prosecuting such an action, or the possible benefit to the union membership as a whole." *Id.* at 622-23.

¶ 35 Section 14(b)(1) of the Act expressly requires "intentional misconduct" before a breach of the duty of fair representation is established. 115 ILCS 5/14(b)(1) (West 2012); *Jones*, 272 Ill.

App. 3d at 625. For a complaining party to establish a breach of the duty of fair representation under the intentional misconduct standard, he must show "substantial evidence of fraud, deceitful action, or dishonest conduct [citations omitted] or deliberate and severely hostile and irrational treatment [citations omitted]." *Paxton-Buckley-Loda Educ. Ass'n, IEA-NEA v. Illinois Educational Labor Relations Board*, 304 Ill. App. 3d 343, 349 (1999).

¶ 36 In the present case, the record does not indicate that the collective bargaining agreement required the Union to represent Green outside of the grievance mechanism. The Board similarly determined that the Union had no obligation arising from the duty of fair representation to provide Green with representation in his dismissal case arising under the Tenure Act because "the record does not indicate that the collective bargaining agreement designated the Union as Green's exclusive representative in forums outside the grievance mechanism." In addition, the Board concluded the fact the Union represented other members in their Tenure Act suits did not require the Union to represent Green in this matter. See *Jones*, 272 Ill. App. 3d at 623 (Because the union funded the prosecution in one case it did not create an obligation for it to fund the prosecution of all private suits, especially when it had no duty to provide such funding).

¶ 37 Even if Green could establish the Union had a duty to represent him, the evidence does not support that the Union engaged in "intentional misconduct." 115 ILCS 5/14(b)(1) (West 2012). Green asserts the Union admitted its attorney's relationship with him was adversarial. The Board, however, determined that the Union's counsel's remark was not "deliberate and severely hostile." The Board further determined that counsel's remark was not made during his

1-12-1398

representation of Green and, therefore, it did not meet the standards required to state a *prima facie* case under section 14(b)(1) of the Act.

¶ 38 Each of the foregoing conclusions reached by the Board is eminently reasonable and supported by the evidence. Accordingly, it cannot be said that the Board abused its discretion in dismissing the charge of unfair labor practice against the Union.

¶ 39 CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the Board.

¶ 41 Affirmed.