

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-1306

JUSTIN B. CHASE

vs.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Justin B. Chase appeals from the Commonwealth Employment Relations Board (board) determination that the American Federation of State, County and Municipal Employees Council 93, Local 1700 (union), did not breach its duty of fair representation in connection with certain aspects of Chase's layoff. We affirm.

Background. We summarize the facts as found by the Department of Labor Relations hearing officer and adopted by the board, together with the additional factual determinations made by the board based on uncontested evidence. In February of 2004, Chase submitted a job application for a class III laborer position with the town of Rockland (town) highway department (department). A few weeks later, he received a letter from the department's superintendent, Robert Corvi, informing Chase that

he had been "awarded the position." His salary was commensurate with the salary for "Truck Driver/Laborer/Class III"; however, his initial payroll notice indicated he was a "Laborer Class III." A few months later, a department employee who was classified as a "Truck Driver/Laborer" was granted military leave. After his departure, the department advertised an opening for a laborer with a class II commercial driver's license (CDL). Thomas Riordan was hired into this position, with the job title "Truck Driver/Laborer," in August of 2004. In November, 2004, some two years before the layoff, Chase's salary was changed to reflect the position of laborer, not laborer class III.<sup>1</sup>

In a letter dated October 12, 2006, Chase received a sixty-day notice of lay off from Corvi that stated, "[d]ue to the budget crisis in the Town of Rockland the Highway may possibly have to cut one position-Laborer if the override does not pass. I am giving you this notice to prepare you for this situation and to uphold the contract as my 60 days['] notice."<sup>2</sup> Albert

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<sup>1</sup> Chase received a merit increase consistent with the contractual six-month step increase for laborer. On this payroll/status change notice, a handwritten note indicated that the department previously had been paying Chase a salary inconsistent with his job title as laborer, but Chase maintained that this note was not given to him or the union.

<sup>2</sup> The employee who previously was granted military leave had returned to the department earlier than expected. In addition, the town had voted in May, 2005, to delay the vote that would provide funds for an additional worker in the department.

Giannini, Jr., the "foreman," union steward, and member of the union bargaining committee, was present when Chase received the letter. Giannini signed it as foreman. No thirty-day meeting had occurred between the town and the union to discuss Chase's impending layoff as mandated by the collective bargaining agreement.<sup>3</sup> The hearing officer credited Giannini's testimony that he was unaware of this error and the contract violation.<sup>4</sup>

Approximately one month later, in a letter dated November 8, 2006, Chase received a final notice of layoff, effective November 30, 2006. On that latter day, his mother contacted the union representative, Karen Hathaway, and informed Hathaway that she wanted her to file a grievance on Chase's behalf. The mother claimed that Riordan was hired after Chase, and should have been laid off as the junior employee. Hathaway performed an investigation and determined that Chase had no viable grievance because Chase and Riordan had different job titles, and that the contract provided for layoff by classification.

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<sup>3</sup> The agreement provides: "The Town shall meet with the Union to discuss any impending layoffs at least thirty (30) days prior to such layoff."

<sup>4</sup> Chase testified he was afraid of Giannini because Giannini was a hunter and had guns in his house, and because Giannini threatened him once. No further explanation was provided, and Chase has not argued the existence of union hostility on appeal. Chase did not seek advice from any other union official. The board considered these facts in connection with the union's challenge to the arbitrability of the grievance, an issue that is not before us on appeal.

As it later became apparent, Chase was laid off not just without a thirty-day meeting and the bargaining associated with such a meeting, but before the town took the official vote on the budget. The November 8, 2006, letter was sent after a proposed tax override failed, but before the department's budget was presented for a vote. The hearing officer found that this aspect of the union's investigation -- the town's compliance with contractual prerequisites to layoff -- was inadequate and perfunctory. The board concurred, and no appeal has been taken from this determination. Accordingly, we address only those issues concerning the union's investigation of Chase's job classification and the propriety of the seniority-based layoff.

The hearing officer found that the union violated its duty of fair representation by failing to take action before November 30, 2006, and by failing to adequately investigate and grieve Chase's contractual displacement rights under the collective bargaining agreement once complaint was made on November 30, 2006. The board concluded that (1) the union did not breach its duty of fair representation with respect to its actions before the November 30, 2006, request for assistance; and (2) the union's investigation of Chase's displacement rights on and after November 30, 2006, was not perfunctory or grossly negligent.

Discussion. Our standard of review is a limited one. See G. L. c. 30A, § 14(7). "[U]nless it is clear that the [board's] ultimate findings are not supported by [its] subsidiary findings, . . . review is limited to determining whether error of law occurred." Connolly v. Suffolk County Sheriff's Dept., 62 Mass. App. Ct. 187, 193 (2004). "In addition, we give deference to the board's specialized knowledge in interpreting collective bargaining agreements and applicable statutory provisions." United Steelworkers of America v. Commonwealth Employment Relations Bd., 74 Mass. App. Ct. 656, 661 (2009).

Chase contends that the board erred as a matter of law because the union violated its duty of fair representation when Giannini failed to affirmatively advise Chase of his right to contest the layoff when he received the sixty-day notice. Chase contends that because the union was on notice of a potential layoff, it acted perfunctorily by failing to advise him as to the propriety of the layoff, inform him of his right to file a grievance, and "trigger[] a protest on Chase's behalf, regardless of any request for help."

"Breach of the duty of fair representation occurs if a union's actions toward an employee are 'arbitrary, discriminatory, or in bad faith.'" Graham v. Quincy Food Serv. Employees Assn. & Hosp., Library & Pub. Employees Union, 407 Mass. 601, 606 (1990), quoting from Vaca v. Sipes, 386 U.S. 171,

190 (1967). "'A wide range of reasonableness,' of course, 'must be allowed a . . . bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.' Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). Although ordinary negligence may not amount to a denial of fair representation, lack of a rational basis for a union decision and egregious unfairness or reckless omissions or disregard for an individual employee's rights may have that effect." Trinque v. Mount Wachusett Community College Faculty Assn., 14 Mass. App. Ct. 191, 199 (1982). See Graham, supra.

The board concluded that the union must respond to a bargaining unit member's request for assistance, but is not obligated to initiate a grievance in the absence of a request, relying on New England Water Resource Professionals & Flammia, 25 MLC 135 (1999). Chase argues that this case is different because Giannini was aware that Chase was being laid off, Giannini participated in the layoff, and this knowledge and participation created an obligation to take affirmative steps to advise and counsel Chase. This argument misperceives the applicable standard. Neither a failure to adhere to best practices nor mere negligence suffices to establish a breach of the duty of fair representation. See Graham, supra. Cf. Amalgamated Transit Union Local No. 1498, 360 N.L.R.B. 96

(2014). Chase asks that we impose an even higher obligation, that is, to require a union to anticipate, advise, and engage in proactive measures when it becomes aware of a potential grievance.

The union is not a fiduciary; it is a representative. The board's conclusion that the union did not act in a perfunctory manner in failing to advise Chase of his rights, when Chase did not ask for the union's advice, falls within the range of discretion granted to the agency to which we will defer. See United Steelworkers of America, 74 Mass. App. Ct. at 661. Because a union is accorded a "wide range of reasonableness" in processing grievances, the board permissibly could conclude that the "wide range" encompasses the obligation to provide assistance to those who request it, but not to those who do not. Graham, supra (citation omitted). Chase has not cited, and we have not found, any case under State or Federal administrative or decisional law imposing an affirmative duty on a union to advise a bargaining unit member concerning a potential grievance in the absence of a request from the bargaining unit member to do so. See New England Water Resource Professionals & Flammia, supra.<sup>5</sup> Compare National Assn. of Govt.

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<sup>5</sup> Chase contends that the board misinterpreted its own precedent. In New England Water Resource Professionals & Flammia, supra, the Labor Relations Commission (now the board) stated that "[a] union must respond to unit members' requests for assistance,"

Employees v. Labor Relations Commn., 38 Mass. App. Ct. 611, 612-614 (1995) (union breached duty of fair representation where it ignored two seniority-based bumping rights grievances submitted by employee after his termination); Goncalves v. Labor Relations Commn., 43 Mass. App. Ct. 289, 297 (1997) (union failed to provide status updates of grievance and ignored inquiries by employee's attorney).

In the absence of a request for assistance, the union breaches its duty of fair representation if it colludes with the employer, fails to act due to unlawful motivation, engages in disparate treatment of the bargaining unit member, or otherwise acts in a manner that is arbitrary, capricious, or in bad faith. See generally Graham, 407 Mass. at 609. To the extent that Chase suggests the presence of hostility or bad faith based on his allegations regarding the relationship between the union steward and management, the hearing officer rejected any suggestion of bad faith or collusion, and the board concurred. We defer to those factual findings. See United Steelworkers of America, 74 Mass. App. Ct. at 661.<sup>6</sup>

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but also clearly held that the "Union could not unlawfully fail to file or process a grievance on [the grievant's] behalf when he never asked them to do so." The board did not misapply its own precedent.

<sup>6</sup> Chase argued collusion below, claiming a close personal friendship between the union steward and management. On appeal, Chase argues that the union "wholly disregard[ed] known provisions of the collective bargaining agreement."

Grievance investigation. Chase further maintains that the board erred as a matter of law when it found that Hathaway's investigation of his seniority-based displacement rights was not perfunctory. "If the union's failure to press [his] grievances was the result of a reasonable and good-faith belief that [his] grievances were unmeritorious, the union was vested with the discretion not to pursue them. . . . There must be 'substantial evidence' of bad faith that is 'intentional, severe, and unrelated to legitimate union objectives' in order to show a breach of the duty of fair representation. Amalgamated Assoc. of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 301 (1971)." Graham, supra, citing Vaca v. Sipes, 386 U.S. at 192; Trinque, 14 Mass. App. Ct. at 199; Baker v. Local 2977, State Council 93, Am. Fedn. of State, County, & Mun. Employees, 25 Mass. App. Ct. 439, 441 (1988).

Evidence of bad faith is absent from the record. After receiving Chase's mother's request, Hathaway spoke with Corvi and with Bradley Plante, the town administrator, as well as with Michelle McNulty, labor counsel for the town. All three told her that Chase and Riordan were working in separate classifications; that is, Chase was a laborer and Riordan, the more junior employee, was a truck driver/laborer. The collective bargaining agreement provided for layoff by seniority by classification, not unit-wide seniority. Hathaway then spoke

with two senior union officials who confirmed that Chase was not permitted to bump an employee in the truck driver/laborer classification. There is no suggestion that Hathaway arrived at this interpretation of the contract in bad faith.

Chase further contends that he was improperly reassigned from the classification of truck driver/laborer III to laborer on November 5, 2004, without notice to the union or to him. He argued to the hearing officer that this was a covert effort by the department to place him in a more vulnerable position in the event of layoff.<sup>7</sup> This allegation of bad faith by the department is not the same as an allegation of bad faith by the union. The hearing officer specifically rejected allegations of union collusion.

On appeal, Chase argues that Hathaway should have done more to investigate his classification and any past manipulation, but this argument, at its very best, suggests negligence, not bad faith or gross negligence. At the time of Chase's layoff and Hathaway's investigation, Chase had been classified as a laborer and had been receiving pay commensurate with that of a laborer for approximately two years. Chase did not have a CDL license;

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<sup>7</sup> When Chase was hired, his job title, as reflected in the payroll/status change notice on February 23, 2004, was "Laborer Class III." Chase received a notices of step increases reflecting the job title "Laborer." However, during the first months of employment, Chase's actual salary tracked that of a "Truck Driver/Laborer Class III." His payroll status was changed thereafter.

this fact was not contested before the agency.<sup>8</sup> The board did not err as a matter of law when it decided that Hathaway's investigation of Chase's seniority-based displacement rights, after consultation with town and union officials, and review of the collective bargaining agreement, was not arbitrary or capricious.<sup>9</sup> See Cappellano v. Massachusetts Bay Transp. Authy., 38 Mass. App. Ct. 231, 235 (1995) ("Even if the union, acting diligently and in good faith, misjudges the grievance, it has not committed a breach of the duty of fair representation as long as it has acted rationally"). In the absence of factual findings of bad faith, hostility, or disparate treatment, there is no basis for disturbing the board's determination.

Decision and order of the  
Commonwealth Employment  
Relations Board affirmed.

By the Court (Vuono, Rubin  
& Sullivan, JJ.<sup>10</sup>),

Clerk

Entered: August 28, 2015.

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<sup>8</sup> At oral argument, Chase's counsel acknowledged that Chase did not possess a CDL at any time relevant to the administrative proceedings.

<sup>9</sup> At the administrative hearing, Chase presented facts regarding the merits of the grievance. The union elected to defer its response to the merits of the grievance to a second stage (if any) in a bifurcated proceeding. We express no opinion on the merits of the grievance.

<sup>10</sup> The panelists are listed in order of seniority.