STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 23-PPC-18 & 19
Issued: May 23, 2024

LISBON EDUCATION ASSOCIATION, Complainant, v. LISBON SCHOOL COMMITTEE, Respondent.	DECISION AND ORDER

I. Statement of the Case

These consolidated cases consist of two prohibited practice complaints filed by the Lisbon Education Association (Union) against the Lisbon School Committee (School Committee). After a partial settlement by the parties, the remaining issues are: 1) whether the School violated 26 M.R.S.A. § 964(1)(A), (B) and (D) when the School Superintendent did not recommend a probationary teacher (Teacher), who was then serving as the Union president, for a continuing teaching contract, and 2) whether the School violated 26 M.R.S.A. § 964(1)(A) and (B) when the High School Principal (Principal) downwardly adjusted the Teacher's final teaching evaluation score. [1]

The Maine Labor Relations Board (MLRB or Board) finds that while the Union established a prima facie case for discrimination with respect to the Superintendent's decision not to recommend the teacher for a continuing contract, the School Committee has amply demonstrated that the Superintendent had legitimate reasons for his decision and he would have taken the same action regardless of the Teacher's protected Union activity. Additionally, the Union did not put forward sufficient evidence of a relationship between the Teacher's protected activity and an adverse employment action in order to establish discrimination with respect to the Principal's evaluation scoring.

II. Procedural History

On May 12, 2023, the Union filed a prohibited practice complaint with the Board, MLRB case number 23-PPC-18, and on June 29, 2023, the Union filed an additional prohibited practice complaint, MLRB case number 23-PPC-19. The Executive Director issued sufficiency letters to the parties on June 5, 2023, and August 4, 2023, and Sheila Mayberry, Esq., Neutral Chair, conducted a prehearing conference for each complaint on July 6, 2023, and September 5, 2023. At

the request of the parties, Chair Mayberry issued a Protective Order on December 29, 2023, prohibiting disclosure, except upon order of a court, of certain exhibits of employment and educational records that fall within confidentiality provisions under Maine law.

A consolidated evidentiary hearing was held on January 3, 4, 5 and 12, 2024, presided over by Sheila Mayberry, Esq., Neutral Chair, Michael Miles, Employer Representative and Jessica Maher, Esq., Alternate Employee Representative. The Union was represented by Benjamin K. Grant, Esq., and the School Committee was represented by S. Campbell Badger, Esq., and Connor P. Schratz, Esq. The parties were given a full opportunity to examine and cross-examine witnesses, introduce evidence, and make their arguments. The parties were also permitted to file post-hearing briefs, which were submitted on February 28, 2024.

III. Findings of Fact

Upon review of the entire record, the Board finds the following.

Hiring of Teacher and Teacher's Protected Activity

The School Committee hired the Teacher in August of 2021. The Teacher has taught since 2003, first in Pennsylvania and then in Texas. He received generally positive evaluations for his teaching performance prior to his arrival in Lisbon. The School Committee initially hired the Teacher as a probationary teacher for the 2021-2022 school year. Based in part on an instance of questionable language used by the Teacher, the School Committee did not renew his employment after his first probationary year, but he was encouraged to re-apply for the position. He did so and was hired again as a probationary teacher for the 2022-2023 school year.

The Teacher was elected president of the Union in the spring of 2022, and he served as the Union's lead negotiator for a successor collective bargaining agreement. The lead negotiator for the School Committee was the Superintendent. After several negotiating sessions, the parties were at impasse and went on to mediation and fact-finding in an attempt to resolve their differences. In addition to filing for mediation and fact-finding, the Union filed three grievances and two prohibited practice complaints during the Teacher's tenure as president.

The prior Union president testified that the relationship between the Superintendent and the Union became difficult after the Superintendent was personally named in a Union-facilitated harassment complaint in 2018. He was visibly angry and refused to meet with Union representatives behind closed doors, as had been the practice. He also refused to have informal conversations with Union representatives and criticized the prior Union president for engaging in Union activity during her planning period when such activity had previously been permitted. A hostile relationship also developed between the Superintendent and a certain staff member of the Maine Education Association serving as the Union's representative after the staff member told the Superintendent to "shut up" and "sit down" during a grievance meeting during the 2022-2023 school year. The Superintendent testified that he began circumventing the staff member as much as he could after this interaction.

By the Superintendent's own admission, he was frustrated about the prolonged negotiations for a

successor contract which had started in 2022 during the Teacher's tenure as Union president. By April 2023, when the Superintendent made the decision regarding the Teacher's employment, negotiations had been underway for nearly a year. During this time, the Union had filed a request for formal mediation and then for fact-finding when that mediation was unsuccessful. This was the Superintendent's first time engaging with the mediation and fact-finding process in his approximately 13 years of prior contract negotiations. School Committee members expressed concern and frustration about the pace of negotiations, both privately to the Superintendent as well as publicly.

Problems with Teacher's Work Performance

The Superintendent, Principal and the Director of Curriculum, Instruction and Assessment (Curriculum Director), testified to a number of issues about the Teacher's work performance during the 2022-2023 school year, including both classroom instruction, described more fully below, and other aspects of his professional responsibilities. For example, as a Curriculum Team Leader for the Music Department, the Teacher failed to provide, except for once, the required monthly meeting notes and also submitted inadequate required "scope and sequence" documentation. The Superintendent and two administrators also indicated the Teacher missed meetings, left other meetings early and was, at points, inattentive and often frequently disengaged and on his phone during meetings he attended. They also were concerned with the Teacher's untimely email responses.

The record also indicates miscellaneous instances of the Teacher failing to follow protocol including leaving the building without proper notice; failing to request a substitute in a timely manner or not leaving substitute plans in the event of an absence; failing to timely request transportation for a student to attend a band opportunity; using a librarian to cover his class while he went to recruit students in another building; deciding to excuse students from class to clean out the Performing Arts Center without authorization; and leaving outside doors propped open in violation of school safety standards.

The Teacher had issues with student supervision, allowing students to leave his class without a hall pass and, on one occasion, sending a sick student to an empty classroom rather than sending him to the nurse's office. The administrators noted issues with the Teacher's student grading practices as well. He failed to submit grades on time and had a lax grading standard, for instance, giving top daily performance scores to all students, even to a student that had been sleeping in class. In addition, the Principal cited the Teacher's failure to submit a budget for the Music Department and missing documentation regarding student assignments and student conferences as additional cause for concern.

The Superintendent testified to what he classified as a lack of "follow-through" from the Teacher. For instance, the Teacher had been tasked with making improvements to the Performing Arts Center but had produced no discernable progress. Additionally, he did not timely start an after-school music program for which he was receiving a stipend, taking several months to do so.

The Superintendent and administrators attempted to provide support to the Teacher during the 2022-2023 school year to help him with these identified issues. The Principal tried to help the

Teacher by counseling him about the importance of attending meetings in a timely manner and adhering to established protocols. She also created a document to help keep the Teacher organized, to address his scheduling problems, and met with him to teach him how to use it. After observing performance issues with his first two classroom observations, the Curriculum Director reached out with a detailed email outlining her concerns and what the Teacher needed to do to improve. She also arranged to meet with the Teacher in person to go over her concerns, but he missed the meeting and it was not rescheduled. The Curriculum Director also requested from the Superintendent that the Teacher be permitted to have a third classroom observation, even though only two observations were typical, in order to give him an opportunity to improve on his performance, to which the Superintendent agreed.

Evaluation of Teacher's Performance

The School Committee uses an evaluation system for teachers that produces a numerical evaluation score known as a Summative Effectiveness Rating. This score is determined by a combination of two components--a Professional Practice score and a Growth Plan score. [2] The first portion of the evaluation, Professional Practice, counts for 50% of the final score and is drawn from observations of a teacher's classroom performance. The other 50% of the Summative Effectiveness Rating comes from an evaluation of the teacher's progress towards their previously submitted Growth Plan. The Principal is responsible for entering the data into a software system that determines a high school teacher's final effectiveness rating.

As part of the Teacher's evaluation, the Teacher was video recorded on three separate occasions while teaching a class. The dates of recording were December 1, 2022, January 30, 2023, and March 6, 2023. From the classroom observation videos the administrators noted a lack of student engagement, including a sleeping student in two of the videos, and that the Teacher employed too much lecture and seat time. The Curriculum Director also noted that the Teacher had no assessment strategies necessary to ensure students were learning. Even when presented with these and other critiques regarding his teaching practice, the Teacher failed to demonstrate interest in following recommendations for improvement.

Based upon her personal review, and in consultation with an evaluation committee, of three videos of the Teacher's performance in the classroom, the Principal input her evaluation of the Teacher into the School Committee's evaluation software and, as a result, the Teacher received a Professional Practice score of 2.81, "Effective," on March 21, 2023. On May 23, 2023, the Principal, in consultation with the Curriculum Director, completed the Teacher's Growth Plan assessment, which resulted in a score of 2.0. Incorporating this component with the Professional Practice component, the Principal finalized the Teacher's evaluation on May 31, 2023, which yielded a final Summative Effectiveness Rating of 2.41, "Partially Effective."

Among the Superintendent's duties, he is responsible for making the decision regarding which probationary teachers are to be recommended to the School Committee for a continuing contract. This decision is typically based on the Superintendent's own review of a teacher's performance, in combination with a narrative assessment from an evaluation committee, based on classroom observations of a teacher, and the advice of administrators. The Superintendent does not see and does not consider a probationary teacher's Summative Effectiveness Rating when making his

decision regarding whether to offer the teacher a second year of probationary teaching or a continuing contract.

Decision to Not Recommend Teacher for a Continuing Contract
Sometime in April 2023, the Superintendent made the decision not to recommend the Teacher for a continuing contract. In making this decision, the Superintendent testified that he relied upon classroom observation video of the Teacher and first-hand observations of the Teacher's discharge of his other professional duties. He testified that he also relied on the recommendations of the Principal and Curriculum Director, based on their assessments of the Teacher.

On April 14, 2023, the Teacher received a notice from the Principal that his name would not be brought forward to the School Committee for a continuing contract. He received formal notice of his non-renewal from the Superintendent on May 12, 2023.

IV. Analysis

At all times relevant, the Teacher was a public employee within the meaning of 26 M.R.S.A. § 962(6), and the School was a public employer within the meaning of 26 M.R.S.A. § 962(7). The Board's jurisdiction to hear this case and to issue a decision and order derives from 26 M.R.S.A. § 968(5).

The well-established test for whether a complainant has established a prima facie case for discrimination [3] is whether the complainant has shown by a preponderance of the evidence that 1) the employee engaged in protected activity, 2) the relevant decision makers were aware of this activity and 3) there is a relationship, or causal connection, between the protected activity and an adverse employment action. *Maine State Law Enforcement Association v. Maine Office of State Fire Marshal*, No. 23-PPC-07, slip op. at 9 (December 18, 2023); *Holmes v. Town of Old Orchard*, No. 82-14 (Sept. 27, 1982) (Board adopted the three-part test established in *Wright Line and Bernard R. Lamoureux*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), for issues that turn on employer motivation.) In other words, the Board first examines whether the complainant has put forward a showing sufficient to support the inference that protected conduct was a "substantial or motivating factor in the employer's decision." *Maine Office of State Fire Marshal*, No. 23-PPC-07, slip op. at 9 (citing *Ritchie v. Town of Hampden*, No. 83-15, slip op. at 4-5 (July 18, 1983)). Unlawful motivation can be proved either by direct evidence or inferred through circumstantial evidence based on the record as a whole. *Id.* (citing *Maine State Law Enforcement Association and Timothy McLaughlin v. State of Maine, Maine Department of Corrections*, No. 13-15, slip op. at 9-10 (October 31, 2013)). Some examples of circumstantial evidence of discrimination are evidence of anti-union animus, disparate treatment or inconsistent or less-than-credible explanations for the action. *Maine State Law Enforcement Association and Timothy McLaughlin*, No. 13-15, slip op. at 10.

If the complainant succeeds in establishing a prima facie case for discrimination, the employer may defend against the claim by proving by a preponderance of the evidence that the adverse employment action was based on unprotected activity as well, and that the complainant would have suffered the adverse employment action regardless of the protected conduct. *Maine State*

Employees Association v. State Development Office, 499 A.2d 165, 167 (Me. 1985). Even if the employer meets this burden, the complainant can still prevail if it can demonstrate that the alternate reasons offered by the employer for the adverse action are merely pretextual. See *Teamsters v. Town of Kennebunk and MLRB*, CV-80-413 (Me. Super. Ct., Kennebec Cty., October 18, 1985) (citing *NLRB v. Great Dane Trailers*, 333 U.S. 26 (1967)).

The Municipal Public Employees Labor Relations Law (the Act) prohibits public employers from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed in section 963." 26 M.R.S. § 964(1)(A). The rights guaranteed by § 963 are the rights to participate, or not participate, in union-related activity. See 26 M.R.S. § 963. A bargaining agent unlawfully interferes with the rights of a bargaining unit employee when they have "engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Maine Association of Police v. Town of Pittsfield*, No. 20-PPC-07, slip op. at 6 (December 31, 2020). This is an objective standard, and "does not depend upon the employer's motive or success." *Id.*

A claim of unlawful interference, restraint or coercion can be either derivative, where the claim is based on an action's violation of another provision of the Act, or independent, where the claim is based on an action that does not otherwise violate the Act . *Maine State Law Enforcement Association v. State of Maine*, No. 23-PPC-04, slip op. at 7 (August 15, 2023). In the case of a derivative claim, if the Board finds the alleged violation underlying the claim to be without merit, the Board will dismiss the derivative claim as well. *Id.*

A. The Superintendent's Decision Not to Nominate the Teacher for a Continuing Teaching Contract

Undeniably, the Teacher engaged in protected union activity. He was the Union's president and chief negotiator during contract negotiations, and he was at least marginally involved in filing for mediation and fact-finding as well as in the filing of three grievances and two prohibited practice complaints. It is equally clear that the Superintendent was aware of this activity. As there is no direct evidence to establish a sufficient connection between the protected activity and the Superintendent's decision not to recommend the Teacher for a continuing contract, [4] resolution of this question will turn on circumstantial evidence of the Superintendent's motivation.

Overall, the Union was more active during the Teacher's time as Union president than it had been previously, particularly with the filing of multiple prohibited practice complaints and the prolonged negotiations leading to the mediation and fact-finding interventions. The fact that the prohibited practice complaints and grievances filed by the Union during this time targeted specific conduct of the Superintendent lends itself to an inference of anti-union animus. Additionally, the Superintendent's frustration with the prolonged negotiation process adds to this inference. Animus can also be inferred by the Superintendent's angry reaction when he was personally named in the Union-facilitated harassment complaint in 2018, which was still ongoing in the months leading up to the Superintendent's decision. The hostile relationship between the Superintendent and the Union staff member during the 2022-2023 school year also lends support to an inference of anti-union animus.

Looking at the record as a whole, the Board finds sufficient circumstantial evidence of anti-union animus to infer unlawful motivation by the Superintendent, and therefore the Union has established a prima facie case for discrimination. In order to maintain an affirmative defense to this claim, the School Committee must prove by a preponderance of the evidence that the Superintendent's decision regarding the Teacher was based on unprotected activity as well, and that he would have made the same decision, regardless of the Teacher's protected activity. See *State Development Office*, 499 A.2d 165, 167 (Me. 1985). As explained below, the Board finds that the School Committee has successfully established this defense.

Most significantly, the record contained numerous, undisputed examples of problems in the Teacher's performance. Regarding classroom instruction, the record indicates several occasions of lack of student engagement, compounded by the Teacher's failure to use assessment strategies necessary to ensure students were learning. Notably, when presented with these and other critiques regarding his teaching practice, as well as offers of assistance, the Teacher failed to take the necessary steps for, or demonstrate interest in, improvement.

Given all of the evidence of the Superintendent and administrator concerns with the Teacher's job performance, the School Committee has met its burden to demonstrate that the Superintendent's decision not to recommend the Teacher for a continuing contract was at least partially based on unprotected activity and that he would have made the same decision regardless of the Teacher's protected activity.

The Union offers several arguments that the School's justifications for the Superintendent's decision are in fact mere pretext, and that protected activity was the real reason the Teacher was not offered a continuing contract. It points to "weaknesses, impossibilities, inconsistencies, incoherencies, or contradictions" in the offered reasons for the School's employment action. (citing *Gomez-Gonzales v. Rural Opportunities, Inc.*, 626 F. 3d 654, 662-663 (1st Cir. 2010), for the standard of pretext used in the context of other types of employment discrimination cases.)

The Union's primary argument in its case for pretext is that because the Superintendent testified that sometimes the decision to recommend a teacher for a continuing contract is based solely on the discretion of the Superintendent, and sometimes it is a group consensus with other administrators, there are in effect no standards or consistency in the decision-making process, and therefore, there is no way to predict any outcome for any teacher based on this process. In other words, the School Committee cannot establish with any credibility what "would have" happened with respect to the Teacher absent his protected activity. The Union also argues that the Superintendent's refusal to refer to the School Committee's teacher evaluation scoring system when making his nomination decision is so incoherent as to support an inference of pretext.

The Union attempts to rebut several of the justifications for the non-renewal decision put forward by the Superintendent and the two administrators whose advice he relied on when making the decision, the Principal and Curriculum Director. Regarding the Teacher's classroom performance, the Union points out some inconsistencies in the record to support its claim of pretext. For example, the Superintendent testified as to the importance of having experts who taught the same

subject be part of the evaluation team for student classroom observations, but there were no other music teachers involved in the Teacher's evaluation. The Union points out that the Superintendent acknowledged that the time of day is an important factor to consider when observing a classroom due to students' behavior during different times of the day, yet this was not taken into account during observations of the Teacher's morning class.

The Union also argues that the Superintendent made some inconsistent statements in his testimony regarding his classroom observations of the Teacher. For example, while the Superintendent noted a lack of student engagement, he also acknowledged that the Teacher called up on multiple students, as seen in a videotaped observation. The Union also compares comments the Superintendent made of videotaped classroom observations with the comments of the real-time observation documented by the Principal. For instance, with respect to student engagement, the Principal had written in her evaluation: "The desired effect is displayed in the majority of students." The Union notes that this was inconsistent with the Superintendent's assessment of the Teacher's efforts to engage the students.

Regarding the Superintendent and administrator criticisms of the Teacher's non-teaching professional duties, the Union also puts forward several arguments for pretext. Concerning the failure of the Teacher to make renovations to the Performing Arts Center, the Union points to the Teacher's testimony that he had had difficulty finding a contractor and had notified the administration of this by email. The Union addressed the after-school program complaint, stating that the Teacher credibly testified that the class was delayed due to an issue with the after-school bus and the delayed hiring of the teacher that was supposed to be teaching the class with him. The Union argues that, with respect to missed meetings, the Teacher missed only one meeting, an all-faculty meeting at the beginning of the year, due to a misunderstanding on his part. The Union also argues that the Teacher reentered his grades and corrected this issue after proper instruction and thereafter complied with grading protocols.

The Union argues that the Superintendent either knew about these mitigating factors and did not acknowledge them, or he never followed up adequately to discover them. The Union argues that by merely citing these occurrences without acknowledging or investigating the underlying causes is clear evidence that they were used as a pretext to recommend the Teacher's non-renewal.

The Union also seeks to invalidate the Superintendent's reliance on the advice of his two administrators, claiming that regardless of their motivation, their assessments were so flawed as to be invalid and that as a result pretext can be inferred. Additionally, the Union argues that positive statements in teacher evaluations from different schools both before and after the Teacher's time at Lisbon demonstrate that the School's decision was pretext. Regarding the safety and other protocol deviations, the Union argues that if these were significant enough to base an employment decision on then there should have been some degree of employee discipline, which was not meted out. The Union also argues that the Principal was aware that the Teacher claimed to suffer from a disability that impacted his work performance, but nevertheless failed to take it into account when evaluating him.

The Union's argument that there are no standards or predictability regarding the Superintendent's

decision to recommend a teacher for a continuing contract does not withstand scrutiny. The decision-making process the Superintendent described was based not only on his own assessment of classroom observation videos of the Teacher and first-hand observations of the Teacher's discharge of his other professional duties, but also on assessments of the Teacher by the Principal and the Curriculum Director, who both credibly testified in detail regarding the foundation for their advice to the Superintendent that the Teacher should not have been offered a continuing contract. While it strains credulity that the results of the School's elaborate teacher evaluation scoring system are not even seen by the Superintendent before making a decision regarding whether to offer a continuing contract to a probationary teacher, there was no compelling evidence that the process used in making the decision regarding the Teacher, or the standards informing the decision, in any way deviated from the norm.

Although inconsistencies and contradictions do lend support to a claim of pretext, the instances put forward by the Union with respect to the evaluation of the Teacher are relatively minor and not compelling in the context of the record as a whole. The Superintendent and the two administrators testified credibly about the myriad of reasons for their opinions that the Teacher's employment with the School Committee should not have continued. None of the alleged inconsistencies or contradictions regarding their assessment of the Teacher's abilities put forward by the Union are convincing evidence of pretext under these circumstances.

The Board does not find the Teacher's relatively poor evaluation during the time period at issue in the context of positive evaluations from two other schools during the course of his career compelling evidence of pretext--the Teacher could have had an objectively worse performance during his time at Lisbon and performance standards may well not be consistent across all three school districts. The fact that the Teacher did not receive discipline for his various breaches of protocol does not invalidate the Superintendent's factoring in this pattern of behavior during the course of his consideration of whether to offer the Teacher a continuing contract.

Further undercutting the claims of pretext are the multiple offers of assistance, from both the Principal and the Curriculum Director, to help the Teacher with the identified classroom issues as well as the issues with his other professional obligations. For the most part, the Teacher did not avail himself of the assistance offered. Additionally, the Superintendent agreed with the Curriculum Director to give the Teacher the opportunity for a third classroom observation, even though only two were required, to give the Teacher every chance to improve on his performance in the prior two observations.

With regard to the Principal's alleged disregard of the Teacher's claimed disability when making her assessments, the Principal did offer the Teacher extra assistance, even creating a specific scheduling document for his benefit. She also requested documentation from the Teacher regarding the disability so that appropriate accommodations could be put into place to help him. This documentation was ultimately not provided by the Teacher.

In sum, while there is sufficient evidence to infer some anti-union motivation on the part of the Superintendent, there is substantial evidence in the record that the Superintendent had legitimate reasons for making the decision that he did and that it would have happened regardless of the

Teacher's protected activity. In the context of the totality of the record, the Union has not met its burden with sufficient evidence to establish that the School Committee's justifications are mere pretext, therefore the discrimination claims regarding the Superintendent's decision must be dismissed. The Union has not alleged any unlawful interference, restraint or coercion occurring independently from its discrimination claim. As the underlying discrimination claim must be dismissed, so too must this derivative claim. *Maine State Law Enforcement Association*, No. 23-PPC-04, slip op. at 7.

B. The Principal's Adjustment of the Teacher's Evaluation Score

It is clear that the Principal was also aware of the Teacher's protected union activity. In the absence of direct evidence linking the Teacher's protected activity and the Principal's adjustment of the Teacher's evaluation score, the Board turns again to circumstantial evidence. In this instance, the circumstantial evidence is scant.

The Teacher testified to having a "sense" that the Principal's attitude towards him had changed in his second year of employment, subsequent to becoming Union president. This sense was based on the Teacher's reading of the Principal's body language and the Teacher's impression that the Principal began asking him more questions. Additionally, the Union argues in its brief that the Principal had been "infected" by the same anti-union animus that motivated the Superintendent.

The Union points to what it sees as an arbitrary adjustment to a category in the Growth Plan component of the Teacher's evaluation, "Maintaining Expertise in Content and Pedagogy," arguing that this is what accounted for the lower final evaluation score. In the Professional Practice component of the evaluation, the Teacher received a 2.0 in this category and at the end of the year, in the Growth Plan evaluation, the Principal rated him a 1.0 in the same category. It is not clear from the record, however, that these are in fact both measuring the same aspect of the Teacher's performance, occurring as they are in distinct components of the evaluation. The Principal's comments in the Growth Plan reflect concern with multiple professional deficiencies, including inattentiveness at meetings and failure to submit adequate paperwork required for the Growth Plan evaluation. That these performance issues should result in a lower score in this component of the evaluation is reasonable, regardless of the characterization of the category.

There is no evidence that there was anything improper in the adjustment of the Teacher's evaluation score. Once the Principal completed the Growth Plan component of the evaluation, the School's evaluation software calculated a score according to the established weighted formula, which is, it accounted for 50% of the final score. That this final score was different than the partially completed score, from just the Professional Practice evaluation, is no surprise.

The Union finds the timing of the final evaluation score worth consideration, coming as it does after prohibited practice complaints and grievance filings, and after a level two grievance meeting involving the Teacher. As the Board has long held though, "evidence of the timing of the adverse employment action, without more, is insufficient to establish a prima facie case for discrimination." *McLaughlin*, No. 13-15, slip op. at 13. Here, there is nothing more. The record supports that the timing of the completion of the Growth Plan evaluation and the calculation of the

final evaluation score for the Teacher occurred in line with standard procedure, and the suggestion that this was a post-hoc attempt to quantify a justification for the Superintendent's decision is not compelling, especially in light of the fact that the Superintendent does not review the evaluation score as part of his decision-making process.

This is not a situation, as in *Duff v. Town of Houlton*, where the evaluation process was clearly tampered with. Nos. 97-20 & 97-21 (Oct. 19, 1999). In that case, the union was challenging the non-promotion of three police officers who were union activists. The employer had just changed its previous practice so that evaluations were the only basis for promotion decisions and the Police Chief the only one with authority to conduct the evaluations. *Id.* at 24. The Board found that the Police Chief had refused to produce evaluation scores until he could be sure that he had given those three employees the lowest scores, in order to defeat their chances for promotion. *Id.* at 25. Additionally, the Board found his testimony to be not credible. *Id.* Here, the School's evaluation process had not been changed and there was no evidence that there was anything outside of standard procedure with the timing of the final evaluation score. In addition, there is evidence that the timing of the adjustment was, at least in part, a result of when the Teacher submitted his Growth Plan for evaluation. Also, the Board finds that the Principal was highly credible in her testimony and that she had not conspired to artificially lower the Teacher's final evaluation score. Finally, the evaluation score is not the sole basis, or even a basis, for the Superintendent's decision of whether to offer a continuing contract.

Regardless, the Principal's adjustment of the Teacher's final evaluation score is not an adverse employment action, and therefore not actionable as an alleged act of discrimination based on protected activity. See *Fraternal Order of Police v. York County*, Nos. 18-10 & 19-02, slip op. at 21 (July 24, 2019) ("[N]o violation of § 964(1)(B) or (D) occurs absent an adverse employment action."). As noted above, the Superintendent's decision not to recommend the Teacher for a continuing contract was made in April of 2023, well before the Teacher's Growth Plan had been evaluated and before the final evaluation score was completed in May. Further, even if the score had been determined before the Superintendent's decision, it is not relevant to any change in employment status [5] because the Superintendent does not take the evaluation score into account when he makes his recommendations regarding probationary teachers.

Given the lack of adverse employment action and insufficient evidence of any anti-union animus motivating the Principal, this discrimination claim must fail. As there is no independent basis for an unlawful interference, restraint or coercion claim under § 964(1)(A), the derivative claim must be dismissed along with the underlying discrimination claim. See *Maine State Law Enforcement Association*, No. 23-PPC-04, slip op. at 7.

V. Conclusion

The Union has not met its burden to establish that the reasons given for the Superintendent's decision not to recommend the Teacher for a continuing contract were a pretext. Neither has the Union met its burden to establish that the Principal's completion of the Teacher's evaluation was motivated by anti-union animus or even had any adverse employment consequences. Without underlying prohibited conduct, the derivative unlawful interference, restraint or coercion claims

also fail. As such, these cases are dismissed.

VI. Order

On the basis of the foregoing discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by 26 M.R.S.A. § 968(5), it is ORDERED that the complaints in Case Nos. 23-PPC-18 and 19 be, and hereby are, DISMISSED.

Dated this day, May 23, 2024.

MAINE LABOR RELATIONS BOARD

/s/
Sheila Mayberry, Esq.
Board Chair

/s/
Michael Miles
Employer Representative

/s/
Jessica L. Maher, Esq.
Employee Representative

The parties are advised of their right pursuant to 26 MR.S.A. § 968(5) to seek a review of this decision and order by the Superior Court. To initiate such a review, an appealing party must file a complaint with the Superior Court within fifteen (15) days of the date of issuance of this decision and order, and otherwise comply with the requirements of Rule 80(C) of the Rules of Civil Procedure.

[1] At the outset of the hearing, the Union amended its complaint regarding the second issue, concerning the Principal's actions, to waive its claim for a violation of § 964(1)(D). However, in its post-hearing brief it renews the argument for that claim. Despite any confusion on this point, the analysis and outcome are the same regardless of whether or not the claim was indeed waived. See n.3.

[2] Teachers have the option of having a third component, Student Learning Objective, factored into their Final Summative Rating, but the Teacher chose not to incorporate this component into his final score so the Board will focus on the evaluation method actually used.

[3] Public employers, their representatives and their agents are prohibited from: "Encouraging or discouraging membership in any employee organization by discrimination in regard to hire or tenure of employment or any term or condition of employment." 26 MRSA § 964(1)(B). They are also prohibited from: "Discharging or otherwise discriminating against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony" under the Act. 26 MRSA § 964(1)(D). Although each type of discrimination is an independent violation, the analysis applied to determine a violation of either is effectively the same. *Fraternal Order of Police v. York County*, Nos. 18-10 & 19-02, slip op. at 18 (July 24, 2019).

[4] As the parties have not raised the issue, the Board will assume for the purposes of this case, without holding, that a decision not to recommend a probationary teacher for a continuing contract constitutes sufficient adverse employment action to maintain a claim for discrimination. See *Casey v. Mountain Valley Education Association and School Administrative District No. 43*, 96-26 & 97-03 (October 30, 1997) (The Board analyzed a probationary teacher's non-nomination for a continuing contract in the context of a § 964(1)(B) claim without noting any issue regarding adverse employment action).

[5] See e.g., *Fraternal Order of Police v. York County*, Nos. 18-10 & 19-02, slip op. at 21, n.21 (July 24, 2019).