OVERRULED IN PART by Mount Diablo Education Association (Scott) (2010) PERB Decision No. 2127

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BONNIE DEHLER,	)	
	)	
Charging Party,	)	Case No. SF-CO-45-H
	)	
v.	)	PERB Decision No. 1152-H
	)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, INTERNATIONAL, COUNCIL 57,	)	May 29, 1996
	)	
Respondent.	)	
	)	

Appearance: Bonnie Dehler, on her own behalf.

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Bonnie Dehler (Dehler) of a Board agent's dismissal of her unfair practice charge. In her charge, Dehler alleged that the American Federation of State, County and Municipal Employees, International, Council 57 (AFSCME) breached the duty of fair representation mandated by section 3578 of the Higher Education Employer-Employee Relations Act (HEERA,[1] and thereby violated

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[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3578 states:

> The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

section 3571.1(b) and (e) of the HEERA, in its handling of a grievance Dehler filed against her employer, the University of California (University).

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge, the warning and dismissal letters, and Dehler's appeal. The Board hereby reverses the Board agent's dismissal and remands the case to the PERB General Counsel's office for issuance of a complaint in accordance with the following discussion.

FACTUAL SUMMARY

Dehler is employed by the University as an administrative assistant at the University of California Press. On May 10, 1993, Dehler filed a grievance alleging fraud and mismanagement of her payroll and personnel records by the University.

Dehler's grievance was handled by a succession of AFSCME representatives. Robert Dietrich represented Dehler until September 1994, at which point Dehler alleges that he abandoned the grievance without informing her. Dehler complained to AFSCME

Section 3571.1 states, in pertinent part:

> It shall be unlawful for an employee organization to:
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.

and requested assignment of a new representative. After a subsequent request in October 1994, Dehler's grievance was assigned by AFSCME to Howard Eberhart (Eberhart). In February 1995, Eberhart informed the University that George Popyack (Popyack) would be handling Dehler's grievance.

On May 2, 1994, at Step 1 of the grievance procedure, the University proposed a settlement of Dehler's grievance. After receiving no response to the settlement offer, on February 28, 1995, the University wrote to Eberhart indicating that the settlement offer would be withdrawn after March 10, 1995. The University also indicated that if the settlement was not accepted, AFSCME could proceed with the grievance by scheduling a Step 2 meeting by March 27, 1995.

On March 22, 1995, University representative Patricia Donnelly (Donnelly) called AFSCME and spoke to Popyack's assistant, reminding the union of the March 27 deadline for scheduling a Step 2 grievance meeting.

On March 30, 1995, Donnelly wrote to Popyack and described her contacts with AFSCME by both letter and telephone in which she reminded AFSCME of the deadline for proceeding with Dehler's grievance. Donnelly's letter notes that Popyack's assistant had assured her during the March 22 telephone conversation that AFSCME would get back to her by the March 27 deadline for scheduling a Step 2 grievance meeting. Since Donnelly failed to receive any contact from AFSCME by that date, she indicates in

the March 30 letter that the University considered Dehler's grievance to be resolved based on the Step 1 response.

Dehler learned of these developments when she received a copy of Donnelly's March 30 letter on April 11, 1995. On that date, Dehler wrote to Donnelly objecting to the closure of her grievance. On April 19, 1995, Dehler wrote to Eberhart complaining about his handling of her grievance. On April 21, 1995, Dehler wrote to Popyack complaining about AFSCME's representation and requesting copies of all correspondence relating to the grievance. Dehler received no response to her letters to Eberhart and Popyack.

Dehler filed her unfair practice charge against AFSCME on October 11, 1995, and an amended charge on January 8, 1996, alleging that AFSCME had not fairly represented her beginning in September 1994, had unlawfully abandoned her grievance without informing her, and that AFSCME's actions and inactions reflected its collusion with the University and failure in its duty of fair representation. A Board agent dismissed Dehler's charge on January 12, 1996, based on its untimeliness and failure to state a prima facie case of a violation by AFSCME of its duty of fair representation. Dehler filed an appeal of the dismissal on February 6, 1996, in which she reiterates her allegations against AFSCME, and asserts that AFSCME's actions were "wantonly negligent and constitute bad faith and a breach of the union's duty to provide fair representation." AFSCME filed no response to Dehler's appeal.

DISCUSSION

HEERA section 3563.2(a)[2] bars PERB from issuing a complaint relative to alleged unlawful conduct which occurred more than six months prior to the filing of the unfair practice charge. The limitations period begins to run once the charging party knows, or should have known, of the alleged unlawful conduct. (Healdsburg Union High School District (1984) PERB Decision No. 467.) Since Dehler's charge was filed on October 11, 1995, the allegations relating to AFSCME's handling of Dehler's grievance which she knew about, or should have known about, prior to April 11, 1995, are untimely and must be dismissed.

The allegation that AFSCME violated its duty of fair representation by its conduct relating to the failure to meet the University's deadline for scheduling a Step 2 meeting on Dehler's grievance is timely, since Dehler learned of AFSCME's actions on April 11, 1995, when she received a copy of Donnelly's letter to Popyack.

Dehler alleges that AFSCME's actions and inactions denied her the right to fair representation guaranteed by HEERA section 3578, in violation of sections 3571.1(b) and (e). The duty of

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[2]HEERA section 3563.2 states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

fair representation imposed on an exclusive representative extends to grievance handling. (Fremont Unified School District Teachers Association, CTA/NEA (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258 (UTLA).) In order to state a prima facie violation of this duty, Dehler must show that AFSCME's conduct was arbitrary, discriminatory or in bad faith. In UTLA, the Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citations.]

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a charging party:

> [M]ust at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. [Emphasis added; Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

In numerous cases, the Board has reiterated that a union's honest, reasonable determination not to pursue a grievance does not breach its duty of fair representation, regardless of the merits of the grievance. (California State Employees'

Association (Calloway) (1985) PERB Decision No. 497-H; American Federation of State, County and Municipal Employees, Local 2620 (Moore) (1988) PERB Decision No. 683-S.) The Board has also consistently held that case handling errors and incidents of simple negligence in a union's prosecution of a grievance are insufficient to demonstrate a breach of the duty of fair representation. (American Federation of State, County and Municipal Employees, Council 10 (Olson) (1988) PERB Decision No. 682-H.)

However, the Board has also held that the exclusive representative has an obligation to explain why it has chosen not to process an employee grievance. (Oakland Education Association, CTA/NEA (Mingo) (1984) PERB Decision No. 447.) Furthermore, in San Francisco Classroom Teachers Association, CTA/NEA (Bramell) (1984) PERB Decision No. 430 (San Francisco Classroom Teachers Association), the Board found that the cumulative actions of the exclusive representative, considered in their totality, were sufficient to constitute a prima facie showing of an arbitrary failure to fairly represent the employee. In that case, the exclusive representative took no action to pursue an employee grievance to the second level of the grievance procedure, then advised the employee that it would seek an extension of time to allow it to do so, and ultimately failed to do so without explanation to the employee. The Board, considering the overall pattern of union actions, any one of which would not breach its duty of fair representation, reversed

a Board agent's dismissal of the case and remanded it for further proceedings to resolve the factual disputes concerning the union's representation of the employee.

Similar to San Francisco Classroom Teachers Association, this case presents a pattern of conduct by AFSCME which, considered in its entirety, demonstrates a prima facie showing of an arbitrary failure to fairly represent Dehler. AFSCME was contacted by the University by letter and by telephone concerning the withdrawal of the proposed settlement of Dehler's grievance, and the need to schedule a Step 2 grievance meeting no later than March 27, 1995. Donnelly reiterated that deadline in a conversation with Popyack's assistant, and was assured that AFSCME would contact her by that date. However, no contact was made and the University considered Dehler's grievance resolved based on the Step 1 response. AFSCME did not notify Dehler or offer her any explanation for its actions. Dehler became aware of those developments only through receipt of a copy of Donnelly's March 30 letter to Popyack. Dehler's subsequent attempts to address her concerns with AFSCME's representation of her were not responded to by AFSCME.

AFSCME's failure to respond to the University's inquiry after indicating that it would do so, its failure to schedule a Step 2 grievance meeting, its failure to notify Dehler or explain AFSCME's actions to her, and its failure to respond to her specific written inquiries, present a pattern demonstrating a prima facie showing of an arbitrary failure by AFSCME to fairly

represent Dehler. Accordingly, the Board concludes that this case should be remanded to the General Counsel's office for further proceedings.

ORDER

The Board reverses the Board agent's dismissal in Case No. SF-CO-45-H and REMANDS the case to the PERB General Counsel's office for issuance of a complaint in accordance with the foregoing discussion.

Member Johnson joined in the Decision.

Member Garcia's concurrence begins on page 10.

GARCIA, Member, concurring: I concur with the Public Employment Relations Board (PERB or Board) majority opinion to reverse the dismissal because I agree that Bonnie Dehler (Dehler) has stated a prima facie case of a violation of the duty of fair representation by the American Federation of State, County and Municipal Employees, International Council 57 (AFSCME). However, I disagree with the majority opinion's statements that "allegations relating to AFSCME's handling of Dehler's grievance which she knew about, or should have known about, prior to April 11, 1995, are untimely and must be dismissed."

This conclusion misses the point of San Francisco Classroom Teachers Association, CTA/NEA (Bramell) (1984) PERB Decision No. 430 (San Francisco Classroom Teachers Association). In San Francisco Classroom Teachers Association, the Board considered the cumulative actions of the exclusive representative and ruled that a prima facie showing of arbitrary failure to fairly represent the grievant had been made. The majority in the case at bar correctly compares the facts here to that case: AFSCME's failure to notify Dehler of the status of her grievance and its failure to respond to her specific written requests for information constitute an identifiable pattern of conduct similar to that in San Francisco Classroom Teachers Association. The letter received by Dehler on April 11, 1995 was simply the culmination of a long period of inaction by AFSCME.

To immunize AFSCME from liability for any events occurring prior to April 11, 1995 is to dilute the message of San Francisco

Classroom Teachers Association: without the allegations of AFSCME's cumulative (in)actions, the grievant is left with a single allegation that on a certain date she no longer had the benefit of the grievance procedure. In this type of case, the focus should be on the chain of events as the cumulative cause of the alleged unfair practice, the exclusive representative's pattern of conduct during the entire course of handling the grievance, rather than the effect (i.e., the date when Dehler learned the result). The six-month statute of limitations is jurisdictional, and should not be used to bar the allegations necessary to prove an otherwise timely filed charge.

The majority recites PERB precedent that the statute of limitations period begins to run once the charging party "knows, or should have known," of the alleged unlawful conduct (citing Healdsburg Union High School District (1984) PERB Decision No. 467). Thus, we must identify the moment when Dehler knew or should have known that AFSCME's inaction or method of handling her grievance was intentional, negligent, capricious, or arbitrary. In this case, that moment did not occur until she realized the result of the inaction, not when some hypothetical, and perhaps more perceptive person, could have realized something was wrong. In such a situation the grievant cannot tell until after the harm has occurred that his or her right to representation has been violated. That is the rationale for the "cumulative violation" concept embodied in San Francisco

Classroom Teachers Association, and it is appropriate to apply it here.

Another reason not to bar Dehler from including the allegations prior to April 11 is that it is bad policy. When the "conduct" in dispute consists of a lengthy period of silence and inaction, the Board must be able to consider the entire course of processing a particular grievance to discern whether a pattern exists: otherwise grievants will be encouraged to file unfair practice charges prematurely, perhaps even before the outcome of their grievance is known, in order to protect their chain of evidence and preserve their cause of action should they later realize they were not fairly represented.

In conclusion, applying San Francisco Classroom Teachers Association to the facts of this case, I would allow Dehler to include all allegations dating back to the point at which she first requested AFSCME to represent her in handling this specific grievance, since the pattern of improper conduct could not be identified without viewing the entire course of conduct. Without the benefit of hindsight, I see no evidence that Dehler knew or should have known of the alleged unlawful conduct at any point earlier than April 11, 1995.