**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| VIVIAN OWENS,<br><br>Charging Party,<br><br>v.<br><br>AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,<br><br>Respondent. | Case No. SF-CO-162-H<br><br>PERB Decision No. 1974-H<br><br>August 29, 2008 |

Appearance: The Revelation Law Firm by Melanie D. Popper, Attorney, for Vivian Owens.

Before Neuwald, Chair; McKeag and Rystrom, Members.

## DECISION

NEUWALD, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by Vivian Owens (Owens) to an administrative law judge's (ALJ) proposed decision. The charge alleged that the American Federation of State, County and Municipal Employees (AFSCME) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by breaching its duty of fair representation. Owens alleged that this conduct constituted a violation of Section 3571.1.

We reviewed the entire record in this matter and affirm the ALJ's dismissal because the unfair practice charge was not timely filed.[2]

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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.

[2]Owens did not except to the ALJ's proposed decision concerning her allegation that AFSCME breached its duty of fair representation. Therefore, we do not address the ALJ's analysis and conclusion regarding this issue.

## BACKGROUND

The University of California hired Owens as a custodian at the Lawrence Berkeley National Laboratory (Laboratory) in June 2001. AFSCME exclusively represented the custodians at the University of California. As such, Owens is represented by AFSCME.

We only examine those facts pertinent to the unfair practice charge. On November 21, 2005, the Laboratory issued Owens a 5-day suspension without pay. Subsequently, Owens requested representation and that AFSCME file a grievance on her behalf. On December 28, 2005, Owens received a phone call from one AFSCME representative stating that a grievance would not be filed. Fifteen minutes later, Owens received a phone call from another AFSCME representative who stated a grievance would be filed. A grievance was filed on December 22, 2005, as evidenced by the Laboratory's stamp in the Employee/Labor Relations Human Resources Department. On January 11, 2006, the Laboratory determined that the discipline was warranted. An AFSCME representative telephoned the next day and informed Owens that a grievance would not be pursued. Four days later, on January 16, 2006, the same AFSCME representative sent a letter reiterating that a grievance would not be pursued. Owens filed the unfair practice charge on August 25, 2006. In the proposed decision, the ALJ dismissed the charge as untimely.

## OWENS' EXCEPTIONS

On July 25, 2007, Owens filed her exceptions arguing that she timely filed her unfair practice charge. Owens claims that there was no evidence suggesting that she received notice that AFSCME would no longer pursue her grievance. Additionally, Owens claims that she timely filed her charge with PERB on June 19, 2006, as evidenced by a proof of service with said date.[3]

[3]The proof of service was first introduced in her exceptions.

## DISCUSSION

First, we address Owens' newly presented supporting evidence, the June 19, 2006, proof of service. PERB Regulation[4] 32635(b) precludes a charging party from raising new allegations or new supporting evidence on appeal without good cause. (Regents of the University of California (1998) PERB Decision No. 1271-H.) Owens did not produce the June 19, 2006, proof of service at the hearing as evidenced by the fact that there is no mention of the June 19, 2006, proof of service in the hearing transcript nor is it an exhibit. Yet, this document was known to Owens at the time of hearing as her signature is on the document. In her appeal, Owens fails to demonstrate good cause for the presentation of new supporting evidence on appeal and nothing in the document filed related to the appeal indicates good cause. Therefore, the Board does not consider this evidence.

We now turn to Owens' timeliness issue. HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

In cases alleging a breach of the duty of fair representation, the six-month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.) (1991) PERB

[4]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

Decision No. 889; United Teachers of Los Angeles (Hopper) (2001) PERB Decision No. 1441.) Repeated union refusals to process a grievance over a recurring issue does not start the limitations period anew. (California State Employees' Association (Calloway) (1985) PERB Decision No. 497-H.)

Owens alleges that there was "no evidence suggesting that Ms. Owens actually received any such notice or on or about that time." The ALJ credited AFSCME's representatives testimony over Owens in regards to receiving notice that AFSCME did not intend to pursue her grievance further. The ALJ reasoned:

> The history of interactions between Owens and the Laboratory and with AFSCME indicate that Owens was persistent in pursing her claims and demands for information. Thus I do not believe that Owens had only two telephone conversations with Grabelle. Grabelle's January 16 letter reminds Owens of the earlier conversation regarding AFSCME's decision not to pursue the grievance, so as to corroborate the January 12 call. I found Grabelle to be a credible witness without any apparent motive to fabricate. I conclude that Grabelle wrote the January 16 letter to confirm the content of the parties' verbal communications and to document the fact that AFSCME had informed Owens of its reasons for not pursing the grievance. Grabelle testified she confirmed the accuracy of Owens' mailing address with her.

While the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented, it will afford deference to the ALJ's findings of fact which incorporate credibility determinations. (Santa Clara Unified School District (1979) PERB Decision No. 104; Los Angeles Unified School District (1988) PERB Decision No. 659.) Here, the record supports the ALJ's findings that Owens was notified that AFSCME would not pursue her grievance at the latest, January 16. As such, the statute of limitations began in January 2006 and expired in July 2006. Owens filed the present charge on August 25, 2006, as

evidenced by PERB's receipt stamp on the charge. Therefore, the Board finds the unfair practice charge is untimely and dismisses both the charge and the complaint.

ORDER

The unfair practice charge and complaint in Case No. SF-CO-162-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

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Members McKeag and Rystrom joined in this Decision.