STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KELLY MCGUIRE, Charging Party, v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 2620, Respondent.	Case No. SF-CO-58-S PERB Decision No. 2286-S September 24, 2012

Appearance: Kelly McGuire, on her own behalf.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Kelly McGuire (McGuire) from the dismissal (attached) by the Office of the General Counsel of her unfair practice charge. The charge, as amended, alleged that the American Federation of State, County, and Municipal Employees, Local 2620 (AFSCME) breached its duty of fair representation by failing to adequately represent McGuire in dealings with her former employer, the California Department of Social Services, in violation of the Ralph C. Dills Act (Dills Act)[1] sections 3515.7(g) and 3519.5(b). The Board agent found that most of the allegations were untimely and that the charge failed to state a prima facie case of violation of the duty of fair representation or retaliation.

The Board has reviewed the dismissal and the record in light of McGuire's appeal and the relevant law. Based on this review, we find the dismissal and warning letters to be well-reasoned, adequately supported by the record, and in accordance with applicable law.

[1] The Dills Act is codified at Government Code section 3512 et seq.

Accordingly, the Board adopts the dismissal and warning letters as the decision of the Board itself, supplemented by the discussion below.

DISCUSSION

Compliance with Requirements for Filing Appeal

Pursuant to PERB Regulation 32635(a),[2] an appeal from dismissal must:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

To satisfy the requirements of PERB Regulation 32635(a), the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H (*State Employees Trades Council*); *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent's dismissal fails to comply with PERB Regulation 32635(a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381 (*Pratt*); *Lodi Education Association (Hudock)* (1995) PERB Decision No. 1124; *United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635(a). (*Pratt*; *State Employees Trades Council*; *Contra Costa County Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.)

The appeal in this case merely restates facts alleged in the original charge. It fails, however, to reference any portion of the Board agent's determination or otherwise identify the

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

specific issues of procedure, fact, law or rationale to which the appeal is taken, the page or part of the dismissal to which appeal is taken, or the grounds for each issue. Thus, it is subject to dismissal on that basis. (*City of Brea* (2009) PERB Decision No. 2083-M.)

New Evidence and Allegations on Appeal

In her appeal, McGuire presents new factual allegations and evidence that were not presented in the original charge or the amended charge. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b); see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)

On December 22, 2011, the Board agent issued a letter advising McGuire that the charge failed to state a prima facie case and warning her that the charge would be dismissed unless she amended the charge to state a prima facie case.[3] McGuire filed a first amended charge on April 2, 2012.[4] AFSCME filed a response to the first amended charge on April 18, 2012. On April 30, 2012, the Board agent dismissed the charge. On May 2, 2012, PERB received a letter from McGuire dated April 30, 2012, stating that it was a "response in dispute to Mr. Baker's letter dated April 26, 2012." It appears this letter was intended to be a reply to AFSCME's April 18, 2012 response to the amended charge. Attached to this letter were the following documents that were not previously provided to the Board agent: (1) an email thread

[3] The warning letter gave McGuire until January 9, 2012, within which to file an amended charge. The file indicates that McGuire was given an extension of time until April 2, 2012, to file an amended charge.

[4] The proof of service attached to the amended charge states that it was sent by facsimile and by U.S. mail on March 30, 2012.

reflecting a communication on May 10, 2011, from McGuire to AFSCME Director George Popyack (Popyack) in response to an email from Popyack dated April 18, 2011; and (2) a letter dated May 25, 2011, from McGuire to AFSCME President Gerald McEntee. The letter further asserts that McGuire contacted AFSCME on or about February 22, 2011, and that the April 18, 2011 letter was the last communication McGuire received from Popyack.

McGuire filed an appeal from the dismissal on June 13, 2012. The appeal includes the following attachments: (1) McGuire's March 30, 2012 letter in support of her amended charge; (2) McGuire's April 30, 2012 letter received by PERB on May 2, 2012; and (3) additional copies of the April 18 and May 10, 2011 emails and May 25, 2011 letter attached to McGuire's April 30, 2012 letter. As indicated above, the April 30, 2012 letter was not received by PERB until May 2, 2012, after the General Counsel had already dismissed the charge. The appeal provides no reason why these documents and factual allegations could not have been included in the original charge or in an amended charge. Thus, we do not find good cause to consider these new allegations.

Even if we were to consider the additional allegations and evidence, however, we would still agree with the General Counsel that the charge failed to state a prima facie violation of the duty of fair representation. As set forth in the dismissal letter, Popyack repeatedly requested that McGuire inform him whether she wished to have an AFSCME business agent represent her at her State Personnel Board (SPB) hearing or to confirm that she had retained private counsel. McGuire's May 10, 2011 response continues to fail to provide this information. The May 25, 2011, letter continues to request that AFSCME provide "effective assistance of counsel/advocate" to represent McGuire in her hearing before the SPB, but fails to provide the information requested by AFSCME concerning her use of private counsel. As

noted in the dismissal letter, AFSCME voluntarily represented McGuire at a *Skelly*[5] meeting and a settlement conference, although it had no initial obligation to do so. (*Service Employees International Union, Local 1021 (Horan)* (2011) PERB Decision No. 2204-M; *California Correctional Peace Officers Association (Kashtanoff)* (1993) PERB Decision No. 1007.) These additional facts, even if considered, do not demonstrate that AFSCME's conduct in attempting to determine whether McGuire was represented by private counsel violated its duty of fair representation. Accordingly, we affirm the dismissal of the charge.

ORDER

The unfair practice charge in Case No. SF-CO-58-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

[5] *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*).

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

April 30, 2012

Kelly McGuire
P. O. Box 11072
Santa Rosa, CA 95406

Re: *Kelly McGuire v. AFSCME Local 2620*
Unfair Practice Charge No. SF-CO-58-S
DISMISSAL LETTER

Dear Ms. McGuire:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 15, 2011. Kelly McGuire (McGuire or Charging Party) alleges that AFSCME Local 2620 (AFSCME, Union or Respondent) violated the Ralph C. Dills Act (Dills Act)[1] by failing to adequately represent her in dealings with her former employer.

Charging Party was informed in the attached Warning Letter dated December 22, 2011, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to January 9, 2012, the charge would be dismissed. Subsequently, an extension of time to respond was granted.

On April 2, 2012, Charging Party filed a First Amended Charge (FAC). AFSCME has filed position statements dated January 17, 2012, and April 18, 2012. Because the FAC does not cure the deficiencies discussed in the Warning Letter, the charge is hereby dismissed based upon the reasons set forth herein and in the December 22, 2011 Warning Letter.

Summary of Additional Facts Alleged in the First Amended Charge

As stated in the Warning Letter, McGuire was employed by the California Department of Social Services (Department) in a position exclusively represented by AFSCME. From April 2008 through September 23, 2010, McGuire sought the union's assistance on a number of occasions, and also filed complaints with the employer and third-party administrative agencies. Details of these events are summarized in the Warning Letter, and McGuire supplies additional details in the FAC.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov.

On June 27, 2008, AFSCME filed a letter of complaint regarding McGuire's hostile work environment, but AFSCME "ultimately never followed through with this grievance." Later, McGuire asked AFSCME business agent Pam Manwiller (Manwiller) for union representation regarding weekly case load review meetings with management. Manwiller replied that she was too busy to drive to McGuire's workplace in Rohnert Park, and asked McGuire to have a co-worker accompany her in meetings with management. McGuire believes this violated her *Weingarten* rights.[2]

In January 2009, Manwiller filed a grievance on McGuire's behalf regarding a negative performance evaluation of McGuire. However, AFSCME "ultimately never followed through with this grievance."

In February 2009, McGuire feared that a co-worker was being aggressive and hostile. She reported this to her supervisor. She then told Manwiller she feared for her safety and also feared retaliation for reporting this to management. Manwiller ignored McGuire's concerns and did not represent McGuire when she was subsequently interviewed about the incident. Later McGuire was "written up" for an alleged violation of an informal office procedure. McGuire believes AFSCME's conduct violated her *Weingarten* rights.

In March 2009, McGuire received a Notice of Adverse Action from her employer and was suspended from employment for 30 days. On March 25, 2009, Manwiller represented McGuire at a *Skelly* hearing and the suspension was reduced to 15 days. After the *Skelly* hearing, Manwiller said she had advised management to issue McGuire an additional set of expectations beyond what other staff had received. McGuire alleges that "it is apparent Manwiller requested [that] management reprimand McGuire for asking Manwiller's assistance regarding representation." After the *Skelly* hearing, Manwiller suggested McGuire leave her employment and go live with her family. McGuire alleges that Manwiller was trying to get McGuire to leave so that Manwiller would not have to travel to McGuire's Rohnert Park workplace, which had a hostile environment.

On January 4, 2010, McGuire called Manwiller to confirm a settlement conference before the State Personnel Board (SPB) scheduled for the next day. Manwiller replied that the settlement conference had been cancelled because the SPB had told her a settlement offer had been accepted. The settlement conference was held on January 5, 2010 with a different Administrative Law Judge (ALJ) than the one originally assigned.

McGuire alleges that Manwiller pressured her into accepting a one-day suspension in settlement of the adverse action. It is unclear whether the SPB matter concerned the March 2009 adverse action or some subsequent adverse action. McGuire alleges that Manwiller

---

[2] In *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), the U.S. Supreme Court granted employees the right to representation during disciplinary interviews.

recommended that McGuire accept the one-day suspension in settlement because it was a good offer, and that if McGuire did not accept it there would be a hearing. Manwiller stated, "no one cares that you have a disability," and "No one is going to listen to you." Manwiller warned that the adverse action would stay in McGuire's personnel file for the rest of her career.

On July 16, 2010, Manwiller represented McGuire in an internal investigation meeting at the Department regarding a complaint filed by a co-worker. During this meeting, McGuire raised a number of complaints concerning the Department's failure to accommodate her disability and her fear at work for her personal safety.

In July 2010, McGuire filed a police report alleging that a co-worker had made threats against her. AFSCME did not file any grievances concerning this incident.

On August 2, 2010, McGuire was placed on administrative time off. Department Regional Manager Linda Kryla (Kryla) called McGuire at home to tell McGuire she was to testify pursuant to a subpoena dated August 6, 2010, despite this creating a conflict with her placement on administrative time off. McGuire contacted Manwiller for clarification, however Manwiller deferred providing clarity.

On August 5, 2010, Manwiller told McGuire that McGuire could file her own grievances. McGuire then told AFSCME Director George Popyack that Manwiller said that employees could file their own grievances. Popyack dismissed McGuire's report. McGuire ultimately sent certified letters and e-mail messages to AFSCME President Gerald McEntee (McEntee), which were ignored.

On December 13, 2010, McGuire received notice that the Department intended to dismiss her from employment. On December 16, 2010, there was a *Skelly* meeting[3] which included McGuire and Manwiller. During this meeting, Manwiller told McGuire that her October 2010 appeal would be denied. It cannot be determined what this appeal denial refers to. McGuire believes that Manwiller had a continuing strategy to get McGuire to drop all of her grievances prior to the January 5, 2010 SPB settlement conference. After the *Skelly* meeting, Manwiller angrily screamed at McGuire: "you ruined my reputation! I have been getting calls from all over the country about you!"

On December 21, 2010, the *Skelly* officer Sandra LaBaron (LaBaron) upheld the decision to terminate. McGuire alleges, "It was not until this point that Manwiller's intentions per her prejudiced representation by insisting McGuire accept the unfavorable agreement of January 5,

[3] *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 held that due process mandates that certain employees be accorded procedural rights before the imposition of discipline becomes effective. A pre-discipline meeting held as part of these procedural rights is commonly referred to as a *Skelly* meeting.

2010 completely extinguished McGuire's right to pursue the grievances Manwiller negligently did not pursue."

On January 20, 2011, Manwiller resigned from her position with AFSCME and returned to her previous employment at the California Department of Personnel Administration (DPA). McGuire believes that Manwiller's conduct towards her was discriminatory because Manwiller had been trying to get a job with DPA.

On February 10, 2011, on AFSCME's recommendation, McGuire requested copies of her personnel file.

On February 15, 2011, Popyack assigned Gregory Ramirez (Ramirez) to represent McGuire at the SPB settlement conference on McGuire's dismissal. Ramirez admitted to McGuire that the last woman he had represented had been terminated due to Ramirez's inadequate representation. He told McGuire "if she did not accept the unlawful settlement [then] not to call."

The SPB settlement conference apparently did not result in a settlement. McGuire repeatedly called and sent e-mail messages to Popyack, requesting representation at the upcoming SPB evidentiary hearing. As of March 11, 2011, Popyack had not responded.

On March 30, 2011, McGuire went to the Department's office in Sacramento to view copies of her personnel file. There were 118 pages to view.

On April 14, 2011, McGuire received a letter from the Department informing her that it had an enormous number of documents which McGuire had not been told were available, or permitted to view, on March 30, 2011.

On September 26, 2011, McGuire attended an evidentiary hearing before the SPB. It was continued to November 28, 2011 through December 1, 2011. On November 28, 2011 through December 1, 2011, McGuire represented herself and there were no further communications from AFSCME. McGuire believes she was dismissed on the basis of her protected activity. She further alleges that AFSCME allowed all grievances it filed on McGuire's behalf since 2008, to be ignored resulting in dismissal of the grievances.

Position of the Respondent

ASCME alleges that when Manwiller resigned from AFSCME, it assigned Ramirez to represent McGuire in a February 15, 2011 SPB settlement conference regarding McGuire's dismissal. At that conference, the State made a generous settlement offer, which Ramirez recommended that McGuire accept. The ALJ also recommended that McGuire accept the settlement offer. McGuire declined the offer and decided to proceed with the hearing, then scheduled for April 25, 2011.

On March 11, 2011, McGuire asked AFSCME representative Yvonne Wheeler (Wheeler) to provide an attorney for the hearing. Wheeler explained that the Union would not pay for an attorney, but would provide an AFSCME business representative. McGuire asked that AFSCME assign someone other than Ramirez, and AFSCME agreed.

By e-mail message dated March 12, 2011, Popyack told McGuire she could choose to have an AFSCME business agent represent her at the hearing, at the Union's expense, or she could choose to retain private counsel, at her own expense. The Union's policy is that it will not provide a business agent if the member has retained private counsel; the member must choose one or the other but may not choose both.

McGuire did not immediately respond and on March 15, 2011, Popyack sent her another e-mail message to confirm she had received the first one.

On March 21, 2011, McGuire replied to Popyack, but did not answer his question regarding whether she was choosing to have a business agent represent her or retain her own counsel. At some point between March 15 and March 26, 2011, AFSCME learned that McGuire had retained an attorney, Steven Bassoff (Bassoff) to represent her at the hearing, and that Bassoff had filed a request with SPB to postpone the hearing.

By e-mail message dated March 26, 2011, Popyack informed McGuire that the Union had learned that she had retained counsel and asked her again to confirm that she would not need AFSCME to provide representation. McGuire responded via e-mail message on March 31, 2011, but again did not answer Popyack's question. McGuire sent several further e-mail messages to Popyack, referring back to her March 31, 2011 e-mail message, but still not answering the question.

The Union subsequently learned from the Department's attorney that Bassoff had represented McGuire at the SPB hearing but had left before the hearing concluded.

Standard of Review and Burden of Proof

In determining whether a prima facie case exists, PERB must accept Charging Party's facts as true. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489.) It is not the function of the Board agent to judge the merits of the Charging Party's dispute. (*Ibid.*) Where there is a material factual dispute the Charging Party's allegations must be accepted as true. (*UPTE, CWA Local 9119 (Crisosto)* (2006) PERB Decision No. 1811-H.) However, a Board Agent is not required to ignore the facts provided by Respondent and to only consider the facts provided by Charging Party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.) Further, factually unsupported legal conclusions in the charge need not be accepted as true. (*Charter Oak Unified School District* (1991) PERB Decision No. 873.)

As stated in the Warning Letter, the charging party's burden includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no

more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited 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. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) 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.) In a charge alleging that a union breached its duty of fair representation, the limitations period begins to run when the charging party knew, or should have known, that further assistance from the union was unlikely. (*IFPTE, Local 21, AFL-CIO (Hosny)* (2011) PERB Decision No. 2192-M.)

Discussion

A. *Skelly* Meetings and SPB Dismissal Hearing

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by Dills Act section 3515.7(g) and *California State Employees' Association (Norgard)* (1984) PERB Decision No. 451-S and thereby violated section 3519.5(b). In order to state a prima facie violation of this section of the Dills Act, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith.

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

> must 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.

(Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332.)

As discussed in the Warning Letter, the union's duty is to enforce the negotiated agreement; the Union's duty generally does not extend to extra-contractual proceedings including *Skelly* meetings and SPB proceedings. (*United Faculty of Grossmont-Cuyamaca Community College District (Tarvin)* (2010) PERB Decision No. 2133; *California Correctional Peace Officers Association (Kashtanoff)* (1993) PERB Decision No. 1007.) Under some circumstances, if a union voluntarily undertakes representation in an extra-contractual forum, it may be held to the duty of fair representation described above. (*Lane v. IUOE Stationary Engineers, Local 39* (1989) 212 Cal.App.3d 164; *California Union of Safety Employees (John)* (1994) PERB Decision No. 1064-S.)

AFSCME represented McGuire at her March 2009 *Skelly* meeting, although it apparently did not have a contractual duty to do so. McGuire's proposed suspension was subsequently reduced. There are no facts to establish that AFSCME breached its duty of fair representation

by representing her at the March 2009 *Skelly* meeting. Moreover, the March 2009 *Skelly* meeting occurred more than six months prior to the filing of the instant charge and therefore allegations of a violation arising from this meeting are untimely filed. (*IFPTE, Local 21, AFL-CIO (Hosny)*, *supra*, PERB Decision No. 2192-M; *Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board*, *supra*, 35 Cal.4th 1072.)

On January 5, 2010, AFSCME represented McGuire at an SPB settlement conference. McGuire received a one-day suspension in settlement of an unspecified proposed adverse action. McGuire alleges that AFSCME recommended that she accept the settlement instead of going forward to an SPB hearing. McGuire apparently took this advice. She alleges that Manwiller "pressured" her into accepting the settlement, but there is nothing alleged to establish that this was a violation of the duty of fair representation. (*California School Employees Association, Chapter 296 (Morrison)* (2000) PERB Decision No. 1415 [union's advice that employee resign to avoid further investigation did not violate duty of fair representation].)

On December 16, 2010, AFSCME represented McGuire at another *Skelly* meeting. Subsequently the *Skelly* officer upheld the employer's decision to terminate McGuire. After the hearing, Manwiller angrily told McGuire "you ruined my reputation! I have been getting calls from all over the country about you!" Shortly thereafter, Manwiller resigned from AFSCME and returned to her previous employment at DPA. The facts that Manwiller made a single angry outburst after the *Skelly* hearing, and later took another job, do not demonstrate that the Union failed to fairly represent McGuire with respect to the *Skelly* meeting.

On February 15, 2011, AFSCME assigned Ramirez to represent McGuire at an SPB settlement conference. As with the previous SPB settlement conference, it appears that the Union voluntarily undertook this representation although under no initial obligation to do so. It appears that McGuire alleges that Ramirez also pressured her to accept an "unlawful" settlement, but does not allege any facts to establish how the proposed settlement was unlawful or how Ramirez's conduct violated the duty of fair representation. Subsequently, McGuire obtained private counsel to represent her at further proceedings. AFSCME was under no obligation to provide her with legal counsel or the representative of her choice. (*SEIU Local 1021 (DeLarge)* (2009) PERB Decision No. 2068; *Los Rios College Federation of Teachers/CFT/AFT Local 2279 (Deglow)* (1998) PERB Decision No. 1275.)

B. Failure to File Grievances

The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Teachers Association (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In order to state a prima facie violation of this duty under the Dills Act, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations 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 omitted.]
>
> 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.

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

In June 2008, AFSCME filed a "letter of complaint" on McGuire's behalf regarding a hostile work environment claim. McGuire alleges that AFSCME "never followed through with this grievance," but it is unclear whether this was a grievance filed under the labor agreement or a complaint to an outside agency. No other facts concerning this grievance are provided.

In approximately January 2009, AFSCME filed a grievance on McGuire's behalf regarding a "damaging evaluation" that prevented McGuire from getting a promotion. However, AFSCME "never followed through with this grievance." No other details concerning this are provided.

In July 2010, there was a workplace incident which resulted in McGuire filing a police report alleging that a co-worker had made threats against her. AFSCME did not file any grievances concerning this incident.

On August 5, 2010, Manwiller advised McGuire that McGuire could file her own grievances. This is presumed to be a reference to a grievance procedure contained in a labor agreement which allows individual employees, as well as a union, to file grievances over violations of that agreement. (See, e.g., *Service Employees International Union, Local 790 (Rax)* (2002) PERB Decision No. 1488; *Trustees of the California State University* (1997) PERB Decision No. 1231-H.)

These facts are insufficient to establish that AFSCME treated any of these grievances in an arbitrary, discriminatory or bad faith manner. McGuire also does not meet her burden to establish that the charge was timely filed within six months of the purported violation.

It appears that two grievances were filed on McGuire's behalf, but there are no facts alleged concerning the purported contract violation underlying the grievance, or any information

concerning when or why AFSCME did not pursue the grievance. With regard to any grievances arising out of the July 2010 workplace incident, there are no facts alleged to establish that there was any basis upon which AFSCME should have filed a grievance over a contract violation or how AFSCME's decision not to pursue the grievance would have constituted arbitrary, discriminatory, or bad faith conduct. Likewise, Manwiller's advice that McGuire could file her own grievance does not appear to violate the duty of fair representation.

McGuire draws the legal conclusion that Manwiller's insistence that she accept the January 5, 2010 settlement agreement "completely extinguished McGuire's right to pursue the grievances Manwiller negligently did not pursue"; however this conclusion is unsupported by any facts. (*Charter Oak Unified School District*, *supra*, PERB Decision No. 873.) The facts do not establish that AFSCME failed, within the limitations period, to perform some specific ministerial act such that McGuire's claim was completely extinguished. Accordingly, these allegations do not state a prima facie case.

C. *Weingarten* Rights

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. PERB adopted the *Weingarten*[4] rule in *Rio Hondo Community College District* (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617 (*Redwoods*); *Fremont Union High School District* (1983) PERB Decision No. 301; see also, *Social Workers' Union, Local 535 v. Alameda County Welfare Department* (1974) 11 Cal.3d 382.)

In *Rio Hondo Community College District*, *supra*, PERB Decision No. 260, the Board cited with approval *Baton Rouge Water Works Company* (1979) 246 NLRB 995, that provided:

> the right to representation applies to a disciplinary interview, whether labeled as investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined.

In approving the *Weingarten* rule, the U.S. Supreme Court noted with approval that the National Labor Relations Board would not apply it to "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of

---

[4] In *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), the U.S. Supreme Court granted employees the right to representation during disciplinary interviews.

work techniques." (*Weingarten*, *supra*, 420 U.S. 251, quoting *Quality Manufacturing Co.* (1972) 195 NLRB 197, 199.)

A right to union representation may be held to exist, in the absence of an objectively reasonable fear of discipline, only under "highly unusual circumstances." (*Redwoods*, *supra*, 159 Cal.App.3d 617.) The finding of "highly unusual circumstances" in the *Redwoods* case was based on the requirement that the employee attend a meeting that she no longer sought over her appeal of a negative performance rating; the fact that the interview was investigatory and formal; the interview was held by a high-ranking official of the employer; and the hostile attitude of the official toward the employee.

McGuire alleges that AFSCME deprived her of her *Weingarten* rights in June 2008 when Manwiller did not agree to attend weekly case load review meetings with her, and in February 2009, when Manwiller did not represent her in an interview about a co-worker's aggressive conduct. Both of these incidents occurred more than six months prior to the filing of the instant charge and are therefore untimely. (*IFPTE, Local 21, AFL-CIO (Hosny)*, *supra*, PERB Decision No. 2192-M; *Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board*, *supra*, 35 Cal.4th 1072.) Even if timely, McGuire does not establish that the elements of the violation are established or that AFSCME, not the employer, is the proper respondent.

D. Totality of Conduct

McGuire contends that the totality of ASCME's conduct demonstrates a breach of the duty of fair representation. When a charge alleges that an exclusive representative breached its duty of fair representation by failing to act on behalf of an employee, PERB looks to whether the cumulative actions of the exclusive representative, considered in their totality, are sufficient to constitute a prima facie showing of an arbitrary failure to fairly represent the employee. (*Service Employees International Union, Local 1021 (Schmidt)* (2009) PERB Decision No. 2080-M.)

Here, the totality of AFSCME's conduct demonstrates that it represented McGuire on multiple occasions over the course of several years. Although McGuire alleges that AFSCME failed to follow through with grievances, she provides no specifics from which a violation can be ascertained. With respect to the SPB hearing in 2011, concerning McGuire's termination, it appears that McGuire elected to have a private attorney represent her instead of an AFSCME representative, and that AFSCME repeatedly communicated with her regarding the status of the hearing and her representation. In light of these facts, no prima facie violation is established.

E. Retaliation

In analyzing allegations of discrimination that also violate the duty of fair representation, the Board follows the principals applicable for violations of parallel provisions prohibiting employer interference and reprisals. (*AFT Part-Time Faculty United, Local 6286 (Peavy)*

(2011) PERB Decision No. 2194.) In order to prevail on a discrimination theory the charging party must establish: (1) the employee exercised rights guaranteed by the Dills Act; (2) the employee organization had knowledge of the exercise of those rights; (3) the employee organization took adverse action against the employee; and (4) the employee took such action because of the employee's exercise of those protected rights. (*Ibid.*)

McGuire alleges that Manwiller had failed to pursue grievances on McGuire's behalf because Manwiller was seeking employment with the State DPA, and that this was retaliatory. However, as discussed above, McGuire does not offer any facts to support her general statement that AFSCME failed to follow through with unspecified grievances. Even if these facts were alleged, McGuire alleges Manwiller did not pursue the grievances because Manwiller was hoping to get a new job, not because McGuire engaged in protected activity under the Dills Act.

McGuire also alleges that AFSCME retaliated against her for protected activity by not continuing its representation of her after she had obtained private legal counsel. Under the standard stated above, these allegations do not state a prima facie violation.

Right to Appeal

Pursuant to PERB Regulations,[5] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

[5] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By
Laura Z. Davis
Regional Attorney

Attachment

cc: Andrew H. Baker, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

December 22, 2011

Kelly McGuire
P. O. Box 11072
Santa Rosa, CA 95406

Re: *Kelly McGuire v. AFSCME Local 2620*
Unfair Practice Charge No. SF-CO-58-S
WARNING LETTER

Dear Ms. McGuire:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 15, 2011. Kelly McGuire (McGuire or Charging Party) alleges that AFSCME Local 2620 (AFSCME or Respondent) violated the Ralph C. Dills Act (Dills Act)[1] by failing to adequately represent her in dealings with her former employer.

Summary of Facts as Alleged

Prior to December 17, 2010, McGuire was employed for six years by the California Department of Social Services (Department) as a Licensing Program Analyst. Her position is included in State Bargaining Unit 19; and AFSCME is the exclusive representative of Unit 19.

Beginning in or about April 2008, McGuire sought assistance from AFSCME regarding alleged harassment and discriminatory treatment at work. A meeting was held in June 2008, between AFSCME representatives and Department managers, regarding these concerns. On June 20, 2008, McGuire received a written reprimand from her supervisor, and was required to participate in weekly case load review meetings through September 2008. A Department manager, Linda Kryla, stated to McGuire that the reprimand and meetings were imposed "because [McGuire] involved the union."

On June 27, 2008, AFSCME filed a "letter of complaint" regarding McGuire's "hostile work environment." In December 2008, McGuire sought a promotion and was told to obtain an evaluation. On January 13, 2009, McGuire received a "damaging evaluation that precluded her from obtaining a promotion." AFSCME filed a grievance on McGuire's behalf over the evaluation.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov.

On February 9, 2009, McGuire reported to her supervisor that a co-worker was "conducting herself in an aggressive and hostile manner towards McGuire" and that McGuire was fearful of being assaulted by this co-worker.

On March 5, 2009, McGuire was placed on administrative time off and was escorted from her work location without being informed of the reason. On March 19, 2009, McGuire was served with a notice of adverse action in the form of a 30-day suspension. On March 25, 2009, the suspension was reduced to 15 days. AFSCME filed an appeal regarding the adverse action with the State Personnel Board (SPB). The appeal filed by AFSCME on behalf of McGuire asserted that she was being retaliated against. AFSCME representative Pam Manwiller (Manwiller) told McGuire that she had "advised management to outline [for] McGuire [ ] expectations upon her return to work in April 2009." In March 2009 McGuire contacted AFSCME management requesting fair union representation.

On April 16, 2009, McGuire filed a request for reasonable accommodation with the Department. The Department did not enter into an interactive process with McGuire over this request. Manwiller, the AFSCME representative, "repeatedly screamed at [McGuire] when conversing, 'If you do not do your job they will get you for that!'"

On January 5, 2010, Manwiller advised McGuire that her appeal of the adverse action was settled with a one-day suspension. Manwiller did not provide fair representation in the prehearing settlement conference. On January 4, 2010, Manwiller had the prehearing settlement conference originally scheduled for January 5, 2010, rescheduled and reassigned.

On February 10, 2010, McGuire received a merit salary adjustment. On May 12, 2010, McGuire received approval from her supervisor to attend volunteer emergency service training on June 30, 2010.

On June 2, 2010, McGuire complained to her supervisor about aggressive and hostile behavior by the same co-worker she had reported earlier in February 2009. On June 8, 2010, McGuire learned that the same co-worker had filed a complaint against McGuire in 2009. On July 16, 2010, McGuire was interviewed by an investigator regarding the co-worker's 2009 complaint. The Department investigated the co-worker's complaint but did not take any action regarding McGuire's complaint.

On July 21, 2010, McGuire was instructed by the Department's Acting EEO Director "to report information in violation of EEO policy for zero-tolerance for violence in the workplace." On July 21, 2010, McGuire provided the information as instructed as well as reporting it to AFSCME representative Manwiller.

On July 23 and 24, 2010, McGuire was "written up" on three occasions "for participating in the Department's EEO investigation and for making the report as instructed by the EEO Acting Director." On July 29, 2010, McGuire was advised by Department personnel of the right to take complaints to the police. On July 30, 2010, McGuire filed a police report based on alleged threats made by an unnamed manager.

On August 2, 2010, McGuire was again placed on administrative time off, and again escorted from her work location without being informed of the cause.

On August 5, 2010, Manwiller told McGuire she could file her own grievances. McGuire told another AFSCME representative, George Popyack (Popyack) that Manwiller said this. Popyack dismissed McGuire's report.

On September 23, 2010, McGuire filed a retaliation complaint with the Equal Employment Opportunity Commission (EEOC).

On December 13, 2010, McGuire was served with a notice of adverse action terminating her employment with the Department.

On December 16, 2010, after the Skelly hearing, Manwiller angrily screamed at McGuire that McGuire had ruined her (Manwiller's) reputation.

On January 20, 2011, Manwiller sent McGuire an e-mail message in appreciation of her work and notifying McGuire that Manwiller had resigned from AFSCME that day. According to Popyack, Manwiller had returned to her previous employment with the California Department of Personnel Administration.

On February 15, 2011, Popyack assigned AFSCME representative Gregory Ramirez (Ramirez) to attend the prehearing settlement conference.[2] Ramirez told McGuire he did not have the tools to provide her with fair representation.

McGuire alleges that she was terminated in retaliation for her actions of seeking assistance from AFSCME and exercising her rights. McGuire was dismissed because of her exercise of rights and because AFSCME allowed all grievances filed on McGuire's behalf since 2008 to be ignored.

Six-Month Statute of Limitations

Dills Act section 3514.5(a)(1) 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.)

[2] It is assumed that this refers to a proceeding before the SPB.

The charge was filed on June 15, 2011. Therefore, allegations occurring prior to December 15, 2010 are untimely filed and cannot form the basis of a prima facie case. McGuire alleges that she was suspended in March 2009 and that AFSCME represented her at the subsequent SPB proceeding. This occurred prior to December 15, 2010 and therefore these allegations are untimely. McGuire also alleges that Manwiller made an angry statement towards her in connection with a disability accommodation request. This incident occurred in April 2009. These allegations are untimely.

McGuire also alleges that Manwiller failed to adequately represent her during an SPB prehearing settlement conference in January 2010. This allegation is also untimely.

McGuire alleges that in August 2010 Manwiller told McGuire she could file grievances on her own and Popyack allowed this. These allegations are similarly untimely.

Legal Standard—Duty of Fair Representation

Charging Party appears to allege that the exclusive representative denied Charging Party the right to fair representation guaranteed by Dills Act section 3515.7(g) and *California State Employees' Association (Norgard)* (1984) PERB Decision No. 451-S and thereby violated section 3519.5(b). In order to state a prima facie violation of this section of the Dills Act, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith.

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

> must 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.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332.)

A union's alleged negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (*Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H.)

The union's duty is to enforce the negotiated agreement; the Union's duty generally does *not* extend to extra-contractual proceedings where the union does not control the exclusive means to a remedy. (*Bay Area Air Quality Management District Employees Association (Mauriello)* (2006) PERB Decision No. 1808-M.)

It appears implied—although not specifically stated—that AFSCME representative Manwiller represented McGuire at her *Skelly*[3] hearing on an unspecified date in approximately December 2010. The union does not have a duty to represent employees at a *Skelly* hearing. (*Service Employees International Union, Local 1021 (Horan)* (2011) PERB Decision No. 2204-M.) Even assuming, arguendo, that AFSCME had a duty of fair representation with respect to the *Skelly* hearing, there is no showing that a single statement by Manwiller on December 16, 2010, followed by Manwiller's decision to change jobs, would constitute arbitrary, discriminatory or bad faith conduct. Therefore, these allegations do not state a prima facie case.

A SPB hearing is an extra-contractual proceeding and the union does not have a duty to represent members with respect to an SPB proceeding. (*California Correctional Peace Officers Association (Kashtanoff)* (1993) PERB Decision No. 1007.) Under some circumstances, where the union has affirmatively acted to undertake representation of a party in an extra-contractual forum, it may be held to the usual duty of fair representation. (*Lane v. IUOE Stationary Engineers, Local 39* (1989) 212 Cal.App. 3d 164.) It appears that McGuire had a SPB hearing sometime in the Spring of 2011, which included a prehearing settlement conference on February 15, 2011. However, it is not alleged that AFSCME undertook representation of McGuire with respect to this SPB proceeding. Assuming arguendo that AFSCME owed any duty to McGuire with respect to the SPB hearing, there is no showing that it breached that duty in this case. McGuire alleges that Ramirez told her on February 15, 2011 he did not have the tools to provide her with fair representation. No other information is given. This allegation does not show that AFSCME's conduct was arbitrary, discriminatory or in bad faith. Therefore, this allegation does not state a prima facie case.

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with

---

[3] *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 give employees the right to certain due process safeguards prior to imposition of discipline.

[4] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

PERB. If an amended charge or withdrawal is not filed on or before **January 9, 2012**,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Davis
Regional Attorney

LD

[5] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)