STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DON E. PEAVY, SR., Charging Party, v. AFT PART-TIME FACULTY UNITED, LOCAL 6286, Respondent.	Case No. LA-CO-1442-E PERB Decision No. 2194 August 12, 2011

Appearances: Don E. Peavy, Sr., on his own behalf; Jeffrey R. Boxer, Attorney, for AFT Part-Time Faculty United, Local 6286.

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

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Don E. Peavy, Sr. (Peavy) of a Board agent's dismissal of his unfair practice charge. The charge alleged that AFT Part-Time Faculty United, Local 6286 (Local 6286) breached its duty of fair representation under section 3543.6(b) of the Educational Employment Relations Act (EERA or Act)[1] by failing to handle a grievance on his behalf. The Board agent found that the charge was untimely filed and failed to state a prima facie violation of the duty of fair representation.

The Board has reviewed the dismissal and the record in light of Peavy's appeal and the relevant law. Based on this review, we find that the charge was timely filed but affirm the dismissal of the charge for failure to state a prima facie case for the reasons discussed below.

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code.

FACTUAL SUMMARY

Peavy has been employed at Victor Valley Community College District (District) as a part-time (adjunct) faculty member since 2001. Local 6286 is the exclusive representative of part-time faculty members employed by the District. Peavy was one of the founding members of Local 6286, its first elected president, and a member of its negotiating team. In March 2008, Peavy resigned as president of Local 6286 and relocated to the Philippines. At some point thereafter, Peavy moved to Texas.[2]

Local 6286 and the District were parties to a collective bargaining agreement (CBA) for the period February 13, 2007 through February 12, 2010. The CBA provides for the establishment of "Priority Lists" of continuing adjunct faculty members who have taught at the District for three years, under specified circumstances. Employees on a priority list are eligible for priority in assignment over other employees. Section 13.4.2 of the CBA provides, in relevant part:

> An individual adjunct faculty member's priority for assignment shall be determined by her/his total accumulated FTEF [Full Time Equivalent Faculty] within a specific discipline.

The CBA further provides, in relevant part:

> 13.4.4 Within one week after contract faculty assignments have been made, the Chief Instructional Officer or designee shall provide via email a list of all available assignments to the adjuncts on the priority hire list. The adjuncts shall respond via email or written documentation within six (6) working days, indicating their preference for assignments (up to the legal percentage limit of a full-time load). The CIO or designee shall

[2] The charge also alleges that, following his resignation as president of Local 6286, Peavy was removed from the negotiations committee and various communication lists, where other former Local 6286 officers were allowed to remain on such lists. It was also alleged that Local 6286 reduced the number of hours for which Peavy was entitled to receive compensation for union duties. Because neither the charge nor the appeal alleges that these actions constituted separate violations of EERA, they are not considered here. Peavy filed a charge of racial discrimination with the Equal Employment Opportunity Commission over these actions.

> respond within five (5) working days, confirming the adjuncts' assignments.
>
> 13.4.5 Adjuncts shall receive assignments in the following order: (a) those on the Priority List, and (b) those on the Priority List in order of their accumulated FTEFs.

In or around October 2009, Peavy requested to teach three online courses in Religious Studies during the Spring 2010 semester. At the time, Peavy was on the priority list for the Department of Philosophy and Religious Studies and had the highest priority among employees who requested to be assigned to these courses, based upon accumulated FTEFs. On December 8, 2009, the District assigned Peavy only one of the three courses he requested. The other courses were assigned to two other employees with less accumulated FTEFs than Peavy.

On December 9, 2009, Peavy contacted Local 6286 with concerns over his assignment. Local 6286 responded by suggesting that he contact the grievance officer, Carol Scissel (Scissel). On December 15, 2009, Peavy contacted Scissel and notified her that he wanted to file a grievance. Peavy did not receive a response from Scissel. Therefore, out of concern over missing the timelines set forth in the CBA, Peavy filed a grievance on his own behalf shortly after his initial communication with Scissel, but continued to contact Scissel during the grievance process.[3]

After the grievance was not resolved at earlier levels, on February 17, 2010, Peavy sent an email to Scissel requesting mediation of his grievance and, should mediation fail, binding arbitration. After Scissel failed to respond to this request, Peavy sent a request to the District requesting that the grievance be submitted to mediation. At some point between February 17

[3] In his January 28, 2011 warning letter, the Board agent found that Peavy filed the grievance on or around January 4, 2010. However, the record before us does not contain the grievance, and we find no evidence in the record upon which to determine the specific date the grievance was filed. It appears undisputed that Peavy filed the grievance some time between December 15, 2009 and January 14, 2010.

and February 27, 2010, during a telephone conversation, Scissel told Peavy that she was discussing his grievance with the new president and would get back to him. On February 27, 2010, Peavy sent Scissel an email expressing his frustration with the manner in which she was handling his grievance. On March 1, 2010, Scissel sent a response apologizing and stating that she would work on it that day and get back to him.

On March 17, 2010, Peavy sent an email to Scissel requesting that she request information relevant to his grievance from the District. During a telephone conversation on April 14, 2010, Scissel told Peavy to request the information directly from the District, which he did. The District provided the information on May 17, 2010.

On April 21, 2010, Scissel notified Peavy that the District had offered him three classes for the fall semester, of which two would be online classes and one face to face with the students. The message further states: "I need your acceptance of this offer." Peavy responded by rejecting the offer and stated: "I do not plan to return to California anytime soon and so a face to face class is out of the question." Peavy then proposed a counter-offer in which he would be awarded two online classes for the fall and two online classes for the spring, the District would compensate him for one of the two classes he lost the prior spring, he would receive at least one online class for the summer, and the District would "commit to adhering to the letter and the intent" of the CBA.

On April 29, 2010, Peavy contacted Scissel to find out whether his mediation had been scheduled. Scissel informed Peavy that the mediation was scheduled for May 21, 2010, but that she did not know the time. She stated that she would contact the District's human resources office and get back to him.

After he did not hear back from Scissel, on May 12, 2010, Peavy sent a letter to the District, with a copy to Scissel, stating that he was no longer requesting the assistance of

Local 6286 in representing him in his grievance and that "I will be proceeding to mediation without the assistance of the union." The letter further asks that the District communicate directly with Peavy regarding the grievance. Additionally, the letter reiterates Peavy's request for information from the District. That day, Scissel informed Peavy of the time of the mediation.

On May 17, 2010, the District provided Peavy with the information he requested, along with the date and time of the mediation. Attached to the District's letter to Peavy is an email message dated March 29, 2010 from the District to Local 6286 stating the date, time and place of the mediation.

On May 21, 2010, Peavy appeared at the scheduled mediation. He incurred $550.00 in expenses traveling from Texas to California to attend the mediation. Scissel and another Local 6286 representative also appeared at the mediation, along with several other part-time faculty members who had filed grievances against the District. The charge alleges that the Local 6286 representatives presented grievances on behalf of the other employees during a meeting from which Peavy was excluded. The charge further alleges that Local 6286 provided Peavy with no assistance at the mediation and that Peavy presented his grievance after the Local 6286 representatives left the meeting. The matter was not resolved during the mediation.

On May 29, 2010, Peavy requested that Local 6286 arbitrate his grievance. On June 7, 2010, Local 6286 informed Peavy that, pursuant to a vote at a meeting on June 4, 2010, it would not arbitrate his grievance. On June 11, 2010, Local 6286 provided Peavy with a written statement of its reasons for not proceeding to arbitration. The written statement states that the mediator disagreed with Local 6286's interpretation of the CBA and that the mediator felt that the District had a better chance of winning at arbitration. The statement goes on to

state that, if the arbitrator were to find against Local 6286, the language would always be interpreted that way. Therefore, Local 6286 felt that, given that the parties were currently at the bargaining table, it would be better to try to get stronger language in the CBA than to risk losing at arbitration, and that it believed that the risk of losing at arbitration was high.

BOARD AGENT'S DECISION

The Board agent dismissed the charge, finding that it was not timely filed and that, even if timely, it failed to state a prima facie case of violation of the duty of fair representation.

CHARGING PARTY'S APPEAL

On appeal, Peavy asserts that the charge was timely filed and that the charge stated a prima facie violation of the duty of fair representation based upon Local 6286's failure to represent him in his grievance with the District. Peavy asserts that Local 6286's actions were arbitrary, capricious, discriminatory and in bad faith.

DISCUSSION

Timeliness of Charge

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 & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.) The limitation period begins to run on the date the employee, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*International Union of Operating Engineers, Local 501 (Reich)* (1986) PERB Decision No. 591-H; *Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889.) Thus, the statute of limitations begins to run once the employee is aware, or should be aware, that the union has made a firm decision not to represent him. (*California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC*

(Sutton) (2003) PERB Decision No. 1553-S; *Teamsters Locals 78 & 853 (Hinek)* (2009) PERB Decision No. 2056-M.)

The charge was filed on July 14, 2010. Therefore, to be timely, the alleged unlawful conduct must have occurred on or after January 14, 2010. On December 15, 2009, Peavy requested Local 6286 to file a grievance on his behalf. Having received no response, Peavy filed the grievance himself but continued to seek assistance from Local 6286. Although Local 6286 did not assist Peavy in filing his grievance, some form of assistance was ongoing as evidenced by the exchange between Peavy and Local 6286 on April 21, 2009. On that date, Local 6286 communicated the District's offer to Peavy. In a letter dated May 12, 2010, Peavy notified the District that Peavy was no longer seeking the assistance of Local 6286 and that he would proceed to mediation on his own. Scissel was copied on Peavy's letter. Even though Peavy subsequently requested that Local 6286 take his grievance to arbitration, it is reasonable to conclude that Peavy knew or should have known that assistance from Local 6286 was unlikely as of May 12, 2010, the date Peavy notified the District that he no longer sought Local 6286's assistance. Furthermore, Peavy knew or should have known that further assistance from Local 6286 was unlikely when, on June 7, 2010, Local 6286 informed him that it would not take his case to arbitration. In either case, it is clear that the six-month limitation period for filing the charge did not begin to run until well after January 14, 2010. Accordingly, we conclude that the charge filed on July 14, 2010 was timely.

Duty of Fair Representation

The charge alleges that Local 6286 denied Peavy the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125;

United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258 *(Collins).*) In order to state a prima facie violation, a charging party must show that the respondent's conduct was arbitrary, discriminatory or in bad faith. In *Collins, supra,* 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. [Citation.]

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 rationale [sic] basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124 (*Rocklin Teachers Professional Association*); emphasis in original.)

The Board has held that a union's decision not to take a grievance to arbitration is lawful where a rational basis for the decision exists. (*Castro Valley Unified School District* (1980) PERB Decision No. 149.) Accordingly, PERB will dismiss a charge alleging a violation of the duty of fair representation if it is shown that a union has made an honest, reasonable determination that the grievance lacks merit. (*Sacramento City Teachers Association (Fanning, et al.)* (1984) PERB Decision No. 428.) In determining whether that standard is met, PERB does not determine whether the union's decision was correct but whether it "had a rational basis, or was reached for reasons that were arbitrary or based upon

invidious discrimination." (*Ibid.*; see *Vaca v. Sipes* (1967) 386 U.S. 171, 195 [holding that "a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious"].) The burden is on the charging party to show how a union abused its discretion; it is not the union's burden to show that it properly exercised its discretion. (*United Teachers - Los Angeles (Wyler)* (1993) PERB Decision No. 970.)

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." (*Ibid.*, quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also *Robesky v. Qantas Empire Airways, Ltd.* (9th Cir. 1978) 573 F.2d 1082.) Thus, in the absence of evidence that the exclusive representative's negligence foreclosed any remedy for the grievant, "a breach of the duty of fair representation is not stated merely because an exclusive representative declines to proceed or negligently forgets to file a timely appeal of a grievance." (*Service Employees International Union, Local 99 (Arteaga)* (2008) PERB Decision No. 1991 (*Arteaga*), citing *SEIU Local 99 (Jones)* (2007) PERB Decision No. 1882 and *San Francisco Classroom Teachers Association, CTA/NEA (Bramell)* (1984) PERB Decision No. 430; see also *United Teachers of Los Angeles (Strygin)* (2010) PERB Decision No. 2149 (*Strygin*) [failure of the exclusive representative to file a grievance does not rise to the level of a breach of the duty of fair representation, where the employee failed to file a grievance on his own behalf and the union's failure to file did not completely extinguish his right to file a grievance].)

Peavy asserts that Local 6286 breached its duty of fair representation by failing to represent him in his grievance against the District, even after he filed the grievance on his own

behalf. Any negligence by Local 6286 did not foreclose Peavy's right to a remedy or completely extinguish his right to pursue his claim. (*Arteaga*, *supra*; *Strygin*, *supra*.) Rather, it is clear that Peavy actively pursued his claim up to and including mediation, which he specifically asserted he was pursuing without the assistance of Local 6286. Thus, the charge fails to state a prima facie violation of the duty of fair representation with respect to Local 6286's failure to assist Peavy in processing his grievance.

Moreover, the charge establishes that, even after Peavy filed a grievance on his own behalf, Local 6286 played some role in the processing of the grievance. Local 6286 notified Peavy of the mediation date and transmitted the District's settlement offer to him, and was present for at least some portion of the mediation. Absent evidence of arbitrary, discriminatory or bad faith conduct, a union's decision to conduct its representation in a manner contrary to the wishes of a bargaining unit employee does not violate the duty of fair representation. (*International Brotherhood of Electrical Workers, Local 1245 (Gallardo)* (2010) PERB Decision No. 2146-M.) Furthermore, a union's settlement of a grievance contrary to a grievant's wishes does not necessarily demonstrate a violation of the duty of fair representation (*United Teachers of Los Angeles (Seliga)* (1998) PERB Decision No. 1289), nor does a rational, good faith settlement agreement that benefits some unit members and not others (*California Correctional Peace Officers Association (Horspool)* (1997) PERB Decision No. 1217-S.) Therefore, the failure of Local 6286 to present Peavy's counter-offer to the District does not establish a violation of the duty of fair representation.

On appeal, Peavy asserts that Local 6286's inaction caused him harm in that he incurred $550.45 in travel expenses as a result of attending mediation on his own behalf.[4] The

[4] Peavy also asserts on appeal that he was harmed by the partial dismissal by PERB of an unfair practice charge he filed against the District, on the ground of untimeliness. In the absence of any showing of good cause why this new factual evidence concerning the filing of

issue before us is not whether Peavy incurred expenses as a result of Local 6286's inaction but whether that inaction extinguished the right to pursue his claim. The charge fails to establish this essential element.

Finally, Peavy asserts that Local 6286 breached its duty of fair representation by refusing to take his case to arbitration. As indicated above, it is well established that a union does not violate the duty of fair representation when it decides not to take a grievance to arbitration based upon a rational, good faith determination that the grievance lacks merit. (*Collins, supra*; *California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096; *California Faculty Association (Wunder)* (2007) PERB Decision No. 1889-H.) Indeed, a union has the discretion to decide in good faith that even a meritorious grievance should not be pursued. (*Los Rios College Federation of Teachers (Deglow)* (1996) PERB Decision No. 1133.)

Following mediation, Local 6286 evaluated Peavy's grievance in light of the mediator's assessment of the claim and provided Peavy with a written statement of the reasons it had decided not to pursue arbitration. Based upon the mediator's assessment of the case, Local 6286 determined that it would be better to address the contract language during negotiations rather than risk losing at arbitration. While Peavy asserts that the reasons are "nonsensical and border on the absurd," he has provided no facts to demonstrate that the decision was "without rational basis or devoid of honest judgment." (*Rocklin Teachers Professional Association, supra.*) Instead, he asserts only that the District's violations of the

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another charge could not have been presented to the Board agent prior to the dismissal of the charge, we do not consider this evidence and argument on appeal. (PERB Reg. 32635(b) [PERB regs. are codified at Cal. Code Regs., title 8, sec. 31001 et seq.]; *Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.) Were we to do so, however, the charge fails to establish any connection between Local 6286's failure to pursue Peavy's grievance and the partial dismissal of his charge against the District.

CBA were "clear" and that "it is highly unlikely that a competent arbitrator would find in the District's favor." He further asserts that Local 6286 "has nothing to lose by going to arbitration."

The question is not whether Local 6286's decision was correct but only whether it was the product of "honest judgment." (*Duarte Unified Education Association (Fox)* (1997) PERB Decision No. 1220.) Because the charge fails to establish that Local 6286's decision not to arbitrate Peavy's grievance was arbitrary or lacking in good faith, it fails to state a prima facie violation of the duty of fair representation on that basis. (*California School Employees Association & its Chapter 168 (Gibson)* (2010) PERB Decision No. 2128.)

Discrimination

The charge also alleges that Local 6286's actions constituted discrimination in violation of EERA section 3543.6(b), which makes it unlawful for an employee organization to:

> 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.

In analyzing allegations of discrimination that also violate the duty of fair representation, the Board follows the principles applicable for violations of EERA section 3543.5(a), a parallel provision prohibiting employer interference and reprisals. (*Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Deglow)* (1999) PERB Decision No. 1350 (*Los Rios College Federation of Teachers*); *Service Employees International Union. Local 99 (Kimmett)* (1979) PERB Decision No. 106, at p. 13.) In order to prevail on a discrimination theory, the charging party must establish: (1) the employee exercised rights guaranteed by EERA; (2) the employee organization had knowledge of the employee's exercise of those rights; (3) the employee organization took adverse action against the employee; and (4) the employee organization took the action because of the exercise of

those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 at pp. 5-6 (*Novato*).)

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) The test is not whether the employee found the employee organization's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. (*Newark Unified School District* (1991) PERB Decision No. 864.)

Although the timing of the adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) animosity towards union activists

(*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento*, *supra*; *Novato, supra.*)

Peavy alleges that Local 6286's refusal to represent him in his grievance constitutes disparate treatment and therefore discrimination because Local 6286 handled the grievances of other part-time faculty members while refusing to represent Peavy in his grievance. A finding of disparate treatment requires a showing that others have been treated differently for similar or identical conduct or in a similar situation. (*Los Rios College Federation of Teachers*, *supra*, citing *Belridge School District* (1980) PERB Decision No. 157.) The charge fails, however, to allege any facts showing that the other grievances arose under similar circumstances and contains no facts concerning the nature of the other employees' grievances. Indeed, Peavy asserts that he was not present when they were presented to the mediator. The mere fact that all three grievances may have involved the issue of class assignments is insufficient, as even grievances raising the same issue may have different bases. (*Ibid.)* In addition, Peavy was not similarly situated because he expressly chose to file a grievance himself and to represent himself in mediation. Therefore, the charge fails to establish that Local 6286 acted discriminatorily in its handling of his grievance.[5] Accordingly, the charge fails to establish a prima facie violation of the duty of fair representation.[6]

[5] Peavy's assertion that one of the Local 6286 representatives ignored him at the May 21 mediation is insufficient to establish arbitrary, discriminatory or bad faith conduct on the part of Local 6286 in its handling of the grievance.

[6] Because we find no disparate treatment, and no other nexus factors have been alleged, we do not address the other elements of the *Novato, supra,* test.

ORDER

The unfair practice charge in Case No. LA-CO-1442-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member McKeag joined in this Decision.