STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DOUGLAS W. SCOTT, Charging Party, v. MOUNT DIABLO EDUCATION ASSOCIATION, Respondent.	Case No. SF-CO-722-E PERB Decision No. 2127 August 17, 2010

Appearances: Douglas W. Scott, on his own behalf; California Teachers Association by Ballinger G. Kemp, Attorney, for Mount Diablo Education Association.

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

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Douglas W. Scott (Scott) to the proposed decision of an administrative law judge (ALJ). The complaint issued by PERB's Office of the General Counsel alleged that the Mount Diablo Education Association (Association) breached its duty of fair representation by failing to take various actions on Scott's behalf. The ALJ dismissed the complaint after an evidentiary hearing, finding that neither the Association's individual failures to act nor the totality of its conduct constituted a breach of the duty of fair representation.

The Board has reviewed the proposed decision and the record in light of Scott's exceptions, the Association's response, and the relevant law. Based on this review, the Board affirms the ALJ's dismissal of the complaint for the reasons discussed below.

FACTUAL BACKGROUND

Scott is a science teacher at College Park High School in the Mount Diablo Unified School District (District). Scott has taught in the District continuously since 1991.

Mark York (York) has been the executive director of the Association since 2002. In 2003, York authored an Association flyer that informed unit members of their right to union representation in meetings with management that could result in discipline. The flyer pointed out that the collective bargaining agreement (CBA) between the Association and the District requires that a unit member receive a copy of a written complaint against the member before attending a meeting about the complaint.[1] The flyer also stated that if a District administrator requires a unit member to attend a meeting without providing the written complaint, the unit member is "not required to say or sign anything at such a meeting, and [the Association] will immediately file a grievance on [the unit member's] behalf."

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[1] The formal complaint procedure is set forth in CBA Article 23.5, which states, in relevant part:

> 23.5.1 Any formal complaint or criticism (other than of a criminal act indicating a need for investigation) concerning a unit member shall be brought to the attention of the unit member involved in a timely manner provided the administrator decides that action is warranted. A copy of the complaint, in writing, shall be provided to the unit member.
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> 23.5.2 If requested by the unit member and deemed appropriate by the administrator, a conference shall be scheduled among the unit member, the administrator, and the person making the complaint or criticism. The unit member shall at his/her option have representation at any conference.
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> . . . . . .
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> 23.5.4 No written report or entry in a unit member's personnel file will be made based on a complaint or criticism if the unit member has requested a conference, the prinicipal/ program administrator agrees, but the person making the complaint refuses.

York represented Scott regarding complaints made against him in December 2003, February 2006, and June 2006. In 2003 and again in September 2006, York wrote to the District asserting that the District had failed to provide the written complaint to Scott as required by CBA Article 23.5.1.

In early December 2006, a parent complained that Scott had thrown two boxes of razor blades in her daughter's lap during class. Scott testified that he believed Barbara Oaks (Oaks), the principal of College Park High School, had investigated the complaint and found it meritless. Scott admitted, however, that Oaks "never got back to me on her findings."

On December 12, 2006, Oaks, along with the school's vice principal, came to Scott's classroom just before the end of the school day and asked him to excuse his class early. After Scott did so, Oaks produced a handwritten note stating that a particular student "is an asshole." Oaks asked Scott if he wrote the note. Scott testified that he could not remember what he said in response; he also testified that he did not answer any of Oaks' questions.[2] Oaks immediately placed Scott on paid administrative leave pending further investigation.

The following day, York filed a grievance on Scott's behalf alleging that the District violated Article 23.5.1 of the CBA by failing to provide a unit member with a copy of a complaint before being questioned by an administrator and then being placed on administrative leave. The grievance stated that the Association had reminded the District of the CBA requirement in writing "several times in the past in regard to their management interactions with the grievant and other affected unit members." The grievance further contended that the meeting violated the unit member's right to union representation pursuant to section 3543 of

[2] The record contains Oaks' typed summary of the day's events involving Scott, including a detailed recounting of Scott's statements to Oaks during her classroom visit. Because resolution of this case does not turn on whether Scott answered Oaks' questions, we need not resolve this factual dispute.

the Educational Employment Relations Act (EERA).[3] Nowhere did the grievance mention Scott by name. Per York's usual practice, he faxed the grievance to both Oaks, as required by CBA Article 3.8.2, and District Assistant Superintendent for Personnel Services Gail Isserman (Isserman).

On December 21, 2006, Isserman denied the grievance. Isserman contended that no scheduled meeting occurred and that Scott was not questioned. She also noted that Oaks showed Scott "the written note in question." The letter ended: "The meetings to address this particular complaint and other recent complaints have been and will be scheduled so that the unit member may have representation present should the member so choose."

York testified that he thought he had forwarded a copy of the District's response to Scott but then learned in November 2007 that he had not. York attributed this oversight to the transfer of Scott's files to attorney Dale Brodsky (Brodsky), whom the Association had retained to represent Scott in a disciplinary matter. York further testified that after receiving the Step 1 response from Isserman he believed the grievance was moot because the District had provided Scott with the written complaint, i.e. the note.

On March 1, 2007, Scott, York and Brodsky attended a scheduled meeting at which the District presented Scott with a Notice of Incompetency and Unprofessional Conduct, commonly known as a "45-day notice."[4] The notice was based in part on both the razor blade and profanity note incidents. The District also gave Scott a copy of the written complaint in

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

[4] Education Code section 44938 provides that written notice of performance deficiencies be given at least 45 days before disciplinary action is taken to allow the teacher "an opportunity to correct his or her faults and overcome the grounds for the charge."

the razor blade incident for the first time. York and Scott testified they were surprised by this as the District had led them to believe no written complaint existed.

On March 8, 2007, York filed a grievance on Scott's behalf. The grievance reiterated the general allegations from the December 13, 2006 grievance and further alleged that the District failed to provide copies of complaints between that date and March 1, 2007, despite numerous requests for them. The grievance did not specifically mention Scott, the razor blade incident, or the profanity note incident. As a remedy, the grievance sought rescission of the 45-day notice and withdrawal of all negative materials from Scott's personnel file "which are not supported by substantiated evidence of wrongdoing." That same day, York wrote to Oaks requesting a meeting with the complainant in the razor blade incident.

On March 21, 2007, Oaks responded on the District's grievance form that she had not received a copy of the March 8 grievance, only the letter requesting a meeting. She further stated: "Mr. Scott was informed of a complaint on December 1, 2006, notifying him that a complaint had been filed and the nature of the complaint." Oaks also said she would arrange a meeting with the complainant parent per York's request.

On March 27, 2007, Oaks informed Scott by letter that the parent had declined to meet but that a meeting nonetheless would take place on April 5. Because York had a conflict on this date, the meeting was rescheduled to April 19. Oaks notified Scott of the rescheduled date by letter of April 6, 2007. According to York, he learned from Brodsky sometime before April 19 that Scott did not believe York needed to attend the meeting because Oaks was favorable to Scott's position in the matter. Based on his conversation with Brodsky, York did not attend the April 19 meeting.

On May 2, 2007, York wrote to Isserman about the status of the March 8 grievance. Receiving no response, York again wrote to Isserman on May 15 asking about the status of the

grievance and requesting that, due to the District's lack of response, "this matter be addressed through Expedited Arbitration." Isserman responded on May 22, asserting that Oaks responded to the Step 1 grievance on March 21 and therefore York's "request to address this matter further is untimely." York did not pursue the grievance further.

Scott did not receive a copy of Isserman's denial until November 2007. Scott testified that he inquired about the grievance during the spring of 2007 but was told by the Association that "it was still in progress."

York testified that soon after filing the March 8 grievance he consulted with Brodsky and the California Teachers Association's (CTA) legal department about it. Based on these consultations, York concluded that the remedy sought could not be granted because the 45-day notice was not grievable under the CBA and that even if the Association prevailed on the grievance it would have no binding effect in disciplinary proceedings under the Education Code. York also testified that he told Scott they could challenge the incidents in any future disciplinary hearing on the ground that the District had not provided Scott with the complaints. Scott admitted that this conversation took place.

Also in May 2007, Oaks prepared Scott's performance evaluation for the 2006-2007 school year. Oaks gave Scott a "needs improvement" rating. On May 15, York grieved the evaluation on the basis that, because of his involuntary leave, Scott did not have sufficient time during the year to address the concerns raised. On May 24, Oaks wrote to York, with copies to Scott and Isserman, stating that she would purge the 2006-2007 evaluation from Scott's personnel file and evaluate Scott the following year.

During the summer of 2007, Scott submitted a written response to the 45-day notice. According to Scott, the District told him that the response would be "revised." Scott contacted

York, who told him he should review his personnel file to determine if the District had altered his response. Scott attempted to review his file several times but was denied access.

On November 2, 2007, York filed a grievance alleging that the District had denied Scott access to his personnel file on four occasions. The District denied the grievance, claiming that Scott had not made an appointment in advance to review the file as required by District procedure. Despite the denial, the District agreed to schedule an appointment for Scott to view his file.

Scott asked York to move the grievance to Step 2. York told him there was no point in doing so because the District had arranged for him to view the file. Scott testified that York said to let him know if Scott still wanted to pursue the grievance.

Upon inspecting his personnel file, Scott discovered that his 2006-2007 evaluation was still in the file and that his response to the 45-day notice was incomplete. York testified that he did not file a grievance over the evaluation because he felt Oaks' letter saying she would purge it would be sufficient to prevent its use in future disciplinary proceedings. As to the 45-day notice response, York testified that by this point he felt it was unproductive to pursue further grievances over the notice. In a November 14, 2007 letter to Scott, York recounted a recent meeting with Isserman that indicated the District would initiate disciplinary action if it received further complaints about Scott. York then stated:

> At this point, the best course of action may be to leave things as they are and try to get several months of teaching behind you without further incidents. Alternatively, I can formally pursue the issue relating to the inclusion of the 'razor blade' incident in your 45 day notice.
>
> When I spoke with Dale Brodsky, she though [sic] it would be best for you to focus on your teaching and not so much on the content of your 45 day notice. The allegations in the notice would have to be argued at a hearing anyway. As we've discussed, there seems to be clear evidence that the reference to

> the 'razor blade' incident would be removed if the District moves to a hearing. I just don't want it to come to that.

York wrote to Isserman on December 11, 2007. Despite his reluctance to pursue the issue further, York objected to the District's failure to remove the 2006-2007 evaluation from Scott's personnel file. He also objected to inclusion of the razor blade incident in the 45-day notice. The letter then stated: "While I believe that some of the materials in Mr. Scott's personnel file have been placed there due to legitimate District concerns, his 2006-07 evaluation and any reference to the alleged razor blade incident clearly should not have been included."

After receiving a copy of this letter, Scott emailed York to thank him for it. He also asked York what he felt were the "legitimate District concerns" reflected in his personnel file. York did not respond despite two further inquiries by Scott.

ALJ's Proposed Decision

The ALJ analyzed the allegations in the PERB complaint as both independent violations and under a "totality of the conduct" analysis. Regarding the former, the ALJ found the allegation regarding the failure to file a grievance in December 2006 untimely but concluded the allegations of failure to properly file and appeal the March 2007 grievance were timely because Scott did not discover the underlying facts until less than six months before the charge was filed. Examining the timely allegations, the ALJ found no evidence that York's action or inaction was arbitrary, discriminatory or in bad faith. The ALJ thus dismissed the complaint.

Scott's Exceptions

A close examination of Scott's voluminous exceptions reveals two main arguments. First, Scott argues that the Association breached its duty of fair representation by failing to precisely follow the contractual grievance procedures. Second, Scott contends that the

Association's conduct deprived him of an opportunity to adequately respond to the District's allegations of misconduct.[5]

DISCUSSION

The General Counsel's complaint alleged that the Association denied Scott the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6, subdivision (b). The exclusive representative's duty of fair representation extends to grievance handling. (*Fremont Teachers Association (King)* (1980) PERB Decision No. 125.) In *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258, 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 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.

To establish that the exclusive representative's conduct was arbitrary, the charging party must show "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, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

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[5] Scott also asserts that the ALJ erred in excluding one of his proferred exhibits, a September 14, 2006 letter from Brodsky to Isserman in which Brodsky informed the District that Scott had been diagnosed with attention deficit hyperactive disorder. Scott argues this document should have been admitted to show his "situation" prior to York's actions. He also contends that the disclosure of his condition caused the District to issue him the 45-day notice.

The letter does not pertain to any of the incidents that were the subject of the allegations in the PERB complaint. Moreover, PERB has no jurisdiction over disability discrimination claims. (*Alum Rock Union Elementary School District* (2005) PERB Decision No. 1748.) Therefore, even though the ALJ did not state on the record why he rejected this exhibit, we find it was properly excluded on relevancy grounds.

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, 1274.)

When a charge alleges that the exclusive representative's failure to act on behalf of an employee constituted a breach of its duty of fair representation, 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." (*American Federation of State, County and Municipal Employees, International, Council 57 (Dehler)* (1996) PERB Decision No. 1152-H.) A violation may be established based on an overall pattern of conduct even if any one of the exclusive representative's actions by itself would not breach the duty of fair representation. (*Ibid.*; *San Francisco Classroom Teachers Association, CTA/NEA (Bramell)* (1984) PERB Decision No. 430.) However, the exclusive representative's failure to take certain actions does not establish a violation if the overall pattern of conduct was one in which the union assisted the employee. (*California School Employees Association (Hansen)* (2000) PERB Decision No. 1379.)

The complaint alleged eight separate failures to act by the Association that cumulatively constituted a breach of the duty of fair representation. While we address each of the failures to act in turn, our ultimate inquiry is whether the Association's overall pattern of conduct was one in which the Association assisted Scott.

Before turning to the individual failures to act, however, we briefly address the timing of the charge. Generally, alleged violations occurring more than six months before the filing

of the charge are untimely. Clearly, the application of this rule is appropriate in cases where a single independent act is alleged to breach the duty of fair representation. However, "[w]hen 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 grievance to discern whether a pattern exists." (*American Federation of State, County and Municipal Employees, International, Council 57 (Dehler)*, *supra*, concurring opinion of Member Garcia.) Accordingly, we hold that in duty of fair representation cases based on the "pattern of conduct" theory set forth in *San Francisco Classroom Teachers Association, CTA/NEA (Bramell)*, *supra*, a violation may be established based on inaction that occurred more than six months before the charge was filed, provided the inaction was part of the same course of conduct as inaction within the statutory limitations period. We therefore overrule the Board's contrary holding in *American Federation of State, County and Municipal Employees, International, Council 57 (Dehler)*, *supra*.

The complaint alleged that the Association "failed to file a grievance on Charging Party's behalf with respect to several personnel issues arising in December 2006." This allegation is easily dismissed as the record clearly shows the Association filed grievances over the razor blade and profanity note incidents, both of which occurred in December 2006.

The complaint also alleged that the Association "failed to provide the Charging Party with copies of any and all relevant documentation and/or information regarding the grievances." It is undisputed that the Association did not provide Scott with copies of the District's denials of the December 12, 2006 profanity note grievance and the March 8, 2007 razor blade grievance until November 2007. It appears from York's testimony that he either believed he had sent copies to Scott or assumed Brodsky had provided copies to Scott. There is no evidence that the Association intentionally withheld these documents from Scott. Thus,

the Association was at most negligent in failing to provide the documents to Scott upon receiving them from the District.

We do not find that this negligence constituted a breach of the Association's duty of fair representation. In *Dutrisac*, *supra*, the court found the employee's individual interest to be strong because the grievance concerned the employee's discharge. (749 F.2d at p. 1274.) Here, the interest asserted in the grievances was Scott's right under the CBA to receive a written copy of any formal complaint against him. While this is certainly an important interest, in light of *Dutrisac*, *supra*, we find it insufficient to be considered "strong," notwithstanding that the underlying incidents were also used in Scott's 45-day notice. Moreover, while the Association's failure to provide Scott copies of the grievance denials precluded him from timely elevating the grievances to the next step, this conduct did not prevent Scott from challenging the underlying allegations in a future disciplinary hearing.

The complaint made two allegations regarding the March 8, 2007 razor blade grievance. The first is that the Association failed to file the grievance in accordance with the procedures set forth in the CBA. In his exceptions, Scott makes much of the fact that York filed the grievance not only with his immediate supervisor, Principal Oaks, as required by the CBA, but also with Assistant Superintendent of Personnel Isserman.[6] According to Scott, this resulted in the grievance being reviewed initially by Isserman, who usually resolved issues unfavorably to Scott, instead of by Oaks, who often resolved them in Scott's favor.

Nothing in the record indicates that a different outcome would have resulted if York had not faxed a copy of the grievance to Isserman on the same day he faxed it to Oaks. Oaks

[6] Pursuant to Article 3.8 of the CBA, the Step 1 grievance is to be filed with the employee's "immediate supervisor." The grievant may appeal the Step 1 decision to Step 2, which provides for review by the "Superintendent or his/her designee." Isserman was the superintendent's designee for Step 2 grievances. Step 3 of the grievance procedure is final and binding arbitration.

responded on March 21, 2007 that she believed the issue being grieved had been resolved by the December 12, 2006 grievance. Isserman affirmed that conclusion in her May 22, 2007 response to York. Thus, the proper order of grievance steps was followed in this case.

The second allegation is that York failed to timely appeal Oaks' Step 1 denial, resulting in Isserman's denial of the appeal as untimely. CBA Article 3.9.1 states that the grievant has 10 days to appeal the Step 1 decision to Step 2. It is undisputed that, following Oaks' March 21 denial of the grievance, York did not write to Isserman until May 2, 2007. Clearly York missed the 10 day appeal deadline.

York testified, however, that by the time he received Oaks' denial, he believed based on conversations with CTA and outside counsel that the grievance was futile because it could not result in removal of the razor blade incident from the 45-day notice. We therefore find that, because York made an honest judgment that the grievance could not achieve the desired result, he did not act arbitrarily by failing to immediately appeal the March 21 denial. It is also worth noting that, despite his conclusion, York pursued the matter further with Isserman and even demanded that the grievance be moved to Step 3 arbitration.

Though not alleged in the complaint, Scott argues that the Association breached its duty of fair representation by misrepresenting the status of the razor blade grievance. Assuring an employee that a grievance is being processed when in fact it has been abandoned constitutes a breach of the duty of fair representation. (*Service Employees Local 3036 (Linden Maintenance)* (1986) 280 NLRB 995, 996-997.) Scott testified that when he asked about the razor blade grievance in spring 2007, the Association told him "it was still in progress." Scott contends this statement was false because York failed to appeal the Step 1 denial of the grievance in March 2007. The record establishes that, as of May 15, 2007, the Association was still pursuing the grievance, which also incorporated the allegations from the prior profanity

note grievance. Because the record does not show when Scott made his inquiry, we cannot conclude that the Association told Scott his grievance was still being processed at a time when it had abandoned the grievance. Furthermore, given the overlapping subject matter of the grievance and the 45-day notice, it is clear that the Association continued to pursue the matter well into the fall of 2007.

The complaint next alleged that the Association failed to timely appeal the denial of the November 2, 2007 grievance regarding Scott's inability to access his personnel file. There is no dispute that York did not appeal the denial. However, Scott admitted that York told him there was no point in pursuing the grievance because the District had agreed to set up a time for Scott to review the file. Thus, York's failure to appeal the denial did not prejudice Scott's rights in any way.

The complaint further alleged that the Association "failed to file a grievance with respect to the placement of Charging Party's 2006-07 performance evaluation in Charging Party's personnel file." It is true that no grievance was filed over this issue. However, York did raise the issue in a letter to Isserman on December 11, 2007. In the letter, he demanded that Isserman "take steps to ensure that [Scott's] 2006-07 evaluation is marked 'purged.'" York took this step despite his statements to Scott that it was in Scott's "best interest" not to grieve the issue and that they could challenge the District's failure to purge the evaluation in a disciplinary hearing if necessary. Thus, notwithstanding his misgivings over pursuing this course of action, he continued to advocate on behalf of Scott regarding the 2006-2007 evaluation. That he did not file a formal grievance over the issue does not establish a breach of the duty of fair representation. (See *Coalition of University Employees (Buxton)*, *supra* ["Failure to pursue the grievance in the way requested by the employee does not necessarily constitute a breach."]; *Duarte Unified Education Association (Fox)* (1997) PERB Decision

No. 1220 [union representative's failure to adopt aggressive strategy urged by employee insufficient to establish breach of duty of fair representation].)

As for the allegation that the Association "failed to file a grievance with respect to the District's actions of redacting portions of Charging Party's response to a disciplinary document," there is no evidence that Scott ever requested York file a grievance over the matter. The same is true for the allegation that the Association failed to file a grievance over the absence from Scott's personnel file of his response to the 2006-2007 performance evaluation. Scott's expression of concern over these matters to York was insufficient to impose a duty on York to file grievances over them. Therefore, the Association's failure to file grievances over these issues did not breach the duty of fair representation. (See *California School Employees Association (Hansen)*, *supra* [union's failure to file grievances over employee's concerns did not breach duty of fair representation because employee did not request that grievances be filed].)

Viewed as a whole, the record establishes that the Association's overall pattern of conduct toward Scott between December 2006 and December 2007 was one of assistance. While the Association's handling of Scott's personnel issues was less than stellar at times, nothing in the record demonstrates that the Association acted in "reckless disregard" of Scott's rights. (See *Dutrisac*, *supra*, 749 F.2d at p. 1272 ["an unintentional mistake is arbitrary if it reflects a 'reckless disregard' for the rights of the individual employee"].) York and Scott clearly disagreed over how best to deal with Scott's issues but the record fails to show that York acted in bad faith, or in an arbitrary or discriminatory manner. Accordingly, we conclude the Association did not breach its duty of fair representation.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CO-722-E are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.