

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DELMONT YUSUF WAQIA,

Charging Party,

v.

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS LOCAL 55,

Respondent.

Case No. SF-CO-38-M

PERB Decision No. 1621-M

April 21, 2004

Appearances: Delmont Yusuf Waqia, on his own behalf; Davis, Cowell & Bowe by W. David Holsberry, Attorney, for International Association of Firefighters Local 55.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Delmont Yusuf Waqia (Waqia) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the International Association of Firefighters Local 55 (Local 55) violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to take his grievance to arbitration. Waqia alleged that this conduct constituted a violation of the MMBA.

After review of the record, including the unfair practice charge, the amended charge, the warning and dismissal letters, Waqia's appeal, and Local 55's response to the appeal, the Board affirms the Board agent's dismissal consistent with the discussion below.

BACKGROUND

Waqia is a firefighter with the City of Oakland (City). In his charge, Waqia alleges the following information: During 2002, Waqia was on administrative leave. When the leave

¹MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

ended, Waqia did not wish to return to work and consequently hired a private attorney, Gaspar Garcia (Garcia), to negotiate a retirement/severance package on his behalf. On November 26, 2002, City Fire Chief, Ronald Carter (Carter) ordered Waqia to return to work on November 27, 2002. Waqia had planned a trip to Mecca from November 29 to December 10, 2002 and was unwilling to cancel the trip. Garcia was not able to achieve a settlement before Waqia left on his trip. On December 2, 2002, Carter ordered Waqia to return to work on December 4. Garcia contacted Carter to inform him of Waqia's whereabouts and informed City officials that Waqia did not intend to resign. Waqia called Carter and said he could not return on December 4 but could report to work on December 9. When Waqia returned to Oakland and called Carter on December 9, Waqia was told to stay home until further notice. On December 13, Waqia received a letter informing him that the City planned to separate him from his employment due to job abandonment. This separation decision was affirmed by the City Manager on December 26.

Sometime in mid-January 2003, Waqia met with Local 55, Vice President, Brad Pieraldi (Pieraldi) to discuss his dispute with the City. By letter dated January 30, 2003, Local 55 protested the City's action to separate Waqia without a Skelly hearing.² Carter responded by letter dated February 4, 2003 that Waqia was not entitled to a Skelly hearing because his separation was not disciplinary. Waqia, with the assistance of Local 55, filed a formal grievance on February 10, 2003. The grievance alleged that he was denied his right to a Skelly hearing before the separation became final. The City denied his grievance stating that

²Skelly refers to Skelly v. State Personnel Board (1975) 15 Cal. 3d 194 [124 Cal. Rptr. 14] (Skelly), in which the California Supreme Court held that minimal due process safeguards require public employers to provide notice of a proposed disciplinary action, the reasons for the proposed action, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline before disciplinary action may be taken. (Skelly, at p. 215.)

Waqia had no right to a Skelly hearing. The City reasoned that, under its rules, regulations, and the collective bargaining agreement (CBA) between Local 55 and the City, since Waqia's job separation was due to job abandonment, his termination was not "disciplinary"; therefore, Skelly rules were not applicable. The City also stated that Waqia had had an opportunity to respond to the City's proposed action before it became final.

Local 55 assisted Waqia with his grievance through the third step of the grievance procedure but its executive board ultimately decided against taking the case to arbitration. Local 55's decision was based upon a June 10, 2003 advice letter from its Legal Counsel, David Holsberry (Holsberry). In the June 10 letter, Holsberry believed that Waqia had a good chance for success on the merits; however, he expressed concern regarding the timeliness of the grievance. The June 10 letter states, in pertinent part:

Despite having [been] informed of the termination on December 26, 2002, Waqia did not file a grievance until February 10, 2003. Under any interpretation of the MOU, this is untimely. Waqia offers no real explanation for the delay, other than to point the finger at Attorney Garcia. We argued to the City that a Skelly hearing was required and that the time for grievance does not run until a hearing has ben [sic] conducted. The City has responded that its treatment of Waqia was not discriminatory [sic] and therefore, no right to a Skelly hearing existed. . . .

On the merits of the 'job abandonment' issue, I believe Waqia has a reasonable chance of success. . . .

On the procedural issue of timeliness, Waqia's argument is much weaker. He is aware of the grievance procedure, yet delayed the filing of a grievance well beyond the contractual time limits. For many arbitrators, this delay would prevent Waqia from ever getting to the merits of his claim. I estimate the chance of prevailing on the timeliness issue, and therefore to proceed on the merits, to be approximately 40%. Another aspect which bothers me is that the failure to file a timely grievance seems to have been a strategy concurred in by Waqia's attorney in favor of simply bringing a lawsuit. Thus, in a sense, Waqia is asking the Union to step in and clean up after (or at least explain) his lawyer, when Local 55 would not have agreed to such a strategy to begin with. . . .

[D]ue to Waqia's failure to file a timely grievance, there is also a reasonable chance that he will never get to the merits because an arbitrator (or court) will determine that his grievance is untimely. (Emphasis added.)

Local 55 conveyed its decision to Waqia in an undated letter from Local 55 Vice President Pieraldi. Pieraldi explained that Local 55 had been concerned from day one that the grievance was not timely and that Local 55 had a policy of not pursuing arbitration in situations with less than a 50 percent chance of success. He summarized the legal opinion and stated that as a result, Local 55's advisory board voted unanimously not to pursue his grievance to arbitration and the local's executive board voted unanimously to accept the advisory board's recommendation.

In Waqia's amended charge, Waqia alleged more facts regarding his communications with the City both before and during his trip to Mecca. He argues that the City would not declare his grievance to be untimely in an arbitration because the City had responded to the merits of his grievance during the previous grievance steps. Therefore, Waqia contends that Local 55's refusal to pursue arbitration did not make sense. In addition, the City itself did not follow timelines in responding at each level. Therefore, Waqia argues, the City and Local 55 have an implied mutual agreement to recognize the grievance. Waqia thus concludes that Local 55 abused its discretion and its action was devoid of honest judgment.

In the dismissal, the Board agent found that the charge did not state a prima facie violation of the duty of fair representation. Local 55, the exclusive representative, and the City are parties to a CBA that expires in June 2007. Under Section 10.3(b) of the CBA, a formal grievance must be filed within 10 calendar days of the supervisor's response to the informal presentation of the grievance, or if no response, after 10 days of informal discussion. Should

Local 55 or the unit member miss any deadline, the grievance is nullified.³ (CBA Section 10.4.) If the City misses a deadline to respond, the grievance is moved to the next level. (CBA Section 10.4.) In late January 2003, Waqia met with Pieraldi regarding his termination and Pieraldi agreed to pursue his grievance. Before that, Waqia had been working with Garcia on these issues.

Applying the test for breach of the duty of fair representation, the Board agent found that Local 55 provided Waqia with fair representation. Local 55 met with Waqia and processed his grievance through the third level despite its belief that the grievance was untimely. Local 55 further preserved its ability to proceed to the fourth level by requesting arbitration. However, after reviewing all the relevant facts, Local 55 decided not to proceed to arbitration. Local 55 supplied Waqia with a detailed analysis of his case and chances of success. Although Waqia disagrees with Local 55's decision, that does not make its decision unlawful. There was no evidence provided that Local 55's decision was "without rational basis or devoid of honest judgment." (International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M (IAM (Attard)).)

The Board agent also found no implied agreement arising from the City's failure to adhere to timelines. Under the plain language of the CBA, Waqia's grievance was untimely

³Also pertinent to a determination regarding the timeliness of the grievance is CBA Section 10.3(a) concerning informal presentation of the grievance prior to a filing of a formal grievance. This key section was not cited in the warning or dismissal letters but must be noted here as support for dismissal of the charge. Section 10.3(a) states, in pertinent part:

(a) Informal Discussion

The bargaining unit member or the Union representative may present the grievance orally to the immediate supervisor within ten calendar days from such time as the bargaining unit member or Union should reasonably have been aware of the occurrence of the incident giving rise to the grievance. [Emphasis added.]

and so subject to nullification. In contrast, the lack of timeliness in the City's responses merely moves the grievance to the next level. Therefore, Local 55 did not violate the duty of fair representation in failing to take the grievance to arbitration.

Waqia reiterates the same issues on appeal as stated in his amended charge. He states that although Local 55 acknowledged that his grievance had merit, it still failed to pursue the grievance through the arbitration process in violation of the duty of fair representation. All documents and attachments previously filed with his charge and amended charge were attached to the appeal.

Waqia also filed a late reply to Local 55's response on March 23, 2004, several days after the case had been placed on the Board's docket for review. Under PERB Regulation 32136,⁴ a late filing may be excused in the Board's discretion for good cause only. Waqia has not provided any facts showing good cause to excuse the late-filed reply and consequently, the Board shall not consider this document in our review.

DISCUSSION

Waqia alleges that Local 55 breached the duty of fair representation by refusing to process his grievance to arbitration. While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (Hussey v. Operating Engineers (1995) 35 Cal.App.4th 1213 [42 Cal.Rptr.2d 389] (Hussey.) In Hussey, the court further held that the duty of fair representation is not breached by mere negligence and that a

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

union is to be “accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union’s power.”

In IAM (Attard), the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332 and American Federation of State, County and Municipal Employees, Local 2620 (Moore) (1988) PERB Decision No. 683-S, are consistent with the approach of both Hussey and federal precedent (Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369]).

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (IAM (Attard).) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (United Teachers – Los Angeles (Wyler) (1993) PERB Decision No. 970.)

In this case, Waqia has not shown that Local 55’s refusal to take his grievance to arbitration was arbitrary, discriminatory, or in bad faith. Waqia had ended a leave of absence and was asked by his employer initially to return to work on November 27, 2002. The return-to-work date was later extended to December 4, 2002. Waqia instead wished to retire as well as travel and hired a private attorney, Garcia, to work out these arrangements with the City. Waqia was visiting Mecca when the City demanded that he return to work or be considered to have abandoned his job. As Waqia was unable to return to work by the December 4 date, the City terminated his employment on December 26, 2002 without a Skelly hearing. During this

time, Garcia was continuing to negotiate a retirement package on his behalf. However, when discussions broke down between the City and Garcia, sometime in mid-January 2003, Waqia turned to Local 55 to grieve his termination.

CBA Section 10.3(a) only allows 10 calendar days for Waqia or Local 55 to present the grievance orally to the immediate supervisor after the bargaining unit member or Local 55 was reasonably aware of the incident giving rise to the grievance. At the latest, the date Waqia knew of the City's decision was December 26, 2002 when the City Manager affirmed the decision to separate Waqia from employment.⁵ The deadline for presenting an informal grievance to Waqia's supervisor was therefore January 5, 2003. Under Section 10.4, failure by the bargaining unit member or Local 55 to meet any deadline nullifies the grievance. At the time of the City's action and immediately thereafter, Waqia was represented by private counsel, Garcia. He did not request assistance from Local 55 until sometime in mid-January, 2003. Nonetheless, Local 55 assisted Waqia in submitting an informal grievance on January 30, and, after receipt of Carter's denial on February 4, filing a formal grievance on February 10. Local 55 further assisted him in pursuing the grievance to the third level. At that point, pursuant to a legal opinion from its attorney, Local 55 decided not to pursue the grievance to arbitration. The legal opinion estimated a 40 percent chance of success in arbitration due to the timeliness issue and Local 55's policy was not to arbitrate grievances with less than a 50 percent chance of success.

These facts do not show a breach of the duty of fair representation. In fact, they demonstrate that Local 55 assisted Waqia with his grievance despite the fact that Waqia originally had attempted to resolve his dispute outside the grievance process and, as a result,

⁵December 13, when Waqia initially received notice of his separation might also be considered as the date when Waqia was reasonably aware of his impending termination from employment.

filed an untimely grievance over a month after receipt of the City's decision to terminate his employment. An exclusive representative has no obligation to pursue a grievance where the "potential success of arbitration is doubtful." (Sacramento City Teachers Association (Fanning, et al.) (1984) PERB Decision No. 428.) The facts also evidence that Local 55 gave much thought to the matter before making a determination not to proceed to arbitration. Therefore, Local 55's conduct appears to have a rational basis and is not devoid of honest judgment.

Waqia's argument that the City had already accepted his grievance and would not claim untimeliness at the arbitration level is pure speculation, particularly given that the plain meaning of the CBA could require nullification of the grievance by an arbitrator. We find that Waqia's charge is without merit and therefore, affirm the Board agent's dismissal of his unfair practice charge.

ORDER

The unfair practice charge in Case No. SF-CO-38-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.