STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RICHARD E. KEMPE, Charging Party, v. IUOE LOCAL 39, Respondent.	Case No. SF-CO-54-M PERB Decision No. 1747-M February 4, 2005

Appearances: Richard E. Kempe, on his own behalf; Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for IUOE Local 39.

Before Neima, Whitehead and Shek, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Richard E. Kempe (Kempe) of a Board agent's dismissal of his unfair practice charge. The charge alleged that IUOE Local 39 (IUOE) breached its duty of fair representation in violation of the Meyers-Milias-Brown Act (MMBA)[1] by failing to fairly represent Kempe in his grievance against his employer.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the amended charge, the warning and dismissal letters, Kempe's appeal, IUOE's response and Kempe's reply.[2] Based on the discussion below, the Board affirms the dismissal of the charge.

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

[2]PERB regulations do not address the filing of reply documents. The Board exercised its discretion in this case to consider the reply filed by Kempe.

BACKGROUND

Kempe was employed by the Contra Costa Water District (District) as a canal safety guard, a position which was exclusively represented by IUOE. In May 2000, Kempe suffered a heart attack and was out on medical leave until July 11, 2000. On August 10, 2000, while at work, Kempe experienced chest pain and was taken to the hospital.

Kempe's doctor released him to return to work with restrictions on October 30, 2000. Following an examination by the District's physician, additional restrictions were placed on Kempe's activities.

At that time, Human Resources Supervisor, Al Johnson (Johnson) informed Kempe that alternative work in a different classification was not available. Johnson advised Kempe to apply for long-term disability under the policy provided by the District.

Memorandum of Understanding (MOU) section 14.4 states, in relevant part:

> If the District requests a medical release certifying the employee's ability to return to work, the District is under no obligation, and retains exclusive discretion and authority, whether or not to permit the employee to return to work unless the employee is medically certified to be physically able to return to the full, and unrestricted duties of the employee's normal, regular, permanent classification.
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> For employees whose disability does not allow the return to full, and unrestricted performance of the normal, regular duties of their permanent classification, the District at its exclusive discretion and upon written request from the disabled employee, may provide alternative work in a different classification, if such work is available, and compatible with the employee's restricted abilities. [Emphasis added.]

MOU section 13.6(A) states, in part:

> The District shall provide long-term disability insurance coverage for its employees . , . Each employee on medical leave shall receive employment status protection for up to twenty-four (24) months. Additionally, each employee shall receive full

> medical/dental benefits for the first twelve (12) months; and, one half of such benefits for the second twelve (12) months. Employees who are declared permanently disabled shall receive lifetime medical benefits. [Emphasis added.]

Kempe applied for long-term disability and began receiving monthly benefits effective January 21, 2001. On May 17, 2001, Kempe settled his workers compensation claim by compromise and release. In the settlement documents, the District acknowledged that Kempe was permanently disabled from his occupation as a canal safety guard.

On July 5, 2001, Human Resources Manager, Rebecca Lee (Lee) notified Kempe that his employment had been terminated due to the provisions of the compromise and release.

Kempe believed he was entitled to the 24 month job protection status and other benefits, including lifetime medical benefits, identified in Section 13.6 of the MOU. Kempe sought the assistance of IUOE Business Agent, Wanda Kinney (Kinney). Kinney and Kempe met with Johnson on July 24, 2001. Johnson agreed to reinstate Kempe but stated that if Kempe resigned at that time he would receive lifetime medical benefits. Kempe advised Johnson that he wanted to wait until the 24-month job protection period had expired in the event that his condition improved to allow him to return to work.

On August 3, 2001, Kempe received a letter from Lee in which she confirmed her understanding that Kempe was an active employee with a non-industrial disability and that he had employment protection status until August 10, 2002. She further stated:

> Please note that you also have the option to receive lifetime medical benefits upon your resignation, if that occurs prior to the expiration of your employment protection period and if you are still permanently disabled at the time of your resignation from the District.

On June 14, 2002, Kempe submitted a resignation letter to the District to be effective on July 15, 2002.

On July 8, 2002, the District acknowledged Kempe's resignation letter and requested medical documentation that he remained permanently disabled. Kempe believed that his permanent disability had been previously established. He contacted Kinney for assistance.

On August 7, 2002, Kinney informed Kempe that the District had the right to have an employee examined after 24 months of disability. She advised Kempe to submit to an examination by the District's doctor. The doctor's report was issued on November 4, 2002 indicating that Kempe was not to respond to emergency calls and imposing other work restrictions.

In a letter dated November 11, 2002, Lee informed Kempe that based on the doctor's report the District was denying his request for lifetime medical benefits because they believed that he could return to work with certain restrictions. Kempe contacted Kinney and after a series of conversations with the District, Kempe requested that Kinney file a grievance alleging that the District breached the MOU when it failed to provide him with lifetime medical benefits.

Lee denied the grievance at the first level in a letter to Kinney, dated December 30, 2002.

Kempe contacted Kinney on January 6, 2003, the day she returned from vacation, asking that his grievance be advanced to the next level prior to expiration of the seven-day filing deadline. On January 15, 2003, Kinney advised Kempe that she had submitted the grievance to Step 4 but that the District had missed the deadline to respond. She stated she was going to advance the grievance to arbitration.

On January 23, 2003, Kempe received a letter from the District which stated that the appeal of his grievance was not timely filed. Kempe spoke with IUOE Labor Representative,

Joan Bryant (Bryant) who informed him that Kinney was not available due to an extended medical leave. Bryant said she would look into his case.

On January 29, 2003, Bryant called Kempe and told him that his file had been lost. She requested that he provide a copy of his records. Kempe asked Bryant whether Kinney had filed the Step 4 grievance. He also advised Bryant that the last day to request arbitration of his grievance was that day. Bryant stated she did not know whether Kinney had filed the Step 4 grievance, but she would inform the District that afternoon of the IUOE's intent to take his grievance to arbitration.

On February 3, 2003, Bryant called Kempe and advised him that the District believed IUOE missed the filing deadline. Bryant reported that she would continue to pursue the matter and would keep him informed.

Kempe made repeated calls to the IUOE seeking information on the status of his grievance. Subsequently, IUOE petitioned the superior court to compel arbitration. The court granted the petition on June 16, 2003, directing the arbitrator to determine whether the grievance was timely filed.

Kempe was notified on September 17, 2003, that the arbitration hearing was scheduled for January 6, 2004.

On December 22, 2003, Kempe spoke with IUOE Business Agent, Steve Crouch (Crouch) asking to consult with IUOE's Attorney, Stewart Weinberg (Weinberg), regarding the merits of his grievance. Crouch informed him that the usual procedure was for the attorney to meet with the grievant two to three weeks prior to the arbitration. Crouch stated he would

schedule a meeting between Kempe and Weinberg and notify him of the date. Crouch also requested further documentation from Kempe explaining that he was compiling information for Weinberg.

Kempe called Crouch on December 31, 2003, asking when he was to meet with Weinberg. Crouch told him that Weinberg was very busy and he should arrive at the arbitration hearing early in case Weinberg arrived early.

On January 6, 2004, Kempe arrived at the arbitration hearing two hours before it was scheduled to begin. Weinberg arrived 45 minutes before the hearing and met with other IUOE representatives. Just prior to the hearing, Kempe asked Weinberg if they needed to discuss his case. Weinberg told Kempe that he had read his position statement and that "about said it all." During the hearing, an issue emerged regarding medical documentation of Kempe's disability.

The arbitrator's decision was issued on May 8, 2004. The arbitrator first concluded that the IUOE's late filing of the grievance did not substantially prejudice the District. On the merits, the arbitrator denied the grievance finding that the District had not improperly denied lifetime medical benefits because Kempe had not established that he remained permanently disabled at the time of his resignation.

Kempe made several phone calls to IUOE in May and June 2004 regarding the status of the arbitrator's decision. It was not until June 25, 2004, that IUOE informed Kempe that the arbitrator's decision had issued and provided him with a copy.

DISCUSSION

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 Local Union No. 3 (1995) 35 Cal.App.4th 1213, 1219 [42 Cal.Rptr.2d 389].) 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 was devoid of honest judgment. (International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M.)

In the context of grievance handling, the Board has defined the scope of the duty of fair representation as follows:

> 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.
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> 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. [United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258; Cit. omitted.]

More recently in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H, the Board, following federal precedent, held that a union's "mere negligence" may breach 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 [113 LRRM 3552].)

The Board has found that various actions taken by a union, considered separately, would not violate the duty of fair representation. However, when considered in their totality,

the actions represent a pattern of conduct which demonstrate an arbitrary failure to fairly represent a bargaining unit employee. In San Francisco Classroom Teachers Association, CTA/NEA (Bramell (1984) PERB Decision No. 430, the union failed to appeal the employee's grievance challenging his dismissal to the second level after being requested to do so. The union representative apologized for his failure to act and stated he would request an extension of time to advance the grievance. However, the union failed to request the extension. Weeks later, allegedly in an effort to cover up its failure, the union wrote to the employee stating the grievance would not be pursued because it lacked merit. After further complaints by the employee, the union filed a protest over the employer's process in filling the vacancy created by the dismissal. However, the union failed to pursue a grievance challenging the employer's process. The Board reversed the Board agent's dismissal of the charge, finding that these actions, considered cumulatively, demonstrated an arbitrary failure to fairly represent the employee.

Similarly, in American Federation of State, County and Municipal Employees, International, Council 57 (Dehler) (1996) PERB Decision No. 1152-H, the employee was represented by a succession of union representatives. Even after being reminded by the employer of the deadline for elevating the grievance to the second level, the union missed the filing deadline. The union did not notify the employee that the grievance was closed or offer any explanation for its actions. When the employee learned from her employer that her grievance had been rejected, she wrote to the union requesting information and copies of all correspondence related to her grievance. The union failed to respond. The Board found that these actions presented a pattern of conduct demonstrating an arbitrary failure to fairly represent.

In the present case, Kempe alleged that the lost file, missed timelines, unreturned phone calls, failure to schedule time to consult with the attorney, and the attorney's failure to admit MOU Section 14.4 and Kempe's medical records into evidence, demonstrate arbitrary conduct in violation of the duty of fair representation.

The present case differs from those above as IUOE continued to pursue Kempe's grievance and attempted to correct some mistakes. When Bryant determined that Kempe's file was lost she requested that he provide her with copies of his records. When it missed the filing deadline, IUOE filed an action in court to compel arbitration. Although Weinberg did not meet with Kempe in advance of the arbitration hearing, IUOE compiled records which were reviewed by Weinberg. These actions do not suggest efforts by IUOE to ignore or mislead Kempe concerning the status of his grievance.

Kempe also alleges that Weinberg's failure to admit MOU Section 14.4 and his medical records into evidence during the arbitration hearing breached the duty of fair representation. Kempe believes this evidence would have demonstrated the District's failure to comply with the contract. The Board has previously concluded, however, that a union's decision to conduct an arbitration hearing contrary to the wishes of an employee, by failing to meet with the employee before the hearing, and by failing to present certain evidence, does not violate the duty of fair representation. (United Teachers-Los Angeles (Farrar) (1990) PERB Decision No. 797.)

Although errors were made, IUOE continued to pursue Kempe's grievance to arbitration. None of these errors constituted negligence which foreclosed the arbitration of Kempe's grievance. Furthermore, Kempe's disagreement with IUOE's presentation of his case

during the arbitration hearing does not demonstrate a breach of the duty of fair representation. Accordingly, the charge does not state a prima facie violation of the duty of fair representation.

ORDER

The unfair practice charge in Case No. SF-CO-54-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Shek joined in this Decision.