STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Michael McClain, Charging Party	)	
and	)	Case No. 2020-CB-0008-C
Service Employees Int'l Union, Local 73, Respondent	)	

OPINION AND ORDER

I. Statement of the Case

On December 12, 2019, Michael McClain (McClain or Charging Party) filed a charge with the Illinois Educational Labor Relations Board (Board) in the above-captioned matter alleging that Service Employees International Union, Local 73 (Union) committed unfair labor practices within the meaning of Section 14(b) of the Illinois Educational Labor Relations Act (Act or IELRA), 115 ILCS 5/1 *et seq*. Following an investigation, the Board's Executive Director issued a Recommended Decision and Order (EDRDO) dismissing the charge in its entirety. McClain filed exceptions to the EDRDO. For the reasons discussed below, we affirm the EDRDO.

II. Factual Background

We adopt the facts as set forth in the underlying EDRDO. Because the EDRDO comprehensively sets forth the factual background of the case, we will not repeat the facts herein.

III. Discussion

McClain's exceptions consist of allegations against his former employer that are not the subject of this charge and a timeline of events that occurred between August 2018 and February 2019 that he claims are a reminder of how the Union failed him.

As the Executive Director correctly determined in the EDRDO, alleged misconduct that McClain knew or should have known of before June 12, 2019, more than six months before he filed this charge, cannot be the subject of a timely charge. Section 15 of the Act provides that "[n]o order shall be issued upon an unfair labor practice occurring more than 6 months before the filing of the charge alleging the unfair labor practice." Thus, we do not consider the alleged misconduct outlined in McClain's exceptions.

McClain raises nothing in his exceptions to warrant overturning the Executive Director's dismissal of his charge. He does not challenge the Executive Director's determination that there

was no evidence that the Union's refusal to arbitrate his grievance was unlawfully motivated. Even if he had, a review of the record indicates the Executive Director did not err in that determination because the Union was within the wide latitude of discretion it is granted in determining how far to pursue a member's grievance when it refused to arbitrate McClain's grievance based on its belief that it would be unlikely to prevail. *Norman Jones v. Illinois Educational Labor Relations Board*, 272 Ill. App. 3d 622-23, 650 N.E.2d 1099 (1st Dist. 1995); *NEA, IEA, Rock Island Education Ass'n (Adams)*, 10 PERI 1045, Case No. 93-CB-0025-C (IELRB Opinion and Order, February 28, 1994).

IV. Order

For the reasons discussed above, IT IS HEREBY ORDERED that the Executive Director's Recommended Decision and Order is affirmed.

V. Right to Appeal

This is a final order of the Illinois Educational Labor Relations Board. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to Section 16(a) of the Act, such review must be taken directly to the Appellate Court of the judicial district in which the IELRB maintains an office (Chicago or Springfield). Petitions for review of this Order must be filed within 35 days from the date that the Order issued, which is set forth below. 115 ILCS 5/16(a). The IELRB does not have a rule requiring any motion or request for reconsideration.

Decided: **March 18, 2021**
Issued: **March 18, 2021**

/s/ Lara D. Shayne
Lara D. Shayne, Chairman

/s/ Steve Grossman
Steve Grossman, Member

/s/ Chad D. Hays
Chad D. Hays, Member

/s/ Michelle Ishmael
Michelle Ishmael, Member

/s/ Gilbert F. O'Brien
Gilbert F. O'Brien, Member

STATE OF ILLINOIS
ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD

Michael McClain, Charging Party and Service Employees Int'l Union, Local 73, Respondent	)	Case No. 2020-CB-0008-C

EXECUTIVE DIRECTOR'S RECOMMENDED DECISION AND ORDER

I. THE UNFAIR LABOR PRACTICE CHARGE

On December 12, 2019, Charging Party, Michael McClain, filed an unfair labor practice charge with the Illinois Educational Labor Relations Board (IELRB or Board) in the above-captioned case, alleging Respondent, Service Employees International Union, Local 73 (Local 73 or Union), violated Section 14(b) of the Illinois Educational Labor Relations Act (Act), 115 ILCS 5/1, *et seq*. After an investigation conducted in accordance with Section 15 of the Act, the Executive Director issues this dismissal for the reasons set forth below.

II. INVESTIGATORY FACTS

A. Jurisdictional Facts

At all times material, McClain was an educational employee within the meaning of Section 2(b) of the Act, employed by the Chicago Board of Education (CBE) in the job title or classification of Custodian. Respondent Union is a labor organization within the meaning of Section 2(c) of the Act, and at all times material, was the exclusive representative within the meaning of Section 2(d) of the Act, of a bargaining unit comprised of certain of the CBE's employees, including those in the title or classification of Custodian. At all times relevant, McClain was a member of Local 73's bargaining unit. The CBE is an educational employer within the meaning of Section 2(a) of the Act and subject to the jurisdiction of the Board. The Union and CBE are parties to a collective bargaining agreement (CBA) which provides for a grievance procedure culminating in arbitration, for the bargaining unit to which McClain belongs.

B. Facts relevant to the unfair labor practice charge

The CBE hired McClain in or about 2005. On or about June 15, 2018, the CBE directed all its employees to submit to new criminal background checks, otherwise it would terminate their employment. The deadline the CBE imposed for completing such checks was August 3, 2018. To achieve compliance with this directive, the CBE sent several reminders by telephone and email to its workforce in the period of time prior to the deadline. Nonetheless, McClain, and apparently numerous other CBE employees, failed to submit to new criminal background checks by the deadline.

On or about August 13, 2018, in response to McClain missing the deadline on the new criminal background check, the CBE sent him an email indicating if he did not immediately complete the background check, it would seek to terminate his employment. McClain apparently failed to heed, in a sufficiently expeditious manner, the warning in the CBE's August 13 email, and as a result, on August 20, 2018, the CBE began the process to terminate his employment. On August 31, 2018, the CBE conducted a pre-suspension hearing for McClain, which he did not attend, and thereafter, suspended him without pay, effective September 4, 2018.

Meanwhile, on August 27, 2018, McClain presented himself to the Illinois State police for the demanded criminal background check. McClain passed the background check, and sometime shortly thereafter, the State police so notified the CBE. Upon receiving notice McClain had passed the check, on September 5, 2018, the CBE reinstated him and directed him to report to work on September 6, 2018. The CBE notified McClain of the reinstatement and the report to work date by email and a letter by U.S. postal service, to his home address. McClain did not thereafter return to work, as he asserts, he never received notice from the CBE to do so. On or about February 14, 2019, the Union contacted the CBE regarding what it and McClain believed was his ongoing suspension over the refusal to timely submit to the background check. It is not entirely clear, but it appears the CBE believed McClain had returned to work after it reinstated him in September 2018. After the Union contacted the CBE, and after the CBE reviewed the circumstances surrounding McClain's suspension, the CBE found it had wrongly suspended him for

September 4 and 5, 2018, and on March 1, 2019, reimbursed him the money he would have earned had he worked on those dates.[1]

On August 10, 2018, during the same time period as detailed above, while the CBE was attempting to compel McClain's compliance with the background check requirement, it brought charges against him to terminate his employment due to the unsatisfactory performance rating he received for the 2017-2018 school year. In a letter dated September 19, 2018, the CBE notified McClain it had scheduled a hearing regarding the termination of his employment, for 10:30 a.m. on October 2, 2018. McClain attended the October 2 hearing and testified in his defense, but the hearing did not conclude on that date. Instead, the hearing was continued twice, first to November 19, 2018, on which it apparently did not convene, and then to November 29, 2018, on which it reconvened and concluded. McClain did not attend the November 29 hearing date, asserting he did not receive notice of it. Based on the evidence adduced at the hearing, the CBE suspended McClain's employment effective February 28, 2019, and determined termination of McClain's employment was warranted. The CBE formally terminated McClain's employment on March 29, 2019.

The Union timely filed a grievance with a demand for arbitration, on April 4, 2019, challenging the CBE's termination of McClain's employment. On April 10, 2019, a Union representative, John Shostack, emailed McClain a copy of the grievance and the demand for arbitration, and notified him the Union would soon review his grievance to determine whether it merited arbitration. Initially, that determination was to occur on June 25, 2019, but the Union's attorneys were not available, so the meeting was moved to July 2, 2019. On that date, McClain, Shostack, the Union's pre-arbitration panel, and its attorneys met to review the merits of McClain's grievance.

The review included evidence McClain had an extensive disciplinary history with the CBE, going back to at least late 2008, including unpaid suspensions and written reprimands. It also included McClain's two unsatisfactory performance ratings he received during the 2017-2018 school year—both scores were

[1]On February 28, 2019, McClain filed a charge with the Board, alleging the CBE violated Section 14(a) of the Act in that on September 4, 2018, it erroneously suspended him without pay for failing to submit to the required criminal background check. The agency dismissed McClain's charge on September 30, 2019, and neither party appealed the dismissal to the Board. Michael McClain/Chicago Board of Education, 36 PERI ¶74, 2019 WL 7454631 (IL ELRB 2019). On at least two earlier occasions, McClain filed charges against the CBE, both of which were dismissed and were not appealed to the Board. Michael McClain/Chicago Board of Education, 34 PERI ¶111, 2017 WL 7049583 (IL ELRB 2017); Michael McClain/Chicago Board of Education, 32 PERI ¶33, 2015 WL 5260227 (IL ELRB 2015).

1.2 on a scale where a "1" was unsatisfactory and a "4" was excellent. In addition, there was evidence McClain received over 100 tardy notices during the 2017-2018 school year. Ultimately, the pre-arbitration panel determined, given McClain's background, the Union was unlikely to prevail at arbitration and voted to decline to pursue his grievance further. In a letter dated July 18, 2019, the Union notified McClain it was not going to arbitrate his termination grievance and informed him he could appeal the determination of the pre-arbitration panel for further internal review by the Union. On or about July 19, 2019, McClain submitted a document to the Union, seeking appeal of the pre-arbitration panel's decision. In a letter dated September 5, 2019, the Union's general counsel notified McClain it was denying his appeal of the pre-arbitration panel's decision and withdrawing his grievance.

III. THE PARTIES' POSITIONS

Herein, McClain contends the Union violated the Act in that it failed to properly represent him in connection with the April 4, 2019 grievance and further, failed to pursue his interests in a vigorous, aggressive manner. In support of his position, McClain asserts the Union ignored his telephone calls concerning his grievance and failed to provide regular updates regarding its progress on his case. Respondent Union denies its actions in this matter were unlawful, and further denies it treated McClain any differently than similarly situated bargaining unit members. The Union contends it provided McClain with competent representation and ensured his rights were protected. In addition, the Union asserts McClain's charge was not timely filed.

IV. DISCUSSION AND ANALYSIS

To the extent, through the instant charge, McClain is challenging any actions of the Union which occurred prior to June 12, 2019, it is untimely filed. Pursuant to Section 15 of the Act, no order shall issue based upon any unfair labor practice occurring more than six months prior to the filing with the Board, of the charge alleging the unfair labor practice. The six-month limitations period begins to run when the person aggrieved by the alleged unlawful conduct either has knowledge of it, or reasonably should have known of it. Jones v. IELRB, 272 Ill. App. 3d 612, 650 N.E.2d 1092 (1st Dist. 1995); Charleston Community Unit School District No. 1 v. IELRB, 203 Ill. App. 3d 619, 561 N.E.2d 331, 7 PERI ¶4001 (4th Dist. 1990); Wapella Education Association v. IELRB, 177 Ill. App. 3d 153, 531 N.E.2d 1371 (4th Dist. 1988).

Herein, McClain filed his charge on December 12, 2019, and therefore, the date six months prior to his filing was June 12, 2019. Accordingly, alleged unlawful conduct he knew of before June 12, 2019, or reasonably should have known of by that date, cannot be the subject of a timely charge. Most of the conduct by the Union, about which McClain now complains, occurred after June 12, 2019, and is tied to the refusal to pursue his termination grievance to arbitration, however, in his charge form and the attachments, he made several references to a lack of responsiveness and insufficient updates in connection with the Union's representation of his interests in the run-up and aftermath of the termination hearings conducted by the CBE in October and November 2018.

There is no dispute McClain was aware of the Union's conduct in relationship to all of his claims at or near the time such conduct occurred. Yet, despite that knowledge, McClain did not file the instant charge until December 12, 2019, over a year after some of the matters he now raises occurred. Any challenges by McClain to Union actions which occurred prior to June 12, 2019, are untimely filed.

To the extent McClain's charge is timely, it is without merit. His allegations take issue with the Union's representation in connection with his April 4, 2019 termination grievance, specifically that it failed to properly guard his interests in connection therewith and failed to pursue the claim to arbitration. Additionally, McClain asserts the Union failed to represent him in a vigorous, aggressive manner, ignored his telephone calls concerning his grievance, and failed to provide regular updates regarding its progress on his behalf.

Section 14(b)(1) of the Act provides as follows:

> (b) Employee organizations, their agents or representatives or educational employees are prohibited from:
>
> (l) restraining or coercing employees in the exercise of the rights guaranteed under this Act, provided that a labor organization or its agents shall commit an unfair labor practice under this paragraph in duty of fair representation cases only by intentional misconduct in representing employees under this Act. [Emphasis added.]

McClain's claim herein is a duty of fair representation case, and in such cases, a two-part standard is used to determine whether a union has committed intentional misconduct within the meaning of Section 14(b)(1). Under that test, a charging party must establish the union's conduct was intentional and directed at charging party, and secondly, the union's intentional action occurred because of and in retaliation for charging party's past actions, or because of charging party's status (such as his or her race, gender, or national origin), or

because of animosity between charging party and the union's representatives (such as that based on personal conflict or charging party's dissident union support). The Board's use of this standard, based on Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981), was affirmed by the Illinois Appellate Court in Paxton-Buckley-Loda Education Association v. IELRB, 304 Ill. App. 3d 343, 710 N.E.2d 538 (4th Dist. 1999), aff'g Paxton-Buckley-Loda Education Association (Nuss), 13 PERI ¶1114 (IELRB 1997). See also, Metropolitan Alliance of Police v. State of Illinois Labor Relations Board, 345 Ill. App. 3d 579, 588-89, 803 N.E.2d 119, 125-26 (1st Dist. 2003).

In this case, there is no evidence Respondent Union intentionally took any action either designed to retaliate against McClain or due to his status. Moreover, McClain made no showing he was treated differently from other similarly situated employees, or that the manner in which the Union addressed his concerns was based on something other than a good faith assessment of the merits of his claim, the bargaining unit's priorities, or the best interests of its membership as a whole.

McClain was upset by the Union's conduct, believing it should have done more, communicated with him more frequently, and been more aggressive on his behalf, and if that had happened, the CBE would have reinstated his employment. Yet, McClain proffered no evidence to support his belief in this regard. Moreover, the evidence plainly indicates the Union was responsive to McClain's concerns and assisted him as much as possible, but was simply unable to achieve the outcome he desired, due in no small measure to the employment record he compiled with the CBE.

The conduct herein, complained-of by McClain, is not unlawful, at least under the circumstances of this case. The exclusive representative has a wide range of discretion in representing the bargaining unit, and as the Board has previously held, a union's failure to take all the steps it might have taken to achieve the results desired by a particular employee does not violate the Act, unless as noted above, the union's conduct appears to have been motivated by vindictiveness, discrimination, or enmity. Jones v. Illinois Educational Labor Relations Board, 272 Ill. App. 3d 612, 650 N.E.2d 1092, 11 PERI ¶4010 (1st Dist. 1995). As there is no evidence indicating that the Union was so motivated, Charging Party failed to present grounds upon which to issue a complaint for hearing.

V. ORDER

Accordingly, the instant charge is hereby dismissed in its entirety.