STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
Oyemola Olanrewaju Kale,	)	
Charging Party,	)	
and	)	Case No. 2004-CB-0019-C
Cook County College Teachers Union, Local 1600, IFT/AFT, AFL-CIO,	)	
Respondent.	)	
Oyemola Olanrewaju Kale,	)	
Charging Party	)	
and	)	Case No. 2004-CA-0041-C
City Colleges of Chicago, District No. 508,	)	
Respondent	)	

OPINION AND ORDER

On January 9, 2004, Oyemola Olanrewaju Kale (Kale or Charging Party) filed unfair labor charges against City Colleges of Chicago, District No. 508 (Employer or City Colleges) and the Cook County College Teachers Union, Local 1600, IFT/AFT, AFL-CIO (Union). Kale alleged that the Employer violated Section 14(a)(1) of the Illinois Educational Labor Relations Act, 115 ILCS 5 *et. seq.* (2002) (Act or IELRA), by failing and refusing to allow him to revoke his application for early retirement and salary enhancement. Kale alleged that the Union violated Section 14(b)(1) of the Act by failing and refusing to arbitrate his grievance regarding his attempts to revoke his application for early retirement and salary enhancement.

After investigation, the IELRB's Executive Director issued a Recommended Decision and Order dismissing Kale's charges against both the Employer and the Union. Kale filed timely exceptions to the Executive Director's Recommended Decision and Order. For the reasons discussed below, we dismiss Kale's charges and affirm the Executive Director's Recommended Decision and Order in its entirety.

I.

The Union and the Employer are parties to a collective bargaining agreement (CBA) covering the full-time faculty bargaining unit at City Colleges. Kale is a member of that bargaining unit. Article VII.K of the CBA allows full-time faculty to elect an early payout of up to 20% of their accumulated and accrued sick leave benefits for a period of up to two years. This will increase their income during that time and increase the earnings upon which their pensions will be calculated.

On September 23, 2002, Kale filed a two-page document with the Employer entitled "Application and Contract for Early Retirement and Enhancement under Article VII.K of the CCCTU Faculty Collective Bargaining Agreement and 40 ILCS 5/15-112." Therein, Kale chose a retirement date of August 7, 2004. On or about October 21, 2002, Kale informed the Employer that he wanted to withdraw his application for early retirement and enhancement. The reason for Kale's request was that by his chosen retirement date of August 7, 2004, he would have had more than thirty years of service, have passed his sixtieth birthday, and therefore would be entitled to a full retirement annuity without any reduction for early retirement. The Employer denied Kale's request. Kale admits that he realized that the Employer had rejected his attempts to rescind his application for early retirement and enhancement when he received his paycheck on November 22, 2002, and saw an increase in his salary.

Kale then filed a grievance. In a letter dated December 12, 2002, the Employer denied the grievance at step one of the grievance procedure. On April 23, 2003, a step two grievance meeting was held. The Union did not participate in the step two meeting. However, at the Union's request, Kale was allowed to be represented at the step two meeting by his privately retained attorney. In a letter dated June 6, 2003, the Employer denied Kale's grievance. On July 10, 2003, Kale's attorney contacted the Union to request it take Kale's grievance to arbitration, the next step in the grievance procedure. The Union declined. According to Kale's attorney, the sole reason cited by the Union in its decision not to arbitrate Kale's grievance was Kale's decision to have legal counsel during the previous two steps. According to the Union, the sole reason it refused to arbitrate Kale's grievance was that it lacked merit.

II.

A. The Charge Against the Employer

Section 15 of the Act provides that "[n]o order shall be issued upon an unfair labor practice occurring more than six months before the filing of the charge alleging the unfair labor practice." 115 ILCS 5/15. The six-month period for filing an unfair labor practice charge begins to run when the charging party becomes aware, or should become aware, of the conduct that allegedly constitutes an unfair labor practice. Jones v. IELRB, 272 Ill. App. 3d 612, 650 N.E.2d 1092 (1st Dist. 1995); Wapella Education Association v. IELRB, 177 Ill. App.3d 153, 531 N.E.2d 1371 (4th Dist. 1988). The filing period begins to run even if the charging party does not know the legal significance of the conduct that constitutes an unfair labor practice. Jones. Only acts that occur within the six-month time period can serve as the basis for a timely charge. City Colleges of Chicago (Johnson), 12 PERI 1004, Case No. 95-CA-0047-C (IELRB Opinion and Order, December 8, 1995); South Suburban College, 11 PERI 1077, Case No. 92-CA-0073-C (IELRB Opinion and Order, September 1, 1995).

In this case, Kale learned that the Employer had rejected his attempts to rescind his application for early retirement and enhancement on November 22, 2002, when he received his paycheck and saw an increase in his salary. The Executive Director dismissed Kale's charge against the Employer as untimely because Kale filed the charge on January 9, 2004, more than a year after he learned of the alleged misconduct. Kale argues in his exceptions that the Executive Director erred when he dismissed the charge as untimely because the alleged incorrect salary enhancement and resulting incorrect pension contributions began on November 22, 2002, and were ongoing and continuous every time his pay was processed and each time the pension contribution was transmitted.

In Taylorville Community Unit School District 3, 10 PERI 1001, Case Nos. 93-CA-0032-S and 93-CA-0033-S (IELRB Opinion and Order, October 10, 1993) (Taylorville I), the IELRB held that the six month filing period began from receipt of the charging parties' paychecks in September 1990, when they would have been placed on notice of a salary dispute. The charging parties in Taylorville I claimed that by failing to provide them with additional compensation, the employer deprived them of their statutory rights under the Illinois School Code, 105 ILCS 5/1-1 *et seq.* (2002). Here, Kale claims that by interpreting the CBA in a manner that caused it not to allow him to rescind his application for early retirement, the

Employer deprived him of his statutory rights under the Illinois Pension Code, 40 ILCS 5/1-101 *et. seq.* (2002). Kale, like the charging parties in Taylorville, contends that his Employer's actions in turn violated Section 10(b)[1] of the Act. Section 10(b) of the Act provides that no CBA can be implemented that would deprive employees of rights under any Illinois statute.[2] The employees at issue in Taylorville I continued to receive paychecks without additional compensation during the six months before they filed their unfair labor practice charge in February 1993. The IELRB found that charging parties in Taylorville I knew or should have known when they received their paychecks in September 1990 that the employer was not going to pay them additional compensation under the collective bargaining agreement. Similarly, Kale was put on notice that the Employer was not going to rescind his application for early retirement when he received his November 22, 2002 paycheck. Thus, in order to have been timely, Kale should have filed his charge within six months after he was put on notice of the Employer's alleged misconduct. Instead, Kale waited over a year to file the charge against the Employer.

For the reasons discussed above, we affirm the Executive Director's Recommended Decision and Order dismissing Kale's charge against the Employer as untimely.

B. The Charge Against the Union

Section 14(b)(1) of the Act prohibits employee organizations, their agents or representatives, and educational employees from:

> 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

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[1] Section 10(b) of the Act provides: "The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of Illinois. The parties to the collective bargaining process may effect or implement a provision in a collective bargaining agreement if the implementation of that provision has the effect of supplementing any provision in any statute or statutes enacted by the General Assembly of Illinois pertaining to wages, hours or other conditions of employment; provided however, no provision in a collective bargaining agreement may be effected or implemented if such provision has the effect of negating, abrogating, replacing, reducing, diminishing, or limiting in any way any employee rights, guarantees or privileges pertaining to wages, hours or other conditions of employment provided in such statutes. Any provision in a collective bargaining agreement which has the effect of negating, abrogating, replacing, reducing, diminishing or limiting in any way any employee rights, guarantees or privileges provided in an Illinois statute or statutes shall be void and unenforceable, but shall not affect the validity, enforceability and implementation of other permissible provisions of the collective bargaining agreement."

[2] An employer's conduct which violates Section 10(b) of the Act constitutes an unfair labor practice within the meaning of Section 14(a)(1). Southern Illinois University (Edwardsville), 5 PERI 1176, Case No. 88-CA-0045-S (IELRB Opinion and Order, October 5, 1989).

under this paragraph in duty of fair representation cases only by intentional misconduct in representing employees under this Act.

It is well established that this Section encompasses a duty of fair representation. NEA, IEA, Rock Island Education Ass'n (Adams), 10 PERI 1045, Case No. 93-CB-0025-C (IELRB Opinion and Order, February 28, 1994); Township High School District 214, 3 PERI 1121, Case Nos. 87-CA-0003-C, 87-CB-0002-C (IELRB Opinion and Order, November 10, 1987).

Section 14(b)(1) provides that an employee organization does not violate its duty of fair representation unless it engages in intentional misconduct. Intentional misconduct consists of actions that are conducted in a deliberate and severely hostile manner, or fraud, deceitful action or conduct. Paxton-Buckley-Loda Education Association v. IELRB, 304 Ill. App. 3d 343, 710 N.E.2d 538 (4th Dist. 1999); University of Illinois at Urbana (Rochkes), 17 PERI 1054, Case Nos. 2000-CB-0006-S, 2001-CA-0007-S (IELRB Opinion and Order, June 19, 2001). Intentional misconduct is more than mere negligence or the exercise of poor judgment. Chicago Teachers Union (Oden), 10 PERI 1135, Case No. 94-CB-0015-C (IELRB Opinion and Order, November 18, 1994).

The Charging Party cites a Fifth Circuit case in his exceptions, Seymour v. Olin Corporation, 666 F.2d 202 (5th Cir. 1982), where the court held that a union's refusal to process a claimant's grievance unless he fired his attorney amounted to a breach of the union's duty of fair representation. This Board is not bound by decisions of the Fifth Circuit Appellate Court. Additionally, the Fifth Circuit, unlike the IELRB, has not adopted the intentional misconduct requirement for duty of fair representation cases. See discussion infra. In 1989, the IELRA was amended to provide that only intentional misconduct would constitute a breach of the duty of fair representation. In North Riverside Education Association, 10 PERI 1062, Case No. 94-CB-0005-C (IELRB Opinion and Order, March 29, 1994), the IELRB adopted the Seventh Circuit Court of Appeals' definition of intentional misconduct cited in Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981), as action conducted in a deliberately and severely hostile manner akin to fraud or deceit. The Illinois Appellate Court affirmed the IELRB's use of this standard in Paxton-Buckley-Loda Education Association, 304 Ill. App. 3d 343, 710 N.E.2d 538. Thus, the Charging Party's argument that Seymour supports its claim that the Union breached its duty of fair representation fails because Seymour provides no mandatory or persuasive authority applicable to the instant case.

A union is not required to process every grievance, AFSME Local 3506 (Pierce), 16 PERI 1010, Case Nos.99-CB-0002-C, 99-CB-0003-C (IELRB Opinion and Order, December 3, 1999) or take every grievance to arbitration. Rochkes, 17 PERI 1054. A union is required to conduct a good faith investigation to determine the merits of a claim. Id.

In his exceptions, Kale contends that the Union never made an investigation into the evidence of his claim or made a good faith determination into the merits of his claim. Instead, Kale complains, the Union said that the evidence did not demonstrate the grievance would be successful. The IELRB has repeatedly held that a union may consider the perceived merits of a complaint when making a good faith determination of the merits of a claim and may decline to process a member's grievance based upon its determination that his or her claim has no merit. Cahokia Federation of Teachers, 19 PERI _____, Case No. 2002-CB-0001-S (IELRB Opinion and Order, February 27, 2003); Service Employees International Union, Local 1 (Arrington), 19 PERI 122, Case No. 2003-CB-0009-C (IELRB Opinion and Order, June 26, 2003); Rochkes, 17 PERI 1054; Chicago Board of Education (Blumenthal), 10 PERI 1007, Case Nos. 93-CA-0065-C and 93-CB-0022-C (IELRB Opinion and Order, November 10, 1993). If a union is incorrect in its assessment and a grievance has merit, failure to process such a grievance does not amount to a violation of Section 14(b)(1) of the Act because even gross negligence and incompetence does not satisfy the statutory prerequisite of intentional misconduct. United Mine Workers (Bearing), 16 PERI 1033, Case Nos. 99-CB-0003-S et al. (IELRB Opinion and Order, March 8, 2000); Rock Island.

In this case, Union made a good faith investigation into the merits of Kale's grievance, determined that it was without merit and decided not to demand arbitration. Such action does not amount to intentional misconduct. Accordingly, we find that the Union did not violate Section 14(b)(1) of the Act by its refusal to arbitrate Kale's grievance.

III.

For the above reasons, IT IS HEREBY ORDERED that the Executive Director's Recommended Decision and Order is affirmed. The unfair labor practice charges against the Union and the Employer are dismissed in their entirety.

IV. Right to Appeal

This is a final order of the IELRB. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to 115 ILCS 5/16(a), such review must be taken directly to the appellate court of the judicial district in which the IELRB maintains an office (Chicago or Springfield). "Any direct appeal to the Appellate Court shall be filed within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision." 115 ILCS 5/16(a).

Decided: July 12, 2005
Issued: July 14, 2005
Chicago, Illinois

/s/ Lynne O. Sered
Lynne O. Sered, Chairman

/s/ Ronald Ettinger
Ronald Ettinger, Member

/s/ Bridget L. Lamont
Bridget L. Lamont, Member

/s/ Michael H. Prueter
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