

STATE OF MARYLAND
STATE LABOR RELATIONS BOARD

IN THE MATTER OF: *

OFFICE 65 AND RANDY WALTERS, et al., *

Complainants *

v. * SLRB Case No. 12-U-05

STATE OF MARYLAND, *

Respondent *

* * * * *

**DECISION AND ORDER GRANTING RESPONDENT’S MOTION TO DISMISS,
OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

POSITION OF THE PARTIES

This case is before the State Labor Relations Board (hereafter “SLRB” or “the Board”) upon the unfair labor practice complaint (hereafter “ULP”) filed by Office 65, Randy Walters, et al., (hereafter “Complainants”) on December 20, 2011.¹

The Complainants’ position is set forth as follows:

- “(1) On 5/7/2009 Governor Martin O’Malley approved the Fair Share Act/Senate Bill 264.
- (2) Effective July 1, 2011 Union Service Fees/2011 Fair Share Act Fees were deducted from all State of Maryland Unit G Employees to support the activities of MPEC (Maryland Professional Employees Council an affiliate of the American Federation of Teachers, AFL-CIO (AFT) and AFT-Maryland) in the name of collective bargaining. In violation of COMAR rules and regulations State of Maryland Unit G Employees were not given the right to refrain from

¹ An additional twelve employees are named as filers along with Mr. Walters.

supporting such union activities and were forced to pay union service fees to support union activities.”

As a remedy, Complainants request the SLRB to order the following:

“(1) Determine that the mandatory Union Service Fee is a direct violation of COMAR rules and regulations under Title 3, Subtitle 3, § 3-301.

(2) Repeal the mandatory Union Service Fee, ceasing mandatory union service fee deductions/payments from State of Maryland Unit G Employees who request these mandatory payments stop.

(3) Reimburse State of Maryland Unit G Employees who request reimbursement for the mandatory Union Service Fees that have been deducted from their pay effective July 1, 2011.”²

According to the undisputed evidence submitted by the State of Maryland (hereafter the “Respondent” or “State”), by way of affidavit of George Myers, President of the Maryland Professional Employees Council (hereafter “MPEC”) and other documentation, such as the MOU between the parties, a “Notice to All Non-Member Fair Share Fee Payers For the Fee Period July 1, 2011 through June 30, 2012,” and the “Opinion and Award” of Arbitrator David Vaughn, and in accordance with the arguments presented in its Motion to Dismiss, it is the State’s position that the Complaint herein must be dismissed. Briefly stated, Respondent argues (1) The Complaint is untimely and (2) the Complaint fails to state a claim upon which relief can be granted because the implementation of the “Fair Share Act” does not conflict with statutory provisions and thus does not constitute a ULP.

BACKGROUND

In 2009, the Maryland General Assembly enacted the “Fair Share Act” which is codified in Md. Code Ann., SPP § 3-502(b), and provides as follows: “(1) Except as provided in paragraph (3) of this subsection, collective bargaining may include negotiations relating to the right of an employee

² The “COMAR rules and regulations” cited by the Complainants is actually a statutory provision, i.e., State Personnel and Pensions (hereinafter “SPP”) Sec. 3-301(a)(1).

organization to receive service fees from nonmembers.” Pursuant to SPP § 3-502(b)(3), certain educational institutions are exempted from the law. Furthermore, pursuant to SPP § 3-502(b)(2), an employee whose religious beliefs are opposed to joining or financially supporting a union is not required to pay the service fee, but must pay an equal amount to a charitable organization.

In 2010, MPEC and the Respondent negotiated a Memorandum of Understanding (hereafter “MOU”) that established the terms and conditions of employment for state employees in Unit G which is comprised of approximately 5,000 scientific personnel, engineers, and administrative personnel. Article 4, Section 15 of the MOU describes the service fee to be collected from non-members of the union, the procedure for becoming a non-member, and the procedure for challenging the union’s calculation of the service fee. Section 15 G of the MOU provides that a challenge to the amount of the fair share fee is subject to arbitration.

In January of 2011, the MOU was approved by approximately 80 percent of the Unit G employees who voted. The MOU was executed and accepted by the parties on February 14, 2011.

In May 2011, MPEC sent every employee in the bargaining unit the MPEC Fair Share Fee Notice (the “Hudson Notice”). This notice informed all employees in Unit G of the type of activities considered to be chargeable and non-chargeable to fair share payers; financial data (audits) in support of the calculation of chargeable expenses; the steps that employees must take to object to paying for that portion of the fair share fee that is attributable to political, ideological or other activities that have been deemed to be non-chargeable to objecting fee payers; steps to challenge the accuracy of the calculation of the chargeable/non-chargeable portions of the fair share fee; and steps to file a conscientious objection based on religious beliefs.

The Fair Share Fee Notice gave every employee until June 30, 2011 to file his or her objections with MPEC. MPEC received several challenges to the calculation of the fair share fee. In addition, on or about June 20, 2011, Mr. Walters, the lead complainant in this matter, complained directly to Mr. Myers about the payroll deduction for the fair share fees.

In July of 2011, MPEC provided the Department of Budget and Management with the names of union members, fair share payers, and conscientious objectors for purposes of the payroll deduction. Only union members had the full amount of union dues deducted from their paychecks. Every employee in the bargaining unit who had not signed up to be a member of the union paid less than full union dues. The records of MPEC reflect that Mr. Walters, a non-member, paid the fair share fee to MPEC, which does not include any amount for political, ideological or other activities conducted by the union that are deemed non-chargeable.

By letter dated September 13, 2011, the challengers, including Mr. Walters, were notified that there would be an arbitration hearing before an independent arbitrator on October 6, 2011, to resolve the challenges to the calculation of the fair share fee. By a letter dated September 26, 2011, Mr. Walters formally protested the assessment of the fair share fee. The arbitration was held on October 6, 2011. The record was held open by the arbitrator until January 6, 2012, so that any party could review the transcripts and submit any additional evidence.

On January 17, 2012, Arbitrator M. David Vaughn issued an Opinion and Award (AAA 16-673-00443-11) upholding MPEC's assessment and calculation of the service fees. The arbitrator also found that the union had met its "*Hudson obligations*" as set out in the Supreme Court's opinion in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) where the Court held that in order to protect union non-members' constitutional rights to freedom of speech and association, the union's collection of agency fees must "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to

challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.” According to Arbitrator Vaughn, MPEC had complied with the law and that “The individual objector’s (including Mr. Walters) positions have been considered but are not persuasive.”

While the arbitration proceeding was pending, on or about December 20, 2011, Mr. Walters, on behalf of himself and twelve other employees in Unit G, filed the ULP complaint herein against Governor Martin O’Malley and the State of Maryland.

DISCUSSION AND CONCLUSIONS

The Board’s authority to investigate and conduct hearings to determine possible violations of the collective bargaining statute (hereafter “CBS”) is discretionary and is exercised when necessary to fairly decide an issue or complaint arising under the CBS or a regulation adopted under it. State Personnel and Pensions , Sec. 3-207. When there is no dispute over material issues of fact, as is the case here, an evidentiary hearing is typically not necessary to decide issues. In the current matter, as set out above, the parties have filed their respective positions with the Board. Therefore, we conclude that an evidentiary hearing, while not requested by either party, is not necessary and we shall decide the issues on the parties’ filings and submissions which make up the existing record.

THE TIMELINESS ISSUE

At the outset, it is the position of Respondent that the ULP complaint filed herein should be dismissed for the reason that it is untimely under COMAR 14.32.05.01A and C.

We agree.

The ULP complaint filed by Mr. Walters on behalf of his fellow employees is untimely under COMAR 14.32.05.01A and C because it was not filed within 90 days of the occurrence which is the basis of the claim. The relevant sections which address the filing of an unfair labor practice before the Board are found at COMAR 14.32.05.01 and provide as follows:

- A. Party. A party alleging an unfair labor practice, as defined in State Personnel and Pensions Article, §3-306, Annotated Code of Maryland, may request relief from the Board by filing a complaint with the Executive Director, within 90 days of knowledge of the occurrence.
- B. Form. A complaint shall be in writing and signed according to this subtitle, and set forth on a form provided by the Board.
- C. Timeliness. The complaint shall be filed with the Board within 90 days from the later of the alleged violation or following the time that a reasonable person would, upon exercising due diligence, have discovered the occurrence of the alleged violation. (Emphasis added.)

The “occurrence” which is the subject of the ULP is the deduction of the service fees from the employees’ paychecks. That practice began on July 20, 2011 the payday for the first full pay period after July 1, 2011. All employees in Unit G were given notice of that deduction and the options available for challenging that deduction via the “Hudson Notice” sent in May of 2011. Mr. Walters (and the other employees in Unit G) received adequate notice of the intention and timing of the payroll deduction. Mr. Walters actually challenged the implementation of the deduction prior to the June 30, 2011 deadline through his emails to MPEC President George Myers. Therefore, Mr. Walters had knowledge of the “occurrence” – the impending payroll deductions – as early as June 20, 2011. The ULP complaint was not filed with the Board until December 20, 2011, six months after the date that he obtained actual knowledge of the deductions. Ninety days from the first date that service fees were withheld, July 20, 2011, would have been October 18, 2011. Therefore, Mr. Walters and the complainants have not filed a timely ULP charge as required by COMAR 14.32.05.01A.

The above facts are supported by an affidavit and other documents filed by Respondent in support of the State's position, an affidavit and supporting documents unchallenged by Complainants.

The "timeliness" provision in COMAR 14.32.05.01C further supports a conclusion that this matter was not filed within the required timeframe of the regulations. That provision allows for the 90-day period to run from the later of the date of the alleged violation, or the date that a reasonably diligent person would have discovered the occurrence of the alleged violation. Since the complainants actually knew about the payroll deduction before it happened, this COMAR provision does not extend the timeframe for filing a complaint beyond the date that the first payroll deductions were made. In this instance, the complainants, with the exercise of reasonable diligence, should have known about the occurrence before it happened.

We are in agreement with Respondent's analysis of the law in Maryland holding that the filing of a complaint within a certain timeframe is akin to a statute of limitations in a civil proceeding. As the Court of Special Appeals noted in *Decker v. Fink*, 47 Md.App. 202, 206, cert. denied 289 Md. 735 (1981), "[s]tatutes of limitation are to be strictly construed." The same approach is taken by federal courts when they interpret the rights of an employee to file an unfair labor practice charge under the National Labor Relations Act. In *Triplett v. Brotherhood of Ry., etc., Local Lodge No. 308*, 801 F.2d 700 (4th Cir. 1986), the U.S. Court of Appeals for the Fourth Circuit (the federal circuit having jurisdiction over federal appeals originating in Maryland), affirmed the dismissal of an employee's unfair labor practice charge by the district court, holding that the employee's action was barred by retroactive application of the six month statute of limitations for filing such a charge under the National Labor Relations Act. In other cases involving labor laws, where employees are exercising complaint rights, courts have narrowly construed filing deadlines. See also *Lopez v. Sears, Roebuck & Co.*, 493 F. Supp. 801 (D.Md. 1980) (noting that the failure to file a timely discrimination complaint with the EEOC under Title VII is

jurisdictional and grounds for dismissal). Therefore, based on the Board's procedural regulations, and well-established case law, the captioned ULP complaint should be dismissed because it was filed well beyond the 90-day timeframe allowed by the Board's applicable COMAR provisions.

Even assuming that the ULP complaint was timely filed, which we find for the reasons stated above, was clearly not the case, we would nevertheless dismiss for the additional reasons set out in detail in Respondent's "Motion," which reasons we will only briefly refer to herein. Because of the importance of this matter, and its application to so many people, we feel it would be beneficial to address the Complainants' arguments and not stop here with the timeliness issue. Our proceeding in this manner is not meant to set a precedent for future cases.

By way of background and as a general overview of the issue, fair share fees have been found to be constitutional, as long as the union follows certain procedures in its calculation and assessment of the fees. The Supreme Court has held that, while an exclusive representative may collect a fee from union non-members to offset costs attributable to collective bargaining and representation, the fees may not be used to support ideological causes not germane to the organization's duties as the collective bargaining representative. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Additional support for the principle of the legality of fair share fees is found in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), where the Supreme Court held that, in order to protect union non-members' constitutional rights to freedom of speech and association, the union's collection of agency fees must "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* At 310. The notice provided to employees by the union must explain the basis for the fee and any rights to challenge the fee is known as the "Hudson Notice."

Based on the uncontradicted evidence presented herein, including an examination of the MOU between MPEC and the State of Maryland that established the terms and conditions of employment for state employees in Unit G and the Affidavit of MPEC President George Myers, it is clear that the parties provided for a procedure for becoming a non-member of the union as well as a procedure for challenging the Union's calculation of the service fee, all in accordance with the dictates of the Supreme Court in opinions in the above cited *Abood* and *Hudson* cases.³

In addition, according to the record herein, in July of 2011, MPEC provided the Department of Budget and Management with the names of union members fair share payers, and conscientious objectors for purposes of the payroll deduction. Only union members had the full amount of union dues deducted from their paychecks. Every employee in the bargaining unit who had not signed up to be a member of the union paid less than full union dues. The records of MPEC reflect that Mr. Walters, a non-member, paid the fair share fee to MPEC, which does not include any amount for political, ideological or other activities conducted by the union that are deemed non-chargeable.

By letter dated September 13, 2011, the challengers, including Mr. Walters, were notified that there would be an arbitration hearing before an independent arbitrator on October 6, 2011, to resolve the challenges to the calculation of the fair share fee. By a letter dated September 26, 2011, Mr. Walters formally protested the assessment of the fair share fee. The arbitration was held on October 6, 2011. The results are discussed above.⁴

The Complainants contend that the Fair Share Act is in conflict with employee rights under Maryland Code Annotated, SPP, Sec. 3-301(a)(1) and that its implementation constitutes an unfair labor

³ In January of 2011, the MOU was approved by approximately 80% of the Unit G employees who voted.

⁴ It should be noted that the ULP charge in the instant case was filed on December 20, 2011, prior to the issuance of Arbitrator Vaughn's decision and award.

practice under SPP, Sec. 3-306. We reject Complainants' allegation and conclude as a matter of law that the Fair Share Act is valid and not in conflict with employee rights under SPP Sec. 3-301(a)(1).

In essence, Complainants contend that the implementation of the fair share deductions conflicts with their right to refrain from "supporting" union activities, as set forth in SPP, Sec. 3-301(a)(1). That section provides as follows: "Employees subject to this title have the right to: (1) take part or refrain from taking part in forming, joining, supporting, or participating in any employee organization or its lawful activities." Complainants assert that they "were not given the right to refrain from supporting such union activities and were forced to pay union service fees to support union activities." (ULP at 2, "Facts")

We are of the opinion that the legislature's purpose in enacting the Fair Share Act was to allow public sector unions representing certain state employees, such as those in Unit G, the Complainants herein, to bargain for a mandatory fee for collective bargaining services provided by law to all employees in a unit, regardless of whether or not such employees choose to become union members.

We find no inherent conflict in the legislature's passage of SPP Sec. 3-301(a)(1) and the provisions of the Fair Share Act. To the contrary, the provisions at issue herein are fully compatible and consistent with the principles of statutory construction which reconcile the State's obligation to bargain over service fees and to ensure that employees' rights are protected under SPP Sec. 3-301(a)(1).

A case in California provides guidance on the issue of "dueling" statutory provisions, i.e. provisions appearing to contradict each other. In this case, there is no reason why both provisions cannot stand together. In the case of *Cumero v. Public Employees Relations Board*, 778 P.2d 174 (S.Ct. Cal., 1989), the California Supreme Court held that "in accordance with the general principle of statutory construction that a specific provision relating to a particular subject prevails over a general provision on that subject (Code Civ. Proc., § 1859; *Bailey v. Superior Court* (1977) 19 Cal. 3d 970, 976, fn. 8; *People v.*

Gilbert, supra, 1 Cal. 3d 475, 479-480), those specific provisions for organizational security arrangements prevail over the nonmembers' more generalized rights, under section 3543, to refuse to participate in the activities of employee organizations." *Id.* At 180. We believe that the same rationale pertains to this case.

We also accept the proposition that the Maryland rules of statutory construction, as enunciated by the Court of Appeals, require that this Board dismiss the ULP filed in this case and uphold the validity of the Fair Share Act. The Court of Appeals has held that a specific provision in a statute takes precedence over a general provision. *Lumbermen's Mutual Casualty Company v. Insurance Commissioner*, 302 Md. 248 (1985). As the Court of Appeals stated in *Lumbermen's*: "It is an often repeated principle that a specific statutory provision governs over a general one. [Citations omitted.] Thus where one statutory provision specifically addresses a matter, and another more general statutory provision also may arguably cover the same matter, the specific statutory provision is held to be applicable and the general provision is deemed inapplicable." *Id.* at 268. Here, the general language in SPP § 3-301(a)(1), which allows employees to refrain from supporting the union, must be overridden by the specific language of the Fair Share Act which clearly gives the union the right to bargain for, and insist upon the imposition of a fair share fee to cover the costs of its representation of employees who are in Unit G. This right also gives the State the authority to deduct that fee from employees who are not members of the union.⁵ After all, under the law, the union must represent all employees in the appropriate bargaining unit, not just those who have become members.

⁵ We also accept the statutory principle that a more recently enacted statutory provision is to be given effect over an older provision. Thus, "While two or more statutes in *pari material* are to be given full effect whenever possible, *Balto. Credit Union v. Thorne*, 214 Md. 200, 309 [] [1957], where the provisions of such statutes are unreconcilable, the later statute governs to the extent of the conflict." *Dept. of Motor Vehicles v. Greyhound Corp.*, 247 Md. 662, 666-67 (1967).

CONCLUSION

While we have given full consideration to the position of the Complainants, understanding that the points raised on their behalf are far from frivolous, they are bucking the tide. Even if we were to find that the charge in this case was timely filed [which it was not and we dismiss for this reason as explained at the beginning of this Decision and Order] we would still find that the case law, from the U.S. Supreme Court to various state courts, is uniformly in support of the position ably argued before us by the State of Maryland in its brief and supporting documents. And that is that the provisions of the Fair Share Act must be read in concert with any statutory right of an employee to refrain from supporting or participating in union activities and that “right to refrain” is limited to the right to refrain from supporting those activities beyond the payment of the fair share fees.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) Respondent State of Maryland's Motion to Dismiss is GRANTED for the reason that the Complaint filed herein is untimely under COMAR 14.32.05.01 A and C because it was not filed within 90 days of knowledge of the occurrence of the claim nor was it filed within 90 days from the later of the alleged violation or following the time that a reasonable person would, upon exercising due diligence, have discovered the occurrence of the alleged violation.

BY ORDER OF THE STATE LABOR RELATIONS BOARD

Glen Burnie, MD

April 25, 2012



Sherry Mason, Member



Laird Patterson, Member



Susie Jablinske, Member



June Marshall, Member



LeRoy Wilkison, Member