STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:	*	
SABRINA ROBINSON	*	
Charging Party	*	
v.	*	PSLRB Case No. SV 2014-15
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 434	* *	
Charged Party	*	

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DECISION AND ORDER DENYING REQUEST FOR RELIEF AND DISMISSING CHARGE

I. INTRODUCTION

On March 28, 2014, Sabrina Robinson ("Charging Party"), a non-certificated employee of the Baltimore County Board of Education ("County Board"), filed a Charge of Violation of Title 6, Subtitle 4 or Subtitle 5, of the Education Article ("Form PSLRB-05"), with the Public School Labor Relations Board ("PSLRB"). Form PSLRB-05 reflects the authority granted to the PSLRB by § 2-205(e)(4)(i) of the Education Article to "decide any controversy or dispute arising under Title 6, Subtitle 4 or Subtitle 5 of this Article."

Charging Party claims that her union, the American Federation of State, County & Municipal Employees, Local 434 ("Local 434"), violated § 6-509(b) of the Education

Article.[1] Section 6-509(b) codifies Local 434's duty of fair representation.[2] Charging Party alleges that Local 434 breached its duty of fair representation in relation to her separation from employment with the County Board.

II. FINDINGS OF FACT

Charging Party was employed by the County Board as a building service worker. On December 7, 2012, she submitted a Resignation Form. Under the "Resignation" column, she checked "Dissatisfied with Position." Under the "Retirement" column, she checked "Regular Service Retirement."

On December 10, 2012, Charging Party discovered that she was not eligible for retirement. Charging Party advised Jack Cimino, Local 434 Shop Steward, that she wished to rescind her resignation and return to work. Mr. Cimino met with management representatives regarding Charging Party's resignation.

By letter to Charging Party dated December 21, 2012, Mary Roney, Personnel Analyst, Baltimore County Public Schools, acknowledged receipt of Charging Party's resignation and advised her to contact the Baltimore County Employees' Retirement System with any questions regarding her contributions.

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[1] The filings in this case are as follows: (1) Form PSLRB-05 (Charge of Violation) filed on March 28, 2014; (2) a supplemental statement of facts filed by Charging Party on March 31, 2014; (3) Local 434's response sent to the Executive Director on April 22, 2014; and (4) Charging Party's reply filed on May 9, 2014. The statutory section Local 434 is alleged to have violated is not indicated on the Form PSLRB-05. In her reply, Charging Party explains that she checked "C.__ Section 6-407(b) or 6-509(b): Duty of Fair Representation" on the first Form she sent to the Executive Director but not on the second Form, which she sent after realizing that part of the first Form had been "cut off."

[2] Section 6-509(b) provides: "Fair representation. -- An employee organization designated as an exclusive representative shall represent all employees in the unit fairly and without discrimination, whether or not the employees are members of the employee organization."

By letter to the County Board dated February 8, 2013, Reginald Downing, Local 434 Chief Shop Steward, appealed Charging Party's separation from employment with the County Board under § 4-205(c) of the Education Article. On March 12, 2013, Dr. Lisa Grillo, Chief Human Resources Officer for Baltimore County Public Schools, met with Charging Party, her son, Shawn Robinson, and Mr. Downing, among others, to discuss Charging Party's "employment status."

In a letter to Charging Party dated April 12, 2013, Dr. Grillo set forth her reasons for accepting Charging Party's resignation as voluntary and for denying her request to rescind her resignation and to be reinstated. Dr. Grillo found no support for Charging Party's allegation that her resignation was improperly accepted or that acceptance of her resignation constituted a disciplinary action.

On November 5, 2013, the Superintendent moved to dismiss the appeal previously filed in February 2013. The motion to dismiss was based on the claim that the appeal was not timely filed under § 4-205(c)(3) of the Education Article.[3] On December 16, 2013, a hearing examiner for the County Board filed a recommendation that the motion to dismiss be granted.

The hearing examiner concluded that Dr. Grillo, as "Superintendent's Designee," decided not to reinstate Charging Party and that this decision was appealable under § 4-205(c). However, the hearing examiner further concluded that the appeal was not timely

[3] Section 4-205(c)(3) provides: "A decision of a county superintendent may be appealed to the county board if taken in writing within 30 days after the decision of the county superintendent. The decision may be further appealed to the State Board if taken in writing within 30 days after the decision of the county board."

filed because there was no appeal taken from Dr. Grillo's letter of April 12, 2013. Alternatively, the hearing examiner reasoned that taking Ms. Roney's letter of December 21, 2012 as the trigger date for the 30-day filing period under § 4-205(c)(3), the appeal filed in February 2013 was untimely.

On December 19, 2013, Ryan Genovese, Local 434 Senior Staff Representative, sent the hearing examiner's recommendation by e-mail to Shawn Robinson, who was communicating with Local 434 on behalf of Charging Party during the relevant period. In the e-mail of December 19, Mr. Genovese explained that the hearing examiner's recommendation was to dismiss Charging Party's appeal as untimely. Mr. Genovese advised that the next step in the appeal process was to request oral argument before the County Board. Mr. Genovese further advised, "If your family is considering appealing on that issue, please let me know so we can discuss your options. Any appeal would have to be postmarked, certified, December 30."

In an e-mail to Mr. Genovese apparently dated January 11, 2014,[4] Mr. Robinson confirmed receipt on December 19, 2013 of Mr. Genovese's e-mail and stated that he understood that the request for oral argument was to have been postmarked by December 30, 2013 but that he wanted confirmation on this point. On January 13, 2014, Mr. Genovese sent an e-mail to Mr. Robinson, informing him that "the deadline for filing anything further in this matter was December 30th."

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[4] Local 434 indicates in its response that this e-mail was part of an e-mail string of "January 11-14, 2014" attached to its response. The attached e-mail from Mr. Robinson in which he confirmed receipt of Mr. Genovese's e-mail is not dated. However, the date of January 11, 2014 as the date on which Mr. Robinson first responded to Mr. Genovese's e-mail is consistent with Mr. Robinson's statement in Charging Party's supplement that his aunt's passing on December 22, 2013 "distracted me away from my mother's case for a few weeks."

In his e-mail of January 14, 2014, responding to Mr. Genovese's January 13 e-mail, Mr. Robinson stated: "So given the fact that I received your e-mail on December 19, 2013 then from that time no phone call from you telling me to check my email along with counting the holidays my mother had this little bit of time to respond back. This is the same set up that she had to file an initial appeal on after December 7, 2012." Mr. Robinson added, "We place this entire fault on the Union...This doesn't have anything to do with Baltimore County at all how can it when they know the Union won't do a thing. With Yahuwah's help this is not over we only just begun."[5]

Communication between Local 434 and Charging Party ceased as of January 22, 2014. In its response to the instant Charge, Local 434 explains, "After responding to a subsequent email of January 18, 2014,...the decision was made [by Local 434] to cease responding to emails as this was no longer a representation and had possibly become an adversarial situation."

III. POSITIONS OF THE PARTIES

Charging Party contends that Local 434 breached its duty of fair representation by failing to file a grievance under the contractual grievance procedures in the collective bargaining agreement between the County Board and Local 434 ("Master Agreement"). Charging Party contends further that Local 434's failure to file a grievance caused her appeal under § 4-205(c) to be dismissed as untimely. Charging Party also appears to allege, rather ambiguously, that Local 434 breached its duty of fair representation by failing to timely file an appeal under § 4-205(c), regardless of its failure to file a

[5] The ellipsis is contained in the original January 14, 2014 e-mail from Mr. Robinson to Mr. Genovese.

grievance. With even less clarity, Charging Party appears to allege that Local 434 breached its duty of fair representation by not requesting oral argument before the County Board or informing her that it was not going to do so.[6]

Local 434 moves to dismiss on grounds that Charging Party failed to timely file her Charge. According to Local 434, Charging Party had knowledge of any alleged statutory violation no later than January 22, 2014. As Charging Party did not file her Charge until March 28, 2014, she failed to file it within the 60-day filing period established under the Code of Maryland Regulations (COMAR) 14.34.02.01B.

Local 434 also moves to dismiss on grounds that the Charge does not contain information that would enable it to properly respond. In the alternative, Local 434 argues that even if the facts as alleged are sufficient to enable it to properly respond, the facts are not sufficient to support a claim that it violated any statutory obligation. With respect to the allegation that it failed to file a grievance, Local 434 cites to that part of the Master Agreement, Article V, which provides: "As a result of the decision by the Maryland State Board (Livers v. Board of Education of Charles County), cases pertaining to discipline and discharge shall no longer be subject to arbitration. Administrative review pursuant to Section 4-205(c)(4) [now (c) (3)] of the Education Article will govern appeals." Additionally, Local 434 recounts the actions it took in representing Charging Party in her appeal under § 4-205(c) and denies that it violated any statutory obligation in this regard.

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[6] Form PSLRB-05, section V, requires charging parties to "[p]rovide a clear and concise statement of facts constituting the alleged statutory violation(s), including the names and positions of individuals involved and the dates and places of the occurrences giving rise to the charge." We can resolve the ambiguity on these points in favor of Charging Party, without relaxing the requirement in PSLRB-05, section V, because doing so does not affect the outcome of our analysis with respect to the timeliness of her Charge.

IV. ANALYSIS

As a threshold matter, we consider whether the Charge in this case was timely filed.[7] The Board's Regulations provide that a Charge "must be filed with the Executive Director of the PSLRB within 60 days after the charging party knew, or reasonably should have known, of the statutory violation alleged." COMAR 14.34.02.01B. In ruling on Local 434's motion to dismiss on timeliness grounds, we "assum[e] the truth of all well-pleaded facts in the complaint and tak[e] all inferences from those facts in the light most favorable" to Charging Party. *Doe v. Archdiocese of Washington*, 114 Md. App. 169, 174 (1997).

The Charge is untimely. This conclusion holds whether the Charge is based on Local 434's failure to file a grievance, apart from any effect on the § 4-205(c) appeal, or whether it is based on Local 434's failure to file a grievance and its alleged effect on the § 4-205(c) appeal, or whether it is based on Local 434's failure to timely file an appeal under § 4-205(c), regardless of its failure to file a grievance.

As acknowledged by Charging Party, Mr. Genovese informed her by e-mail on December 19, 2013 that her appeal under § 4-205(c) was dismissed as untimely. Therefore, by no later than December 19, 2013, Charging Party knew of Local 434's failure to file a grievance and/or its failure to timely file an appeal under § 4-205(c). Inasmuch as Charging Party also alleges that Local 434 breached its duty of fair representation by not requesting oral argument before the County Board or informing her

[7] For this purpose only, we assume that the contractual grievance procedures applied.

that it was not going to do so, she was put on notice of that alleged breach by Mr. Genovese's e-mail of January 13, 2014 confirming that "the deadline for filing anything further in this matter was December 30th."

With Mr. Genovese's e-mails of December 19, 2013 and January 13, 2014, Charging Party knew of Local 434's alleged breaches and knew that Local 434 was not going to take further action in her § 4-205(c) appeal, without, at the very least, Charging Party requesting that it do so. In responding to Mr. Genovese's January 13 e-mail on January 14, Charging Party gave every indication that rather than requesting or assuming further representation by Local 434, she was giving up on it: "We place this entire fault on the Union…This doesn't have anything to do with Baltimore County at all how can it when they know the Union won't do a thing. With Yahuwah's help this is not over we only just begun." On January 14, 2014, with Local 434 not offering "rays of hope" or representing that it was still pursuing Charging Party's appeal in an attempt to remedy its alleged breaches, and with Charging Party having indicated that it was giving up on Local 434's representation, the 60-day period for filing the instant Charge began to run.[8] The instant Charge filed on March 28, 2014 is, therefore, untimely.

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[8] *See Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 305 (3d Cir. 2004) ("If, however, a union purports to continue to represent an employee in pursuing relief, the employee's duty of fair representation claim against the union will not accrue so long as the union proffers 'rays of hope' that the union can 'remedy the cause of the employee's dissatisfaction.'") (citation omitted); *see also Mincey v. United States Postal Serv.*, 879 F. Supp. 567, 572 (D.S.C. 1995) ("Courts addressing similar factual scenarios have concluded that the statute of limitations begins to run on the date when the aggrieved employee first obtains actual or imputed knowledge of a decision by union officials not to act on the employee's behalf.").

In her reply to Local 434's response, Charging Party argues that under the doctrine of equitable tolling her Charge is timely. Charging Party quotes the following from *Murphy v. Merzbacher*, 346 Md. 525 (1997), in support of her equitable tolling argument:

> Thus, when stealth, subterfuge, or other difficulties of detection leave a plaintiff "blamelessly ignorant" of the facts and circumstances legally entitling him or her to relief, the statute does not begin to run against the plaintiff, unless he or she knows, or through the exercise of reasonable diligence should know, of the wrong.

Id. at 532. In the same regard, Charging Party cites *Gardner v. International Tel. Employees Local No. 9*, 850 F.2d 518, 523 (9th Cir.1988) (fair representation claim does not accrue if the employee "was totally and reasonably ignorant" of his rights), and *Smith v. Local 7898, United Steelworkers of America*, 834 F.2d 93 (4th Cir. 1987) (statute of limitations may be equitably tolled based on union's withholding of information).[9]

There is no evidence of "stealth, subterfuge, or other difficulties of detection" or that Local 434 withheld information so as to leave Charging Party "blamelessly ignorant" or "totally and reasonably ignorant" of the alleged statutory violation. Charging Party asserts, "there were repeated assurances from the union that the 4[-]205c appeal is in motion and their assistance will still be fourth and coming" and that she "received repeated assurances from AFSCME Local 434 to rely on the promises and reassurances provided to her by the highest elected official of the union, Mr. Genovese."[10] This general assertion of "repeated assurances" does not suffice.

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[9] Charging Party also cites *Stanley v. Am. Fed'n of State & Mun. Emples. Local No. 553*, 165 Md. App. 1 (2005), for a definition of the duty of fair representation. *Stanley* is not a case involving a statute of limitations question.

[10] Charging Party's reply filed on May 9, 2014, at p. 4.

There is no evidence that Local 434 communicated to Charging Party after January 14, 2014 that it was going to continue to represent her in her appeal. Nor is there any evidence that Charging Party, after having by all appearances given up on representation by Local 434 and told it that she was doing so, subsequently requested that Local 434 continue to represent her in her appeal. Nor is there any evidence that such a request was followed by silence on the part of Local 434 or some other ambiguous response that might have given Charging Party reason to believe that Local 434 was going to pursue her appeal further and perhaps succeed in undoing the harm from its alleged breaches of the duty of fair representation. In other words, there is no evidence that subsequent to January 14, 2014, Local 434 did or said anything that would have left her "blamelessly ignorant" of the alleged statutory violation.[11] Her Charge filed on March 28, 2014 is untimely.

V. CONCLUSIONS OF LAW

For the reasons stated herein, we conclude that the Charge filed in the instant case is untimely, and therefore DISMISS the Charge.

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[11] In its response to the Charge, Local 434 indicates that following Mr. Robinson's e-mail of January 14, 2014, it responded to a "subsequent e-mail of January 18, 2014." Neither party has provided the content of this subsequent exchange. While the party raising a statute of limitations defense has the "burden of proving that the cause of action accrued prior to the statutory time limit for filing the suit," when the opposing party "concedes that the statutory period has run but asserts that some equitable reason or exception exists which prevents the claim from being barred," it is the opposing party's burden of proving the exception. *Newell v. Richards*, 323 Md. 717, 725-726 (1991); *see also Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 241 (1984) ("the burden is on Plaintiffs to prove that they did not discover the alleged wrong more than three years before they filed suit and that this lack of discovery was not due to Plaintiffs' unreasonable failure to exercise ordinary diligence"). Charging Party has not carried this burden.

ORDER

IT IS HEREBY ORDERED THAT THE CHARGE IN THE INSTANT MATTER, PSLRB Case No. SV 2014-15, IS DISMISSED.

BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD

Seymour Strongin, Chairman

Ronald S. Boozer, Member

Robert H. Chanin, Member

Charles I. Ecker, Member

Donald W. Harmon, Ed.D., Member

Annapolis, MD
June 26, 2014

APPEAL RIGHTS

Any party aggrieved by this action of the PSLRB may seek judicial review in accordance with Title 10, Subtitle 2 of the State Government Article, Annotated Code of Maryland, Sec. 10-222 (Administrative Procedure Act – Contested Cases), and Maryland Rules 7-201 *et seq*. (Judicial Review of Administrative Agency Decisions).