STATE OF MARYLAND

PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:	*	
SYLVIA WALKER, et al.,	*	
Charging Parties,	*	
v.	*	PSLRB Case No. SV 2012-10
THE BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS, LOCAL 340, AFL-CIO ("BTU"),	*	
and	*	
MARIETTA ENGLISH, BTU President,	*	
and	*	
CHANDRA CARRIERE, BTU Field Representative,	*	
Charged Parties.	*	

* * * * * * * * * * * *

DECISION AND ORDER DENYING REQUEST
FOR RELIEF AND GRANTING MOTIONS TO DISMISS

I. INTRODUCTION

On June 12, 2012, Sylvia Walker ("Walker"), on behalf of herself and 14 other paraprofessionals employed by the Baltimore City Public Schools ("BCPS") at the Sharp Leaden-Hall Elementary School #314, filed a Form PSLRB-05 – "Charge of Violation of Title 6, Subtitle 4 or Subtitle 5 of the Education Article" with the Public School Labor Relations Board ("PSLRB"). Form PSLRB-05 reflects the authority granted to the

PSLRB by Section 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."

In her charge, Walker alleges that her union, the BTU and its president Marietta English ("English") and the union's field representative, Chandra Carriere ("Carriere") violated "Section 6-407(b) or 6-509(b): Duty of Fair Representation."[1] Simply put, Walker, et al., contend that BTU violated its duty of fair representation by failing to file a formal grievance on behalf of the paraprofessionals when they were notified, on July 29, 2011, that they would no longer be paid for intersessions when they do not work.

The position of BTU is as follows:

1) The PSLRB lacks jurisdiction over Marietta English and Chandra Carriere for the reason that Title 6, Subtitle 5, gives the PSLRB jurisdiction over "employee organizations," "public school employees," and "public school employers," none of which describe English and Carriere. BTU, in support of its position to dismiss as to English and Carriere, cites Education Association of St. Mary's County and Dr. Michael Martirano, PSLRB Case No. SV-12-05 (March 30, 2012).
2) The charge fails to state a claim upon which relief can be granted for the reason that the charge is untimely filed.
3) BTU committed no breach of the Duty of Fair Representation.

II. ANALYSIS

[1] Sections 6-407(b) and 6-509(b) read as follows: (1) 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.

A) THE CHARGE AGAINST ENGLISH and CARRIERE

In the case of Education Association of St. Mary's County and Dr. Michael Martirano, PSLRB Case No. SV-12-05 (March 30, 2012) this Board ruled that a county superintendent of public schools could not be named as a charged party for actions that he had taken in his capacity as a representative of a public school employer. The same reasoning compels dismissal here as to BTU's president and field representative, acting in their capacities as representatives of BTU.

The PSLRB has jurisdiction over "employee organizations," "public school employees," "public school employers" (Education Article, Sec. 6-510(d) and (g)). Neither English nor Carriere fit into any of these statutory categories, and, as a result, the PSLRB lacks jurisdiction to decide any controversy or dispute regarding English and Carriere.

For these reasons, BTU's Motion to Dismiss as to English and Carriere is GRANTED.

B. THE TIMELINESS ISSUE

Form PSLRB-05, Charge of Violation of Title 6, Subtitle 4 or Subtitle 5, states: "In order to be timely, a charge must be filed with the Executive Director of the PSLRB within sixty (60) days after the charging party knew or reasonably should have known, of the statutory violation alleged." COMAR 14.34.01.01B.

BTU takes the position that Walker's charge of statutory violation is untimely because it should have been filed within 60 days of August 8, 2011, the date on which Walker was made aware that the BTU did not file a grievance on her behalf. Thus,

according to BTU, Walker had until October 7, 2011 to file her charge, but, she waited until June 12, 2012, 218 days late. Additionally, BTU alleges that a second event occurred on October 25, 2011, when Walker and others signed a paper stating that they wished "to file a grievance concerning a past practice that has been in place for the last 15 years or more." According to BTU, Walker had until December 27, 2011 to file a charge but failed to do so until June 12, 2012, 168 days late.

For the reasons stated above, BTU contends that the charge herein must be dismissed on timeliness grounds.

We reject BTU's request to dismiss on the basis of untimeliness. Rather, we find, as noted by BTU, that as recently as May 9, 2012, May 15, 2012, and June 4, 2012, BTU conducted "formal and informal meetings" with several school system top executives, in an attempt "to bargain for additional pay for paraprofessionals to make up for the loss of intersession pay." The meetings, however, failed to result in an agreement for additional pay for the paraprofessionals in compensation for the loss of intersession pay.

Thus, Walker, having been informed of BTU's failure to negotiate an agreement for the loss of intersession pay, and realizing that this was the end of the line as to her complaint, filed her charge with the PSLRB on June 12, 2012, which was within the 60 day open window, only eight days after BTU's final meeting on the matter with school officials on June 4, 2012.

As a result, we find that Walker's charge of statutory violation was timely, and BTU's Motion to Dismiss on the basis of untimeliness is DENIED.

C. THE DUTY OF FAIR REPRESENTATION

The Supreme Court's early definitions of the duty of fair representation imposed on the bargaining agent the responsibility of representing the interests of all employees "fairly, impartially and in good faith" (Steel v. Louisville & Nashville R.R., 323 U.S. 192 (1944). The NLRB's first definition in Miranda Fuel Co., 140 NLRB 181 (1962)) assured employees of the right "to be free from unfair or invidious treatment by their bargaining agent." The Supreme Court's Vaca v. Sipes decision, (386 U.S. 1710 (1967) posited a violation when a union's "conduct toward a member is arbitrary, discriminatory, or in bad faith," but it also provided a wide area of union discretion, subject to the requirement of good faith. Thus, said the Court, "though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration." Later cases specified a wide range of reasonableness which must be allowed a statutory bargaining representative in serving the unit it represents. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

The inquiry in every fair representation case must be whether the union's acts or omissions show "hostile discrimination," based on "irrelevant and invidious" considerations, or whether they show good faith within a "wide range of reasonableness" granted bargaining agents. The bargaining agent's latitude in contract administration was specifically addressed in Humphrey v. Moore, 375 U.S. 355 (1964), where the Supreme Court affirmed that a union does not breach its duty of fair representation so long as it acts "honestly, in good faith, and without hostility or arbitrary discrimination."

The United States Court of Appeals for the 4th Circuit, which includes Maryland, has reiterated the principles cited above. In the case of Buchanan v. N.L.R.B., 597 F.2d 388 (1979), the Court stated: "The duty to avoid arbitrary conduct does not require a union to take every employee grievance to arbitration, and it has considerable discretion in sifting out grievances which it regards as lacking merit."

While most of the case law on the duty of fair representation is found on the federal level, the Maryland Court of Special Appeals held that the duty of fair representation includes the following requirements. "(1) to serve the interests of all members without hostility or discrimination toward any, (2) to exercise its discretion with complete good faith and honesty, and (3) to avoid arbitrary conduct." Stanley v. American Federation of State and Mun. Employees Local No. 553, 165 Md. App. 1, 15, 884 A.2d 724, (2005) (citing: Vaca v. Sipes, 386 U.S. at 177, 87 S. Ct. 903), *accord*, Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44, 119 S. Ct. 292 (1998). And most importantly and bearing on the current case before the PSLRB, the *Stanley* court made clear that a union is not necessarily in breach of the duty of fair representation if it opts to not process a particular grievance. The *Stanley* court stated:

> "'[A] union is accorded considerable discretion in the handling and settling of grievances.' "Neal, 48 Md. App. At 358, 427 A.2d 1033. A union does not necessarily breach its duty when it declines to take a member's grievance to arbitration. *See*, Vaca, 386 U.S. at 191-92, 87 S. Ct. 903; *accord* Meola v. Bethlehem Steel Co., 246 Md. 226, 235, 228 A.2d 254 (1967). Indeed, "an employee has no absolute right to insist that his grievance be pressed through any particular state of the contractual grievance procedure. A union may screen

grievances and press only those that it concludes will justify the expense and time involved in terms of benefitting the membership at large." (Emphasis added) Neal, 48 Md. App. At 358-59, 427 A.2d 1033.

Additionally, the law is clear that a union need not process any employee's grievance if the chances for success are slight. See Williams v. Sea-Land Corp., 844 F.2d 17 (1st Cir. 1988). "The union must provide 'some minimal investigation of employee grievances,' but the thoroughness of this investigation depends on the particular case, and 'only an egregious disregard for union members' rights constitutes a breach of the union's duty.'" Garcia v. Zenith Elec. Corp., 58 F.3d 1171, 1176 (7th Cir. 1995).

A review of the above cases in conjunction with the evidence submitted by the parties convinces us that the BTU did not violate its Title 6, Section 6-509(b) of the Education Article's duty of fair representation.

According to the uncontradicted evidence, BTU vigorously represented the charging parties at numerous meetings with BCPS officials. According to BTU, meetings were held on September 6, 2011, October 4, 2011, November 1, 2011, November 29, 2011, January 10, 26, and 31, 2012, February 21, 2012, April 11, 17, and 24 of 2012, May 9 and 15 of 2012, and June 4, 2012, all for the purpose of negotiating an agreement with BCPS for additional pay for the paraprofessionals to compensate them for the loss of intersession pay.

Although these efforts were unsuccessful, we find that BTU acting in good faith and, based on sound legal reasoning, concluded that it would not prevail in a grievance

proceeding. BTU's conclusion that BCPS' decision to no longer pay non-exempt paraprofessionals for time they did not work was in accordance with the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C.A., Ch. 8, as amended. The fact that BCPS may have made payments to the paraprofessionals does not constitute a past practice binding BCPS to continue to make such payments. According to the record, the paraprofessionals are hourly employees who are non-exempt under the FLSA. Under the FLSA, non-exempt employees are not required to be paid for hours that they do not work. Thus, compensation paid to the paraprofessionals in the past for hours they did not work was arguably overpayment. BCPS did not seek repayment. Rather, it determined that the practice would be eliminated for the future.

We conclude that BTU analyzed the evidence provided by BCPS in conjunction with the position of Walker, et al., and concluded that if it filed a grievance it would not prevail. Such conduct is clearly permissible and is in line with the case law cited and discussed above. Therefore, we find that BTU did not violate its duty of fair representation by refusing to file a grievance on behalf of Walker and we DISMISS the charge against BTU.

ORDER

(1) BTU's Motion to Dismiss as to English and Carriere is GRANTED.

(2) BTU'S Motion to Dismiss for untimeliness is DENIED.

(3) BTU's request that Sylvia Walker, et al.'s charge of breach of the duty of fair representation be dismissed is GRANTED.

(4) Sylvia Walker, et al.'s request for relief is DENIED.

BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD

Seymour Strongin, Chairman

Robert H. Chanin, Member

Charles I. Ecker, Member

Donald P. Kopp, Member

Stuart O. Simms, Member

Glen Burnie, MD
August 6, 2012

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 CIR CT Rule 7-201 *et seq.* (Judicial Review of Administrative Agency Decisions).