STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

In the Matter of:

JOSEPHAT M. MUA	*	
	*	PSLRB Case No. SV 2013-08
Charging Party,	*	
	*	
v.	*	
	*	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	*	
	*	
Charged Parties	*	
	*	

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DISSENTING OPINION

I do not agree with the conclusion reached by the majority that the charge filed by Mr. Josephat M. Mua on November 27, 2012, was not filed in a timely fashion. Accepting the majority premise that the purported facts and reasonable inferences are to be "considered in the light most favorable to the Charging Party," I do not believe that there is sufficient reason to argue that charging party should have known that the union was not going to honor its promises earlier than he reached that conclusion.

At issue is when the charging party "knew or reasonably should have known" of the basis for claiming that the union did not and would not represent him fairly as required by Maryland Law in the **Education Article, Section 6-509(b) – Fair Representation**. The majority opinion argues that the charging party should have known of the statutory violation as early as May 2011. Yet, at the beginning of May 2011 the union actually assigned an attorney to represent charging party. Unfortunately, that attorney withdrew due to family illness. There is no indication that the union advised charging party at that time that they would not appoint an

attorney to represent him. Charging party had a written agreement with the union stating that the union would pay the cost of a private attorney hired by charging party for such representation. Charging party states that sometime during the summer of 2011 the president of the local union reassured him that he would be reimbursed for attorneys fees. This reassurance came despite a letter to charging party dated June 16, 2011, from the "Acting Associate Director" of the union claiming that "our responsibility to represent you has been removed as well as the cost associated with your case."

Charging party asserts that he was assured by the union President repeatedly that the union would pay the cost of a private attorney since they were unable to directly provide the needed legal representation. These assurances allegedly were given on February 15, 2010; on December 16, 2010 (in the Legal Reimbursement Agreement); in May 2011; in June 2011; On October 26, 2011; on January 25, 2012; and on August 21, 2012. Charging party asserts that he attempted to follow up on these commitments repeatedly, including in August, September, and October of 2012. He claims he finally realized on or about October 1, 2012, after failing to receive responses to letters delivered and sent to the International Union, the local union, and the local union President, that the union was not going to make good on its promises. These letters were allegedly sent/delivered on August 30, 2012, and September 24, 2012. Despite having reached his realization, charging party sent additional letters on November 1, 2012 (to the International Union), November 4, 2012 (to the local Executive Director), and November 17, 2012 (to the AFSCME Area Field Services Director. After again receiving no response he filed the charges on November 27, 2012. To my knowledge, the union representatives have not disputed any of these alleged reassurances or explained how charging party should have known that they would not honor the commitments.

The union argues that the Executive Director did not have the authority to enter into an agreement on behalf of the union, in December 2010, committing the union to pay the cost of a private attorney to represent charging party in the relevant issues. (It should be noted that charging party claims that on February 15, 2010, the Executive director told him to get a private lawyer.) This argument, made in the context of a claim that the charge was not filed in a timely fashion, would imply that somehow charging party should have known that the Executive Director had no such authority. There is no evidence presented to this effect. In fact, the letter sent to charging party by the "Acting Associate Director" on June 16, 2011, does not even make such a claim. That letter says the union will not pay because charging party obtained "legal services not affiliated with ACE-AFSCME Local 2250…" How was charging party to determine that the Acting Associate Director had authority but the Executive Director did not? (I would also note that the argument made by the Acting Associate Director appears to be illogical since charging party would not have had to pay an attorney affiliated with the union in the first place.) In any event, these arguments made in the context of a claim that the charge was not timely filed would require evidence that charging party somehow knew who the union considered to have authority and who didn't. I have seen no such evidence. If these arguments are not made in the context of the argument of failure to file in a timely fashion then they are solely related to the merits of the charge and this Board has not considered the merits of the charge.

The majority argues that the union's "ongoing pattern of noncompliance *after* the June 16 letter – should have put him on notice that Local 2250 did not intend to honor its promises." As stated in the previous paragraph, I do not find the June 16 letter to be compelling evidence that charging party was in any way put on notice of a lack of intent on the part of the union to comply honor its promises. Subsequent to June 16, 2011, there were repeated assurances from the union

president that representation and the cost of private representation would still be provided. Rather than a pattern of noncompliance, I see a pattern of partial compliance and repeated reassurances. The majority opinion cites a series of dates and events when "it certainly should have been" clear that the union was not going to honor its promises. It certainly seems apparent now, in retrospect, that the union did not honor the promises made by the Executive Director and President, but it is not at all clear to me whether or not the promises were made in good faith, were fraudulent from the beginning, or the charging party was just dealt with in a negligent fashion. There is no evidence to indicate when the union actually made the decision not to provide representation or to pay the cost of representation. There is clear evidence that they intended to do so at several points along the way.

The ultimate question is when charging party "should have known through due diligence, that his claim had accrued." There is no specific statement from the union at any of the times indicated in the majority list of dates when charging party should have known that identifies why charging party should have known at that particular time. There is no standard identified for reaching such a conclusion. I am not persuaded that "Local 2250's manifestation of its intent not to comply with the Agreement was clear, consistent and continuous over a considerable period of time," as argued in the majority opinion. To the contrary, charging party received repeated reassurances from the President, an official in whom he should have been able to rely. Ultimately, I believe it was reasonable for charging party to rely on the promises and reassurances provided to him by the highest elected official of the union. Thus, I am not satisfied that another reasonable person, without benefit of hindsight, should have known sooner than charging party did that the union would not honor its promises. That being the case, I believe the charges were timely filed.

DISSENTING OPINION OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD

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Donald P. Kopp, Member

May 29, 2013

Glen Burnie, MD