

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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UNI-UNITED FACULTY,	)		
Complainant,	)		
	)		
and	)	CASE No. 8246	
	)		
STATE OF IOWA (BOARD OF REGENTS,	)		
UNIVERSITY OF NORTHERN IOWA),	)		
Respondent.	)		

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PROPOSED DECISION AND ORDER

Complainant UNI-United Faculty (United Faculty) filed this prohibited practice complaint with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 20.11 and PERB rule 621–3.1(20). United Faculty’s complaint, as subsequently amended, alleged that Respondent State of Iowa (Board of Regents, University of Northern Iowa) committed prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(a), (e), (f) and (g). The complaint alleged these prohibited practices occurred when, in December, 2009 and January, 2010, the State failed to fully respond to United Faculty’s request for information on a matter relevant to bargaining, bargained in bad faith with United Faculty by making claims concerning its financial straits while withholding known information which conflicted with those claims, and threatened layoffs and increased teaching loads should United Faculty not agree to certain proposed wage and benefit reductions.

The ALJ granted the State’s motion to dismiss the claim that the State had committed a prohibited practice when it threatened layoffs and increased

teaching loads, but denied the motion as to the complaint's remaining claims. Pursuant to notice, an evidentiary hearing on those claims was held before the ALJ in Des Moines, Iowa, on December 19, 2011. United Faculty was represented by attorney Nate Willems and the State by attorneys Thomas Evans and Aimee Clayton. Both parties submitted post-hearing briefs and reply briefs, the last of which was filed February 20, 2012.

Based upon the entirety of the record, and having considered the parties' arguments, the ALJ has concluded that United Faculty's complaint was not filed within the mandatory and jurisdictional limitation period and that it must consequently be dismissed.

#### FINDINGS OF FACT

The State of Iowa is a public employer within the meaning of Iowa Code section 20.3(11),<sup>1</sup> and United Faculty is an employee organization within the meaning of section 20.3(4). United Faculty has been certified as the exclusive collective bargaining representative for a unit of employees which includes full-time and regular part-time faculty at the University of Northern Iowa (UNI). At all relevant times, the State and United Faculty were parties to a collective bargaining agreement effective from July 1, 2009 through June 30, 2011.

In early 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (ARRA). A portion of the Act established the State Fiscal Stabilization Fund (SFSF) program which would, upon a state's successful application, provide federal funding to support and advance both

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<sup>1</sup> This and all subsequent statutory citations are to the 2009 Iowa Code.

elementary and secondary education within the state as well as its public institutions of higher education (IHEs).

The SFSF program included “maintenance of effort” (MOE) provisions which required that, in the absence of a waiver of the requirement issued by the U.S. Department of Education (USDOE), the state receiving SFSF program funding maintain state support for elementary and secondary education, and for public IHEs, at least at the level of such support provided by the state during fiscal year (FY) 2006. Board of Regents Policy and Operations Officer Brad Berg read the legislation in early 2009 and became aware of its MOE requirements and of the potential for a state to obtain a waiver of them.

The Iowa General Assembly had appropriated over \$504 million for FY 2010 support of public IHEs, thus enabling the State to (apparently) meet the MOE requirement, since in FY 2006 such support had been less than \$485 million. On May 1, 2009, the USDOE provided states with written guidance from the Office of Management and Budget on the SFSF program’s MOE requirements. Shortly thereafter, Board of Regents Executive Director Bob Donley became aware that MOE requirements existed.

The State determined that the Iowa Department of Education (IDOE) would be the applicant for and prime recipient of SFSF funding. The Board of Regents was considered a sub-recipient and, as such, would not be consulted in the preparation of the ARRA application and would need to apply to IDOE for SFSF funds. Accordingly, the State, through IDOE, applied for SFSF program funds in May, 2009, providing in its application a number of assurances

concerning its receipt and use of the funds. Among these was the State's assurance that in FY 2010 it would maintain state support for public IHEs at least at the level of such support in FY 2006.

In September, 2009, the USDOE issued an alert memorandum entitled "Potential Consequences of the Maintenance of Effort Requirements under the American Recovery and Reinvestment Act State Fiscal Stabilization Fund." The memorandum included discussion of the MOE requirements as well as the criteria under which states could request they be waived – that the percentage of the state's total revenues expended on education must be greater than or equal to the percentage expended in the fiscal year preceding the year for which the waiver is being requested. The alert memo, from USDOE's Office of Inspector General to its Office of Elementary and Secondary Education, expressed concern that states would reduce higher levels of support for public education back to FY 2006 levels, thus meeting the MOE requirements, then replace those reductions with SFSF money, effectively freeing up state resources previously devoted to education for non-education budget items. Patrice Sayre, the Regents' Chief Business Officer, saw the alert memo and understood that MOE was a requirement, but also saw that if a state receiving SFSF funds could not meet the requirements for elementary/secondary education or IHEs, or both, it could request a MOE waiver if it met the proportionality criteria.

On October 8, 2009, Governor Culver issued an executive order providing for a 10 percent budget reduction for all state departments and establishments

for FY 2010. Sayre realized that the 10 percent reduction would take the State's support for public IHEs under the Board of Regents' control below the FY 2006 spending level and thus out of compliance with the SFSF program's MOE requirements. Sayre expressed this observation to Berg and, among others, a representative of the IDOE, who indicated that the MOE requirement was not the Board of Regents' concern and that the State, through IDOE, would apply for a MOE waiver.

In the wake of the 10 percent cut, the Board of Regents directed that the heads of its institutions prepare plans for managing their respective budget reductions. UNI's share of the 10 percent cut was approximately \$8.8 million. As part of its plan, UNI proposed pursuing varying strategies to reduce expenditures, including temporary salary reductions or temporary layoffs within all employee groups, including the bargaining unit represented by United Faculty. In late October, 2009, United Faculty agreed to discuss the possible re-opening of its collective bargaining agreement with the State for the temporary adjustment of economic items.

In mid-November the parties began their discussions. The State initially proposed mandatory furlough days. United Faculty initially proposed a two percent reduction in compensation in exchange for the promise of no layoffs and maintenance of the then-current workloads for the remainder of the academic year. It also requested that UNI utilize SFSF funds to account for any shortfall in state appropriations allocated to economic affairs.

United Faculty was understandably interested in understanding UNI's financial situation, including its receipt and use of ARRA's SFSF funding. Anticipating that United Faculty would be requesting information during the negotiations, the parties agreed that United Faculty's president, Hans Isakson, would be its designated point of contact and that Virginia Arthur, UNI's Associate Provost for Faculty Affairs, would be UNI's.

Throughout their negotiations, the parties discussed ARRA's SFSF funds as a component of University revenue. United Faculty made numerous information requests during the course of the parties' discussions, including ones seeking permission concerning how UNI's allocation of SFSF funding was being spent or had been committed. In one such request, conveyed to Arthur on December 7, 2009, Isakson wrote:

Ginny,  
The UF Meet & Confer Team has a keen interest in understanding the use of ARRA funds better. To that end, we make the following requests for additional information:

1. A copy of any state or federal documents that specify the criteria for Iowa government agencies, especially the [Board of Regents] and UNI, receipt and expenditure of stimulus funds.
2. A copy of any reports produced by UNI for any state or federal agency that specifies how the stimulus funds have been spent, and/or any future plans for those expenditures. If reports have not yet been produced we would like to know the reporting requirements and deadlines.

Arthur responded the following day with information which included UNI's total ARRA funding, listings of FY 2010 projects for which UNI had approved the use of a specified amount of SFSF funds, projects and their

anticipated amounts of funding which were then “on hold,” and the amount of uncommitted SFSF funds. Also included was a memorandum from UNI president Ben Allen to his cabinet dated October 8, 2009, which provided a summary of the guidelines used to approve projects for SFSF funding. The memorandum included excerpts from an Iowa Department of Management and USDOE document concerning the appropriate uses of SFSF funds, reporting requirements, prohibitions on the use of the funds and Governor Culver’s stated priorities for their use. A link to [www.recovery.iowa.gov](http://www.recovery.iowa.gov), a state maintained website where ARRA-related information was available, was also included, as was a July 9, 2009 communication from Sayre entitled “Board of Regents Guidelines for ARRA funds used for Infrastructure.” Sayre’s piece included a link to a federally maintained website where the text of the ARRA could be accessed, repeated the link to the recovery.iowa site where state ARRA guidelines could be found, and identified a third website where additional ARRA-related information appeared. The existence of the MOE requirements, the possibility of obtaining a MOE waiver, and the IDOE’s May, 2009 application for ARRA funding (which included its MOE assurances) were not, however, specifically referenced. The memorandum also included the notation that on October 5, 2009 (prior to the announcement of the 10 percent budget reduction) Sayre had represented that “UNI’s focus is on modernizing software, ERIP Program (jobs), and adjunct faculty (jobs). We are in compliance with the federal and state requirements.”

Despite the absence of specifics concerning the criteria for the State's, Regents' and UNI's receipt of ARRA funds (beyond what was available at the cited websites), Isakson did not scrutinize the linked text of the ARRA and only briefly visited the recovery.iowa website, where additional links to ARRA-related documents appeared, and which specifically referenced the SFSF program and its MOE requirements. Isakson and the rest of United Faculty's bargaining team were satisfied with the response Arthur had provided and seemingly assumed the continuing accuracy of the statement attributed to Sayre that UNI was in compliance with state and federal requirements, even though that statement had been made more than two months earlier, prior to the 10 percent budget reduction, and was made in the context of a discussion on the use of SFSF funds, rather than their receipt.

On December 14, 2009, the parties reached agreement, contingent upon the approval of United Faculty's membership, upon the terms of a memorandum of understanding which would effectively modify certain provisions of their collective agreement in response to the budget cut. In consideration of the State's agreement that there would be no layoffs of bargaining unit employees during the remainder of FY 2010 and that it would maintain the status quo on faculty workloads through the spring semester, United Faculty agreed to a temporary wage reduction of \$520,000, plus benefits, to be allocated among faculty using a progressive schedule to be determined by United Faculty.

The following day, December 15, 2009, the IDOE prepared and subsequently submitted the State's request for USDOE's waiver of the FY 2010 MOE requirement as it applied to public IHEs. Although at least Sayre had previously anticipated and been advised that such a request would be made, there is no evidence that anyone within the Board of Regents' management hierarchy was aware of the waiver request at that time.

On January 13, 2010, the memorandum of understanding reached between the Regents' representatives and United Faculty was ratified by United Faculty's membership.

Later in January, Isakson saw a January 22, 2010 article from the Des Moines Register, which discussed the State's possible loss of SFSF funds due to the 2009 budget cut's effect of reducing education spending below the FY 2006 level (*i.e.*, the MOE requirement), Governor Culver's having met with federal Education Secretary Arne Duncan to discuss the possible waiver of the MOE and Culver's expressed confidence that a waiver of the requirement would be granted. Isakson began to investigate the MOE requirements.

On January 27, 2010, Governor Culver informed Regents Executive Director Donley that the USDOE was not likely to grant Iowa's request for a MOE waiver, and that the Governor would seek to restore over \$36 million for IHEs, including approximately \$31 million for Regents institutions, in order to ensure compliance with the MOE requirements and restore entitlement to the SFSF funding. The Governor's FY 2011 budget recommendations, released

that same day, did in fact reflect the Governor's request for \$36.4 million more in FY 2010 to ensure the State met the MOE requirements.

On January 28, 2010, the finalized memorandum of understanding between United Faculty and the Board of Regents was executed.

Isakson became aware of the Governor's request for the FY 2010 supplemental appropriation to restore funding to IHEs. Recognizing that this would considerably alter the landscape upon which the parties' memorandum of understanding had been premised, he emailed UNI President Allen on February 2, 2010, noting the possibility that "UNI will receive a windfall gain from the state of \$5.3 million" and asking that should the supplemental appropriation come to pass, UNI consider using it to restore the reductions United Faculty had accepted in the memorandum of understanding.

In another email to Allen on February 9, 2010, Isakson asked that he and a committee of United Faculty members meet with Allen "to discuss how this MOE mandate might affect the appropriations received by UNI, and how any additional funds received as a result of this MOE might be allocated at UNI."

On February 15, 2010, Isakson again emailed Allen, referencing the request for a meeting contained in his email the week before. Isakson's email indicated that he had subsequently "examined Iowa's initial application for SFSF program funds, Iowa's Request for a Waiver of the MOE requirement in the SFSF program, and Iowa's application for Phase II of the SFSF program funds." Indicating that he had also looked at "the SFSF enabling legislation,"

Isakson requested a meeting with Allen to discuss, among other matters, “the potential restoration of the temporary faculty salary cuts” to which United Faculty had agreed.

Although the record is not exactly clear concerning the identity of all involved or the details of what was communicated, a teleconference between representatives of the Regents and United Faculty was conducted on February 26, 2010. During the conference Sayre made comments which revealed that she had known of the MOE requirements during the fall of 2009, prior to the parties’ discussions which ultimately led to the memorandum of understanding, and had shared her knowledge with (at least) Berg and Donley. This was the first time United Faculty representatives gained actual knowledge that Regents representatives had known of the existence of the MOE requirement prior to responding to United Faculty’s December 7, 2009 request for information and United Faculty’s agreement to the memorandum of understanding.

On April 15, 2010, Governor Culver signed SF 2366, which provided supplemental appropriations to the Board of Regents, \$5,227,665 of which was earmarked for UNI, and which became effective upon its enactment.

On April 21, 2010, counsel for United Faculty wrote to the Regents’ general counsel, relating the Governor’s signing of SF 2366 and its restoration of money to UNI. Counsel noted that the parties’ memorandum of understanding had been premised on the fact that the 2009 cuts in State appropriations were irreversible, that the supplemental appropriation revealed

that this premise was no longer correct or true, and asserted that had United Faculty known of the MOE during the parties' discussions, it would not have agreed to the memorandum of understanding which was ultimately executed. Counsel asserted that the salary give-back contained in the memorandum of understanding "was agreed to by United Faculty under false pretenses and based upon incomplete and inaccurate information."

Counsel's letter also stated:

In addition, we believe that in the bargaining of the [memorandum of understanding], the Board has committed a prohibited practice in violation of Iowa Code Section 20.10 subsections 1 and 20.10 subsections 2 (e)(g). Specifically, I would note that the duty of the public employer to negotiate in good faith carries with it the obligation on the public employers' part to provide the union with accurate information relevant and necessary to effectively represent public employees. In this case, as you are fully aware, the lack of information that was supplied to United Faculty constitutes misinformation as to matters I have discussed above. We believe it is clear that the Board knew or showed reckless disregard for the information that was supplied to United Faculty regarding the cuts in State appropriations and the Maintenance of Effort Requirements of the Fiscal Stabilization Act. Even if your local negotiation's group did not have personal knowledge of these facts, the Governor and the Board stand in the representative capacity of the State. We are prepared, and I have been authorized, to file a formal Prohibited Practice Complaint with the Public Employment Relations Board and explore other possible civil action.

Counsel requested that the faculty salary reductions contained in the memorandum of understanding be restored retroactively as soon as possible.

On April 30, 2010, counsel for the Regents advised United Faculty's counsel that it did not intend to return pay to faculty or other UNI staff who had experienced a pay cut or furlough during FY 2010.

United Faculty's prohibited practice complaint was mailed to PERB, postmarked May 17, 2010, and is considered filed that date pursuant to Iowa Code section 17A.12(9).

#### CONCLUSIONS OF LAW

The surviving portions of United Faculty's complaint allege the State's commission of prohibited practices within the meaning of Iowa Code sections 20.10(1) and 20.10(2)(a), (e), (f) and (g) (2009). Those sections provide:

##### **20.10 Prohibited practices.**

1. It shall be a prohibited practice for any public employer, public employee or employee organization to willfully refuse to negotiate in good faith with respect to the scope of negotiations as defined in section 20.9.

2. It shall be a prohibited practice for a public employer or the employer's designated representative willfully to:

*a.* Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.

• • •

*e.* Refuse to negotiate collectively with representatives of certified employee organizations as required in this chapter.

*f.* Deny the rights accompanying certification or exclusive recognition granted in this chapter.

*g.* Refuse to participate in good faith in any agreed upon impasse procedures or those set forth in this chapter.

Also central to this matter is Iowa Code section 20.11(1) which provides, in relevant part:

##### **20.11 Prohibited practice violations.**

1. Proceedings against a party alleging a violation of section 20.10 shall be commenced by filing a complaint with the board within ninety days of the alleged violation causing a copy of the complaint to be served upon the accused party in the manner of an original notice as provided in this chapter. The accused party shall have ten days within which to file a written answer to the complaint....

As well as asserting a number of other defenses, the State argues initially that United Faculty's complaint was untimely and consequently must be dismissed.

The 90-day limitation period specified in section 20.11(1) is mandatory and jurisdictional. *Brown v. PERB*, 345 N.W.2d 88, 93-94 (Iowa 1984). The Iowa Supreme Court has, however, recognized the applicability of the "discovery rule" exception to the 20.11 limitation period. *Id.* Under this exception, a party's cause of action does not accrue, and the applicable limitation period does not begin to run, until the party knew or reasonably should have known of the acts which constituted the prohibited practice. *Id.*

In this case, all of the alleged prohibited practices occurred, if at all, on December 8, 2009 when the State allegedly willfully failed to fully respond to United Faculty's December 7 request for information by failing to disclose the MOE requirement, and no later than December 14, when the parties agreed upon the terms of their memorandum of understanding which was, United Faculty alleges, the product of the State's bad faith bargaining. United Faculty's complaint was filed May 17, 2010, far more than 90 days after these alleged violations.

United Faculty relies upon the discovery rule exception to the 90-day limitation period, and argues that its complaint was filed within 90 days of it having acquired knowledge of what it argues is proof of the willfulness of the State's alleged violations — that Board of Regents agents knew of the MOE requirement prior to responding to United Faculty's request for information

and prior to the consummation of the bargaining which resulted in the memorandum of understanding.

Resolution of this timeliness/jurisdictional issue requires application of the discovery rule and the related concept of inquiry notice. Under the discovery rule, the limitations period begins to run when the injured party knew or reasonably should have known of the acts which constituted the prohibited practice. *Brown*, 345 N.W.2d at 93-94.

Here, it is clear that United Faculty knew, or at least should have known, of the State's (alleged) failure to disclose the existence of the MOE requirement and of its (alleged) bad-faith bargaining no later than February 9, 2010. By this time Isakson had learned of the MOE requirements and of the potential for a supplemental appropriation "windfall" to UNI.

Courts have at times described the discovery rule as tolling the running of the statute of limitations until the injured party has actual or imputed knowledge of all of the elements of the action. *See Franzen v. Deere and Co.*, 377 N.W.2d 660, 662 (Iowa 1985), *citing Sahlie v. Johns-Manville Sales Corp.*, 99 Wash.2d 550, 554, 663 P.2d 473, 475 (1983). Pointing out that "willfulness" was an element of all prohibited practices at the time this case arose, United Faculty argues that the limitations period did not begin to run until February 26, 2010, when it actually discovered that Sayre and others within the Regents organization had known of the MOE requirements during the fall of 2009, thus revealing the willfulness of the State's allegedly prohibited behaviors.

The ALJ has found that United Faculty did not have actual knowledge that Regents representatives had known of the existence of the MOE requirement prior to responding to United Faculty's December 7 request and negotiating the terms of the memorandum of understanding. Assuming, for the sake of discussion, that the willfulness of the State's challenged behavior was indeed an "element of the action" and that it cannot be said that United Faculty "should have known" of this supposed willfulness, the question becomes whether United Faculty had imputed knowledge that the State had behaved willfully. This brings the concept of inquiry notice into play.

Knowledge is imputed to a complainant when he gains information sufficient to alert a reasonable person of the need to investigate. *Ranney v. Parawax Co., Inc.*, 582 N.W.2d 152, 155 (Iowa 1998). See also *Estate of Montag v. T H Agic. & Nutrition Co.*, 509 N.W.2d 469, 470 (Iowa 1993); *Franzen*, 377 N.W.2d at 662. As of that date the complainant is on inquiry notice of all facts that would have been discovered by a reasonably diligent investigation. The beginning of the limitations period is not postponed until the end of an additional period deemed reasonable for making the investigation. See *Franzen*, 377 N.W.2d at 662. The limitations period begins to run when the complainant first becomes aware of the facts that would prompt a reasonably prudent person to begin seeking information as to the problem and its cause. *Montag*, 509 N.W.2d at 470. The period of limitations is the outer time limit for making the investigation and bringing the action. *Id.*

The duty to investigate does not depend on exact knowledge of the nature of the problem that caused the injury. It is sufficient that the injured party be aware that a problem existed. One purpose of inquiry is to ascertain its exact nature. *Franzen*, 377 N.W.2d at 662.

The ALJ concludes that United Faculty was on inquiry notice no later than February 9, 2010, and that the 90-day limitations period established by Iowa Code section 20.11(1) began to run no later than that date. At that point United Faculty knew that it had requested “the criteria for Iowa government agencies, especially the [Board of Regents] and UNI, receipt and expenditure of stimulus funds,” that the MOE requirement was a criteria for the receipt of such funds and that (according to United Faculty) the existence of the MOE requirement had not been disclosed in response to its request or during the course of the parties’ negotiations. It thus knew that a problem existed, and had a duty to investigate whether the State’s allegedly wrongful actions were willful or not, and to file its complaint within 90 days.

United Faculty argues that it did all it could reasonably do once it became aware of the State’s supposed failure to disclose the requested information, but was unable to uncover the State’s alleged willfulness until the February 26, 2010 teleconference. But the fact that United Faculty’s inquiry was not immediately successful in uncovering the alleged willfulness does not assist its argument.

As the State points out in its reply brief, the Iowa Supreme Court has rejected a similar claim that the discovery rule should toll the running of the

limitations period until the complainant uncovers facts supportive of all of the elements of the claim. As the Court noted in *Ranney*:

If we adopted *Ranney's* interpretation of when inquiry notice is triggered, the beginning of the limitations period would be postponed until the *successful completion* of the plaintiff's investigation. Such an application of the discovery rule would be contrary to our holdings in *Estate of Montag* and *Franzen*. As we stated in *Franzen*, "[t]he period of limitations is the outer time limit for making the investigation and to bringing the action. The period *begins* at the time the person is on inquiry notice." *Franzen*, 377 N.W.2d at 662 (emphasis added); accord *Estate of Montag*, 509 N.W.2d at 470.

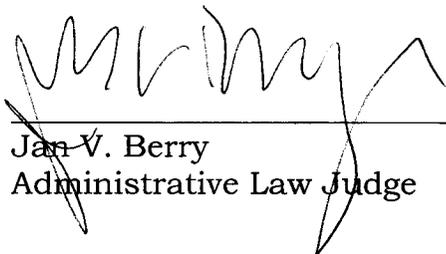
582 N.W.2d at 156.

Even affording it the benefit of the discovery rule, United Faculty's complaint was not filed in a timely fashion. Since timeliness is essential to PERB's possession of jurisdiction over a particular practice complaint, United Faculty's complaint must be dismissed. The ALJ consequently proposes the following:

ORDER

UNI-United Faculty's prohibited practice complaint is DISMISSED.

DATED at Des Moines, Iowa, this 6<sup>th</sup> day of February, 2013.

  
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Jan V. Berry  
Administrative Law Judge

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