

**STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD**

DENISE E. MARTIN,
Complainant,

and

UNISERV UNIT TWO/ISEA/NEA,
CLEAR LAKE, IOWA REGIONAL OFFICE,
Respondents.

Case No. 8539

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PUBLIC EMPLOYMENT
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DECISION ON APPEAL

This case is before the Public Employment Relations Board (PERB or Board) upon Complainant Denise E. Martin’s appeal of an administrative law judge’s (ALJ) Ruling on Motion dated April 15, 2013, and Proposed Decision and Order dated November 19, 2013, concerning a prohibited practice complaint filed by Martin against Uniserv Unit Two/ISEA/NEA, Clear Lake, Iowa Regional Office (collectively ISEA) pursuant to Iowa Code section 20.11. In the Ruling on Motion, the ALJ dismissed some of Martin’s claims due to her alleging violations of inapplicable statutory provisions and dismissed others as time-barred. Following an evidentiary hearing, the ALJ concluded that Martin had failed to establish ISEA’s commission of a prohibited practice and dismissed the remaining claims in her Proposed Decision and Order.

Pursuant to PERB subrule 621—9.2(3), the Board has heard the case upon the record submitted before the ALJ. Martin, representing herself, and counsel for ISEA, Gerald L. (Jay) Hammond, presented their oral arguments to

the Board on February 3, 2014. Prior to oral arguments, the parties filed briefs outlining their respective positions.

In this appeal, the Board possesses all powers it would have possessed had it elected, pursuant to PERB rule 621—2.1(20), to preside at the evidentiary hearing in place of the ALJ. Based upon its review of the record before the ALJ, and having considered the parties' oral arguments and briefs, the Board agrees with the ALJ's Ruling on Motion dated April 15, 2013, and her Proposed Decision and Order dated November 19, 2013, and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The ALJ's findings of fact in the Proposed Decision and Order are fully supported by the record, and the Board adopts them as its own. These factual findings are reproduced below as supplemented by relevant findings made in the ALJ's Ruling on Motion.

Denise Martin was a special education teacher for the Mason City Community School District. She was a member of the Mason City Education Association, a certified employee organization that represents the school district's teachers and is affiliated with ISEA. On April 20, 2010, Martin received notice that she would be laid off at the end of the 2009-2010 school year. The notice of her layoff was also sent to ISEA. ISEA UniServ directors Jane Elerding and Steve Shamburger were assigned to represent her.

Martin made a request for a private hearing on her termination pursuant to Iowa Code chapter 279 on April 21, 2010. On April 29, 2010, UniServ

directors Elerding and Shamburger filed a request for a continuance of the chapter 279 private hearing.

Meanwhile, Martin applied for several positions with the school district following her layoff, but was not hired for any of the positions. On May 7, 2010, she filed a grievance claiming that the layoff was not conducted in accordance with the collective bargaining agreement between the school district and the Mason City Education Association. ISEA represented Martin in the grievance. The school district denied Martin's grievance at level one in May 2010. On May 25th, in preparation for grievance level two, Martin gave Shamburger medical records to support her claim. The district denied the grievance at level two in June 2010.

On July 12, 2010, Shamburger sent a letter to the school district regarding the grievance. It stated in part that "[a]fter a careful examination of the facts and necessary evidence in presenting an argument to an arbitrator it is our decision to NOT proceed to arbitration." Shamburger did not inform Martin of ISEA's decision.

As to the request for private hearing under Iowa Code chapter 279, Shamburger communicated to the school district that this request would be withdrawn. In an email dated August 26, 2010, the school district superintendent emailed Shamburger and stated,

Just following up with you regarding our conversation regarding Denise Martin's hearing request. You indicated verbally that she did not want to pursue this, but we do still need to have something in writing from her. Thanks for your follow-through with this matter. Let me know if you need something further from us.

Shamburger replied that he had previously tried unsuccessfully to obtain Martin's consent in writing but would once again send a letter to Martin. On September 1, 2010, ISEA staff member Michele Alden emailed Martin the form that needed her signature and stated,

Steve Shamburger has been trying to reach you to provide you with a letter that you can give to the district that informs them that you are withdrawing your request for a private hearing, but that you are not giving up your recall or unemployment benefits.

On September 7, the superintendent emailed Shamburger again asking whether Martin had signed the form withdrawing her request for a chapter 279 private hearing. Shamburger responded that he had not received any reply from Martin. Martin never signed the withdrawal form and believed she would be having a private hearing.

On November 23, 2010, Martin sent an email to Shamburger stating that she had been trying to reach him by phone, that she was unhappy with the handling of her grievance, and that she wanted to "re-start [her] appeal."

Shamburger and Martin were scheduled to meet on December 8, 2010, to discuss her case. On December 7, Martin sent an email to Shamburger asking him to bring the letter ISEA sent to the district stating ISEA's position on her grievance. The email also states, "I see nowhere in the contract that union board can vote and decided [sic] not to take my grievance to arbitration. Again, the grievance certainly was not resolved satisfactorily on my end."

Shamburger and Martin did meet on December 8, but Shamburger did not bring any documents with him, refused to provide Martin any documents,

and stated that he was not required to provide any documents. He told her that he had given the school district three potential dates for the chapter 279 private hearing.

On December 10, 2010, Martin spoke with ISEA Associate Executive Director Randy Richardson and Shamburger. Martin asked Richardson if she could bring outside counsel to represent her in the private hearing. Richardson responded that she could but expressed doubt about whether the district would grant a private hearing before the board because her case was old. When Martin asked what ISEA's position was on taking her grievance to arbitration, Richardson responded "that it appears that [Martin had] a number of issues going on." Richardson also stated that ISEA was not required to provide her any documents.

On January 4, 2011, the school superintendent sent Martin a letter by certified mail notifying her that her request for a private hearing with the school board was denied. It stated that "[d]ocumentation of conversations held with [you], the Superintendent, [and] ISEA Representation . . . from July, 2010 indicate that you withdrew a request for hearing in exchange for a recommendation for employment from the Superintendent of Schools. This recommendation letter was provided to you on or about July 19, 2010."

On January 5, 2011, Martin sent a response letter to the school superintendent stating that she never received notification of the district's decision on her grievance after the level two grievance meeting. In the letter Martin asserted that she had not given up her recall rights, denied agreeing to

withdraw her request for a hearing in exchange for a letter of recommendation, and requested an appeal of that determination.

On January 25, 2011, the school district sent a letter to Martin informing her that she continued to have recall rights under the collective bargaining agreement and that ISEA made the decision to not arbitrate Martin's grievance. The letter states in part,

We have in our records a response letter dated July 12, 2010 from Steve Shamburger . . . which is quoted below:

"After a careful examination of the facts and necessary evidence in presenting an argument to an arbitrator it is our decision to NOT proceed to arbitration."

. . .

Because we have yet to receive a signed copy of [sic] letter sent via registered mail denying your request for a private hearing with the Board of Education, we will note that you have refused to sign and place [sic] in your personnel file.

The record does not show whether there was any further communication between Martin and Shamburger about her grievance or chapter 279 private hearing. Shamburger left employment with ISEA sometime in early 2011.¹ Also during this time period, Martin had a complaint against the school district pending with the Iowa Civil Rights Commission.

On April 9, 2012, over a year after Martin received the district's letter notifying her of ISEA's refusal to arbitrate her grievance and of the district's denial of her request for a chapter 279 private hearing, and approximately a year after Shamburger had left ISEA, Martin called the Clear Lake ISEA office.

¹ That Martin was not notified of Shamburger's departure from ISEA is irrelevant to the claims pled in her complaint.

In the conversation with ISEA staff member Michele Alden, Martin inquired about her “grievance file.” Alden informed Martin that Shamburger no longer worked for ISEA and that ISEA was trying to “piece together” files.

Martin believed a file would have been maintained on her grievance regarding her layoff with all pertinent documents, including the medical records she had provided to Shamburger, since such a file existed for a previous grievance Martin filed in 2009. But no such file was found after Shamburger’s departure from ISEA. His office was left in a disorderly state and he left no organized file system. After he left, ISEA could only find a few documents and notes on Martin’s grievance. No one knows whether Shamburger maintained “grievance files” on individual grievances or files on individual bargaining unit members. No one knows what documents and notes Shamburger collected on Martin’s case and no one knows what happened to them. The medical records Martin had given to Shamburger for her grievance were never found. There is no evidence showing whether Shamburger took documents pertaining to Martin when he left employment with ISEA, whether Shamburger shared documents pertaining to Martin with anyone else, or whether he destroyed documents when he left. Shamburger did not testify at the hearing.

On April 10, 2012, Martin sent a letter to the Clear Lake office asking for copies of all correspondence between ISEA and the school district regarding Martin and any notes in ISEA’s possession pertaining to Martin and the school district between June 1, 2009, and April 10, 2012. In the letter, she asserted

she was entitled to the information pursuant to the Freedom of Information Act. On April 11, 2012, Martin went to the Clear Lake office and met with the regional office director, Jason Enke. He confirmed that Martin's file, along with others, had been missing since Shamburger's departure and ISEA was attempting to reconstruct the missing files. On April 12, she sent another letter to the ISEA Clear Lake office requesting a copy of the letter Shamburger sent to the school district advising that ISEA would not arbitrate Martin's grievance. Alden and Enke searched through Shamburger's former office for any notes or documents that pertained to Martin. Approximately 10 pages of notes and documents were found and compiled into a file. Enke sent the partially-reconstructed file to Richardson in ISEA's administrative offices in Des Moines.

On April 20, 2012, Martin sent letters to the ISEA president, executive director, associate executive directors, and the administrative assistant to the executive director detailing how she discovered that ISEA did not have a complete file on her 2010 grievance, stating that the loss of her file was a breach of confidentiality, and requesting that ISEA "obtain [her] lost file" and initiate arbitration proceedings on her behalf. On May 11 and May 12, Martin, having received no response to her initial information requests, resent the requests to the Clear Lake office.

Sometime in the spring of 2012, after Martin had made her information requests, Richardson contacted the school district's superintendent to determine whether the school district had a copy of the letter from Shamburger

stating that ISEA was declining to arbitrate Martin's grievance. Martin had requested a copy of this letter in her information requests and ISEA was unable to find the letter in Shamburger's office. The superintendent confirmed that the district did have the letter. Martin never asked Richardson to contact the school district about the letter or discuss her case with the district and Richardson did not ask Martin for permission prior to contacting the district.

On May 14, 2012, Richardson spoke with Martin and her representative, John McEwan, by phone and requested Martin meet with him, the ISEA executive director, and ISEA's chief legal counsel. During the call, Richardson stated that he had a file with all of the documents ISEA had regarding Martin but the file did not include the letter from Shamburger declining to arbitrate the grievance. He further asserted that the ISEA was not subject to the Freedom of Information Act but that Martin could come to the ISEA office to view the file. At hearing, Richardson noted it is his policy to not release files, even to bargaining unit members, because they may contain working documents.

By letter dated May 15, Martin declined to meet with the ISEA administrators and again requested all documentation pertaining to her in ISEA's possession. On May 23, 2012, Richardson responded to Martin's letter on behalf of ISEA. He stated that since ISEA was not a public entity, it was not subject to the Freedom of Information Act. However, he noted that the school district would be subject to the Act and suggested she could direct information requests to the district. Richardson also noted that pursuant to Iowa Code

section 20.18(1), collective bargaining agreements may provide procedures for processing grievances but that such procedures must provide that employee grievances will only be arbitrated if there is approval of both the employee organization and the employee. He also stated that ISEA did not have Shamburger's letter stating that ISEA was declining to arbitrate Martin's grievance and that any handwritten notes on file were not pertinent to this issue.

On July 6, 2012, Martin filed the present prohibited practice complaint. On or about September 5, 2012, Martin received a copy of the file in ISEA's possession. The file included extensive records about her 2009 grievance but only had sparse records about her 2010 layoff and grievance. It did not include any of the medical records that Martin gave Shamburger in May 2010 or the letter Shamburger sent to the district stating ISEA was not taking Martin's grievance to arbitration. The documents also contained a couple of notes that referred to another bargaining unit member.²

CONCLUSIONS OF LAW

Martin alleges that ISEA breached its duty of fair representation pursuant to Iowa Code sections 20.10(2)(a), (2)(f), and 3(a) in two ways: (1) by refusing to arbitrate her grievance and (2) by "breaching her confidentiality"

² On appeal, Martin alleges that ISEA employees, specifically Richardson and General Counsel Gerald L. (Jay) Hammond, made several inconsistent statements since she filed this prohibited practice complaint and cites to these alleged inconsistent statements as additional violations of ISEA's duty of fair representation. To the extent these alleged inconsistent statements are relevant, the Board has considered them in its assessment of credibility.

when it lost her file, called the school district without her permission, and denied her access to ISEA's work product.³

As the ALJ noted in her Proposed Decision and Order, the Mason City Education Association is the certified employee organization that represents the unit of which Martin was a member. Therefore, it is the Mason City Education Association that owes the duty of fair representation. Iowa Code § 20.17(1). Martin has not named the Mason City Education Association as a respondent and it is questionable whether ISEA is the proper respondent in this action. However, it is undisputed that the Mason City Education Association is affiliated with ISEA for representation purposes and ISEA has not sought dismissal on this ground. Thus, just as the ALJ did, the Board will address Martin's claims.

I. Section 20.10(2)(a) and (2)(f)

As the ALJ correctly concluded in her Ruling on Motion, Iowa Code sections 20.10(2)(a) and (2)(f) refer to prohibited conduct by an *employer* rather than an *employee organization*. Martin's complaint is solely against an employee organization. Thus, sections 20.10(2)(a) and (2)(f) claims cannot be

³ At the evidentiary hearing before the ALJ and in her post hearing brief dated September 19, 2013, Martin claimed ISEA also breached its duty of fair representation by: (1) not informing her that Shamburger's employment with ISEA ended; (2) not fairly representing her during the period she had recall rights under the collective bargaining agreement; and (3) by sending her grievance file to the Des Moines ISEA office. Martin has failed to establish that any of these alleged actions were arbitrary, discriminatory, or in bad faith. See Iowa Code § 20.17(1).

Martin has also claimed that ISEA breached its fiduciary duty to her and violated the Iowa Rules of Professional Conduct. In this case, PERB's jurisdiction is limited to Iowa Code chapter 20. PERB has no jurisdiction over general tort claims or to enforce the Iowa Rules of Professional Conduct.

established against ISEA, and the ALJ properly dismissed them as failing to state a claim for which relief may be granted.

II. Refusal to Arbitrate Grievance

A valid prohibited practice complaint must be filed with the Board within 90 days of the alleged violation. Iowa Code § 20.11. This time requirement is mandatory and jurisdictional. *Brown v. PERB*, 345 N.W.2d 88, 94 (Iowa 1984); *Lomen & AFSCME Iowa Council 61*, 99 PERB 5966 at 3. The 90 day filing period commences at the time final action is taken. *See Lomen*, 99 PERB 5966 at 4. In the context of an employee's claim against an employee organization for refusing to take a grievance to arbitration, the time period begins to run when the employee is notified of the refusal to arbitrate. *See Kincaid & AFSCME Iowa Council 61*, 02 PERB 6445 at 3.

But, an untimely complaint may be deemed timely if a factual and legal basis exists which excuses the untimely filing. *See Brown*, 345 N.W.2d at 94 (explaining that if a complaint is not filed in a timely manner, then the complainant shoulders the burden to establish a sound basis for being excused from the 90 day requirement). For example, under the discovery rule exception, the 90 day period begins to run when the complainant "first knew or should have known of the acts which constituted a prohibited practice." *Id.* at 95-96. "[T]he statute of limitations begins to run when a plaintiff first becomes aware of facts that would prompt a reasonably prudent person to begin seeking information as to the problem and its cause." *Estate of Montag v. T H Agric. & Nutrition Co.*, 509 N.W.2d 469, 470 (Iowa 1993). Under the misrepresentation

exception, the complaint will be considered timely if the complainant proves the respondent fraudulently concealed *the cause of action* regardless of the complainant's due diligence to discover the factual basis for the complaint. *Brown*, 345 N.W.2d at 96 (emphasis added). "[T]he party relying on exceptional circumstances to avoid a statute of limitations must bear the burden of proving the facts which the exception requires." *Id.* at 94.

Here, the evidence establishes that Martin knew or should have known that ISEA had declined to arbitrate her grievance no later than the end of January 2011 when she received the school district's letter dated January 25, 2011, and that there is no basis to excuse the untimely filing. The January 2011 letter quotes Steve Shamburger's July 2010 letter, which unequivocally states that ISEA had decided not to proceed to arbitration on Martin's grievance, thus putting her on notice of this fact. Despite this, Martin argues that the commencement of the 90 day period is May 23, 2012, the date of Richardson's letter. She states this letter gives ISEA's final decision not to arbitrate.

Her argument is unavailing. While the Richardson letter provides a detailed explanation for the legal grounds on which ISEA relied in making its unilateral decision not to proceed to arbitration,⁴ this does not change the fact

⁴ Richardson's letter quotes Iowa Code section 20.18 which provides in part,

1. An agreement with an employee organization which is the exclusive representative of public employees in an appropriate unit may provide procedures for the consideration of public employee and employee organization grievances over the interpretation and application of agreements. Negotiated procedures may provide for binding arbitration

that Martin was made aware of ISEA's decision not to arbitrate her grievance in January 2011 upon receipt of the school district's letter. Ignorance of the law does not excuse Martin from investigating why and how ISEA made its decision, nor does it toll the mandatory and jurisdictional time limitations on her claim. *See Montag*, 509 N.W.2d at 470.

Martin also argues that the school district's January 2011 letter should not be considered notice sufficient to commence the 90 day period because she could not trust communications from the school district due to the pending Civil Rights complaint. This argument likewise fails. At a minimum, the letter served to alert her that there may be a potential problem with her grievance that she should investigate. The fact that the notice came from the district rather than ISEA does not excuse her from the duty to investigate.

Alternatively, Martin argues that ISEA should be estopped from arguing that her claim is untimely because ISEA fraudulently concealed her claim by not disclosing that her file was missing. But whether the file was missing is not a material fact when determining if Martin's claim was timely made. What is material is whether ISEA concealed its decision not to arbitrate her grievance. *See, e.g., Brown*, 345 N.W.2d at 96 (holding that the complainant must prove that the respondent fraudulently concealed the cause of action to

of public employee and employee organization grievances over the interpretation and application of existing agreements. . . . *Such procedures shall provide for the invoking of arbitration only with the approval of the employee organization in all instances, and in the case of an employee grievance, only with the additional approval of the public employee.*

(emphasis added).

extend the statute of limitation). ISEA did not conceal that it was refusing to arbitrate her grievance, thus Martin's alternative argument to excuse her untimely filing also fails.

The limitation period for Martin's claim that ISEA failed to fairly represent her by refusing to arbitrate her grievance commenced no later than her receipt of the school district's letter and expired 90 days later, in late April 2011. Martin has failed to establish that any factual and legal basis exists to excuse her untimely filing. Her grievance, filed July 6, 2012, was properly dismissed.

III. Breach of Confidentiality

In her complaint, Martin alleges ISEA failed to fairly represent her by breaching her confidentiality in three ways: (1) by losing her file which contained confidential information; (2) by calling the school district without her permission; and (3) by denying her access to ISEA work product.

ISEA's duty of fair representation arises from Iowa Code section 20.17(1), which provides in relevant part, that "the employee organization certified as the bargaining representative shall be the exclusive representative of all public employees in the bargaining unit and shall represent all public employees fairly." A breach of the employee organization's duty of fair representation constitutes a prohibited practice within the meaning of Iowa Code section 20.10(3)(a). *See, e.g., Steffensmeier and AFSCME*, 05 PERB 6637; *O'Hara and AFSCME*, 02 PERB 5532. This subsection provides,

It shall be a prohibited practice for public employees or an employee organization or for any person, union or organization or their agents to:

(a) Interfere with, restrain, coerce or harass any public employee with respect to any of the employee's rights under this chapter or in order to prevent or discourage the employee's exercise of any such right, including, without limitation, all rights under section 20.8.

Iowa Code § 20.10(3)(a).

The duty of fair representation is a well-developed doctrine under federal labor law, and has been addressed in a number of cases under the Public Employment Relations Act. In the leading United States Supreme Court case, *Vaca v. Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967), the Court set out the basic standard for evaluating duty of fair representation claims and held that a plaintiff, in order to prevail, must prove that the union's actions were arbitrary, discriminatory or in bad faith. The *Vaca* standard was discussed and adopted by PERB in *Kenneth Ross and AFSCME/Iowa Council 61*, 85 PERB 2562. This standard was later adopted and codified by the Iowa legislature, and since 1991, Iowa Code section 20.17(1) has contained the following language:

. . . To sustain a claim that a certified employee organization has committed a prohibited practice by breaching its duty of fair representation, a public employee must establish by a preponderance of the evidence action or inaction by the organization which was arbitrary, discriminatory, or in bad faith.

The duty of fair representation has been described as “[a] statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” *Norton v. Adair County*, 441

N.W.2d 347, 351 (Iowa 1981) (quoting *Vaca v. Sipes*, 386 U.S. at 177). Arbitrary means “action taken without fair, solid, and substantial cause . . . [and] refers to action which will not stand the test of reason or principle.” *Norton*, 441 N.W.2d at 358-59. “Arbitrary action has [also] been defined as a ‘willful and *unreasonable* action, without consideration and in disregard of the facts or circumstances of the case.’” *Kunzman & Teamsters Local Union No. 828*, 05 PERB 6602 at 8 (quoting *Norton*, 441 N.W.2d at 358). Discrimination occurs when the union does not utilize the same decision-making process for all bargaining unit members. *Id.* at 10. Bad faith conduct is that which is fraudulent, deceitful or dishonest. *Id.* at 10-11.

“[T]he statutory duty of fair representation does not require perfect representation nor require that every meritorious grievance be taken to arbitration.” *Kunzman*, 05 PERB 6602 at 10. Even when mistakes are made, “mere negligence, poor judgment, or ineptitude on the part of the union is insufficient to establish a breach of the duty of fair representation.” *Id.*

Martin’s argument that a breach of confidentiality equates to a failure to fairly represent is a rather novel concept. No known cases decided by PERB, the National Labor Relations Board (NLRB), or other similar agencies exist that address this particular argument. In this case, the Board need not address the issue of whether an unfair representation claim can be based on an alleged breach of confidentiality because, even assuming a duty to maintain confidentiality existed and that ISEA breached that duty, Martin has failed to

establish that any of ISEA's actions were arbitrary, discriminatory, or done in bad faith.

A. Loss of File

Martin first claims ISEA breached its duty of fair representation by losing her file. She contends ISEA had confidential and privileged information concerning her and that ISEA did not have adequate safeguards in place to ensure her information was protected. To support her claim that ISEA failed to take proper care of records, Martin showed that documents concerning another bargaining unit member were included with her records.⁵

It is clear that Martin provided medical records to Shamburger, records were made concerning her grievance, and these documents disappeared while in ISEA's possession. Nonetheless, to establish a claim that the loss of her file was a breach of ISEA's duty of fair representation, Martin must show that

⁵ Martin also claims that the ALJ erred by failing to find that ISEA breached the other bargaining unit member's confidentiality by including her documents in Martin's file. She is incorrect. Martin has no standing to bring such a claim. *See Godfrey v. State*, 752 N.W.2d 413, (Iowa 2008) (stating that a plaintiff must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected to have standing) (citations omitted). The ALJ was correct by declining to rule on the claim and merely referencing these facts as evidence in Martin's claims.

Martin also asserts that the ALJ (1) improperly added to the Ruling on Motion at the start of the evidentiary hearing; (2) engaged in improper side bar conversations with ISEA's counsel; and (3) generally permitted ISEA's counsel to ignore courtroom decorum. The Board, having reviewed the recording of the evidentiary hearing, finds no evidence supporting Martin's assertions. The ALJ properly stated the status of the case at the beginning of the hearing. While there was clearly tension between the parties and both parties expressed frustration with the opposing side, the ALJ attempted to control the situation by repeatedly explaining hearing procedures to Martin and her non-attorney representative and explaining to ISEA's counsel why she was allowing Martin such latitude in presenting her case. The recording reveals no improper side bar conversations between the ALJ and ISEA's counsel nor does it reflect complacency in managing both parties' actions throughout the evidentiary hearing.

ISEA's actions were arbitrary, discriminatory, or in bad faith. Martin has failed to meet this burden. There is simply no proof that Shamburger treated her documents any differently than other documents. The record establishes that Shamburger had a disorganized office upon leaving ISEA and that all documents were commingled. While testimony reveals that other ISEA UniServ directors would not organize documents as Shamburger did, there is no evidence that Shamburger did not follow ISEA policies and procedures as it pertained to Martin's documents. Martin has failed to show that Shamburger's actions were anything more than negligent, which as stated above, does not rise to the level of arbitrary, discriminatory, or bad faith.

Nor is there any proof that ISEA as a whole acted arbitrarily, discriminatorily, or in bad faith as to Martin's file. In fact, as the problem came to light, ISEA gathered all documents it could locate pertaining to Martin, offered to let her see the file it had composed, and eventually gave her the documents it discovered. While Martin was unhappy with the way ISEA handled the matter and felt ISEA was not forthcoming with information about what happened to her file, she provided no proof that she was treated in an arbitrary or discriminatory way or that ISEA acted in bad faith. At most, ISEA's conduct was negligent. But as explained above, negligence, poor judgment, or ineptitude does not establish a breach of the duty of fair representation. Like the ALJ, the Board could find no instances where similar conduct was determined to be a breach of the duty of fair representation by PERB or the NLRB. Even under the NLRB's heightened duty of fair

representation owed by employee organizations when carrying out hiring hall⁶ practices, simple negligence “without evidence of bad faith, discrimination, or untoward business practices” will not establish a breach of the duty of fair representation.” *Jacoby v. NLRB*, 325 F.3d 301, 308-09 (D.C. Cir. 2003). Thus, even if the Board applied a heightened standard to ISEA, Martin’s proof falls short of establishing any arbitrary, discriminatory or bad faith conduct.

B. Phone Call to School District

Martin also claims ISEA breached its duty of fair representation when Richardson spoke with the school district superintendent about Shamburger’s July 2010 letter without her authorization. In the spring of 2012, Martin requested all documents pertaining to her grievance from ISEA, and specifically asked for the letter Shamburger sent to the district stating that ISEA was not pursuing Martin’s grievance to arbitration. Richardson contacted the school district to see if it had a copy of this letter because it was not in ISEA’s possession. After receiving confirmation from the district that it had a copy of the letter, Richardson conveyed to Martin that a copy of the letter could be obtained from the school district since the district was subject to the Freedom of Information Act. There was no evidence that any other matters pertaining to Martin were discussed, or that any information (“confidential” or otherwise) was revealed in the call. Martin has not shown how Richardson’s conduct was arbitrary, discriminatory or in bad faith. In fact, it seems entirely appropriate

⁶ A “hiring hall” is an “[a]gency or office operated by union, by employer and union, or by state or local employment service, to provide and place employees for specific jobs.” *Black’s Law Dictionary* 502 (1991 ed.).

for ISEA to contact the school district to inquire whether it possessed the documents that Martin requested.

C. Access to ISEA Work Product

Martin also alleges that ISEA “breached a duty of confidentiality” and unfairly represented her by denying her access to its work product. Martin has failed to prove that ISEA did so in an arbitrary or discriminatory manner or in bad faith. Richardson testified that it was his policy not to release its files because they might contain work product. During the phone call with Martin on May 14, 2012, he did, however, offer to allow Martin to view the reconstructed file at ISEA offices, which she declined to do. Eventually, she did receive a copy of the documents ISEA had in its possession regarding her. There is no evidence that Richardson acted arbitrarily, discriminatorily, or in bad faith, but rather followed his policy regarding files.

In support of her position, Martin cites *The Union of Union Staff (SEIU Healthcare Michigan) and Sara Vitale*, 359 NLRB 58 (Feb. 7, 2013). In that case, a union’s refusal to give a bargaining unit member her grievance file was found to be an unfair labor practice. *Id.* at 3. But, as ISEA correctly notes, in that case the parties had made a settlement agreement whereby the union agreed to turn over the grievance file and then refused to abide by the settlement agreement. *Id.* at 1. That case did not establish a general duty to share a union’s work product or file generally; rather, the deliberate violation of a disclosure provision in a settlement agreement constituted a breach of the

duty of fair representation. *Id.* at 2-3. Here, ISEA did not violate any agreement to give her any files because no agreement to do so was ever made.

ORDER

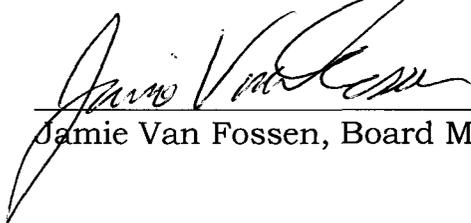
For the reasons stated above, Complainant Denise E. Martin's prohibited practice complaint is hereby DISMISSED.

Dated at Des Moines, Iowa this 10th day of April, 2014.

PUBLIC EMPLOYMENT RELATIONS BOARD

By: 
James R. Riordan, Chair


Janelle L. Niebuhr, Board Member


Jamie Van Fossen, Board Member

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