STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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| SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL #199,<br>Complainant,<br><br>and<br><br>IOWA CITY COMMUNITY SCHOOL DISTRICT,<br>Respondent. | CASE NO. 100073 |

# RULING AND ORDER

Complainant Service Employees International Union Local 199 (SEIU or the Union) filed the present prohibited practice complaint on September 30, 2015, with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 20.11 and PERB rule 621—3.1. The complaint as amended alleges that Respondent Iowa City Community School District (the District) committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(*a*)-(*d*) and (*f*) when it changed the regular work hours of bargaining unit employee Mark McBurney because of his status as a union leader. The District filed a motion to dismiss on October 28, 2015 contending the complaint was not timely filed.

Pursuant to notice, an evidentiary hearing on the motion was held before the undersigned administrative law judge in Iowa City, Iowa on January 20, 2016. The Union was represented by James Jacobson and the District was represented by Joseph Holland. Both parties filed post-hearing briefs on February 19, 2016.

## Background

The District employs approximately 2000 employees. Some time prior to July 1, 2015, the school board made a decision to change the District's "bell schedule." This decision resulted in a District-wide change to the school day start and end times. Following the decision to change the bell schedule, the District implemented a "comprehensive" change in work hours for employees across the District.

SEIU is the certified bargaining representative of the District's "physical plant" bargaining unit that includes building custodians throughout the District and various classifications of employees at the physical plant location. Mark McBurney has been employed by the District as a carpenter at the physical plant location since October 2010. Approximately eight out of 23 employees at the physical plant, including McBurney, had their work hours changed. McBurney is an active union member and currently serves as both president of the chapter and vice president of SEIU.

Prior to July 1, 2015, McBurney's normal work hours during the 2014-2015 school year were 4:30 a.m. to 1:00 p.m. On June 25, 2015, McBurney was called into a "courtesy meeting" with the assistant physical plant manager Jeff Barnes and Human Resource Specialist Lyndsee Detra during which he was informed his work hours would change in the 2015-2016 school year. It appears the parties

agreed McBurney would start working the new hours when school was back in session, which was set for August 24, 2015.[1]

During the June 25 meeting, McBurney asked for the criteria used for selecting the physical plant employees whose schedules were changed. Barnes told him it was a "management decision" and further explained that because the bell schedule was changing for the upcoming school year, the District had to change the employees' schedules to ensure "coverage" from each craft extended throughout the day. While McBurney does not deem to have received "a clear answer" from the District during the June 25 meeting, he agrees he was told "the schedule is changing because of the bell time change."

McBurney received his 2015-2016 school year letter of assignment after the June 25 meeting. The letter of assignment stated, in pertinent part:

> Your assignment for the 2015-2016 school year will be Carpenter Journeyman 1. Your building will be Physical Plant, and your work hours are 7:30am-4:00pm. You will be placed on Step 1 of Class SE. The 2015-2016 year will consist of 262 days or 2096 total hours. This letter will serve as notification of your employment.

The letter of assignment asked McBurney to indicate whether he accepted the assignment for the 2015-2016 school year. The letter also gave him an option to decline the assignment which would operate as his letter of resignation. On June 30, 2015, McBurney signed the letter indicating he accepted the 2015-2016 school year work assignment.

[1] On August 24, when McBurney was to start working the new hours, he had "a memory lapse" and reported to work at his old scheduled time. He received an email reminder and his first day working the new schedule was August 25, 2015.

In order to provide context for the meetings and information requests that occurred between the parties during this time, it is important to note the Union grieved the schedule change issue under the parties' collective bargaining agreement. On June 27, 2015, union representative Devin Mehaffey emailed Chace Ramey, the Human Resources Director at the time, indicating the Union would like to set up a meeting to discuss the custodians' schedule changes which the Union deemed to be in violation of the parties' collective bargaining agreement. Due to scheduling conflicts, this meeting did not occur until July 9. The Union filed a group contract grievance on or about July 9 alleging the schedule changes violated the parties' collective bargaining agreement. The July 9 meeting was the parties' step 1 meeting of the grievance procedure.

Ramey, Detra, Mahaffey and McBurney were present at the July 9 meeting. The Union's purported reason for scheduling the meeting was to understand why the schedules were changed. During the meeting, "there was reference back to the change in the bell schedule and the need for coverage."

Part of the discussion on July 9 was in regard to the collective bargaining agreement language at issue. Pertinent to the prohibited practice complaint, however, the parties talked about McBurney's "concern with his schedule" and why the physical plant employees' schedules were changed. Detra told McBurney that he was given the reasoning in a previous discussion but McBurney disagreed with her assertion. The Union "asked [the District] again for the criteria on how the people [whose schedule changed] were chosen." The District again said "the

bell times changed and that they had to make [schedule] changes to accommodate the school." From McBurney's perspective, the District did not have "a specific answer" for the criteria they used but "just [had] the talk about the bell time." Other than the bell schedule change there was no other rationale given.

Mehaffey did not think there was a violation of Chapter 20 until shortly prior to the July 9 meeting because he was under the impression that only the building custodians were impacted by the schedule changes. On July 9, he realized "there was this odd mix of groups from the physical plant" whose schedules were changed.

Following the July 9 meeting, McBurney and Mehaffey were "surprised" that they had this meeting and "didn't get any answers...other than just...referring to this bell time." The District's supposed "inability" to provide the criteria they used for selecting the employees "struck" the Union because it thought Ramey, as the head of HR, should have been involved in the decision-making and should have been readily prepared to answer why certain employees were chosen over others. It appeared to the Union that the physical plant employees whose schedules were changed were either Union members or officers. The supposed lack of response from the District "raised a red flag" in McBurney's situation specifically because he is a union leader and had been, in the Union's view, targeted in the past.

Mehaffey followed up with Ramey a number of times after July 9 seeking more information pertaining to the contract grievance and the rationale used in

choosing the physical plant employees whose schedules were changed. On August 24, 2015, Mehaffey sent an email to Ramey, asking for:

> A list of employees that are affected by the hour change along with their classification, current hours, the hours that they are being changed to, phone number.
> Rationale for the hour change for each of the classifications listed.
> Who was involved in the decision making process.

While there is no email response in the record, it appears the District made contact with Mehaffey to notify him Detra was gathering the list. Mehaffey sent another email on September 14, 2015 which stated, in part:

> I asked the district for some information regarding the grievance. [Detra] is working on the list. (names, classification, old hours, new hours, etc.)
> I would like also from you is who made the decision and the reasoning involved in making the decision to change the hours of the physical plant employees that are NOT at Elementary schools.

Ramey responded on September 14, stating:

> The decision was made by the Physical Plant Director and Assistant Directors in conjunction with HR. In terms of the rationale for the change, I think that we have talked about this; however, I don't think that rationale is subject to an information request. Again, happy to discuss with you but not sure it fits in an info request. Let me know if you want to chat.

After receiving Ramey's September 14 response, the Union "decided at that point in time" that this was "more than just a contract violation." SEIU's contention that McBurney had been "targeted" in the past changed its "thoughts" over the summer months because the District was purportedly being "guarded" with the information the Union requested.

SEIU filed a prohibited practice complaint on September 30, 2015 alleging the District violated Iowa Code section 20.10(2)(*a*)-(*d*) and (*f*). The Union alleges,

> The schedule changes were motivated by the department manager's anti-union animus as the Employer has offered no legitimate business reason to have changed their schedules. Moreover, the department manager has, in the Union's estimation, a history of targeting Union activists for adverse employment actions in violation of Iowa law.

SEIU's requested remedy is "[t]o have the employees' schedules returned to the ones they worked prior to July 1, 2015."[2]

On October 28, 2015, the District filed a motion to dismiss arguing the complaint was filed more than 90 days after McBurney's letter of assignment became effective on July 1, 2015.

**Applicable Legal Standards**

Iowa Code section 20.11 provides that prohibited practice complaints "shall be commenced by filing a complaint with PERB within ninety days of the alleged violation . . . ." Compliance with this time requirement is mandatory and jurisdictional in nature. *Brown v. PERB*, 345 N.W.2d 88, 93 (Iowa 1984); *Lomen & AFSCME Iowa Council 61*, 99 PERB 5966 at 3. "The complainant bears the burden to establish that the statutory 90-day jurisdictional requirement has been satisfied." *Union of Prof'l Police and AFSCME Iowa Council 61*, 13 PERB 8571 at 4.

[2]SEIU's original complaint listed two employees, Joel Venteicher and Mark McBurney, as having their "schedules altered on July 1, 2015 in violation of the parties' collective bargaining agreement." A subsequent amendment to the complaint removed Venteicher and only named McBurney as the only employee affected by the alleged prohibited practice.

An untimely complaint may, however, survive a motion to dismiss if there is "a factual and legal basis for being excused from timely filing." *Brown*, 345 N.W.2d at 94. The Iowa Supreme Court has recognized the applicability of two separate and distinct exceptions to the section 20.11 limitations period – the discovery exception and the fraudulent concealment exception. *Id.* at 95-97.

Under the discovery rule exception, the ninety-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); *see UNI-United Faculty & State of Iowa*, 13 PERB 8246 at 16.

Under the fraudulent concealment 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. "[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.

**Analysis**

In its complaint, SEIU alleges McBurney was targeted because of his status as a union leader and his work hours were changed because of his department manager's union animus. The Union contends the District "offered no legitimate business reason" for changing McBurney's work hours. SEIU makes it clear the

underlying basis of this complaint is predicated on the motivation behind the change to McBurney's work hours, not the schedule change itself, and this needs to be kept in mind when evaluating the timeliness of the complaint.

**A. When Did the Prohibited Practice Occur?**

In evaluating the timeliness of a complaint, a hearing officer must first determine when the alleged prohibited practice occurred, and thus, when the 90-day filing period commenced. *Brown*, 345 N.W.2d at 94; *PPME Local 2003 & Appanoose Cnty.*, 04 PERB 6807 at 2.

In this case, the parties disagree when the limitations period commenced. The Union identified July 1, 2015 as the date of the alleged prohibited practice in its complaint. If this is in fact the date then the Union's complaint filed on September 30, 2015 is untimely. SEIU subsequently retracted from its initial assertion to argue that while July 1 is the date of the contract violation (effective date of the letter of assignment), July 1 has no significance to the timeliness of the prohibited practice complaint because the 90-day filing period starts when the "status of the employee(s) changed." SEIU contends that since McBurney did not work his new hours until August 25, 2015, the limitations period did not commence until that later date.

In *Brown*, the Court concluded that the 90-day limitations period to file a prohibited practice complaint commences on the date the affected employee's employment status changes due to an adverse employment determination. 345 N.W.2d 88. Employee Brown knew that a midterm change to the collective bargaining agreement had effectively altered her seniority status. However, she

did not challenge it until the change in her seniority status subsequently resulted in her layoff more than 90 days after her seniority was changed. The Court held that the changed seniority status was a change in a term or condition of employment for Brown and her knowledge of such obligated her to timely file the prohibited practice complaint. The Court's reasoning in *Brown* and earlier decisions have resulted in a standard that the time period for filing "would ordinarily run from the date [employee's] status changed" rather than when the change subsequently effectuates an adverse action.[3] *Id.* at 95.

While not disagreeing with the general standard developed by *Brown*, SEIU instead focuses on *Des Moines Association of Professional Firefighters, Local 4 and City of Des Moines*, 14 PERB 8535, to argue that the date McBurney started working his new schedule is the date his "employment status changed." In that case, the complainant's allegation was that the employer "committed a prohibited practice by implementing a change in the utilization of company officers without adjusting the compensation of those affected." *Id.* at app. 13. The employer argued this plan was formed, considered and approved by the city council more than 90 days before the complaint was filed. The hearing officer found these dates to be of no significance because the status of any one employee did not change until the first lieutenant reported to work and took charge of a single-company station under the new plan.

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[3] In reaching that conclusion, the Court relied on an earlier decision, *Ferree v. Bd. of Ed.*, 338 N.W. 2d 870 (Iowa 1983), that held an employee's employment status changed when the teacher was placed on probation as a result of negative job performance evaluations, and not when the teacher was later laid off due to a staff reduction under a provision in a collective bargaining agreement that required probationary employees to be laid off first.

The *Des Moines Firefighters* case is factually distinct from the instant complaint. In that case, the employment term at issue was requiring lieutenants to head single-company stations on a permanent basis with no additional pay. Employees were not told ahead of time to agree to this new term of employment. As the hearing officer accurately concluded, no employee was affected by this unilateral change by the employer until the first lieutenant reported for duty to head a single-company station on a permanent basis.

In the present case, McBurney had advance notice of the effective date of the change. His letter of assignment defined multiple terms of his employment including his work hours, hourly and longevity pay, job classification and work location. He acknowledged and agreed to the terms of the work assignment. McBurney knew, or should have known, even prior to July 1, 2015 that the letter of assignment changed and defined the new terms of his employment. After the effective date of July 1, McBurney could not unilaterally choose to work his "old" hours. The fact that McBurney did not work the 2015-2016 work hours until the start of classes does not indicate there was no change in his employment status, but is merely indicative of an agreement between the parties to deviate from the newly set work hours until classes were back in session. The Union's filing of a contractual grievance indicating July 1 as the date of violation is an acknowledgment that the employees' status, including McBurney's, changed when the new letters of assignment became effective on July 1, 2015.

My conclusion is not swayed by SEIU's insinuation that, because the assignment letter does not itself indicate an effective date, there is no evidence the letter of assignment actually became effective on July 1, 2015. Brief of Union at 8. The Union certainly has not presented evidence to show the effective date is anything but July 1, 2015. To the contrary, the Union has essentially conceded July 1, 2015 to be the effective date of the letter by filing a contractual grievance indicating July 1, 2015 as the date of occurrence. Furthermore, the school year legally starts on July 1 as set by Iowa Code section 279.10(1), and the letter of assignment is for the 2015-2016 school year.

For purposes of calculating the statute of limitations, I find the alleged violation occurred, if at all, when McBurney's letter of assignment for the 2015-2016 school year became effective on July 1, 2015. Having filed the complaint more than 90 days after July 1, 2015, SEIU's complaint is untimely and can survive the motion to dismiss only if SEIU has proven the facts required under at least one of the recognized exceptions.

**B. Discovery Exception**

The underlying purpose of the discovery rule is to preserve claims in situations when a plaintiff suffers an injury but is excusably oblivious to significant facts needed to realize an actionable claim exists. But once a claimant has knowledge of facts supporting an actionable claim, the claimant has no more than the applicable period of limitations to file. *Vachon v. State,* 514 N.W.2d 442, 446 (Iowa 1994). Courts have consistently held that the party relying on exceptional circumstances to avoid a statute of limitations has the burden of

proving the facts which the exception requires. *PPME Local 2003*, 04 PERB 6807 at 3.

Under the discovery rule, the 90-day period for filing commenced when SEIU first knew or should have known of the acts which constituted a prohibited practice. *Brown*, 345 N.W.2d at 95-96; *Martin and UniServ Unit Two/ISEA*, 14 PERB 8539 at 6. In urging for the application of the discovery exception, SEIU argues it was only after the July 9 meeting between the District and SEIU that the Union "realized that the bell schedule may in fact have been a pretext for the real reason Mr. McBurney had his schedule altered." Brief for Union at 5.

"[K]nowledge of the facts and knowledge that they are actionable are distinct and unrelated issues for the purposes of the discovery rule." *Franzen v. Deere & Co.*, 377 N.W.2d 660, 662 (Iowa 1985). The burden under the discovery exception requires SEIU to prove it did not and should not have known a claim existed prior to July 9 because it did not have knowledge of pertinent facts needed to recognize a claim. The term "discovery" implies SEIU learned new facts probative to the underlying claim which were not known to them prior to the July 9 meeting.

SEIU references several "facts" or rationales to argue July 9 is the date it first knew or should have known a claim may exist. The Union acknowledges the District referred back to the bell schedule change and needing coverage as the reason for changing the employees' schedules. However, the Union's contention appears to be with the "fact" it did not get any additional information. SEIU argues

it "could not have reasonably suspected that the new school bell schedule might actually be a pretext for the anti-union animus [sic] it believes was behind Mr. McBurney's new hours until it met with (and heard from) the director of human resources for the District." Brief for Union at 5.

The reasons for the schedule changes the District provided at the July 9 meeting were previously known by the Union regardless of the source of that information. The Union has failed to prove how hearing the same facts from Ramey are somehow pivotal to recognizing a claim exists. Conversely, the District not providing additional rationales at the July 9 meeting is not evidence of a new pertinent fact becoming known to SEIU.

The Union also attempts to argue July 9 is the trigger date because union representative Mehaffey did not know physical plant employees were impacted by the schedule changes. If he had known this information, the Union's past suspicions that McBurney had been targeted because of his union involvement would have made him realize a prohibited practice may have been committed.

The fact Mehaffey did not know this information is irrelevant because "knowledge on the part of represented employees to a change in a term or condition of employment means that the certified labor organization possesses the same knowledge." *PPME Local 2003*, 04 PERB 6807 at 3. SEIU is legally assumed to know this information on the date McBurney learned it, which was prior to July 1. Also, without commenting on the veracity or weight of the past instances in which McBurney was "targeted," for the purposes of the discovery

exception it is sufficient to say that any lingering suspicions the Union had because of these past instances were known by the Union prior to July 1.

Having reviewed the facts the Union relies upon from the July 9 meeting, I conclude the Union did not discover any new facts it did not already know prior to July 1 when the letter of assignment became effective. As such, the Union has failed to meet its burden under the discovery exception.

**C. Fraudulent Concealment Exception**

Under the fraudulent concealment exception, the applicable statute of limitation is tolled if the claim is fraudulently concealed from the plaintiff. *Brown,* 345 N.W.2d at 96. Identical to its burden under the discovery exception, SEIU has the burden to prove facts which the exception requires. *Id.* at 94.

To prove fraudulent concealment, a plaintiff must show: (1) that the defendant engaged in some affirmative act to conceal the cause of action from the plaintiff; and (2) that the plaintiff exercised reasonable diligence to discover the cause of action. *Pride v. Peterson,* 173 N.W.2d 549, 555 (Iowa 1970). Consequently, SEIU's complaint will be deemed timely if it proves the District affirmatively concealed the facts on which the Union predicates its cause of action despite its due diligence to discover those facts. *Brown,* 345 N.W.2d at 96.

SEIU argues the email from Ramey which states "I don't think that rationale is subject to an information request" is evidence the District "concealed" pertinent facts, *i.e.* the "real" reason McBurney's work hours were changed. This email response provided by Ramey on September 14, SEIU argues, shows the District "affirmatively said it would not disclose (*i.e.*, it would conceal)

the reasoning behind the decision" and "shows the District's clear intention to withhold relevant information from SEIU." Brief for Union at 6-7; Resistance to Motion at 5.

I am unable to reach the same conclusion. Reading the email in its entirety reveals Ramey also said he thought they "have talked about this" and is "happy to discuss with [SEIU] but not sure it fits in an info request." While it is unclear exactly what Ramey meant by "not sure it fits in an info request," it seems likely he did not believe the requested information was relevant to the contract grievance because Mehaffey's email directly stated he was asking the District "for some information regarding the grievance." Regardless of this ambiguity in the record, the critical part of the email is that the District stated the rationale was previously discussed. The email itself is not evidence, as the Union argues, that the District "concealed" facts from SEIU.

Nevertheless, SEIU insists the District has concealed the "real", *i.e.* illegal, reason McBurney's work hours were changed and appears to argue that concealing the "real" motivation behind the schedule change is sufficient to prove fraudulent concealment. The Union wants to use the District's "refusal" to provide a rationale other than the bell schedule change as evidence of concealment. The fundamental problem with the Union's reasoning is that it attempts to use SEIU's underlying allegations that there was an improper reason for McBurney's schedule change as evidence of the District's fraudulent concealment. Without evidence of any "concealed" facts that the Union

"uncovered" on September 14, or at any time prior to filing the complaint, SEIU has failed to show the District fraudulently concealed facts pertinent for the Union to recognize the existence of a claim.

Because SEIU has failed to prove the first prong under the fraudulent concealment exception, I need not address whether SEIU has met the 'due diligence' prong of the analysis.

The District's motion to dismiss is sustained and the prohibited practice complaint filed by the Union is DISMISSED. The costs of reporting and of the agency-requested transcript in the amount $319.50 are assessed against the Complainant pursuant to PERB rule 621—3.12. A bill of costs will be issued to the Complainant in accordance with PERB subrule 621—3.12(3).

DATED at Des Moines, Iowa this 19th day of April, 2016.

Jasmina Sarajlija
Administrative Law Judge

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