Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Christine Alston,	
Complainant,	PERB Case No. 13-U-27
v.	Opinion No. 1485
AFSCME Local 1959,	
Respondent.	

DECISION AND ORDER

Pending before the Board is the motion of Respondent AFSMCE Local 1959 ("Union") to dismiss the complaint filed by Complainant Christine Alston ("Alston"). For the reasons set forth below, the motion is granted.

I. Statement of the Case

On May 13, 2013, Alston filed *pro se* an unfair labor practice complaint ("Complaint") naming the Union and the Office of the State Superintendant of Education ("Agency") as respondents. Alston alleges that the Agency terminated her employment December 17, 2012, for false reasons and without just cause, conduct that she alleges constituted an unfair labor practice in violation of section 1-617.04(a) of the D.C. Official Code. (Complaint ¶¶ 3, 11.)

With regard to the Union, Alston alleges that she was a member of the Union and that on several occasions before her termination she requested the Union to represent her in the investigation leading up to her termination. She alleges that "[t]he union failed and refused to represent me in that process." (Complaint ¶ 5.) Alston further alleges that she sought union representation after her termination, with the same result:

> After my termination, I contacted the union on several occasions to obtain representation regarding a grievance to contest my termination.
>
> On or about March 3, 2013, Mr. Corey and Mr. Lewis, the union representatives for AFSCME 1959 told me that the union was not

> going to represent me in any grievance challenging my termination.
>
> The union provided me with no valid reason as to why it could not represent me.

(Complaint ¶¶ 6-8.)

Alston contends that if the union had represented her properly, the termination would have been overturned. In addition, she alleges that in failing and refusing to represent her "the union acted arbitrarily, capriciously and in bad faith" (Complaint ¶ 9) and committed an unfair labor practice in violation of section 1-617.04(b) of the D.C. Official Code. (Complaint ¶ 10.) The Complaint adds that a "proceeding related to this complaint is pending at the Office of Employee Appeals. An appeal and answer has been filed but there is no hearing or pre-hearing scheduled." (Complaint ¶ 12.)

The Executive Director administratively dismissed as untimely both Alston's claim against the Agency and her claim that the Union failed to represent her before her termination. However, the Executive Director found to be timely Alston's claim that after her termination the Union on or about March 3, 2013, refused to represent her in a grievance challenging the termination.

On the ground that it had not received a copy of the Complaint until May 28, 2014, the Union requested and was granted an extension of time until twenty days from that date within which to file an answer. On June 16, 2014, the Union filed a pleading styled "Answer, Affirmative Defenses, and Motion to Dismiss." The Union's answer denied that Alston ever approached the Union for representation. The Union's affirmative defenses included insufficiency of service, untimeliness, preclusion of the claim due to Alston's appeal to the Office of Employee Appeals ("OEA"), and failure to state a claim.

The Union moved to dismiss Alston's Complaint "on the ground that she has waived any claim against the Union by pursuing an appeal of her termination to OEA." (Answer, Affirmative Defenses, and Motion to Dismiss 3.) The Union contends that D.C. Official Code § 1-616.52(e) allows an employee to choose to grieve an adverse employment action through a contractual grievance procedure or to file an appeal with OEA, but not both. (*Id.*) The Union argues that "Ms. Alston's choice to seek relief through her pending OEA claim precludes the relief she implicitly seeks: an order directing the Union to seek arbitration of the case." (*Id.* at 4.)

II. Discussion

After the administrative dismissal of the parts of her claim that were untimely, Alston's remaining claim is that the Union refused her request for representation on or about March 3, 2013, and provided her with no valid reason for the refusal. Although the Union denies those

allegations, we take all the allegations as true for purposes of the Union's motion to dismiss and view the Complaint in the light most favorable to the Complainant.

The Complaint alleges that "[i]n failing and refusing to represent me the union acted arbitrarily, capriciously and in bad faith." (Complaint ¶ 9.) However, the Complaint does not assert a basis for attributing an unlawful motive to the Union, as required in cases alleging breach of the duty of fair representation. *See Osborne v. AFSCME, Local 2095*, Slip Op. No. 713 at p. 5, PERB Case Nos. 02-U-30 and 02-S-09 (May 21, 2003). To the contrary, the Complaint asserts a basis for attributing a *lawful* motive to the Union. The Complaint acknowledges that a "proceeding related to this complaint is pending at the Office of Employee Appeals." (Complaint ¶ 12.) The Board's investigation pursuant to Board Rule 520.8 revealed that Alston filed her appeal with OEA December 11, 2012, after receiving her notice of termination. Alston's appeal with OEA was pending when union representatives allegedly told Alston on or about March 3, 2013, that the Union would not represent her in a grievance challenging her termination.

The pendency of that appeal gave the Union a lawful and reasonable basis for declining to bring a grievance on Alston's behalf. As the Union points out in its motion, section 1-616.52(e) of the D.C. Official Code gives an employee an election between pursuing an appeal of discipline with the OEA or challenging the discipline via a negotiated grievance procedure. The statute precludes an employee from raising the matter using both procedures. Alston made her election when she timely filed her appeal with OEA. *See* D.C. Official Code § 1-616.52(f). While a union may not arbitrarily ignore a meritorious grievance, *Board of Trustees of the University of the District of Columbia v. Myers*, 652 A.2d 642, 646 (D.C. 1995), it may decline to process a grievance that is not meritorious. *Ooley v. Schwitzer Div., Household Mfg., Inc.*, 961 F.2d 1293, 1304 (7th Cir. 1992). More particularly, a union does not breach its duty of fair representation by failing to bring a grievance that is precluded by a civil service appeal that had been filed by the employee. *See Local 3, Firemen & Oilers v. Matteo*, No. MUPL-05-4532, 2007 WL 5880604 at *4 (Mass. Labor Relations Comm'n May 16, 2007). *Cf. Morgan v. District 1199E-DC, SEIU*, 49 D.C. Reg. 4360, Slip Op. No. 665 at p. 4, PERB Case No. 01-U-26 (2002) (Union's decision not to arbitrate a grievance because the collective bargaining agreement did not authorize the grievance was not arbitrary conduct.)

As the Complaint does not present a basis for attributing an unlawful motive to the Union but instead acknowledges a basis for attributing a lawful motive to the Union for its conduct, the Complaint fails to state the asserted cause of action under the Comprehensive Merit Personnel Act. Accordingly, the Union's motion is granted and the Complaint is dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondent's motion to dismiss is granted.

2. The Complaint is dismissed.

3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy and Members Donald Wasserman and Keith Washington

Washington, D.C.
August 21, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 13-U-27 was transmitted to the following parties on the 25th day of August 2014.

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VIA U.S. MAIL AND FILE&SERVEXPRESS

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/s/ Adessa Barker

Adessa Barker
Law Clerk