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MICHAEL J. BARBER,

Complainant,

vs.

ALASKA STATE EMPLOYEES ASSOCIATION/AFSCME LOCAL 52, AFL-CIO,

Respondent.

Case No. 93-203-ULP

DECISION AND ORDER NO. 179

This matter was heard on July 12 and 13, 1994, in Anchorage, Alaska, before the Alaska Labor Relations Board, Chair Alfred L. Tamagni, Sr., present in Anchorage, and members James W. Elliott and Karen J. Mahurin, participating by review of the record including tapes of the hearing. Hearing Examiner Jan Hart DeYoung presided. The record closed on July 20, 1994, upon receipt of closing briefs.

Appearances:

Michael J. Barber, complainant; and Don Clocksin and James Glaze, Sonosky, Chambers, Sachse, Miller, Munson & Clocksin, for respondent Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA).

Digest:

ASEA's actions representing general government unit member Michael J. Barber resulted in a substantial settlement and were not arbitrary, discriminatory or in bad faith. ASEA did not violate its duty to represent him fairly.

DECISION

This case concerns the unfair labor practice charge against a union by former Alaska Department of Natural Resources employee Michael J. Barber. The Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA) represented Barber in several disputes with the department over tardiness and use of leave. Ultimately, the department discharged Barber. ASEA settled the discharge grievance for $50,000 with Barber's consent. Nevertheless, Barber claims in his charge that ASEA violated its duty to represent him fairly.

Barber argues that at the hearing he presented evidence of ASEA negligence and misrepresentation regarding its handling of his disputes with his employer and asks that "appropriate compensatory and punitive awards be provided." Barber, closing statement, p. 2.

ASEA argues that "far from breaching its duty of fair representation," it "expended a disproportionate share of its limited resources on Mr. Barber as it attempted to remedy all the perceived injustices." ASEA asks this Agency to rule on several issues. It argues that the doctrine of laches bars a duty of fair representation claim filed almost two years

after the alleged incidents; that the settlement of the discharge grievance against an employer releases the union from a duty of fair representation case as well or, in the alternative, creates a presumption that predischarge complaints also were resolved; that Barber failed to establish negligence or a violation of the duty of fair representation; that the notice of accusation issued in this complaint was insufficient as a matter of law; and that Barber failed to establish that his grievances had merit or that the union would have been successful even if it had proceeded to arbitration. ASEA, closing statement, p. 1, 6 & 7.

We find that ASEA invested much effort and resources in its representation of Barber in his discharge grievance. While the handling of the two grievances preceding his discharge may not have met this same high level of care, it meets the standard required under the duty of fair representation set forth in Kollodge v. State, 757 P.2d 1028 (Alaska 1988). Even so, any injury was compensated in the settlement negotiated with the State in the discharge grievance.

Findings of Fact

1 The Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA) was certified collective bargaining representative for the State of Alaska general government unit on September 28, 1988. Exh. 237.

2. The State and ASEA's first collective bargaining agreement was effective May 16, 1990. Agreement, Preamble, at 1, Exh. 239. It provides for discipline or discharge only for just cause. Agreement, Article 14, at 47, Exh. 239. It also provides a grievance arbitration procedure in Article 16. Agreement, Article 16, at 51 (Exh. 239 omits pages 51 - 55). There are successive steps or reviews of the grievance until the fifth and final step, which is binding arbitration. Agreement, Article 16, at 54.

3. Michael J. Barber was a member of the State's general government unit employed by the State of Alaska as an engineering assistant I and II in the Department of Natural Resources, Division of Parks and Outdoor Recreation, between on or about September 17, 1984, Exh. 168, at 3, and November 19, 1991, Exh. 70, at 3.

4. The specific incidents at issue are two grievances that ASEA filed in April of 1990 and May of 1991 on behalf of Barber when he was denied sick leave. Exh. 70. The grievances, however, must be viewed in the context of Barber's ongoing dispute with his employer over his leave use. According to Barber, the dispute first arose in 1988. Id.

5. Barber's evaluation for the period May 16, 1988--May 16, 1989, contained a statement that he abused sick leave. K. Roloff, memo. to E. Haseltine (Dec. 12, 1990), Exh. 244, at 2; Exh. CC, at 2.

6. Barber appealed the statement about sick leave in his evaluation. See M. Barber, letter to D. Otto (April 11, 1990), Exh. 243, Exh. U. The appeal was heard before Kimberley Gwytheron October 30, 1990, and Penny Palmquist, an ASEA business agent, was present with Barber at the hearing. K. Roloff, memo. to E. Haseltine (Dec. 12, 1990), Exh. 244, at 2; Exh. CC, at 2. The findings and decision were issued by Kip Roloff, personnel manager, Department of Administration. Roloff did recommend changes to the evaluation, such as removal of the sentence, "I feel that Mr. Barber abuses sick leave," but confirmed the existence of a performance problem with sick leave:

> I recommend the first sentence be removed and the second sentence in the paragraph begin with, "Mr. Barber used .. ." Performance evaluations are prepared in part, for the purpose of creating a factual record of an employees performance. Employees should be evaluated on facts and performance standards not on the rater's feelings. After removing the first sentence the rest of the paragraph factually explains there is a sick leave problem.

Id. The substituted page in his evaluation states, in part:

> Mr. Barber used approximately 184 hours of sick leave affecting 55 working days during this one year evaluation period. The high use of sick leave is periodic, not continuous. This situation has been discussed with Mr. Barber, verbally and by memorandum.

Performance Evaluation Investigation (Jan. 30, 1991), Exh. 246, at 2, Exh. N.

7. The sick leave issue continued to escalate while Barber's appeal of his performance evaluation was pending. Barber's immediate supervisor Daryl Haggstrom provided him with a written statement of Haggstrom's concern about Barber's use of sick leave. Haggstrom provided the example of Barber's leave usage of 26 hours in January of 1990. Haggstrom established a number of conditions for Barber to follow when he took sick leave. Haggstrom required a written doctor's report with diagnosis, support for the need to be absent from work so much, or a release authorizing Haggstrom to speak with the doctor. He also required Barber to obtain prior clearance of scheduled sick leave and submit a medical certificate for unscheduled leave upon return to duty. D. Haggstrom, memo. to M. Barber (Jan. 29, 1990), Exh. 192.

8. Barber apparently discussed his sick leave dispute with ASEA business agent Penny (Penelope) Palmquist. Penny Palmquist worked as a business agent for ASEA between November of 1988 and September 4, 1991. She explained to Barber in writing his and his employer's rights regarding sick leave:

> As follow-up to our meeting on Monday, I am writing to advise you of your rights regarding "excessive" absenteeism allegations made by your supervisor Daryl Haggstrom.
>
> The contract under Article 29, Section 2 C1 states:
>
> > An employee may be granted sick leave for a medical or dental appointment or illness or injury for the Employee or the Employee's immediate family at the discretion of the supervisor. Such absence, at the discretion of the supervisor, may be required to be supported by a physicians's certificate. **Employees will not be required to provide a physician's certificate for illness of less than three (3) days unless improper use is suspected.** (emphasis added.)
>
> You have missed 55 days of sick leave as of 05/15/89. Under the contract the employer clearly has the right to require physician's certificates for illness. Your current physician has expressed an unwillingness to continue to provide documentation as required by the contract. You will need to either have your physician reconsider his position or find another physician who will comply with your contractual obligations now and in the future.
>
> Our meeting with management has been rescheduled for February 16, 1990. Should you decide to seek a consultation with another physician, please do so prior to this meeting.
>
> I stand ready to assist you in any way I can.

P. Palmquist, letter to M. Barber (Feb. 7, 1990), Exh. 194.

9. Barber again missed work on February 12 and 13, 1990, and filed a leave slip upon his return to work indicating annual and sick leave. On February 15, 1990, Haggstrom advised Barber that he refused to approve the leave and charged Barber with 12.5 hours of leave without pay. The reasons Haggstrom provided were the absence of preapproval for the annual leave and the inadequate doctor's certificate for the sick leave Barber indicated on his leave slip. D. Haggstrom, letter to M. Barber (Feb. 15, 1990), Exh. 155.

10. The fact that Barber consulted with an ASEA staff member in February of 1990 can be inferred from Barber's written statement to Haggstrom that he had obtained additional time through his union representative, to respond to Haggstrom's January 29, 1990, memorandum, Exh. 193. In his response, Barber promised to "faithfully continue to include doctor's certificates with all sick leave reports." He also referred to the pending performance evaluation review and appears to suggest that this review would be an appropriate forum to address his medical records. M. Barber, memo. to D. Haggstrom (Feb. 20, 1990), Exh. 195.

11. Apparently Haggstrom continued to be dissatisfied with Barber's compliance with the conditions he had established because on February 27, 1990, Haggstrom repeated to Barber the requirement of a medical certificate for all sick leave use. He elaborated that the certificate must provide a medical reason that would cause you to be unable to be on duty and/or perform your work. The medical certificate must also specify the period of time covered by the release.

Haggstrom further provided that failure to comply would affect Barber's employment:

> If you return to duty from unscheduled sick leave without the proper documentation, the leave time will be Leave Without Pay and you may be subject to further disciplinary action.

D. Haggstrom, letter to M. Barber (Feb. 27, 1990), Exh. 196.

12. Barber's leave usage was affecting his coworkers. One testified that Barber did not call in when he should. She characterized the situation as serious, excessive, and demoralizing to other workers.

13. Barber first had notice that leave would not be approved for February 12 and 13, 1990, on February 15, 1990. Exh. 155. However, on April 4, 1990, Palmquist filed a step I grievance, seeking reinstatement of sick leave for the 12.5 hours assessed for the absences on February 12 and 13, 1990--the first grievance. Exh. 223. Palmquist states that the reason for filing the grievance in April was that Barber's harm did not actually occur until the deduction for the leave was made from his paycheck.

14. Palmquist stated she explained to Barber the procedures for filing grievances. Palmquist testified that, before the collective bargaining agreement between ASEA and the State was effective in May of 1990, the parties followed parts of the grievance procedures from the previous 1984-1986 between the State and the Alaska Public Employees Association and the personnel rules. She states that she filed Barber's claim under the extended 1984-1986 contract.

15. At the time, the State had informed its staff that it would follow the personnel rules. It provided notice to Department of Natural Resources employees that during the period before an agreement, grievances would be handled under the personnel rules, 2 AAC 07.435 and 2 AAC 07.440. Exh. 242, at 1. A memorandum to personnel officers notes that employees could pursue the matters themselves or be represented by ASEA and that the time frames under the Personnel Rules were shorter than the time frames under the former general government unit contract with the Alaska Public Employees Association. Exh. 242, at 3.

16. This first grievance was denied on April 13, 1990; 9.5 hours sick leave was denied because the doctor's certificate was inadequate, and 3 hours of annual leave was denied because Barber did not receive prior permission from his supervisor. Exh. 224. Over two months later, on July 2, 1990, Palmquist filed a step II grievance. Exh. 225. Palmquist claims that she had verbal extensions of time to file at the second step. However, on July 3, 1990, a state representative advised that the grievance was inactive and closed. C.R. Hamilton letter to F. Dichter (July 3, 1990), Exh. 227. The State formally denied the step II grievance on July 16, 1990. Exh. 226. On August 1, 1990, Palmquist filed a step III grievance. Exh. 228. The State's response was that "this grievance was closed due to lack of action by ASEA." Exh. 229. On August 20, 1990, Palmquist filed a step IV grievance. Exh. 230. Although Palmquist took no further action on the grievance before she left her employment with ASEA over a year later on September 4, 1991, she considered the matter to be pending. Palmquist called Barber's grievance a "hiatus grievance" and stated that there were many that were not finalized when she left ASEA. She stated that there was a question when she left whether to treat the hiatus grievances individually or as a group.

17. During Palmquist's tenure another leave dispute arose between Haggstrom and Barber resulting in leave without pay. This dispute would result in a second grievance. On February 13, 1991, Haggstrom took issue with the contents of the doctors' reports that Barber submitted for sick leave use on January 28 through February 8, 1991. Haggstrom stated,

> These messages do not verify that you should be excused from work. Perhaps if you show him [the doctor] this letter, he would be able to provide an acceptable release from work for medical reasons.

Exh. 199. The memorandum also threatens unauthorized leave without pay and further disciplinary action, including termination. Id. at 2.

18. Barber received the notice that his supervisor had actually disapproved leave for January 28, through February 8, 1991, on February 22, 1991. Haggstrom also denied approval of leave for February 8 and February 13, 1992, and warned,

> Continued occurrences of unscheduled sick leave without the proper documentation or unapproved annual

> leave will be unauthorized Leave Without Pay and you will be subject to further disciplinary action up to and including termination.

D. Haggstrom, letter to M. Barber (Feb. 22, 1991), Exh. 157.

19. Barber's log of meetings in February of 1991 shows a meeting on February 22, 1991, with Penny Palmquist. In addition, the Department of Natural Resources assistant personnel director Gwen Grant and Palmquist were scheduled to meet on March 4, 1991. M. Barber, personal notes, Exh. 200.

20. The amount of pay deducted from Barber's wages was $1,395.30. However, it was not actually deducted until later. Barber, by letter dated May 3, 1991, was advised of an overpayment of $1,395.00, which would be paid over a period of 12 pay periods, beginning with April 30, 1991. E. Haseltine, letter to M. Barber (May 3, 1991), Exhs. 159 & 208; D. Haggstrom, memo. to G. Grant (April 18, 1991), Exh. 174. See e.g., Exh. 170 (Oct. 1991 pay stub).

21. On April 18, 1991, Haggstrom notified Barber in a letter of reprimand that Barber had not complied with his letter of February 13, 1991, and refused to authorize leave for time in April of 1991:

> You returned from unscheduled sick leave without proper documentation April 8th and 16th totalling 10.5 hours. Both periods of leave are unauthorized Leave Without Pay. Please be advised that further sick Leave unsupported by adequate medical documentation and not presented immediately upon return to duty will result in a three day suspension up to and including termination.

Exhs. 175 & 203. This is the third instance of leave without pay. In a second letter, also dated April 18, 1991, Haggstrom directed Barber to report for a medical examination with Dr. Robert Alberts on April 23, 1991. Exh. 204.

22. Barber responded in writing, stating that additional time would be needed for his doctor to provide medical records and questioning the appropriateness of the doctor chosen for his evaluation. M. Barber, memo. to D. Haggstrom (April 22, 1991), Exh. 207. From the record it does not appear that Barber attended the medical evaluation.

23. ASEA business agent Charlene Milliman met with State officials twice in May on Barber's behalf on May 3 and on May 10. Exhs. 2, 211, & Exh. EE. At one meeting Barber's medical condition was reviewed and State representatives offered Barber time off to obtain additional medical information or a diagnosis of his medical condition.

24. Barber did provide a statement from his treating physician dated May 6, 1991, that "Barber is medically released for work." Exh. 210. The doctor stated he had no opinion whether Barber should undergo a psychological examination. Where the medical form states, "I believe Mr. Barber should consult the following specialist(s)," the doctor wrote, "Maybe university medical school Internal Medicine Dept. with consideration for sleep study. Such as Univ. of Washington, Seattle." Exh. 210.

25. On May 2, 1991, Milliman filed a grievance over the April 18, 1991, letter of reprimand by Haggstrom, which had denied use of sick leave, which the State received on May 6, 1991.[1] Exh. 231; Exh. 232 (showing receipt). Milliman filed this second grievance rather than Penny Palmquist, who was assigned to Department of Natural Resources but on vacation. Milliman stated that she filed the grievance to preserve the time frames and without evaluating whether it had any merit. She returned the file to Palmquist on Palmquist's return to the office.

26. The Intake/Grievance Form for this second grievance shows that the first step was due May 2, 1991. It also shows deadlines for the various steps of May 15, June 5, June 17, and July 9. Exh. H. It does not show that ASEA took any action after the second step was filed, although grievance was apparently pursued through step III. Exh. H; See finding of fact no. 30, infra.

27. Haggstrom denied the grievance for two reasons. First, Haggstrom noted that Barber was absent for the period January 28 through February 8, 1991, and that the notice to Barber that leave would not be approved was dated February 22, 1991, so the grievance was untimely. Haggstrom noted that the notice dated April 18, 1991, was the notice to the payroll department, advising them of the action. Second, Haggstrom denied the grievance on the merits:

> Notwithstanding the timeliness of the issue, Mr. Barber was under the requirement to present a doctor's certificate certifying that in the doctor's opinion Mr. Barber is physically unable to perform his duties when he is absent form work due to illness. Mr. Barber was unable to provide Management with an explanation stating this.

Exh. 232.

28. Apparently, on May 10, 1991, ASEA business agent Charlene Milliman, Tom Young, chief of design and construction, Gwen Grant, assistant personnel officer, and Mike Barber met to discuss the issue of his leave usage. Exh. 162. The State representatives provided a letter to Barber stating conditions of continued employment. D. Haggstrom, letter to M. Barber (May 10, 1991), Exh. 211 & EE.

29. In the May 10, 1991, letter, Haggstrom stated that Barber's repeated absences placed additional burdens on his fellow workers and limited the work he could be assigned. Haggstrom provided four conditions that Barber was warned he would have to comply with to retain his employment. The conditions were to provide notice to the office within 15 minutes of the commencement of the work day if Barber would be absent and to provide a doctor's certificate for all work time missed due to illness or injury, among others:

> 1. In the event you are unable to report for work you are to notify me first, if I am not available than notify Tom Young the Section Chief, and if he is not available you are to notify Neil Johannsen the Division Director not later than 15 minutes after the scheduled start time of your work day.
>
> 2. You are required to present to me or in my absence, Tom Young or in his absence, to Neil Johannsen a doctor's certificate to attest to your inability to report for work, for all work time missed due to an illness or injury. The doctor's certificate is to be presented before you will be allowed to report to work after any such absence and must certify that in the doctors professional opinion you were physically unable to perform your duties for the specific period of work time missed.
>
> 3. All annual leave must be approved in advance by me or Tom Young in my absence, and annual leave will not be approved in lieu of sick leave for uncertificated absences allegedly due to medical reasons.
>
> 4. Your hours of work, until further written notice, will be from 8:45 AM to 5:00 PM with a forty five (45) minute lunch period. Your work week is Monday through Friday and you will not be assigned to projects or tasks outside the office. [Exhs. 2, 211, & EE.]

30. Palmquist filed the step II grievance on May 22, 1991. She responded to the timeliness issue by stating that the harm did not occur until April 18 "when payroll was instructed to place him in LWOP (apparently the paperwork was not processed in February)." Exh. 233; Exh. I. Director Neil Johannsen denied the grievance on June 6, 1991. Exh. 234. On June 14, 1991, again claiming that the grievable event occurred on April 18, 1991, Palmquist filed the step III grievance. Exh. 235 & K. The grievance was denied on the basis that it was untimely and that there was no violation of the collective bargaining agreement. Exh. 236, at 2. Although Palmquist stated it was pretty automatic to go to step V, arbitration, she did not pursue the grievance to step IV.

31. On July 3, 1991, Haggstrom notified Barber that he was being suspended without pay for three days for being about four hours late for work on June 29 and for working without authorization on June 30, 1991. The reason given was

> You are being suspended for continued tardiness and working on days not authorized in direct disregard of the June 28, 1991 letter of warning.

The letter further warns

> Please be advised that further tardiness, working without prior authorization, and any violation of your conditions of employment may result in termination.

Exh. 165.

32. Again, on July 30, 1991, Haggstrom issued a letter of suspension to Barber for five days for reporting to work late on July 29, 1991, without prior notification. Exh. 166. The reason given was the disregard of the July 3, 1991, letter (Exh. 165), and the May 10, 1991, letter (Exhs. 2, EE, & 211) concerning "continued tardiness and lack of proper supervisor notification." Exh.166.

33. Barber's last day at work was November 19, 1991. Barber was required to be at work at 8:45 a.m. Exhs. 2, EE, & 211; Exh. 128, at 2. By Barber's account, he called "Judy at 8:50 after woke up late . . . " and worked between 9:30-12:10 and 1:55-5:00. Exh. 241.

34. ASEA business agent Charlene Milliman had been assigned responsibility for the Department of Natural Resources in October of 1991. Milliman remembers being telephoned by both Barber and Gwen Grant to attend a meeting on November 19, 1991. This was the meeting where Barber was discharged. Barber, his supervisor Daryl Haggstrom, Tom Young, and Gwen Grant were also present. The reason provided for the discharge was Barber's "again failing to comply with Items 1 and 2 of the 'Conditions of Continued Employment' in the letter dated May 10, 1991. T. Young, memo. to M. Barber (Nov. 19, 1991), Exh. 1 & FF.

35. Barber's discharge was effective immediately. Milliman states that Barber wanted to take documents with him but the State's representatives would not permit it. Milliman told Barber he had no right to take the documents.

36. On November 22, 1991, Milliman filed a step III grievance under article 16 of the parties' agreement with the commissioner. In the grievance Milliman requested reinstatement with back pay and benefits, removal of documents relating to termination from Barber's personnel file, and that Barber be made whole. Exh. 23; Exh. GG. That same day Milliman wrote Barber a letter advising that she needed information she believed he was withholding from her. C. Milliman, letter to M. Barber (Nov. 22, 1991), Exhs. 24 & II.

37. The State denied the grievance on December 8, 1991. Exh. 25.

38. Milliman became concerned about Barber's behavior and wrote a confidential memorandum to her supervisor stating her concerns. She states her belief that Barber will not provide information and that they will likely decline to pursue his grievance and release it to him to pursue. She states she contacted Barber's doctor and states her concerns about Barber's condition and future behavior. C. Milliman, memo. to B. Maupin, Exh. 26.

39. On December 13, 1991, Milliman filed a step IV grievance on Barber's behalf, which the State denied. Exhs. 34-35. ASEA received the response on January 16, 1992, and on January 31, 1992, ASEA business agent Charles O'Connell demanded arbitration. Exhs. 38 & NN. That same day, O'Connell demanded that the State provide him with a copy of Barber's personnel file, providing written authorization from Barber. Exhs. OO & PP.

40. O'Connell provided Barber with written notice of the status of his arbitration and the points they would have to prove for Barber to prevail. He also told Barber that he could not proceed without his medical information. C. O'Connell, letter to M. Barber (Mar. 7, 1992), Exh. SS.

41. On April 6, 1992, the State provided O'Connell a copy of the Department of Natural Resources personnel file for Barber. L. Mamae, letter to C. O'Connell (April 6, 1992), Exh. TT. O'Connell attempted to obtain from the State additional documents relevant to the representation of Barber in the dismissal arbitration. C. O'Connell, letter to R. Bacolas (Jan. 5, 1993), Exh. BBBB.

42. As ASEA was preparing for arbitration, it apparently explored settlement options with the State. The record contains early drafts of settlement agreements. A State draft notes that the agreement is to settle "both grievances filed by Michael Barber on _____ and ____." The amount is $25,000.00. The draft also provides, "ineligible for rehire." State draft (Sept. 9, 1992), Exh. 168, at 2. An ASEA draft notes the settlement is for the May 6, 1991, and November 22, 1991, grievances. The amount is $31,000.00, and it states "eligible for rehire." ASEA draft (Sept. 9, 1992), Exh. 168, at 3.

43. On March 15, 1993, Barber filed an unfair labor practice complaint with this Agency charging that ASEA was

negligent in its representation of him and providing documents in support of his charge. He first served a copy on the respondent ASEA on April 15, 1993. On May 7, 1994, Barber amended his complaint and alleged, more specifically (1) negligence by ASEA in its handling of several matters related to his termination; (2) negligence by ASEA in its pursuit of requests for State of Alaska documents; (3) misrepresentation by ASEA agents of Barber's interest concerning events that occurred during his employment with the State; (4) failure by ASEA to pursue action on Barber's behalf at meetings in 1991 with State officials; and (5) negligence by ASEA in its handling of two grievances -- the April 4, 1990, grievance filed by ASEA business agent Penny Palmquist and the May 2, 1991, grievance filed by ASEA business agent Charlene Milliman.

44. Subsequently, Barber proposed settling his case for $50,000, and O'Connell pursued a settlement in that amount for him. The draft of the settlement agreement that Barber proposed stated that the settlement covered the 11-22-91 grievance, was for the amount of $50,000 and provided for no rehire during the Hickel administration. It also stated,

> The parties agree that this action is taken solely to address the particular circumstances of this dispute regarding Mr. Barber's 11-19-91 Notice of Termination as filed in ASEA's subsequent 11-22-91 grievance on Mr. Barber's behalf.

Barber draft (July 14, 1993), Exh. 168, at 5.

45. O'Connell had not been involved in the two leave without pay grievances and was unaware of them. He thought that the settlement would extinguish all claims and represented to the State that, "this resolves all claims."

46. Jennie Day Peterson, business manager of ASEA, became involved in Barber's case because Barber had become dissatisfied with O'Connell and did not want to deal with him anymore.

47. Peterson finalized the settlement documents with the State on July 22, 1993. Exh. 176 & KKKK. The settlement agreement was signed by both Barber and Peterson, Exh. 176, at 3; Exh. LLLL. The draft shows a reference to the May 6, 1991, grievance that is lined out and initialed JDP. It also states, no rehire by State or applications by Barber for two years and provides for payment of $50,000 by the State. The last sentence states,

> The parties agree that this action is taken solely to address the particular circumstances of these disputes and does not establish any practice or precedent between the parties.

Peterson understood that the settlement was to address the entire dispute between Barber and the State. She wrote a letter to the State confirming her understanding, which was signed by both Peterson and Barber and which stated that the letter of grievance resolution was intended to cover the so-called May 6, 1991, grievance[2]:

> This will confirm our verbal agreement that the above referenced grievance is also closed. The deletion of this grievance from the Letter of Grievance Resolution is not intended to keep this file open. ASEA records indicate the dispute was closed approximately two years ago, and this confirms to Mike Barber's recollection as well.

Exh. 176, at 2; Exhs. LLLL-MMMM.

48. On August 3, 1993, the settlement amount was paid to Barber. Exh. 178. Barber was provided a copy of the fully executed letter of grievance resolution. Id., at 2. ASEA documented receipt of the settlement funds on August 4, 1993. Exh. 178, at 3.

49. O'Connell assessed Barber's chances of success at arbitration as "not real good." Under the circumstances, he felt the settlement was the best ASEA could do.

50. O'Connell states that more time was spent on the Barber case than on any other case he ever handled and that Barber was a time intensive grievant. This statement is confirmed by Barber. Barber stated in 1993 that he had met with ASEA personnel approximately 30 hours since his dismissal. M. Barber, letter to D. Gellhouse & J. Peterson (April 6, 1993), Exh. 117.

51. O'Connell represented Barber at his hearing on his appeal from the denial of certain unemployment benefits. See e.g., Exhs. 76-10, 76-12, 76-13, 77; Exhs. NNN & OOO; Exhs. RRR, SSS, & TTT.

52. Barber interfered with ASEA efforts to represent him on a number of occasions. See e.g., M. Barber, letter to arbitrator W. Dorsey (Feb. 24, 1993), Exh. 105; M. Barber, letter to arbitrator W. Dorsey (Mar. 22, 1994), Exh. 111; C. O'Connell, letter to M. Barber (November 30, 1992), Exh. 77; M. Barber, letter to Director Ritchie (July 1, 1993) (settlement proposal), Exh. 154; M. Barber, letter to J. Peterson (July 14, 1993)(wants to resolve issue himself and ASEA standing in his way), Exh. 168; C. Milliman, letter to M. Barber (Nov. 22, 1991)(urging Barber to provide all relevant information), Exh. 24 & II; C. O'Connell, letter to M. Barber (Nov. 30, 1992), Exh. TTT; see also, Exh. 119; Exh. 125; Exh. FFFF; Exh. 130; Exh. 137;

53. During ASEA's representation of him, Barber sought an attorney provided at ASEA expense. M. Barber, letter to D. Gellhouse (July 29, 1992), Exh. XX; M. Barber, letter to D. Gellhouse (August 26, 1992), Exh. BBB; D. Gellhouse, letter to M. Barber (Sept. 4, 1992), Exh. 58 and EEE; D. Gellhouse, letter to M. Barber (Sept. 21, 1992) Exh. LLL.

54. Barber sought internal union review regarding ASEA representation of him. See Exhs. 112, 113, 116, 117, 123, 127, 141, 143, 148, 152, DDD(Stables), HHH, & KKK.

55. Barber enlisted the assistance of the Ombudsman's Office, apparently six times, in his efforts to obtain State documents and to complain about his termination. Exhs. 12-19, 115, 190, 213, 212, 216, 217, 218, 221, & CCC.

56. Barber corresponded directly with State officials a number of times for public documents. Exhs. 10-11, ZZ, AAA, 20, 56, 83, 120, 126, 129, 136, 149, 151, 177, 183, 184, 185, 186, 189, 215, 220, & VV.

57. Barber enlisted the assistance of State Senator Virginia Collins. Exh. 67.

58. During the period of his employment, Barber reported a fair amount of sick leave. Exh. AAAA. Barber appears to believe he made up for this time by staying an extra 15 minutes on the job at the end of the day and by not using all of his vacation leave. He believes his production time was greater than the time reflected in his time records.

59. The reason for the lost work time remains unclear because Barber's medical condition is unclear. The record does not contain a diagnosis.

60. Barber at the time of the hearing in this case does not appear to want to work. He stated that he had applied for positions on the state register but had not applied for private employment. His pursuit of his claims took all of his time.

61. The Agency concluded its investigation of Barber's charges on December 21, 1993, and issued its notice of preliminary finding of probable cause. The notice recommended dismissal of counts 1-4 concerning ASEA negligence in handling matters related to Barber's termination, in requesting documents, in misrepresenting Barber's interests, and in failing to pursue action at meetings with State officials in 1991. The notice did recommend referring count 5 for hearing: the allegations of negligent handling of the two lost time grievances. The Agency issued its notice of accusation on December 21, 1993.

62. On December 29, 1993, ASEA filed its notice of defense, requesting a hearing on the charge in the notice of accusation, count 5.

63. Barber appealed the dismissal of counts 1-4 to a panel of the Alaska Labor Relations Board on January 6, 1994.

64. The board considered the appeal on the basis of a written record filed by the parties.

65. During the appeal, action was suspended on count 5. Prehearing Order (Jan. 11, 1994).

66. The board issued its order on appeal on March 29, 1994, denying the appeal on the basis that Barber had not stated reasons justifying reinstatement of the charges.

67. On April 4, 1994, the Agency issued an order scheduling count 5 for hearing on May 19, 1994. On April 20, the Agency amended its prehearing order and rescheduled the hearing to May 16, 1994.

68. On May 17, 1994, the hearing was rescheduled to July 12, 1994, upon Barber's request. The order stated that no additional extensions would be granted.

69. In June of 1994 ASEA through counsel offered to settle the claims Barber had filed against it for the sum of $1,655.09, in exchange for a complete release of any claims against ASEA, its present and former employees, officers, and directors, as well as the American Federation of State County and Municipal Employees (AFSCME). Exh. UUUU. The $1,655.09 was O'Connell's calculation of the number of hours of leave without pay assessed Barber (12.5 hours for the February 12, 1990--February 13, 1990, suspension and 79.5 hours for the January 28, 1991--February 8, 1992, suspension, times his hourly rate of $17.99 per hour (step 16-B). Exh. UUUU, at 5.

70. On June 28, 1994, Barber filed a motion to disqualify Jan Hart DeYoung as hearing examiner in this case. He also requested that the hearing date be postponed, supporting his motion with 515 pages of documents, and the 479 and 700 page submittals he had previously filed. On June 30, 1994, the Agency issued a procedural order stating that any matters pending during the disqualification motion would be handled by board chair Alfred L. Tamagni, Sr. On July 5, 1994, ASEA opposed postponing the hearing.

71. On July 6, 1994, the motion to disqualify the hearing examiner and postpone the hearing was denied.

72. On July 11, 1994, Barber asked this Agency to provide a continuance for the superior court to consider a petition for review Barber had filed concerning this matter.

73. The hearing on count 5 of the unfair labor practice charge proceeded on July 12 and 13, 1994. The parties presented testimony and other evidence. Complainant's exhibits 1-267 and respondent's exhibits A-UUUU were admitted.

74. The record closed upon the receipt of the parties' closing briefs on July 20, 1994.

Preliminary Matters

1. On July 11, 1994, Barber filed a motion to continue the hearing that was scheduled to begin on July 12, 1994. For the reasons that the motion was not timely, that the order of May 17, 1994, stated that no further extensions would be granted, that respondent would be put to additional expense, and that Barber did not provide grounds justifying the extension, the motion is denied.

2. The ASEA's motion for a one day extension of time to file a supplement to its prehearing brief (from July 5 to July 6, 1994) is granted for the reasons stated in the motion.

Conclusions of Law

1. This Agency has jurisdiction under AS 23.40.110 to consider this matter.

2. As the complainant in this unfair labor practice charge, Barber has the duty to prove each element of his charge by a preponderance of the evidence. 8 AAC 97.350(f).

3. The duty of fair representation a labor organization owes members of the bargaining unit is to avoid conduct that is arbitrary, discriminatory, or in bad faith. Kollodge v. State, 757 P.2d 1028, 1034 (Alaska 1988); Munson v. Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO, Decision & Order No. 161A (Aug. 23, 1993), aff'd 3AN-93-8752 CIV. (super. ct. Sept. 13, 1994). To recover an award, Barber must show that ASEA violated this duty and that this violation caused him injury.

4. ASEA has responded to this unfair labor practice charge by arguing three main points. It argues that the doctrine of laches bars Barber's claims, that the settlement with the State resolved all claims, and that it did not violate the duty of fair representation.

5. **Laches.** ASEA argues that the doctrine of laches bars this action. This Agency referred Barber's unfair labor practice charge on two grievances that arose in April of 1990 and May of 1991. The last action on these grievances was on August 20, 1990, for the April 1990 grievance and on July 5, 1991, for the May 1991 grievance. The time lapse between those dates and the date Barber filed his charge, March 12, 1993, was unreasonable, ASEA argues, and prejudiced ASEA's ability to defend the case. ASEA prehearing brief, p. 4.

6. We disagree that laches should bar Barber's charge. The Alaska Supreme Court has said that laches is an equitable doctrine that applies solely to equitable actions. An unfair labor practice is an action premised on statute, AS 23.40.110, rather than equity, and laches therefore would not apply. Foster v. Schnabel, 752 P.2d 459, 465 (Alaska 1988). The National Labor Relations Board and federal courts apply the six-month statute of limitations for unfair labor practice charges in section 10(b) of the National Labor Relations Act to duty of fair representation cases. Del Costello v. Teamsters, 462 U.S. 151, 113 L.R.R.M.(BNA) 2737 (1983). PERA, however, has no similar limitation period by statute.

7. Even if the doctrine of laches were to apply, however, we do not believe that it would bar Barber's action in this case. Barber does not appear to have had notice of ASEA's actions or inaction on the grievances. ASEA was active on Barber's behalf on the issue of his sick leave dispute with the State throughout the time between his first grievance and the settlement with the State. To say that Barber delayed acting assumes that he knew or should have known the grievances were dropped. Although Barber was informed of the grievance procedures and perhaps he should have inquired of their status, we are not prepared to say that the absence of an inquiry was unreasonable. Laches is an equitable doctrine premised on fairness and we do not believe it is fair to attribute the delay in this case to Barber.

8. **Compromise and settlement.** ASEA argues that the $50,000.00 settlement with the State extinguished any claims against ASEA for violation of the duty of fair representation. The evidence supports the conclusion that the settlement was intended to resolve all of Barber's claims against the State. Barber sought $50,000.00 to settle his claim against the State, and with the assistance of ASEA, he obtained this amount. The ASEA staff members who were principally involved in the final settlement believed that it was intended as full compensation for Barber's losses. Both business manager Peterson and business agent O'Connell testified that they believed the settlement was intended to cover all of Barber's disputes with the State. We find significant the fact that one of the two grievances at issue was specifically named in the settlement documents. Although Peterson had lined out the reference in the settlement agreement itself, she explained that by doing so she did not intend to send a message that the matter was active. She sent the State a letter, signed by Barber, confirming that the May 1991 grievance was not pending. See finding of fact no. 47. It is likely that the parties did not segregate these two grievances but viewed them as only small parts of the chain of events up to and including Barber's termination. Consistent with the general policy favoring settlement and an end to litigation, we conclude that the settlement agreement with the State was a complete settlement of Barber's disputes with it, including the two lost time grievances. See Mitchell v. Mitchell, 655 P.2d 748, 751 (Alaska 1982).

9. Barber obtained in his settlement with the State all of the compensation he sought for his termination. Nevertheless, he has pursued an action against the agent that obtained this compensation, ASEA. We are unaware of any precedent that would support ASEA's contention that a settlement and release of an employer should release the bargaining representative as well. While the settlement is evidence supporting ASEA's argument that its conduct was reasonable and consistent with its duty to Barber, it does not end the inquiry. We still must examine ASEA's conduct under the duty of fair representation.

10. **Duty of fair representation.** In general, the duty of a labor organization is to represent the bargaining unit members fairly. The union can exercise a broad range of discretion in the handling of disputes and grievances so long as it does so fairly. As the Alaska Supreme Court has stated,

> [A] union does not breach its duty of fair representation merely by refusing to bring an employee's grievances to arbitration: Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. To hold otherwise would greatly undermine the settlement machinery agreed to by the union and the employer as contained in the collective bargaining agreement.

Kollodge v. State, 757 P.2d at 1034 (citations omitted).

11. In Kollodge the Court identified three elements of the duty of fair representation: (1) all unit members must be treated without hostility or discrimination; (2) the labor organization must exercise its discretion in good faith and honestly; and (3) the labor organization may not act arbitrarily. Id. at 1035.

12. Examining the ASEA's conduct, we see evidence of effort beyond the minimum required to represent Barber fairly. For example, a business agent attended and represented Barber in an appeal hearing before the employment security division, which is not required. The record has documentation of the efforts of ASEA business agents to obtain appropriate records to present to Barber in arbitration. There is substantial evidence of the effort expended in representing Barber in meetings leading up to his discharge and in his discharge grievance, despite Barber's attempts to interfere with that representation. The union must have the discretion to exercise its judgment on behalf of a member and reasonably should be able to expect the assistance and cooperation of the grievant in processing the case.

13. There is substantial evidence that Barber was treated without hostility or discrimination. All of the evidence shows that ASEA staff exercised discretion honestly and in good faith.

14. The only reservation we have about ASEA's representation is the processing of the two lost time grievances filed in April of 1990 and May of 1991. Both grievances had problems with timeliness. These problems were serious.[3] At the time the first grievance was initiated, the State applied the personnel rules to grievances by or on behalf of general government unit members. Those rules require that a grievance be filed "within 10 working days after the action being grieved." 2 AAC 07.435(b)(1). The first grievance was for leave disapproved on February 15, 1990, but was filed on April 4, 1990, because wages were actually deducted then. The grievance was denied on April 13. An employee has five workdays to submit the grievance to the division director, 2 AAC 07.435(b)(2); but ASEA did not file step II until almost three months later. Although Palmquist states she had verbal extensions of time from the State, the State denied the grievance on the basis that it was untimely. The grievance was not pursued beyond step IV, which was filed on August 20, 1990. The second lost time grievance met a similar fate. The State responded to the 1991 grievance, in part, by stating that it was not timely filed, because the effective date of the action grieved occurred in February.

15. Because neither grievance was pursued to conclusion it is not known whether the State or ASEA's position would have prevailed on the timeliness issues. The existence of these issues creates a question about the standard of care ASEA exercised in processing the grievances.

16. However, the evidence in the record shows that the grievances were weak. The State documented a problem with Barber's tardiness and leave use. He was the subject of progressive discipline on his use of leave. He had written notice and warnings of his supervisor's position. He was denied approval of leave on three separate occasions, two of which were the subject of grievances. He was suspended twice without pay for failure to comply with the conditions established for his leave use. Barber did not present evidence in this proceeding that the State's actions were not merited. ASEA has broad discretion, after investigation, to decline to pursue a nonmeritorious case. So long as the decision is made without hostility or discrimination and in good faith and the action is not arbitrary, the union does not violate its duty to represent a unit member if it declines to process or pursue a grievance. Vaca v. Sipes, 386 U.S. 171, 191, 87 S. Ct. 903, 917, 64 L.R.R.M.(BNA) 2369, 2378 (1967). A decision not to pursue either of Barber's grievances would have met this standard.

17. While neither grievance was pursued to the last step, arbitration, it is not clear that an ASEA staff member made the decision that the grievances lacked merit. Palmquist stated that the grievances were pending when she left ASEA in September of 1991. While Milliman suggested to her supervisor that the discharge grievance would be turned over to the grievant to pursue, there is no evidence that she or another agent informed Barber that ASEA would not pursue the earlier lost time grievances.

18. ASEA was remiss in failing to inform Barber if in fact such a decision were made. See Munson v. Alaska State Employees Association/AFSCME Local 52, AFL-CIO, Decision and Order 161A, at 12. Even so, ASEA has not committed an unfair labor practice.

19. Generally, simple negligence does not violate the duty of fair representation. Martin H. Malin, Individual Rights Within the Union 358-371 (1988). However, at least one jurisdiction has found that, where "the individual interest at stake is strong, and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim," a union may be found to have violated the duty of fair representation. Johnson v. United States Postal Service, 756 F.2d 1461, 118 L.R.R.M.(BNA) 3411, 3414 (9th Cir. 1985); Dutrisac v. Caterpillar Tractor Co., 749 F.2d. 1270, 1274 113 L.R.R.M.(BNA) 3532, 3535 (9th Cir. 1983). The facts of this case do not provide a persuasive argument for extending this rule to Alaska. There is no evidence that Barber was harmed by ASEA's action and nonaction in pursuing the two lost time grievances. Certainly Barber's termination cannot be attributed to any actions related to these two grievances. They were only two of three instances where Barber was assessed leave without pay for failure to meet the conditions established to take leave and, Barber was twice suspended without pay for the same conduct. We have found that Barber obtained the compensation he sought in the settlement agreement ASEA negotiated on his behalf with the State. In addition, Alaska law permits Barber to pursue remedies directly against the employer. He is not required to pursue a matter through his representative. See Kollodge v. State, 757 P.2d at 1034; Casey v. City of Fairbanks, 670 P.2d 1133, 1138 (Alaska 1983).

20. Moreover, we are not prepared to find that a union should compensate an employee who would not have prevailed in the underlying grievance. But see Dutrisac v. Caterpillar Tractor Co., 756 F.2d 1461, 113 L.R.R.M.(BNA) 3532. Both Barber and ASEA have documented thoroughly the fact that the State was dissatisfied with Barber's leave usage and his noncompliance with the conditions established for his employment. Barber still has no insight on the fact that the State as an employer can set the hours of work and his tardiness was a problem. The grievances were not strong cases for success.

21. If Barber had prevailed in establishing a violation of the duty of fair representation and we had found that the settlement did not cover the lost time grievances, his damages would be limited to those incurred as a direct result of the union's failure to file timely his grievances. Often the damage resulting from a duty of fair representation violation is the cost incurred in pursuing an action directly against the employer. See Dutrisac v. Caterpillar Tractor Co., 511 F. Supp. 719; 107 L.R.R.M.(BNA) 2195, 2201 (W.D. Cal. 1981), aff'd, 756 F.2d 1461, 113 L.R.R.M.(BNA) 3532 (attorney's fees incurred in processing individual action against employer awarded for violation of duty of fair representation where employer discharged plaintiff for good cause); see generally Martin H. Malin, supra 472. In this case Barber's damages at most would have been the wages he lost when his supervisor did not approve leave in 1990 and 1991. Barber's charges were referred on two pretermination grievances only. The only evidence of damage to Barber related to these grievances in the record is a lost wages claim for approximately 13 days. ASEA has established evidence, unrefuted by Barber, that the amount lost was about $1655.09. Barber, with the assistance of ASEA, has already obtained compensation from the State for the dispute and grievance arising out of his actual termination. Barber's actual financial loss is therefore at maximum those lost wages.[4]

22. Barber asks the Agency to award punitive damages. The Agency, however, does not have the authority to issue an award for punitive damages. The Agency was created by the legislature and has those powers the legislature authorized. Under AS 23.40.140, if the Agency finds that a person engaged in a prohibited practice, it may order "the person to cease and desist from the prohibited practice and to take affirmative action which will carry out the provisions of" the Public Employment Relations Act, AS 23.40.070--23.40.260. The legislature has not specifically empowered the Agency to order punitive awards. The federal courts have found that punitive damages are not available for a violation of the duty of fair representation. Electrical Workers, IBEW v. Foust, 442 U.S. 42, 101 L.R.R.M.(BNA) 2365 (1979). We see no reason to depart from this rule. 8 AAC 97.450.

23. In sum, ASEA did not treat Barber with hostility or discrimination in its handling of his various grievances and complaints. ASEA acted in good faith and honestly in its handling of Barber's complaints and its conduct was not arbitrary. However, Barber was compensated for any financial injury in his settlement agreement with the State.

ORDER

The complaint filed by Michael J. Barber in this case is DISMISSED.

THE ALASKA LABOR RELATIONS AGENCY

Alfred L. Tamagni, Sr., Chair

James W. Elliott, Board Member

Karen J. Mahurin, Board Member

APPEAL PROCEDURES

An Agency decision and order may be appealed through proceedings in superior court brought by a party in interest against the Agency and all other parties to the proceedings before the Agency, as provided in the Alaska Rules of Appellate Procedure and the Administrative Procedures Act.

The decision and order becomes effective when filed in the office of the Agency, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of Decision and Order No. 179 in the matter of Michael J. Barber v. Alaska State Employees Association/AFSCME Local 52, AFL-CIO, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 25th day of November, 1994.

Victoria D.J. Scates

Administrative Clerk III

This is to certify that on the *th day of November, 1994, a true and correct copy of the foregoing was mailed, postage prepaid to

Michael J. Barber

Don Clocksin, ASEA

James Glaze, ASEA

1The April 18, 1991, letter of reprimand states it covered 10.5 hours in April of 1991. However, the State and ASEA both handled this second grievance as if it were about leave without pay in February of 1991 that the State had deducted from Barber's pay, beginning on April 18, 1991.

2May 6, 1991, was the date the State received the second grievance, dated by Milliman May 2, 1991. See paragraph no. 25 supra.

3ASEA has argued that the notice of accusation in this case was insufficient as a matter of law. See supra, p. 2. The handling of these grievances and the factual issues about what the settlement covered justified the issuance of the notice of accusation and proceeding to hearing in this case.

4We have found, however, that this loss was compensated in the settlement agreement following Barber's termination.