



represent him in a grievance against his former employer.<sup>1</sup> Eldred also filed a complaint against his former employer, the State of Oregon, Department of Transportation (ODOT), alleging that ODOT dismissed him from employment in breach of the relevant collective bargaining agreement, thereby violating ORS 243.672(1)(g).<sup>2</sup>

The case was assigned to Administrative Law Judge (ALJ) Wendy L. Greenwald. The ALJ notified Eldred that his complaint appeared to be untimely. The ALJ offered Eldred the opportunity to either amend the complaint or present legal argument to show cause why the complaint should not be dismissed as untimely. Eldred responded with arguments on July 1, 2009.

For purposes of this Order, we assume that the well-pled facts in the complaints are true. *Schroeder v. State of Oregon, Department of Corrections, Oregon State Correctional Institution, and Association of Oregon Correctional Employees*, Case Nos. UP-49/50-98, 17 PECBR 907, 908 (1999). We also rely on undisputed facts discovered during our investigation. *Upton v. Oregon Education Association/UniServ*, Case No. UP-58-06, 21 PECBR 867, 867-68 (2007); ORS 243.676(1)(b). We have reviewed the complaints, the documents Eldred submitted, and his response to the ALJ's show cause letter. We conclude that the complaint against AEE is untimely and must be dismissed.

Eldred makes the following allegations in his complaints. Eldred worked for ODOT from May 1980 until his dismissal on October 20, 1993. At the time of his dismissal, he was in a bargaining unit represented by AEE. Soon after receiving the dismissal notice, Eldred met with the attorney representing AEE, who told Eldred "NOT to take any action on my own as the A.E.E. would represent me and take care of the matter. \* \* \* Word came thru [*sic*] to me second hand and third hand of supposed actions but absolutely nothing was conveyed to me by the A.E.E. nor was anything clarified" (Complaint at 2; emphasis in original.)

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<sup>1</sup>Eldred, who appears *pro se*, asserts that AEE's actions violated ORS 243.752. This appears to be a mistake. ORS 243.752 pertains to interest arbitration awards. A fair and non-technical reading of the complaint—ignoring the erroneous citation—reveals that Eldred is asserting that AEE breached its duty to fairly represent him. A duty of fair representation claim against a union is appropriately filed under ORS 243.672(2)(a). See *Chan v. Leach*, Case No. UP-13-05, 21 PECBR 563 (2006), *on reconsid.*, 21 PECBR 597 (2007) (generally describing the duty of fair representation). For purposes of this Order, we assume Eldred is asserting that AEE violated ORS 243.672(2)(a).

<sup>2</sup>ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations \* \* \*."

After Eldred met with the AEE attorney, he repeatedly called the number provided by the AEE attorney and left messages, but his telephone calls were not returned. Eldred continued attempting to contact the attorney through either December 1994 or December 1995.<sup>3</sup> He did not attempt to contact the attorney after that date. He did not attempt to contact AEE directly because AEE only had a post office box and no telephone. Sometime after January 2009, Eldred found a phone number for AEE through a search on the internet. Eldred telephoned AEE regarding his case several times and on May 20, 2009, the AEE receptionist told Eldred that “they have done everything they can do for me.” (*Id.*)

Eldred alleges that AEE told him at the time of his dismissal that it would represent him, that AEE representatives failed to keep him informed about the status of the representation, and that AEE could have gained reinstatement for him if it had adequately represented him. Eldred asserts that he did not actually know AEE would not represent him until his telephone call with AEE on May 20, 2009.

### DISCUSSION

All unfair labor practice complaints are subject to a 180-day statute of limitations. ORS 243.672(3) provides that “[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice.” Eldred filed this complaint on May 22, 2009. Under ORS 243.672(3), the complaint is timely for any violation that occurred on or after November 24, 2008.

Eldred alleges only one incident that occurred on or after November 24, 2008. He states that on May 20, 2009,

“I finally got thru [*sic*] to the A.E.E. (Association of Engineering Employees) and they told me ‘they have done everything they can do for me.’ (which is false since they were capable of properly representing me in the first place). It has taken me a lengthy time to get this far as the A.E.E. has never given me an explanation of what is going on but has kept me in the dark.”

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<sup>3</sup>During the ALJ’s investigation of the complaint, Eldred provided the dates on which he attempted to contact the AEE attorney. The ALJ included these dates in her letter asking Eldred to show cause why the complaint should not be dismissed. Neither AEE nor the State objected to or disputed these dates.

In a duty of fair representation case, the 180-day limitations period begins when an employee “knew, with reasonable certainty, that [the union] failed to fairly represent him.” *Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409, 417 (1993). Eldred asserts that AEE failed to fairly represent him when it refused to pursue his grievance. He further asserts that he did not know about AEE’s refusal until May 20, 2009, when AEE told him it would take no further action on his behalf.<sup>4</sup>

We conclude that long before May 20, 2009, Eldred knew or should have known with reasonable certainty that AEE was no longer pursuing his dismissal grievance. Eldred was dismissed on October 20, 1993, more than 15 years ago. He stopped contacting AEE no later than December 1995, and made no further contact until January 2009 at the earliest, a lapse of more than 13 years. A reasonable person would have recognized long before November 24, 2008, that AEE was not pursuing his grievance.

In this regard, *Upton v. Oregon Education Association/UniServ*, Case No. UP-58-06, 21 PECBR 867 (2007) is instructive. In *Upton*, an employee received a reprimand and her union initiated a grievance over it. About 4-1/2 years later, the employee filed a complaint with this Board alleging that the union violated its duty to fairly represent her when it did not respond to her requests for information about the status of the grievance. The union had promised to respond to her requests and never expressly stated that it would refuse. We concluded that given the passage of time, the complainant knew or should have known well outside the limitations period that the union would not respond to her. We dismissed the complaint as untimely.

The same principle controls here. The passage of time alone can serve as notice to an employee that the union does not intend to act. At some point long before the passage of 13 years, Eldred realized, or objectively should have realized, that AEE was not pursuing his grievance.

Our conclusion is consistent with the purpose of the 180-day statute of limitations. ORS 243.672(3) is intended “to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in

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<sup>4</sup>In *Putvinskas v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99, 18 PECBR 882, 898 (2000), we held that in duty of fair representation cases, “[w]e do not review whether a labor organization *communicated* its grievance processing decisions to potential grievants.” (Emphasis in original )

question have become dim and confused, \* \* \* and of course to stabilize existing bargaining relationships.” *AFSCME Council 75, AFL-CIO and Haphey and Bondiotti v. Linn County, Linn County Sheriff’s Office and Martinak*, Case No UP-115-87, 11 PECBR 631, 648 (1989) (quoting *Local Lodge 1424 v. NLRB*, 362 US 411(1960)). These purposes would not be served if we allowed Eldred to revive his “long-stale claim” by simply making another telephone call to AEE more than 13 years after he originally gave up when his prior calls went unreturned. *Upton*, 21 PECBR at 871. Therefore, we conclude that the complaint against AEE is untimely and we dismiss it.

We turn to Eldred’s claim that ODOT dismissed him in violation of the collective bargaining agreement. When we determine that the union did not violate its duty of fair representation, we automatically dismiss the breach of contract claim against the employer. *Chan v. Leach*, Case No. UP-13-05, 21 PECBR 563 (2006), *on reconsideration*, 21 PECBR 597 (2007); *Putvinskis v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College*, Case No. UP-71-99, 18 PECBR 882, 899 (2000). Because we dismiss the complaint against AEE as untimely, we must also dismiss the complaint against ODOT.

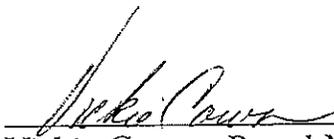
ORDER

The complaints against AEE and ODOT are dismissed.

DATED this 4 day of August 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.