STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHULA VISTA ELEMENTARY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-1233
v.	)	PERB Decision No. 256
CHULA VISTA CITY SCHOOL DISTRICT,	)	November 8, 1982
Respondent.	)	

Appearances; Charles R. Gustafson, Attorney for Chula Vista Elementary Education Association, CTA/NEA; Richard J. Currier and Martha Geiger, Attorneys (Littler, Mendelson, Fastiff & Tichy) for Chula Vista City School District.

Before Gluck, Chairperson; Jaeger and Jensen, Members.

DECISION

GLUCK, Chairperson: The Chula Vista Elementary Education Association, CTA/NEA (CVEEA or Association) excepts to the hearing officer's decision dismissing its charges that the Chula Vista City School District (District) violated subsections 3543.5(a), (b) and (d) of the Educational Employment Relations Act (EERA)[1] by assisting an employee

[1]The EERA is codified at Government Code sections 3540 et seq. All references will be to the Government Code unless otherwise noted.

Subsections 3543.5(a), (b) and (d) provide:

> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

in filing a grievance which would create dissension among unit members, thus interfering with the administration of the Association.

The District excepts to the hearing officer's failure to award it attorneys' fees.

FACTS

Ann Shore, a former CVEEA officer, filed a grievance in late June 1980, protesting the transfer of Jo Buchanan, a newly-appointed Association official, to a position on Shore's elementary reading teaching team. Shore believed that in choosing Buchanan, the District did not select the most qualified person, and thereby violated the transfer provisions of the negotiated agreement between the Association and the District. The agreement permits either employees or the Association to file grievances. The process calls for

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> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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> . . . . . .
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> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

three steps and provides that an individual may choose a representative other than the Association, although the latter has a right to be present at grievance meetings. Grievances are filed directly with the District which then forwards a copy to the Association. The grievance form does not indicate whether the grievant is represented by the Association. The District's practice is to contact the grievant directly to set up initial meetings.[2] The Association had never objected to the District making these direct contacts.

Shore's grievance stated no facts and made no reference to Buchanan. It only alleged violations of particular contract provisions concerning transfers, and that the District had transferred an employee who did not meet the qualifications stated in the posted job announcement. On July 2, Tom Ciolli, the Association's grievance chairperson, met with Shore. He suggested that she attach a chronology of events to the grievance. On the same day, the two met with Dolores Ballesteros, the District's representative assigned to

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2Several witnesses familiar with the grievance procedure attested to this practice. The Association's witness who claimed that the District always contacted the Association rather than the grievants had primarily worked on grievances filed on behalf of the Association. Cross-examination revealed that this witness, in fact, didn't know if the District contacted individuals in addition to the Association in order to set up meeting times.

hear the matter. Ballesteros informed them that because she would be on vacation, she would pass the grievance along to Joe Zampi, District coordinator of negotiations. Neither Shore or Ciolli objected to this. Ballesteros also suggested that Shore add a factual statement to the grievance in order to make it more comprehensible.

Zampi called Shore on July 7 to set up a time to hear the grievance. According to his testimony, she asked him what he thought of the grievance. He replied that, although he didn't know the facts and didn't want to pre-judge the matter, the past practice had been to deny grievances alleging improper transfers unless drastic differences in employee qualifications were shown. According to Shore and Zampi, no further discussion of the merits of the grievance or its contents occurred.

Later, Shore contacted Ciolli regarding a meeting time and recounted her conversation with Zampi. According to Ciolli, Shore's description of the conversation portrayed Zampi as "coaching" her on processing her case. For example, supposedly he gave her examples of grievances in which vast differences in qualifications were shown. We credit the Zampi-Shore account of their telephone conversation. They were the direct participants in the conversation.

On July 10, Ciolli wrote Zampi, protesting his giving Shore advice on how to proceed with the grievance and accusing him of

meddling in Association affairs. The letter concluded by stating that the rewrite of the grievance would be withheld until Ballesteros returned and would be filed with her rather than Zampi. It was from this letter that Zampi learned that Buchanan had been appointed to the position concerning which Shore was grieving. The Association urges us to attribute to Zampi other administrators' knowledge that Buchanan was the subject of the grievance. We do not. There is no evidence supporting such a finding nor any legal principle which requires us to attribute the knowledge of one administrator to another.

Shore, who had not seen the letter before Ciolli sent it, complained to Ciolli when she received a copy on July 11.[3] The following day, she wrote to the Association president protesting Ciolli's letter and informing the Association that she believed it would be in her best interest to represent herself unless the Association was willing to provide another representative. She was notified by Ciolli on July 17 that the Association would not be doing so.

Shore then sought the individual assistance of a former CVEEA grievance committee chairperson and filed a completed grievance on July 21. Ciolli attended subsequent meetings

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3ciolli claims that he discussed with Shore writing a letter to Zampi before he did so. Shore doesn't confirm or deny this but, at the very least, she did not see a copy of it before it was sent to Zampi.

between the District and Shore as the Association observer. The grievance was denied on the ground that Shore had no standing to complain about someone else's transfer.

CVEEA filed this unfair practice charge in October 1980. In its exceptions to the proposed dismissal, CVEEA essentially re-asserts that Zampi, by his conversation with Shore, discriminated against other unit employees by aiding Shore in writing her grievance in a manner which negatively affected other unit members, denied CVEEA its right to represent its members, and interfered with its administration.

CVEEA presented no evidence to support its allegation that Ballastros had met with Shore and a representative who was not authorized to act on behalf of the Association. Instead, CVEEA now claims it raised this in its pleadings as mere background information.

We dismiss the charge in its entirety.

DISCUSSION

CVEEA argues that by dealing directly with Shore outside the grievance format, the District interfered with the Association's administration by causing her to rewrite the grievance. CVEEA contends that the District should not be allowed to promote divisiveness within the unit or the Association by encouraging one member to challenge the job qualifications of another. Further, CVEEA claims that Zampi's remarks caused Shore to abandon Association representation

after Ciolli sent the letter asserting CVEEA's right to control the grievance-writing process and to be present at all meetings.

Zampi's initial contact with Shore conformed to District past practice to which CVEEA had never objected. Zampi understood from the reference to the contract provisions allegedly violated that the grievance concerned a transfer. At the time, he did not know of Buchanan's appointment. His brief reference to the type of information on which such grievances had turned in the past, coupled with his caveat that he did not want to prejudge the matter absent the facts, do not amount to an attempt to control the grievance or even to have Shore rewrite it. Ciolli himself had suggested that Shore attach a chronology of events. Ballesteros had indicated at an earlier time that a factual statement would be helpful. The Association and Shore were free to act upon Zampi's comments as they saw fit. We find nothing in the Zampi-Shore conversation to be discriminatory, coercive or otherwise unlawful.

Nor do we find that Zampi's statements unlawfully discriminated against other unit members or interfered with the administration of the Association by encouraging Shore to demonstrate drastic differences in the qualifications of candidates for transfer. Competing interests of employees necessarily come into play where one employee protests the selection of another. The collective bargaining agreement between the parties recognizes comparative qualifications as a

basis for selections. A management official's remark that such complaints had not been successful in the past unless they showed a great disparity in qualifications simply states the facts. Absent independent proof of unlawful motive underlying the statement, we cannot find it actionable.

Finally, we reject CVEEA's claim that the District caused Shore to abandon Association representation. It is clear that Shore dismissed Ciolli as her representative because of his July 10 letter to Zampi. It was this dissatisfaction and the Association's refusal to provide another representative, not employer intimidation, which caused her to seek help elsewhere.

Attorneys' Fees

In support of its claim for attorneys' fees, the District argues that the charge was frivolous and, in part, false.

In Cumero v. King City High School District Association, CTA/NEA, Et al., (3/3/82) PERB Decision No. 197, p. 26, the Board held that it would consider awarding attorneys' fees only upon a showing that the defense to an unfair practice charge was "without arguable merit." In Unit Determination for the State of California (12/21/80) PERB Decision No. ll0c-S, p. 41, we held that fees would be awarded only where there was a showing of "frivolous or dilatory litigation" and would be denied " . . . if the issues are debatable and brought in good faith." See also Heck's, Inc. (1974) 215 NLRB 765 [88 LRRM 1049].

We find that these standards are appropriate where, as here, the party charged with an unfair practice seeks attorneys' fees. They should be awarded only where the charge is without arguable merit and was brought in bad faith.

We do not find this to be the case here. From CVEEA's viewpoint, a member client, after meeting with management, reported what appeared to be management's advice on the requirements for a successful grievance, which, if followed, would cause the grievant and the Association to attack the qualifications of an Association official. We cannot say that the incorrect conclusion CVEEA reached was so without justification as to be characterized as frivolous.

Furthermore, we do not overlook the fact that it was Zampi's gratuitous advice which triggered this chain of events. Admittedly, he knew none of the facts; he could not know on what theory CVEEA intended to prosecute the grievance. Yet, he presumed to instruct Ms. Shore as to how it would probably have to be handled.

If CVEEA's investigation leading to the charge left something to be desired, it is also apparent that its best source of information was a dissatisfied ex-client. Pursuit of a weak case, as this surely was, does not constitute the indefensible form of litigiousness which an award of attorneys' fees is meant to discourage or remedy.

In the alternative, the District has asked for fees

expended to defend the charge that it met with Shore and a representative of hers not authorized by the exclusive representative. Even if we were to find that this single assertion was frivolously included in the charge, the District has not shown an added burden in preparing its response sufficient to justify apportioning attorneys' fees on so selective a basis.

Lastly, the District excepts to the hearing officer's failure to conclude that the subsection 3543.5(b) charge was totally lacking in proof, as he found the (a) and (d) charges to be. We interpret his dismissal of the (b) charge to be for lack of proof. In any event, we so decide here.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board hereby DISMISSES the charge filed by the Chula Vista Elementary Education Association, CTA/NEA against the Chula Vista City School District.

Members Jaeger and Jensen concurred.