STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN C. SCATES, Charging Party, v. LOS ANGELES CITY AND COUNTY SCHOOL EMPLOYEES UNION, LOCAL 99, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Respondent.	)	Case No. LA-CO-234 PERB Decision No. 341 August 29, 1983
SHIRAL PITTS, Charging Party, v. LOS ANGELES CITY AND COUNTY SCHOOL EMPLOYEES UNION, LOCAL 99, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Respondent.	)	Case No. LA-CO-235

Appearances: John C. Scates and Shiral Pitts, representing themselves.

Before Tovar, Jaeger, and Morgenstern, Members.

DECISION AND ORDER

JAEGER, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed to the administrative law judge's attached dismissal without leave to amend of the charging parties' unfair practice charges alleging that Service Employees International Union, Local 99, AFL-CIO,

violated subsections 3543.6(a), (b), and (c) of the Educational Employment Relations Act.

After a review of the entire record in this matter, the Board adopts the attached dismissal as the decision of the Board itself. Accordingly, the unfair practice charges, Case Nos. LA-CO-234 and LA-CO-235, are hereby DISMISSED without leave to amend.

Members Tovar and Morgenstern joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

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SHIRAL PITTS, Charging Party, v. LOS ANGELES CITY AND COUNTY SCHOOL EMPLOYEES UNION, LOCAL 99, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Respondent.	Case No. LA-CO-235 ORDER GRANTING MOTION TO DISMISS, DENYING MOTION TO DISQUALIFY, AND CANCELLING FORMAL HEARING (2/4/83)

NOTICE IS HEREBY GIVEN that the above-captioned unfair practice charges are dismissed and the complaints are withdrawn.

This action is taken on the ground that the charges fail to state a prima facie violation of the Educational Employment Relations Act (hereafter EERA).[1]

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[1]Government Code section 3540 et seq. All statutory references herein are to the EERA unless otherwise noted.

BACKGROUND

On April 21, 1982, John C. Scates filed an unfair practice charge against the Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL-CIO (hereafter Local 99 or the Union), alleging a violation of section 3544.9[2] In support of his charge, Scates, who is classified as a heavy bus driver, alleges, among other things, that on or about February 5, 1981, he was removed from late bus duty by his employer Los Angeles Unified School District (hereafter District) while the District conducted an investigation of an incident involving him that occurred on that same date. Subsequently, he was issued an unsatisfactory or "U-notice" on March 23, 1981. On that same date he filed a grievance with the Union against the District. He further alleges that on September 25, 1981, he "discovered that the 'U-notice' had been repealed in arbitration, but that the overtime issue from missed

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2Section 3544.9 provides:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

late buses was completely ignored." Additionally, he alleges that as of the date that the charge was filed, he had not been reinstated to overtime status.

On April 21, 1982, Shiral Pitts, who likewise is classified as a heavy-bus driver, also filed an unfair practice charge against Local 99, identical in all respects to the Scates charge, but additionally alleging that on or about May 8, 1981, she was transferred to a bus run in another area, and in March 1982, she was transferred again without benefit of the bidding procedure.

In response to a letter, dated April 28, 1982, from the Public Employment Relations Board (hereafter PERB or Board) regional attorney, noting certain deficiencies in the charges, the charging parties filed identical amendments on May 20, 1982. The amendments are set forth in their entirety as follows:

1. The letter of Oct. 12, 1981 from Clarence R. Luckey, Business Representative to Steven Escoboza, Sr. Division Personnel Representative L.A.U.S.D.

2. On Dec. 1981 I called my Business Representative 3 or 4 times; in Jan. 1982 I did likewise 2 or 3 times; in March 1982 I did likewise 3 or 4 times; on April 30, 1982 I again called in reference to the above mentioned letter of Oct. 1981.

3. It was not until Sept. 25, 1981 at a General Membership Meeting of Local 99 located at 2724 W. 8th St. that I was given the decision rendered by arbitration dated September 7, 1981.

4. This charge is amended to include 3543.6 of the Educational Employees Relations Act subsections a, b, and c. disputes.3

On June 29, 1982, complaints were issued and the two cases consolidated for informal conference purposes only. On July 16, 1982, the Union filed its answer. An informal settlement conference was held on August 9, 1982, but the parties were unable to resolve their disputes.

On September 21, 1982, the Chief Administrative Law Judge consolidated the complaints for further processing, and noticed a formal hearing for November 15, 16, and 18, 1982. Prior to the hearing date, Local 99 requested, with the concurrence of the charging parties, a continuance which was granted, on November 10, 1982. The case was reset for hearing on January 5, 6, and 7, 1983.

3Section 3543.6 states, in pertinent part that:

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.
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> . . . . . .

On November 16, 1982, the Union filed a motion to particularize which was granted, and an order to particularize was issued on December 10, 1982.

On December 23, 1982, charging parties filed a response to the order, which stated, among other things, that the Union, through its business representative Clarence Luckey, was involved in the processing of the grievances filed by both charging parties, and that a collective bargaining agreement with an arbitration provision was in effect at the time the grievances were filed. Otherwise, the response repeated the allegations contained in the original charge. The Union responded on December 28, 1982, with motions to strike, to dismiss and for a continuance of the hearing.

On January 5, 1983, these motions were ruled on at a pre-hearing conference held in lieu of the noticed hearing. It was concluded that the responses to the order to particularize were non-responsive, and therefore charging parties were ordered to file supplements to their responses. February 7 and 9, 1983, were set as tentative dates for the formal hearing.

On January 10, 1983, the charging parties filed a supplement, to which was appended a copy of the arbitrator's decision, dated September 7, 1981.

The supplement to the response contained the following factual allegations:

> 1. Am submitting fifteen (15) page decision in the matter of arbitration involving the Pitts and Scates grievances.
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> 2. In Re No. 3543.6(a) Local 99 did cause the Public School Employer to impose reprisals on employee Pitts and Scates, "the District charged that on or about February 4, 1981 the grievants were observed to be kissing and hugging." And that "the activity took place while both drivers were on duty an in a paid status." The District concluded that this conduct, "is unprofessional and tends to lower the esteem in which the service is held."
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> 3. 3543.6(b) Local 99 did discriminate against employees Pitts and Scates in a letter dated October 12, 1981 of a letter submitted by Clarence R. Luckey, Business Representative to Steven A. Escoboza, Senior Divisional Pesonnel Representative. It is of extreme importance to note that the hearing was held on August 25, 1981 and that employees Pitts and Scates were not informed - and then only by the fact that they protested and made inquiries at a general membership meeting on September 25, 1931 - incidentally the last regular membership meeting held at the Union Hall at 2724 West 8th Street.
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> 4. 3543.6(c) Local 99 Blatantly evaded and avoided to represent employees Pitts and Scates by the following documented evidence which we are prepared to testify under oath and penalty of perjury namely: "During December 1981 employees Pitts and Scates each called three or four times with direct reference to the Union's action or better still - inaction concerning our grievance. In January, 1982, employees Pitts and Scates again called business representative two or three times and against in March, 1982 again three or four times and on April 30, 1982 I again called to the above mentioned letter of October 12, 1981."

> 5. In reply to attorney Jeffrey Paule on Page 3 of his Motion for Continuance I must call to his immediate attention and scrutiny that beginning with lines 12 and concluding at line 22 that the above mentioned facts in the four preceding paragraphs are the alpha and omega of 3544.9, "shall fairly represent each and every employee in the appropriate unit." The Union officials involved in this travesty and sham have been with deliberate intent derelict, delinquent and a total disgrace to employes Pitts and Scates.

The arbitrator's decision shows that the only question before the arbitrator was the District's issuance of the "U-notices". In the event that the grievants prevailed on the issue of the U-notices, the District and the Union were to review the District's overtime records to determine the overtime and the associated transfer matters.

On January 18, 1983, Local 99 filed its answer to the particularized charge and a second motion to dismiss.

DISCUSSION

Duty of Fair Representation and the Alleged 3943.6(b) Violation

For purposes of considering whether the above-captioned unfair practice charges state a prima facie violation of the EERA, it will be assumed that all of the factual allegations are true. San Juan Unified School District (3/10/77) PERB Decision No. 12.

Section 3544.9 of the EERA provides that an exclusive representative "shall fairly represent each and every employee in the appropriate unit." The PERB has interpreted this

section to mean that an exclusive representative clearly has a duty to represent all employees in the unit fairly in meeting and negotiating, consulting on educational objectives, and administering the written agreement. Service Employees International Union, Local 99 (10/19/79) PERB Decision No. 106.

An exclusive representative violates its duty of fair representation when its conduct towards a member of the unit is arbitrary, discriminatory, or in bad faith. Rocklin Teacher Professional Association (3/26/80) PERB Decision No. 124, citing Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].

A violation may occur both in contract negotiations, Steele v. Louisville and Nashville Railroad (1944), 323 U.S. 192 [15 LRRM 708], Ford Motor Co. v. Huffman (1953), 354 U.S. 330 [31 LRRM 2548], and in contract administration and grievance processing, Conley v. Gibson (1957), 355 U.S. 41 [41 LRRM 1089], Humphrey v. Moore (1964), 375 U.S. 355 [55 LRRM 2031], Vaca v. Sipes, supra, 386 U.S. 171.

The NLRB and the courts have granted wide latitude to the exclusive representative in the negotiation of collective bargaining agreements. See Steele, supra. On the other hand, the degree of discretion given the exclusive representative in the enforcement of collective bargaining agreements is somewhat more restricted. The Supreme Court in Vaca proclaimed that a violation of the duty would be found in arbitrary, capricious

or bad faith actions. But it also made reference to "perfunctory" grievance processing in such a way as to create the inference that "perfunctoriness" in handling grievances would be held tantamount to arbitrariness, capriciousness or bad faith. One commentator has stated that the Court's phrasing of the standard "invite[s] the finding of a violation when injury is caused by union carelessness without more." Gorman, Labor Law (1976) p. 720. Another commentator has urged that the appropriate duty of fair representation should be based on "reasonableness," defined as "fairness" as that term has been used in the context of constitutional due process cases. See Duty of Fair Representation and Exclusive Representation in Grievance Administration (1976) Syracuse L.Rev. 1199, 1230. A recent federal case has held extreme negligence in grievance processing to be a breach of the duty of fair representation. Ruzicka v. General Motors Corp. (6th Cir. 1975) 523 F.2d 306 [90 LRRM 2497]. Cf. Local 18, Int'l Union of Operating Engineers (Ohio Pipeline Construction Co.) (1963) 144 NLRB 1365 [54 LRRM 1235].

The PERB has decided that whether a union has met its duty, within the context of grievance processing, depends not upon the merits of the grievance, but rather upon the union's conduct in processing or failing to process the grievance. Absent arbitrary, discriminatory or bad faith conduct, mere

negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty.[4] United Teachers of Los Angeles (11/17/82) PERB Decision No. 258.

A prima facie case alleging conduct violative of the duty of fair representation must, at a minimum, set forth sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action, or inaction, was arbitrary, discriminatory, or in bad faith. Rocklin Teachers Professional Association, supra; see also PERB Regulation 32615(a)(5). The obligation created by section 3544.9 is actionable through section 3543.6(b). Fremont Unified District Teachers Association (4/21/80) PERB Decision No. 125; United Teachers of Los Angeles, supra.

Since filing the original charges, the charging parties have been given three opportunities to provide a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. However, charging parties have failed to do so, and thus, the charge remains unclear.

My best understanding of the charge is as follows: The charging parties believe that the Union violated its duty to fairly represent them by: (1) failing to litigate the overtime and transfer issues in the grievance arbitration held

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[4]See also Dill v. Greyhound Corp. (6th Cir. 1970) 435 F.2d 231, cert. denied (1971) 402 U.S. 952; Steinman v. Spector Freight Systems Inc. (2d Cir. 1973) 476 F.2d 437 [83 LRRM 228].

August 25, 1981 and (2) not notifying the charging parties until September 25, 1981 about the arbitration decision which was dated September 7, 1981. Although it may be inferred from these charges that Local 99's conduct in this regard was possibly negligent, unwise or otherwise unsatisfactory to the charging parties, there is no specific allegation that Local 99, in these instances, acted in an arbitrary, capricious or bad faith manner, or that its manner of handling of the arbitration hearing was improperly motivated.

Although the charging parties further allege that Local 99 has discriminated against them, the only factual support offered for this charge is a letter dated October 12, 1981, sent by Local 99 business representative Clarence Luckey to Steven Escobeza, a personnel representative for the District. A review of the letter reveals that the Union was requesting a date for a meeting with the District to review the overtime records of Scates and Pitts "as per the stipulations by the District in the arbitration of Pitts and Scates v. L.A.U.S.D." Again, other than referring to it, charging parties have failed to state how, or in what manner, the letter demonstrates discriminatory conduct by the Union. Nor have they stated how the Union's manner of notifying them about the arbitration decision also constituted discrimination against them.

For the above-stated reasons, it is concluded that neither of these charges states a prima facie violation of the duty of fair representation (section 3544.9) or section 3543.6(b) and should be dismissed.

Alleged Section 3543.6(a) and (c) Violations

The allegations concerning the section 3543.6(a) and (c) violations are unclear. The charging parties contend that Local 99 violated section 3543.6(a)[5] by causing the employer to impose reprisals on them. In support of this allegation, they refer to the "hugging and kissing" incident between themselves on or about February 4, 1981, from which the grievance against the District arose. Charging parties, however, have failed to show how the conduct of Local 99, as it relates to this set of events, attempted or caused the District to violate section 3543.5 of the EERA.

Finally, the charging parties allege that the Union "blatantly evaded and avoided to represent employees Pitts and Scates," hence violating section 3543.6(c).[6] In support of this allegation, they state that they telephoned the Union several times between December, 1981 and April, 1982 concerning their grievances and the letter of October 12, 1981. However, these factual allegations provide no basis for determining how

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[5]See fn. 3, supra.

[6]See fn. 3, supra.

or in what manner Local 99 refused or failed to meet and negotiate in good faith with the District about either charging party Scates or Pitts.

Under PERB regulations, a charge must be dismissed if it is determined that the charge is insufficient to establish a prima facie case. (See PERB Regulation 32620(b)(4).)

For the above-stated reasons, it is concluded that these unfair practice charges fail to state a prima facie violation of either section 3543.6(a) or (c) and, therefore, must be dismissed.

Motion to Disqualify

As a separate, but related matter, on January 10, 1983, charging parties also filed a motion to disqualify Jeffrey Paule, attorney for Local 99, They argue that a conflict of interest exists because the attorney defending the Union against their unfair practice charges is paid for his services, on a retainer basis, from union membership dues which are contributed by the charging parties who are dues-paying members of Local 99. They assert that this situation constitutes a breach of the fiduciary relationship between the union representatives and its members. No authority is cited for this proposition.

Local 99 did not file a response to this motion.

In King City High School District Association (3/3/82) PERB Decision No. 197, the charging party, who was a nonmmember of

the respondent association, objected to the respondent's use of his service fees for legal services utilized in defending itself aginst the charge that it had breached its duty of fair representation owed to the charging party. However, the Board concluded that:

> . . . the use of service fees to defend against a charge that the Association violated its duty of fair representation is not impermissible unless the defense is frivolous or taken in bad faith. Defending charges against itself preserves the strength and integrity of the exclusive representative, and thus benefits all unit members.
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> King City, supra, at p. 31.

Further, if taken to its logical conclusion, the result of charging parties' argument would be to totally deprive the Union of the right to ever defend itself against an unfair practice charge filed by one of its members.

Since no justifiable basis has been presented for granting the motion, the motion to disqualify must be denied.

ORDER

The unfair practice charges of charging parties John C. Scates and Shiral Pitts are hereby DISMISSED without leave to amend. Additionally, their motion to disqualify the attorney representative of Local 99 is DENIED. The formal hearing tentatively scheduled for Februry 7 and 9, 1983 is CANCELLED.

Charging parties may obtain review of this dismissal by filing an appeal with the Board itself within twenty (20) calendar days after service of this dismissal. (PERB

Regulation 32635(a)). Such appeal must be actually received by the PERB itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on February 24, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. (PERB Regulation 32135). Such appeal must be in writing, must be signed by the charging parties or their agent, and must contain the facts and arguments upon which the appeal is based. The appeal must be accompanied by proof of service upon all parties. (PERB Regulations 32140 and 32635 (a)).

Dated: February 4, 1983.

W. Jean Thomas
Administrative Law Judge