STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN R. LEMMONS AND ROBERT G. LUND, Charging Parties,	)	Case No. S-CO-50-S
v.	)	PERB Decision No. 545-S
CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Respondent.	)	December 13, 1985

Appearance; Robert G. Lund representing himself and John R. Lemmons.

Before Hesse, Chairperson; Jaeger, Morgenstern, Burt and Porter, Members.

DECISION

This case is before the Public Employment Relations Board on appeal by charging parties of the Board agent's dismissal, attached hereto, of their charge alleging that the California State Employees' Association violated section 3519.5 of the State Employer-Employee Relations Act (Gov. Code sec. 3512 et seq.).

We have reviewed the dismissal and finding it free from prejudicial error, adopt it as the Decision of the Board itself, in that, as indicated in the Board agent's letter, the charge failed to state a prima facie case.

ORDER

The unfair practice charge in Case No. S-CO-50-S is DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
SACRAMENTO REGIONAL OFFICE
1031 18TH STREET, SUITE 102
SACRAMENTO, CALIFORNIA 95814
(916) 322-3198

September 23, 1985

Robert G. Lund

John R. Lemmons

Re: Lemmons and Lund v. California State Employees' Association
Unfair Practice Charge No. S-CO-50-S. First Amended Charge

Dear Mr. Lemmons and Mr. Lund:

The above-referenced charge alleges that the California State Employees' Association (Association or CSEA) failed to properly represent three employees by refusing to pursue their grievances to arbitration. This conduct is alleged to violate section 3519.5 of the State Employer-Employee Relations Act (SEERA).

I indicated to you in my letter dated August 23, 1985 that the above-referenced charge did not state a prima facie case, and that unless you amended the charge to state a prima facie case, or withdrew it prior to August 30. 1985. it would be dismissed. More specifically. I informed you that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly.

On August 30. 1985. Mr. Lund called and left a message indicating that he wished to have an extension of time in order to file an amended charge. Pursuant to a conversation on September 6. an extension of time was granted and an amended charge was filed on September 9.

The amended charge contains the following facts not contained in the original charge.

Lund Grievance

On June 24, 1980. Mr. Lund filed an out-of-class grievance which was rejected at the director's level on October 24. 1980. On November 10, 1980, a similar claim was filed with the State Board of Control which was subsequently sent to the State Personnel Board (SPB) for jurisdictional reasons. On September 21, 1981. Rick Weyuker. a CSEA field representative, wrote to the SPB to schedule a meeting to provide further information. Mr. Weyuker was present for the November 1981 meeting with the SPB. During a November 13. 1981 conversation. Mr. Lund alleges that CSEA chief job steward B. Gingrich related that CSEA didn't have the time to represent people in grievances. At about this time, Larry Attenger. a CSEA official, allegedly related to Mr. Lund that CSEA representatives didn't have time to handle grievances and that he should get a good job steward.

On September 2, 1982, SPB informed Mr. Lund that there was no support for his claim. On October 12, 1982, Mr. Lund appealed to the full SPB. On November 19, Mr. Lund made a request to a CSEA representative, S. Hunt, for representation by an attorney at the SPB hearing. This request was denied and Mr. Lund then made a similar appeal to CSEA chief counsel Ben Allemano who responded on November 22 that because no legal dispute existed, no lawyer would be present to represent him, but rather he would be represented by a field representative.

On January 26, 1983, CSEA representative A. Riola was present when Mr. Lund presented his case to the SPB. SPB denied his claim on March 30, 1984 with Mr. Riola requesting Chief Counsel Allemano to review the matter on April 25, 1984. On July 6. 1984. Mr. Lund and Mr. Lemmons met with CSEA attorney Brad Booth regarding a law suit concerning the out-of-class claim. Mr. Booth explained that legal precedent was unfavorable to such a law suit. This issue was discussed further in Booth's July 12 letter to Mr. Rund. On July 19, Mr. Lund appealed Mr. Booth's denial to the Representative Appeals Panel which met on October 19 and rejected the appeal on October 31. A request of November 17 to raise the matter before the General Counsel of CSEA was also denied.

In addition, Mr. Lund states that on two occasions in 1984. Carl Silvia, a unit 1 area manager of CSEA, failed to investigate contracting out allegations and that on August 27, 1985, Mr. Lund was decertified as a job steward.

Evans Grievance

On August 7. 1984, Mr. Evans filed two grievances, one claiming he had been required to work out-of-class and another that he had been unduly reprimanded. On December 5, 1984, the out-of-class grievance was denied at the fourth level. On December 12, 1984, the reprimand/reprisal grievance was denied at the fourth level. On January 14, 1985, CSEA denied Mr. Evans' request to arbitrate the reprimand/reprisal grievance. This denial was based on the failure to provide proof of prior protected activity and a nexus between the activity and the reprimand in question. On January 22, Mr. Evans appealed this decision to the CSEA Central Appeals Committee. The committee met on February 26, 1985 and considered written material submitted by Mr. Evans. A letter denying his appeal was sent to Mr. Evans on February 27, 1985.

Based on the facts stated above, and those contained in my August 23, 1985 letter (attachment 1). the first amended charge in this case fails to state a prima facie violation of the SEERA for the rationale contained in that letter as well as the reasons which follow.

Lund Grievance

1. Section 3514.5(a) of the SEERA reads in pertinent part:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge;

Considering the facts presented by the Charging Party in the light most favorable to it, the latest request to proceed with the out-of-class claim was made and denied on November 17, 1984. This is more than six months prior to the filing of this charge on July 2, 1985 and thus is barred by the statute of limitations.

2. Although the Public Employment Relations Board (PERB) has ruled that the duty of fair representation applies to the handling of contractual grievances, there's no case which concerns itself with the employee organization's duty to pursue

extra-contractual remedies. Such a question, however, has been considered by the federal court system.[1]

In Hawkins v. Babcock and Wilcox Co. (1980) (U.S.D.C., N. Ohio) 105 LRRM 3458. a case involving an employee who alleged that the union should have advised him regarding administrative and judicial remedies to alleged discriminatory conduct by his employers, the District Court ruled:

> The National Labor Relations Act, authorizing unions to represent employees in the creation and administration of collective bargaining agreements with employers, together with the correlative duty of fair representation, however, is limited to the collective bargaining process. Outside of the employer-employee relationship, the union has no authority to represent union members, nor duty to advise those members of their extra-contractual legal rights. The union's duty of fair representation is restricted to the context of the collective bargaining agreement and does not extend to legal remedies available outside the employment context. See International Brotherhood of Electrical Workers v. Foust 442 U.S. 42. 101 LRRM 2365 (1979); Vaca v. Sipes 386 U.S. 171. 64 LRRM 2369 (1967); Humphrey v. Moore 375 U.S. 335. 55 LRRM 2031 (1964); Ford Motor Co. v.

---

[1]The California Supreme Court in Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608. stated that where the National Labor Relations Act does not contain specific wording comparable to the state act. if the rationale that generated the language "lies embedded in the federal precedent under the NLRA" and

> the federal decisions effectively reflect the same interests as those that promoted the inclusion of the [language in the SEERA], [then] federal precedent provides reliable if analogous authority on the issue.

> Huffman 345 U.S. 330. 331 LRRM 2548 (1952); Steele v. Louisville and Nashville Rail Co. 323 U.S. 192. 15 LRRM 708 (1948).
>
> In the present case, the defendant union was not under any duty to advise the plaintiff of his legal rights outside the context of the collective bargaining agreement. The union had no duty to act as an attorney at law advising the plaintiff of all possible alternatives of legal recourse. The court therefore finds that the defendant did not, in fact, inadequately represent the plaintiff by not advising the plaintiff of all possible administrative and judicial remedies available. The plaintiff's claim, consequently, that the defendant BNW violated 29 U.S.C, section 151 et seq., relating to unfair labor practices because of the union's alleged inadequate representation is hereby dismissed. Hines v. Anchor Motor Freight. 424 U.S. 554. 91 LRRM 2481 (1976); Baldini v. Local Union No. 1095. 581 F.2d 145 90 LRRM 2535 (7th Cir. 1978); Smart v. Ellis Trucking Company Inc. 580 F.2d 215. 99 LRRM 2059 (6th Cir. 1978).

Thus, Mr. Lund's request for assistance in pursuing his out-of-class claims before the State Board of Control, the State Personnel Board, and possible courts of competent jurisdiction is outside of the Association's duty of fair representation.

3. Even assuming that Mr. Lund's charges were timely and covered by the duty of fair representation, this charge fails to state evidence which shows clearly and concisely that CSEA has acted arbitrarily, discriminatorily, or in bad faith. Fremont Unified School District Teachers Association. CTA/NEA (King) (1980) PERB Decision No. 125; Board Rule 32615(a)(5).

4. The statement that Mr. Lund was decertified as a job steward by the Association on August 27, 1985 does not without more state a prima facie violation of the Association's duty of fair representation. The issue of Mr. Lund's decertification was the subject of unfair practice charge number S-CO-46-S which was dismissed on May 10, 1985. Although the final decision to decertify Mr. Lund had not been made at that time, a hearing had been held by an Association panel pursuant to its

policy. Based on the facts presented in the present charge as well as those presented in charge number S-CO-46-S. Charging Party has failed to demonstrate that the decertification had substantial impact on the relationship of unit members to their employer and that it was done for arbitrary, capricious, or discriminatory reasons. Kimmett (1979) PERB Decision No. 106.

Mr. Evans

With respect to the one grievance which Mr. Evans requested CSEA to appeal to arbitration under the grievance procedure, there are no facts indicating that CSEA has acted arbitrarily, capriciously, discriminatorily, or in bad faith. Without such facts, a prima facie violation of the duty of fair representation has not been presented.

Mr. Chiu

Although I indicated in ray August 23 letter that there was inadequate information to establish that the CSEA had violated it's duty of fair representation with regard to Mr. Chiu's grievance, no new information was presented in the first amended charge which would allow a complaint to issue. Accordingly, this allegation is also dismissed.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on October 13, 1985. or sent by telegraph or certified United States mail postmarked not later than October 13, 1985, (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento. CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty

(20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours.

JEFFREY SLOAN
Acting General Counsel

By _____
Robert Thompson
Regional Attorney

2660d

STATE OF CALIFORNIA GEORGE DEUKMEJIAN. Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
SACRAMENTO REGIONAL OFFICE
1031 18TH STREET. SUITE 103
SACRAMENTO. CALIFORNIA 95814
(916) 322-3198

August 23, 1985

John R. Lemmons

Re: Lemmons v. California state Employees' Association
Unfair practice Charge NO. S-CO-50-S

Dear Mr. Lemmons:

The above-referenced charge alleges that the California State Employees' Association (Association) failed to properly represent three employees by refusing to pursue their grievances to arbitration. This conduct is alleged to violate section 3519.5 of the State Employer-Employee Relations Act (SEERA).

My investigation revealed the following facts. This case involves grievances filed by three employees, Robert Lund, Robert Evans, and Charles Chiu. Charging Party was requested to provide information on these grievances concerning their substance, date of filing, and the date on which the Association refused to process them to arbitration. Information was received on only Mr. Chiu's grievance. That information shows that on September 11, 1984, Mr. Chiu instituted the grievance procedure regarding an alleged unjustified denial of a merit salary adjustment. After the grievance was denied at the staff levels of the grievance procedure, Mr. Chiu requested the Association proceed to arbitration on his behalf. Mr. Chiu was notified by January 11, 1985 letter from the Association that: (1) there was insufficient evidence to support his grievance, and (2) the grievance was not timely filed. In addition, he was notified that he had ten days to appeal this decision to the arbitration appeals committee. After filing an appeal, Mr. Chiu was notified by an Association letter of February 14 that a hearing by the arbitration appeals committee would be held on February 26 at which time he could submit written argument or a ten-minute oral presentation. Mr. Chiu was then notified by Association letter dated February 27, 1985, that after consideration of all the facts the committee upheld the staff decision to deny arbitration.

In addition to the information requested of Charging Party above, this investigator also asked charging Party to provide evidence that would demonstrate that the Association's conduct

in denying arbitration of these grievances was discriminatory, arbitrary, or capricious. To date no evidence has been presented.

Based on the facts described above, this charge fails to state a prima facie violation of the SEERA for the reasons which follow.

Although SEERA does not contain a specific section specifying an employee organization's duty of fair representation, such a duty can be implied from the fact that the SEERA provides for exclusive representation. Government Code sections 3513(b), 3515.5, Noorgard v. California State Employees' Association (1984) PERB Decision No. 451-S.

To make out a prima facie violation of this duty, charging party must set forth a clear and concise statement of facts demonstrating that the employee organization acted arbitrarily, discriminatorily or in bad faith. Fremont Unified School District Teachers Association, CTA/NEA (King) (1980) PERB Decision No. 125; Board Rule 32615(a)(5). Charging Party has failed to meet this burden in two ways: (1) there is no evidence showing when and how the Association refused to arbitrate the grievances of Mr. Lund and Mr. Evans, (2) even assuming such facts exist, there has been no demonstration that the Association's conduct in denying these requests for arbitration is arbitrary, capricious or in bad faith.

For these reasons, charge number S-CO-50-S, as presently written, does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 30, 1985, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (916) 322-3198.

Sincerely yours,

Robert Thompson
Regional Attorney