

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ROSE MARIE PARISI,)	
)	
Charging Party,)	Case No. S-CO-85-S
)	
v.)	PERB Decision No. 733-S
)	
CALIFORNIA STATE EMPLOYEES)	May 3, 1989
ASSOCIATION,)	
)	
Respondent.)	
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Appearances: James B. Macy, Attorney, for Rose Marie Parisi;
Darrell S. Steinberg, Attorney, for the California State
Employees Association.

Before Hesse, Chairperson; Craib, Shank and Camilli, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by the charging party of the administrative law judge's dismissal, attached hereto, of her charge that the respondent violated section 3519.5 of the Ralph C. Dills Act. We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the decision of the Board itself.

The unfair practice charge in Case No. S-CO-85-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD¹

¹Member Porter did not participate in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ROSE MARIE PARISI,)	
)	
Charging Party,)	Unfair Practice
)	Case No. S-CO-85-S
v.)	
)	ORDER DISMISSING
)	COMPLAINT
CALIFORNIA STATE EMPLOYEES)	(1/26/89)
ASSOCIATION,)	
)	
Respondent.)	
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Appearances: James B. Macy, Attorney for Rose Marie Parisi;
Darrell S. Steinberg, Attorney for California State Employees
Association.

Before Martha Geiger, Administrative Law Judge.

INTRODUCTION

On March 7, 1988, Charging Party Rose Marie Parisi (Parisi or Charging Party) filed an unfair practice charge against the exclusive representative, California State Employees Association (CSEA).

In her charge, as amended on April 15, 1988, Parisi alleges that CSEA violated the Dills Act, Government Code Section 3519.5, specifically, the duty of fair representation owed by the exclusive representative to members of the bargaining unit.¹

¹ The Dills Act is codified at Government Code Section 3512 et. seq. Section 3519.5, in relevant part, reads:

It shall be unlawful for an employee organization to:

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

After a complaint was issued by the office of the General Counsel of the Public Employment Relations Board (PERB), a formal hearing was scheduled on August 3, 1988, to hear the matter between the parties. Immediately prior to that time, however, CSEA filed a Motion to Dismiss the complaint in this matter. Charging Party opposed the Motion and filed a brief in opposition to the Motion on August 30, 1988. For the reasons set forth below, the Motion to Dismiss is granted.

FACTUAL BACKGROUND

Parisi was employed by the State of California as an Office Assistant II assigned to the California Highway Patrol (CHP). In the summer of 1986, Parisi was placed on a six-month "medical leave" from her position at the CHP. Charging Party wished to return to her position in December 1986. Instead, Parisi was terminated from her position, pursuant to Government Code section 19253.5, (unfitness for work).²

Prior to her hearing on March 6, 1987, Parisi contacted CSEA for purposes of representing her in the appeal of her termination

discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

² CSEA places the termination date at December 16, 1986. Parisi's brief places the date of termination at January 17, 1986. Presumably, this was a typographical error and should have read January 17, 1987. In any case, it is unnecessary to resolve this ambiguity because the actions by CSEA that gave rise to this complaint are undisputed to have been in 1987.

before the State Personnel Board (SPB). Judy O'Nan Roth, an employee of CSEA, was assigned by CSEA to Parisi's appeal.

Immediately prior to the hearing, Parisi and Roth engaged in a discussion of Roth's preparedness for the hearing. A factual dispute exists as to whether Roth encouraged Parisi to withdraw her appeal before the SPB due either to the lack of merits of Parisi's appeal, or due to Roth's unpreparedness to proceed to the hearing. For purposes of the Motion to Dismiss, it will be assumed that Parisi's version is correct and that Roth was not prepared to proceed with the appeal on March 6. Roth allegedly told Parisi that if her appeal were withdrawn it could immediately be refiled "the next day," and the case could then proceed before the SPB after Roth had had an adequate time to prepare for the hearing. Again, for purposes of this Motion, Parisi's version will be assumed to be correct.

The appeal was withdrawn, but CSEA did not file the new petition for reinstatement on behalf of Parisi on March 7, 1987, (the day after the original hearing) or on any other date. Parisi inquired several times about her appeal during the following months. She was told it was being prepared, and would be filed shortly. On October 30, 1987, however, Parisi received a letter from CSEA informing her that the appeal was being dropped.

On November 17, 1987, Parisi consulted a private attorney, who informed her that the time for filing her appeal had passed. Upon learning this, Parisi filed an unfair practice charge

against CSEA, alleging that the association had violated its duty of fair representation.

Initially it should be noted that neither side stated outright whether Parisi was a member of CSEA. Both parties, however, at various times in their briefs refer to Parisi as being a member of CSEA. Accordingly, this order is predicated on that basis.³

CSEA'S MOTION TO DISMISS

CSEA sets forth three reasons why the complaint should be dismissed. First, CSEA argues that it owed no duty of representation to Parisi in her appeal before the State Personnel Board. Second, CSEA alleges that the charge was not timely filed pursuant to Government Code section 3514.5(a)(1). Finally, CSEA alleges that Parisi did not exhaust her internal union remedies prior to alleging the denial of representation, a requirement found in CSEA Policy File, Divisions 1601.05(a) and 1002.02(a).

CSEA's first argument, that is, that it owed no duty of fair representation to Parisi, is predicated on two 1986 PERB decisions, California State Employees Association (Lemmons), (1985) PERB Decision No. 545-S and California State Employees Association (Darzins) (1985) PERB Decision No. 546-S. Both of these decisions addressed the issue of whether or not the exclusive representative owed a duty to bargaining unit members

³ It should be noted, however, that the same analysis would apply even if Parisi were not a member of CSEA.

to represent them fairly in matters outside the setting of exclusive representation. In other words, both of those cases held that CSEA's duty of fair representation extended only to those actions where CSEA was acting in its capacity as the exclusive representative. Thus, CSEA owes a duty of fair representation to the bargaining unit members in the handling of grievances, which arise out of the collective bargaining agreement; it owes a duty of fair representation in matters before PERB; and it owes a duty of fair representation to the bargaining unit members in negotiations. CSEA argues, however, that the duty of fair representation does not extend to actions in front of the SPB, where only individual rights and not collective rights are at issue. Thus, CSEA had no duty to represent Parisi in her appeal before the SPB, and thus it could not breach that non-existent duty.

Second, CSEA argues that the charge is time-barred. Government Code section 3514.5(a)(1) sets forth a six-month statute of limitations period for all unfair practice charges to be filed. The charge in this case was filed initially on March 7, 1988. CSEA argues that this cause of action accrued however, on March 7, 1987, the day after the original SPB hearing. On that date, CSEA is alleged to have failed to file Parisi's second appeal in her dismissal. At that point, assuming it existed/ the duty of fair representation was breached because at that point CSEA allegedly failed to act in Parisi's interest. As the charge

was not filed for a full year after March 7, 1987, it is time-barred.

Finally, CSEA alleges that Parisi was bound by CSEA's internal union procedures, which called for an aggrieved party to appeal internally CSEA's decision not to file (or in this case re-file) any action before the SPB. Since the internal union procedure had not been exhausted, Parisi should be barred from litigating the matter before PERB.

PARISI'S RESPONSE

In her reply to CSEA's Motion to Dismiss, Parisi argues that although CSEA did not have an initial duty to represent her in front of the SPB, having agreed to do so CSEA should be held to the standard applicable to those situations wherein the duty clearly attaches. In other words, the duty of fair representation may not have initially applied to CSEA in this matter, but once CSEA agreed to represent Parisi in front of the SPB, it was bound to do so in a manner consistent with the standards set forth in the Dills Act for the duty of fair representation.⁴

⁴ The duty of fair representation for non-member is set forth at Government Code Section 3515.7(g):

An employee who pays a fair share fee shall be entitled to fair and impartial representation by the recognized employee organization. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

This standard of conduct is equally applicable to conduct towards members of the exclusive representative organization.

As to the timeliness issue, Parisi argues that the cause of action in this case accrued only after Parisi received a letter from CSEA on October 30, 1987, informing her that her case was being closed because she was "not interested" in proceeding at that particular time. Indeed, Parisi argues that November 17, 1987, the date that she first learned from her private attorney that she could no longer pursue her appeal in front of the SPB, is the date from which the six-month statute began to run.

Finally, Parisi argued that exhaustion of internal union remedies was unnecessary because long established labor law principles to not require exhaustion of internal union remedies when such claims would be futile. See e.g. Clayton v. International Union (1981) 451 U.S. 689 [107 LRRM 2385].

ISSUES

As noted by the parties, the three issues raised in the Motion to Dismiss are: (1) Did CSEA have a duty under the Dills Act to represent Parisi in her hearing before the SPB; (2) Was the charge against CSEA timely filed; and (3) Was Parisi required to exhaust her internal union appeals prior to filing her unfair practice charge with PERB?

CONCLUSIONS OF LAW

The Motion to Dismiss in this case is treated as a Motion for Summary Judgment. That is, assuming all of the facts in a

California State Employees Association (Norgard) (1984), PERB Decision No. 451-S.

manner most favorable to the non-moving party (in this case, Parisi), as a matter of law is CSEA entitled to the Motion to Dismiss? If CSEA prevails on any one of the three issues raised, Parisi's case must be dismissed, even if the resolution of the remaining two issues would have been favorable to Parisi. This is so because any one of the three grounds raised by CSEA is fatal to the complaint if it is correct as a matter of law. I conclude that the Motion is well-founded.

In this case, Parisi has failed to overcome the argument that CSEA owed Parisi no duty of fair representation in its actions representing her in front of the SPB. The duty of fair representation evolved out of the exclusive representative's duty to represent each and every unit member, regardless of membership status, in actions that arise out of the obligations of collective bargaining, specifically negotiation and administration of a collective bargaining agreement. In this case, as in CSEA (Lemmons), supra, and CSEA (Darzins), supra, CSEA is being accused of failing to represent Parisi in a forum that has no connection with collective bargaining. The right of an employee to appear in front of the SPB is an individual right granted by the California Constitution and unconnected with any aspect of negotiating or administering a collective bargaining agreement.

Parisi impliedly recognizes this limitation on the duty of fair representation by arguing that the duty attached only when CSEA agreed to represent Parisi in front of the SPB. In other

words, had CSEA initially declined representation to Parisi for her SPB appeal, it would not have breached its statutory duty of representation. But, because it did agree initially to represent her, CSEA had "fiduciary duty" to represent Parisi in a fair and impartial manner. This "fiduciary duty" presumably springs from Parisi's membership in CSEA, and stems from her payment of dues to CSEA for various services, including presumably representation at adverse action hearings in front of various state agencies.

In support of this theory, Charging Party cites Archer v. Airline Pilots Association, International (1979) 609 F.2d 934 (9th Cir). The case, however, is inapposite. Archer sued the airlines in a civil court, seeking a civil remedy for breach of the fiduciary duty. PERB's jurisdiction is limited to the examination of CSEA's role as an exclusive representative, and cannot pass judgment on CSEA's duties which may arise by virtue of its fiduciary duty to its members outside the exclusive representation setting. Under our case law and statutes, CSEA did not breach its duty of fair representation to Parisi. ⁵

ORDER

The complaint in Case No. S-CO-85-S is hereby DISMISSED, for the reasons stated above.

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the complaint and

⁵ Because CSEA prevails on this issue, it is unnecessary to address the other two issues, which now become moot.

charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

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

If you file a timely appeal of the dismissal of the complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (California Administrative Code, title 8, section 32635(b)).

Service

All documents authorized to be file 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 California Administrative Code, title 8, section 32140 for the required contents and a sample form.) The document will be considered property "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 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 (California Administrative Code, title 8, 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. See California Administrative Code, title 8, part III, section 32300.

Dated: January 26, 1989

MARTHA GEIGER
Administrative Law Judge