STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REYNALDO HERNANDEZ, Charging Party,	)	Case No. LA-CO-559
v.	)	PERB Decision No. 902
SAN DIEGO TEACHERS ASSOCIATION, Respondent.	)	September 19, 1991

Appearances: Reynaldo Hernandez, on his own behalf; Robert E. Lindquist, Attorney, for San Diego Teachers Association.

Before Hesse, Chairperson; Shank and Carlyle, Members.

DECISION AND ORDER

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by Reynaldo Hernandez (Hernandez) of a Board agent's dismissal (attached hereto) of his charge that the San Diego Teachers Association (Association) violated the Educational Employment Relations Act (EERA), section 3543.6(a), (b) and (c)[1]. We have reviewed the Board agent's dismissal and, finding it to be free of prejudicial error, adopt it as the decision of the Board itself.

On appeal, Hernandez contends that the Board agent failed to address his charge that the collective bargaining agreement (CBA) cost of living adjustment provisions violate his constitutional

[1]EERA is codified at Government Code section 3540 et seq. In his warning letter, the Board agent incorrectly cited EERA section 3543.5(a), (b) and (c) as the alleged violations in this case. However, the Board agent's determination and dismissal was consistent with a review of this case as a violation of EERA section 3543.6(a), (b) and (c).

right to vote free from undue governmental interest. Hernandez argues that his conscience impelled him to vote for a gubernatorial candidate in the November 1990 election who had not promised a cost-of-living adjustment, while the operation of the CBA impelled him to vote for the candidate who had promised such an adjustment. Section 3543,[2] which defines the rights of employees under EERA, does not guarantee employees the right to vote in

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[2]EERA section 3543 states:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
>
> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

general elections free from the influence of financial self-interest.[3]

The unfair practice charge in Case No. LA-CO-559 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Shank joined in this Decision.

[3]The Government Code section cited in footnote 1 of the warning letter should be section 3543.6(c).

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

July 19, 1991

Reynaldo Hernandez

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice Charge No. LA-CO-559, Reynaldo Hernandez v. San Diego Teachers Association

Dear Mr. Hernandez:

I indicated to you in my attached letter dated July 5, 1991, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to July 12, 1991, the charge would be dismissed.

I have not received either a request for withdrawal or an amended charge. I am therefore dismissing the charge based on the facts and reasons contained in my July 5 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 (California Code of Regulations, 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 refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Code of Regulations, title 8, 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 California Code of Regulations, title 8, 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 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 Code of Regulations, 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.

Sincerely,

JOHN W. SPITTLER
General Counsel

By
Thomas J. Allen
Regional Attorney

Attachment

cc: Robert E. Lindquist

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

July 5, 1991

Reynaldo Hernandez

Re: WARNING LETTER, Unfair Practice Charge No. LA-CO-559, Reynaldo Hernandez v. San Diego Teachers Association

Dear Mr. Hernandez:

In the above-referenced charge, you allege that the San Diego Teachers Association (Association) failed to represent you fairly. This conduct is alleged to violate Government Code sections 3543.5(a), (b) and (c)[1]

My investigation of this charge reveals the following facts.

You are employed by the San Diego Unified School District (District) as a teacher of Spanish and physical education at the secondary level, in a bargaining unit for which the Association is the exclusive representative. On July 1, 1989, the District and the Association entered into a collective bargaining agreement for a three-year period ending June 30, 1992. The agreement provides in Article VII ("Wages"), Section 1 ("Salary Schedule"), Paragraph A, that the salary schedule shall be increased each year based on "the cost-of-living, COLA, (inflation) adjustment funded by the state each year." The agreement also provides, in Article IX ("Health and Welfare Benefits"), Section 2 ("Medical Benefits Plans"), for three medical benefit plan options, including the Greater San Diego Health Plan. The agreement also provides, in Article XIII ("Class Size"), Section 4 ("Secondary"), Paragraph B, "Academic classes will average no more than thirty-six (36) pupils each," but in Paragraph C of the same section it provides, "Classes in . . . physical education may exceed the average size established for other classes." The agreement further provides, in Article XVI ("Organizational Security") for an agency fee, to be implemented during the 1991-92 school year.

[1]As an individual, you actually do not have standing to allege a violation of Government Code section 3543.5(c). Oxnard Educators Association (1988) PERB Decision No. 664.

[2]According to records of the Public Employment Relations Board, of which official notice may be taken, the agreement was ratified on November 29, 1988.

You allege that in the 1989-90 school year, you were made to teach two academic classes in excess of the negotiated size limit for classes. You allege that the Association is aware that this is a common practice. You do not allege whether or how you sought the Association's assistance with the situation in 1989-90.

You allege that sometime after August 1989 (apparently during the 1989-90 school year), the Greater San Diego Health Plan went bankrupt, leaving you with a medical bill for $108.00 from August 1989 that is still unpaid. You allege that the Association was "negligent" in agreeing to the Greater San Diego Health Plan as a medical benefit plan option, since it was "common knowledge" that the plan was "not on sound financial ground."

You allege that in March 1991 the Association's board of directors proposed a $1 million or 62% cut in secondary school sports programs. The board of directors made this proposal through a Staff Budget Committee advising the District on how to cut the overall District budget by $37 million. Ten of the 16 members of the Association's board are from elementary schools. The Association President has explained the proposal as follows:

> This Staff Budget Committee wrestled with many options to come up with the $37 million dollars in savings. At the same time, the Superintendent's Cabinet Budget Committee recommended to the Board of Education cuts including terminating seventy-five jobs in our bargaining unit. Nurses, and district and career counselors totaling 75 positions received layoff notices which, by Education Code, had to be sent by March 15.
>
> Most of the budget decisions made so far are NOT final and alternatives are being offered. At a special meeting of the SDTA Board of Directors, the evening before a crucial meeting of the Staff Budget Committee, SDTA took the position that NO BARGAINING UNIT POSITIONS SHOULD BE CUT; however, as I have mentioned, taking that position in a shared decisionmaking mode prevents SDTA from simply walking away without offering an alternative to produce the money to keep the nurses and counselors. Based on the priority that no jobs be cut, the two major sources of funds

> SDTA recommended were lowering the District's year-ending balances by 5 million dollars, thus lowering the amount of money in next year's budget by 5 million dollars, and cutting an additional $800,000 from the interscholastic sports programs. The rest of the $37 million consists of elimination of management positions and some resource positions, as well as unspecified classified jobs. If the SDTA priority is implemented by the Board of Education, no bargaining unit member will lose his or her job and therefore his or her primary source of income.
>
> As elected leaders of SDTA; the board members understand that you can't find $37 million dollars in the district without affecting people. There just aren't enough dollars to be found by cutting corners. To the SDTA leadership, the question was, "What is a higher priority: after school athletics or nursing and counseling?"
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> Unfortunately, the discussion has been reduced by some to an elementary vs. secondary issue, with high school principals calling for elementary prep time to be cut to preserve after-school sports. The political leaders who have presented us with a tax pie that is too small are very gratified to see us fighting among ourselves while allowing them to escape the fact that are not funding schools adequately.

You allege that the negotiated agency fee was to be implemented on July 1, 1991. You allege that the amount initially deducted was to be equivalent to Association dues. You also allege that the Association "has sufficient data at its disposal to ascertain a close approximation of what the proper service fee would be."

You filed your unfair practice charge on May 24, 1991.

The unfair practice charge does not state a violation of the EERA within the jurisdiction of the Public Employment Relations Board (PERB), for the reasons that follow.

Government Code section 3541.5(a) forbids PERB to "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." Your charge alleges that the Association committed unfair practices by entering into the current collective bargaining agreement in 1989, by allowing the District to breach that agreement in 1989-90, and perhaps by allowing the Greater San Diego Health Plan to go bankrupt in 1989-90. These alleged unfair practices occurred more than six months before you filed your charge on May 24, 1991. The allegations are therefore untimely.

PERB Regulation Section 32994 ("Agency Fee Appeal Procedure"), Subsection (a), provides as follows.

> If an agency fee payer disagrees with the exclusive representative's determination of the agency fee amount, that employee (hereinafter known as an "agency fee objector") may file an agency fee objection. Such agency fee objection shall be filed with the exclusive representative. An agency fee objector may file an unfair practice charge that challenges the amount of the agency fee; however, no complaint shall issue until the agency fee objector has first exhausted the exclusive representative's Agency Fee Appeal Procedure. No objector shall be required to exhaust the Agency Fee Appeal Procedure where it is insufficient on its face.

You have not alleged facts showing that the Association's agency fee appeal procedure is insufficient on its face. A complaint challenging the amount of the agency fee may therefore not issue until you exhaust that procedure.

You have alleged that the Association as exclusive representative denied you the right to fair representation guaranteed by Government Code section 3544.9 and thereby violated Government Code section 3543.6(b). In order to state a prima facie violation of this section of the EERA, a Charging Party must show that the exclusive representative's conduct was arbitrary, discriminatory, or in bad faith. In United Teachers of Los Angeles (Collins), id., the Public Employment Relations Board (PERB) stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment . . . does not constitute a breach of the union's duty.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> . . . must, at a minimum, include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Decision No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

It is not apparent from the facts alleged in your charge how the Association's actions were without rational basis, devoid of honest judgment, discriminatory or in bad faith.

For all these reasons, the charge as presently written does not state a prima facie case within PERB's jurisdiction. If you feel that there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge accordingly. This 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 July 12, 1991, I shall dismiss your charge without leave to amend. If you have any questions on how to proceed, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen
Regional Attorney

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