

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LORRAINE WYLER,)
)
 Charging Party,) Case No. LA-CO-599
)
 v.) PERB Decision No. 970
)
 UNITED TEACHERS - LOS ANGELES,) February 8, 1993
)
 Respondent.)
 _____)

Appearance: Paul Wyler, Attorney, for Lorraine Wyler.
Before Hesse, Chairperson; Carlyle and Blair, Members.

DECISION AND ORDER

HESSE, Chairperson: This case is before the Public Employment Relations Board (Board) on appeal by Lorraine Wyler of a Board agent's dismissal (attached hereto) of her charge that the United Teachers - Los Angeles breached its duty of fair representation in violation of section 3543.6(b) of the Educational Employment Relations Act (EERA).¹ The Board has

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3543.6 states, in pertinent part:

It shall be unlawful for an employee organization to:

(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.

EERA section 3544.9 states:

The employee organization recognized or

considered the entire record in this case. 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. LA-CO-599 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Carlyle and Blair joined in this Decision.

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

PUBLIC EMPLOYMENT RELATIONS BOARD



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



August 7, 1992

Paul Wyler, Esq.
Los Angeles Office of Appeals
Unemployment Insurance Appeals
300 S. Spring St., Rm. 1502
Los Angeles, CA 90013-1204

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
Unfair Practice Charge No. LA-CO-599, First Amended Charge
Lorraine Wyler v. United Teachers - Los Angeles

Dear Mr. Wyler:

In the above referenced charge, which was filed on June 26, 1992, Mrs. Wyler alleges that United Teachers - Los Angeles (UTLA or union) failed as an exclusive representative to fairly represent her in dealing with the Los Angeles Unified School District (District), in alleged violation of Government Code section 3543.6 of the EERA.

I indicated to you in my attached letter dated July 24, 1992, 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 which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to July 31, 1992, the charge would be dismissed.

On July 31, 1992, the Charging Party filed a First Amended Charge. It is similar to the initial charge but contains some additional allegations, which I will state in this letter, in support of the argument that the union violated the duty of fair representation (DFR). It is alleged that Mrs. Wyler, during the 1989-91 school years, performed more than 100 days of service each year as a substitute teacher and adult education teacher for the District. Regarding the settlement in August 1991 of the grievance involving the May 1991 Inadequate Service Report (ISR), it is alleged that the settlement would not have been offered (by the District) "had the charging party been present at the scheduled grievance hearing and presented her evidence; a more

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favorable outcome would have taken place."¹ This appears to be mere speculation by the Charging Party. It is also alleged that Mrs. Wyler "reluctantly agreed to accept the settlement. She relied upon the alleged 'superior' acknowledge (sic) and experience of the employee organization in these types of matters. She feared that if she did not accept the settlement, the employee organization would not process her grievance diligently, if further proceedings were required."

It is also newly alleged that the incidents² "are evidence of the bad faith and arbitrary action of the employee organization which constantly pays lesser attention to the rights of its substitute teachers." (emphasis in original.) This latter allegation appears to be Charging Party's conclusion with little factual support offered here. In addition, it is alleged that on April 21, 1992, after the Grievance Review Committee (GRC) indicated on April 10, 1991 that it would not arbitrate the matter of the September 1991 ISR, the Charging Party sent a letter to UTLA President Helen Bernstein requesting "she reconsider, allow the grievance to go to arbitration, and expressing outrage that no reason was given for the decision not to proceed." Mrs. Wyler has not received an answer.

It appears that by letter dated September 30, 1991 to Mrs. Wyler, the District referred to ISR's in 1984, May 1991 and September 1991 (a total of 3). This letter by Robert Fisher, Coordinator for Certificated Substitute Assignments, indicated in part, "In my letter to you dated May 21, 1991, I advised you that receipt by you of an additional Inadequate service report would result in a complete service fitness review. Therefore, be advised that said review process has now been requested to determine whether you should be dismissed as a substitute teacher." Thereafter, arguably due to ISR's in 1980, 1984, May 1991 and September 1991, on October 18, 1991, Charging Party was dismissed by the District from substitute status. Mrs. Wyler alleges that UTLA advised her that she could send in an "appeal" letter. She further alleges that the union failed to advise her that a grievance could be

¹As indicated on page 1 of the attached letter dated July 24, 1992, the Charging Party was not present at the July 1991 grievance hearing due to her being given an incorrect address for the hearing by UTLA.

²This includes providing an erroneous address for the July 1991 grievance hearing, and urging Mrs. Wyler to accept the settlement in August 1991.

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filed for "reprisal".³ She contends that UTLA "knew about this procedure and withheld it from charging party in bad faith." (emphasis in original.) Finally, it is alleged in the amended charge that "The failure of the employee organization to provide a reason for its decision not to proceed to arbitration, together with the previous course of conduct is evidence of its arbitrary action, its bad faith in handling the matter, and further evidence of its disrespect for the rights of its substitute teacher members." (emphasis in original.)

The First Amended Charge does not state a prima facie violation of EERA (the duty of fair representation) for the reasons indicated in the letter dated July 24, 1992. In addition, much of the amended charge contains conclusory, speculative allegations without supporting facts. Pleading or raising a bare allegation without sufficient supporting facts is insufficient for purposes of alleging a prima facie case. California State University (Pomona) (1988) PERB Decision No. 710-H. Furthermore, PERB regulation 32615 (California Code of Regulations, title 8, section 32615) requires that a charge contain "a clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The Charging Party must allege with specificity who, what, when, where and how the union's activities were arbitrary, discriminatory, or in bad faith. Mere speculation, conjecture or legal conclusions are insufficient. Aside from the fact that some of the charge is untimely, Mrs. Wyler has not established with facts that the union intentionally acted against her with an unlawful motive, by the conduct that has been alleged. The various acts described, even if negligent,⁴ do not show that UTLA acted in an arbitrary, discriminatory, or bad faith manner. Thus, a prima facie case has not been alleged.

Therefore, I am dismissing the First Amended Charge based on the facts and reasons contained above and in my July 24, 1992 letter.

³Article V, section 1.1 of the Agreement between UTLA and the District, provides, in part, that claims of discrimination based upon UTLA affiliation (prohibited by Article VII) are subject to the grievance procedure. Also, Article X, section 7.0, regarding Inadequate Service by Substitutes, indicates in part that "In addition to the grievance procedure, the employee may attach a written response to the report within ten working days from date received." Substitute Employees are also discussed in Article XIX.

⁴Negligence will not violate the duty of fair representation.

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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. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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. (Cal. Code of Regs., tit. 8, sec. 32132.)

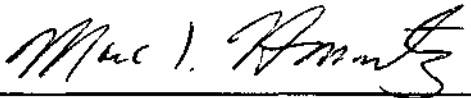
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Final Date

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 

Marc S. Hurwitz
Regional Attorney

Attachment

cc: Helen Bernstein, President, UTLA

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
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(213) 736-3127



July 24, 1992

Paul Wyler, Esq.
Los Angeles Office of Appeals
Unemployment Insurance Appeals
300 S. Spring St., Rm. 1502
Los Angeles, CA 90013-1204

Re: WARNING LETTER, Unfair Practice Charge
No. LA-CO-599, Lorraine Wyler v. United Teachers -
Los Angeles

Dear Mr. Wyler:

In the above referenced charge, which was filed on June 26, 1992, Mrs. Wyler alleges that United Teachers - Los Angeles (UTLA or union) failed as an exclusive representative to fairly represent her in dealing with the Los Angeles Unified School District (District), in alleged violation of Government Code section 3543.6 of the EERA.

My investigation and the charge reveal the following facts. Mrs. Wyler has been employed by the District for over twelve (12) - years as a substitute teacher. She received an Inadequate Service Report (ISR) for Day-to-Day Substitute Teacher on May 8, 1991 for her conduct at Banneker Special Education Center which contained multi-handicapped students. The ISR stated in part, "We have a genuine concern about Mrs. Wyler's health and welfare. We also have a concern about her ability to handle and control the behaviors of some of our more difficult students." On May 28, 1991, UTLA, through its representative, Dot DeLeon, filed a grievance on behalf of Mrs. Wyler. On June 10, 1991, Ms. DeLeon gave Mrs. Wyler the date, time and address for the grievance hearing set for July 24, 1991. On July 24, 1991, you and Mrs. Wyler went to the hearing but learned that Mrs. Wyler was given an incorrect address, some distance from the correct hearing location. Based on the incorrect information, Mrs. Wyler could not be present and did not present her evidence at the hearing. Therefore, on July 26, 1991, the District notified UTLA and Mrs. Wyler that the grievance would be denied. On August 15, 1991, the District offered to resolve/settle the grievance by indicating that the ISR would be "sunset" after one year as long as there were no other ISR's issued during this period. Dot DeLeon urged Mrs. Wyler to accept this settlement. Mrs. Wyler felt the settlement contained a "trap" and was not wise. But based upon the union's advice, the settlement was accepted by Mrs. Wyler and put into effect around August 1991.

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The Charging Party contends that UTLA breached its duty of fair representation (DFR) by giving the erroneous address for the hearing, thus preventing Mrs. Wyler from presenting her evidence. Further, Mrs. Wyler contends that UTLA acted in bad faith in urging her to accept the settlement.¹

On September 11, 1991, Mrs. Wyler received a new ISR for her conduct at Bethune Middle School where she taught seventh grade - Core students. It is alleged that the ISR lacked merit. The ISR mentioned, in part, Mrs. Wyler's alleged failure to attend a faculty meeting, alleged failure to submit daily counts to the counseling office, and alleged failure to keep grades for students. UTLA filed a grievance on or about September 28, 1991. It was denied at Steps 1 and 2. On January, 27, 1992, the union advised the District that it was referring the matter to the District for arbitration, subject to action of UTLA's Grievance Review Committee (GRC). On February 26, 1992, the GRC, apparently based solely on its review of the file, decided that this matter would not go to arbitration. No reason was given but Mrs. Wyler was allowed to appear at a further hearing before the GRC to appeal or discuss the matter. She appeared and presented her evidence to the GRC on April 8, 1992. On April 10, 1992, the GRC advised Mrs. Wyler that its decision was not to go to arbitration. No reason was provided. Within a week or so, the Charging Party sent a letter to UTLA indicating that the decision was wrong and she asked the President of UTLA to reconsider and provide a reason for the decision. Mrs. Wyler has not received an answer to her letter.

The Charging Party contends that the GRC's failure to give a reason for its decision shows the arbitrariness of its action and further violated its duty of fair representation to the charging party. She believes that the rights of substitute teachers were ignored by UTLA. Recently, you advised me that conduct of the union in providing the incorrect address for the hearing, in recommending a settlement with a "trap", and in not providing a reason for deciding against arbitration on April 10, 1992 show a course of conduct by UTLA in giving less consideration for substitute teachers than for regular teachers. You also indicated that UTLA's conduct occurring outside the 6 month statutory period was alleged mainly to show a course of conduct, and not to show separate violations of the duty of fair representation.

¹Mrs. Wyler believes the settlement contained a concealed trap. That is, if the District issued subsequent ISR's, even if they lacked merit, the May 8, 1991 ISR would be revived.

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This charge does not state a prima facie violation of EERA within PERB's jurisdiction for the reasons which follow. This case involves a possible violation of the duty of fair representation found in EERA section 3544.9, as enforced through section 5343.6(b). Section 3544.9 states:

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.²

EERA does not allow a complaint to issue regarding a charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. EERA section 3541.5(a)(1). It is the charging party's burden, as part of the prima facie case, to prove the charge was timely filed. Furthermore, there is no longer any equitable **tolling** of the six month limitations period. The Regents of the University of California (1990) PERB Dec. No. 826-H. This charge **was** filed on June 26, 1992. Therefore, we may only **consider alleged** unlawful conduct of the union occurring after **on or about December 26, 1991**. Therefore, all allegations of **unlawful conduct by UTLA** occurring before this date, are untimely **and will be dismissed**. **However**, they will be used as background for **judging the union's** conduct during the period beginning December 26, 1991.

The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board stated:

Absent bad faith, discrimination, or
arbitrary conduct, mere negligence or poor

²UTLA and the District are parties to a collective bargaining agreement (Agreement) effective June 26, 1989 through June 30, 1991. I note that Article I, section 1.1 excludes from the bargaining unit, in part, all day-to-day substitutes who were paid for fewer than 100 days during the preceding school year. Without deciding the issue here of whether UTLA owes Mrs. Wyler a duty, if you wish to proceed with this charge, you will need to allege facts showing that she qualifies and is a member of the bargaining unit during the relevant period.

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judgment in handling a grievance does not constitute a breach of the union's duty. [Citations.]

A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

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. (Emphasis added.)" [Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

The Agreement states at Article V, section 11.0, Request for Arbitration:

If the grievance is not settled in Step Two, UTLA, with the concurrence of the grievant, may submit the matter to arbitration by a written notice to the District's office of Staff Relations within five (5) days after termination of Step Two (emphasis added).

The Agreement appears to allow the union the discretion to submit matters to arbitration with the concurrence of the grievant. It does not say that the union must submit the matter to arbitration. This charge does not show that the union's conduct in denying arbitration was arbitrary, discriminatory, or in bad faith. As seen above, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. It also appears that UTLA allowed Mrs. Wyler to appeal and present her evidence to the GRC prior to reaching its final decision not to arbitrate. The allegation that Mrs. Wyler was not given a reason or explanation by UTLA does not show that the union has acted in an arbitrary, discriminatory, or bad faith manner. The cases quoted above indicate that the burden is on a

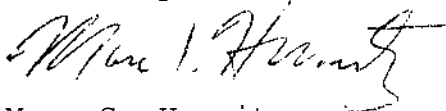
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Charging Party to show how the exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. The case of United Teachers-Los Angeles (Vigil) (1992) PERB Dec. No. 934 is in accord with the proposition that the union's not providing a reason for its denial of a request to pursue a grievance to arbitration, does not, by itself, constitute arbitrary, discriminatory or bad faith conduct in violation of the duty of fair representation.

Even if the conduct in providing an incorrect address was timely, negligence by UTLA will not violate the duty of fair representation. Similarly, even if the union's conduct in recommending the settlement of a grievance, which included a "sunset" provision, was timely, Mrs. Wyler has not alleged facts showing that the union's conduct was dishonest, without a rational basis, or in bad faith. It appears the union representative supported the proposed settlement. There are no facts alleged indicating that Mrs. Wyler was forced to accept the settlement, or that the union concealed the "sunset" provisions. If Mrs. Wyler objected to the settlement as a whole, it appears she could have rejected it. Even if UTLA was negligent in recommending the settlement, this will not violate the duty. I also find that you have not alleged facts demonstrating that UTLA has acted intentionally to ignore the rights of all substitute teachers.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. 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 July 31, 1992, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,



Marc S. Hurwitz
Regional Attorney