STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FRANK D. JANOWICZ, Charging Party,	)	Case No. LA-CO-52-S
v.	)	PERB Decision No. 1043-S
CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, Respondent.	)	March 25, 1994

Appearances; Frank D. Janowicz, on his own behalf; Michael D. Hersh, Attorney, for California State Employees Association.

Before Blair, Chair; Caffrey and Garcia, Members.

DECISION AND ORDER

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Frank D. Janowicz (Janowicz) to a PERB administrative law judge's (ALJ) proposed decision (attached). The ALJ dismissed Janowicz's complaint, which alleged that the California State Employees Association, Local 1000 (CSEA) had failed to assist him in eliminating unfair labor practices directed at Janowicz by his employer, conduct which allegedly constituted a breach of the duty of fair representation in violation of section 3519.5(b) of the Ralph C. Dills Act (Dills Act).[1]

[1]The Dills Act is codified at Government Code section 3512 et seq. Section 3519.5 provides, in part:

> It shall be unlawful for an employee organization to:
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

The Board has reviewed the entire record, including the proposed decision, Janowicz's exceptions and CSEA's response. Finding no prejudicial error, the Board hereby adopts the ALJ's proposed decision as the decision of the Board itself.

The unfair practice charge in Case No. LA-CO-52-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Blair and Member Caffrey joined in this Decision.

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

FRANK D. JANOWICZ, Charging Party, v. CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, Respondent.	)	Unfair Practice Case No. LA-CO-52-S PROPOSED DECISION (12/30/93)

Appearances: Frank D. Janowicz, on his own behalf; Michael D. Hersh, Staff Attorney, for California State Employees Association, Local 1000.

Before W. Jean Thomas, Administrative Law Judge.

PROCEDURAL HISTORY

On April 7, 1992, Frank D. Janowicz (Charging Party or Janowicz) filed an unfair practice charge with the Public Employment Relations Board (Board or PERB) against the California State Employees Association, Local 1000 (Respondent or CSEA). The charge alleged, among other things, a violation of the Ralph C. Dills Act (Dills Act).[1] The charge stated that Respondent failed to assist Janowicz in "eliminating unfair labor practices" directed at him by his employer.

On January 7, 1993, the Office of the General Counsel of PERB, after an investigation of the charge, issued a complaint against the Respondent. The complaint alleges that on or about November 3, 1992, Respondent decided not to submit Janowicz' grievances concerning his alleged layoff and alleged lack of work

[1]The Dills Act is codified at Government Code section 3512 et seq. All section references, unless otherwise noted, are to the Government Code.

assignments since December 9, 1991, to arbitration and failed to notify him in writing of the decision, the reasons therefor, and to direct him about how to appeal the decision. The complaint further alleged that by this conduct, Respondent breached its duty of fair representation in violation of section 3519.5(b) of the Dills Act.[2]

Respondent answered the complaint on January 28, 1993, denying any wrongdoing and asserting a number of affirmative defenses.

An informal conference, held on February 25, 1993, failed to resolve the dispute.

A formal hearing was held before the undersigned on June 16 and July 20, 1993. Respondent filed a motion to dismiss on June 16, 1993, which was taken under submission for a ruling with the proposed decision. No post-hearing briefs were filed. The case was submitted on July 20, 1993, for a proposed decision.

FINDINGS OF FACT

Background

The parties stipulated, and it is therefore found, that the

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[2]In relevant part, section 3519.5 provides as follows:

> 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.

Charging Party is a state employee and the Respondent is a recognized employee organization within the meaning of the Dills Act.

Janowicz began employment with the Department of Youth Authority (DYA) in January 1987 as a permanent intermittent vocational education teacher (industrial arts). Since that time, he has worked as a day-to-day substitute teacher at the Fred C. Nelles School, a correctional facility for boys located in Whittier, California. Janowicz is a member of State Bargaining Unit 3 (professional educators and librarians) which is exclusively represented by CSEA.

At the time that the charge was filed, CSEA and the State of California were parties to a memorandum of understanding (MOU), which had an effective term from July 1, 1988, through June 30, 1991. Following protracted successor contract negotiations, in or about May or June 1992 the parties entered into a successor MOU with an effective term of November 1, 1992, through June 30, 1995.

The 1988-91 MOU contained a five-step grievance procedure. Steps 1 through 3 involve review at various DYA department levels. Step 4 provides for review by the Department of Personnel Administration (DPA). Step 5 is the arbitration level which includes final and binding arbitration.

The December 1991 and January 1992 Grievances

On December 26, 1991, Janowicz filed a grievance alleging violations of Articles 5.5 (Reprisals) and 18(j) (Permanent

Intermittent Appointments) of the 1988-91 MOU. The grievance also alleged violations of various department policies and rules by Janowicz' immediate supervisor, Tony Lombardo (Lombardo) and the school principal, Rachel McCoy (McCoy).

The gist of the grievance was that his supervisors were engaging in a course of harassment and discrimination against him. They also were allegedly conspiring to force Janowicz to quit his position as a day-to-day substitute by not calling him to work since December 9, 1991, even though there were teacher vacancies. Janowicz was assisted with this grievance by Wayne Shada (Shada), the CSEA job steward at Nelles School.

Janowicz also filed an employee complaint on December 26, 1991. The complaint alleged rule violations by McCoy, Lombardo and acting supervisor Bernard Cadle regarding class assignments for Janowicz and other teachers.

On January 27, 1992, Janowicz filed another grievance which apparently alleged the same conduct and violations by his supervisors as those raised in the December 26, 1991, grievance.

Both grievances and the complaint were denied at Step 1 and 2 of the grievance procedure.

On March 2, 1992, Shada elevated both grievances and the complaint to Step 3 for review by the DYA labor relations division. In his cover letter to DYA, Shada noted that further processing of the grievances would be handled by Yvonne Markham (Markham), CSEA's southeast area labor relations representative. A copy of this letter was sent to Janowicz.

After the labor relations division of DYA denied both grievances and the complaint on March 27, 1992, Markham submitted the grievances and the complaint to the DPA appeal level at Step 4 on April 17, 1992. In her cover letter, Markham took issue with the DYA's characterization of the grievances as "complaints." This reference by DYA apparently stemmed from the ongoing dispute between CSEA and the DPA about processing grievances filed subsequent to the expiration date of the 1988-91 Unit 3 MOU. Both the March 27 DYA letter and Markham's April 17 letter show that copies were sent to Janowicz.

During this same period of time, Markham received a copy of the instant unfair practice charge and notification from PERB that the charge would be investigated. However, Markham and Janowicz had no personal contact about the unfair practice charge or the grievances. Markham did have a discussion with Shada about Janowicz' grievances at some point while he was handling them.

On August 7, 1992, Dennis J. Fujii (Fujii), a labor relations officer for DPA, denied both grievances as meritless.[3]

Markham thereafter notified DPA on September 10, 1992, that she was elevating the two grievances and the complaint to arbitration "to comply with contractual time limits." She also stated that she would notify DPA of CSEA's disposition of the

[3]In his cover letter to Markham, Fujii also commented that the complaint procedure specified in the 1988-91 MOU provided that complaints are processed as far as the department head or designee. Thus, DYA's March 27, 1992, response constituted the final level of appeal for Janowicz' December 26, 1991, complaint.

grievances in the near future. Markham's letter shows that a copy was also sent to Janowicz.

Markham testified that the September 10 notice that she sent to DPA is routinely sent to preserve the contractual appeal rights of CSEA and the grievant at a later time in the process.

In September 1992, Markham had several other pending grievances and complaints that had been filed by Janowicz during 1991. She did not evaluate the merits of any of the grievances at the time because, as she testified, she needed time to sort them out, since many of the grievances and complaints were repetitive in nature. She did discuss the cases with CSEA management, but no final decision about arbitration was made in September.

Sometime in November 1992, Markham spoke with Janowicz by telephone. According to her, Janowicz expressed frustration because of delays that he perceived were occurring in processing his grievances to arbitration. She explained to him that a major reason for the delay related to the problems between CSEA and the DPA over the expiration of the 1988-91 Unit 3 MOU. Markham, however, assured Janowicz that she would get back to him regarding arbitration decisions on his cases when they were made.

Janowicz also spoke by telephone with Roger Herrera (Herrera), another CSEA staff person, sometime in late November 1992. Herrera, who served as the southeast area arbitration coordinator, told Janowicz that he had no current active grievance files on him and knew nothing about the substance of

any of his grievances or the merits of his claims. Herrera also mentioned to Janowicz that when he searched Markham's desk for Janowicz' files, he did not find any.

Herrera vehemently denies that he told Janowicz during that telephone conversation that a decision had been made not to take his cases to arbitration. In response to Janowicz' complaint about delays, he did tell him that a one to two year delay in processing grievances was not uncommon.

According to Herrera, as the former southeast area arbitration coordinator for six years, he is quite familiar with the procedure followed by the organization in deciding whether or not to take grievances to arbitration. The labor relations representative handling the grievance is required to evaluate its merits and submit written recommendations to the local area arbitration coordinator, which in this case would have been Herrera in November 1992. The arbitration coordinator reviews the recommendation and the supporting data and then renders his own recommendation. This may or may not agree with the labor relations representative's recommendation. If the arbitration coordinator recommends arbitration, a notice is sent to the CSEA labor relations representative, DPA, and the grievant. If arbitration is not recommended, a letter is sent to the grievant explaining the reasons for the decision and setting forth the member's rights of appeal to the CSEA area manager. Such appeals are submitted to a three-member peer panel of CSEA members who

make the final decision. The panel has the authority to supersede the recommendations of the CSEA staff.

At the time of his November 1992 conversation with Janowicz, the process Herrera described above had not been initiated at his level. Subsequent to this conversation, Herrera and Janowicz had no further contact.

Markham testified that she was unaware of Janowicz' November 1992 conversation with Herrera, until the commencement of the hearing. At that time, all of Janowicz' grievances were still under her consideration. Additionally, unbeknown to Herrera, she had Janowicz' case files in the field with her on the day that he spoke with Janowicz, but Herrera had no way of knowing that.

During the hearing, Markham acknowledged that she had recently prepared recommendations regarding Janowicz' grievances and would shortly submit them to the new local area arbitration coordinator for review.

ISSUES

Did CSEA's processing of Janowicz' December 1991 and January 1992 grievances amount to a breach of the duty of fair representation in violation on section 3519.5(b)?

CONCLUSIONS OF LAW

Standard for Duty of Fair Representation

Unlike the other two statutes administered by PERB, the Dills Act does not contain a specific section stating that an

employee organization has a duty of fair representation.[4] The Board has implied such a duty from the fact that the Dills Act provides for exclusive representation. (California State Employees Association (Lemmons and Lund) (1985) PERB Decision No. 545-S.)

The duty of fair representation requires an exclusive representative to fairly and impartially represent all employees in a bargaining unit. The fair representation duty imposed upon the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125.) To prove a violation of this duty, the Charging Party must show that: (1) the acts complained of were undertaken by the organization in its capacity as exclusive representative of all unit employees; and (2) the representational conduct was arbitrary, discriminatory, or in bad faith. (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124, citing precedent set by the National Labor Relations Board and affirmed by the U.S. Supreme Court in Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].)

The Board in Rocklin, supra. affirmed the interpretation of this concept set forth in Griffin v. United Auto Workers (4th Cir. 1972) 469 F.2d 181 [81 LRRM 2485], as follows:

> A union must conform its behavior to each of these standards. First, it must treat all factions and segments of its membership

[4]Duty of fair representation provisions are set out in section 3544.9 of the Educational Employment Relations Act and 3578 of the Higher Education Employer-Employee Relations Act.

> without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute a basis for civil action. The repeated references in Vaca to "arbitrary" union conduct reflected a calculated broadening of the fair representation standard. Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation.

In determining whether CSEA violated section 3519.5(b) as alleged, the foregoing principles will be applied.

Allegations in the Complaint

The complaint alleges that CSEA did not provide Janowicz with notice of its decision not to pursue his grievances to arbitration, the reasons therefor, and information on how to appeal the decision within CSEA's internal appeal process. The complaint thus presents three elements of proof: (1) failure to give notice of a decision; (2) failure to explain reasons for the decision; and (3) failure to provide an opportunity to appeal the decision.[5] The Charging Party has the burden of proving these elements by a preponderance of the evidence.

[5]Although the complaint is based on CSEA conduct allegedly occurring in November 1992, there is no evidence that the charge was ever amended by the Charging Party to add the allegations set forth in the complaint.

In this case, the Charging Party has failed to meet the burden of establishing a prima facie case.

The record shows clear evidence that in November 1992, CSEA had not made even a preliminary decision about whether or not to pursue Janowicz' December 1991 and January 1992 grievances to arbitration.

Janowicz had telephone conversations with two CSEA representatives in November 1992 -- Markham and Herrera. Markham was unable to recall the exact date of her conversation with Janowicz and Herrera recalls his conversation occurring sometime in late November 1992.

Since Herrera was the person responsible for making an arbitration recommendation regarding Janowicz' grievances, Herrera's testimony is pivotal. Janowicz testified that he learned from Herrera about the decision not to pursue his grievances to arbitration. Herrera adamantly denies that he made such a comment to Janowicz. Herrera recalls that he told Janowicz that he had no current, active grievance files on his cases. It is possible that Janowicz mistakenly concluded from Herrera's comment that CSEA had decided not to submit his two grievances to arbitration and failed to notify him of that fact.

In weighing the credibility of the two witnesses regarding this conversation, Herrera's testimony is credited over that of Janowicz. Herrera's recall of his conversation with Janowicz was much more specific about the statements made and the actions taken in response to his inquiry. Janowicz' recall of the

conversation generally lacked any specifics except that Herrera was the CSEA staff person who informed him of the alleged decision sometime in November 1992. Additionally, Herrera's testimony about why he could not have told Janowicz that such a decision had been made is supported by Markham's testimony that at the time of Janowicz' call to Herrera, she still had the responsibility for processing his grievances and had made no recommendations to Herrera.

Since it has not been established that CSEA made a decision in November 1992 about pursuing Janowicz' grievances to arbitration, as alleged, it is unnecessary to address the other two elements of unlawful conduct alleged in the complaint. The other two elements depend on an affirmative finding about the alleged decision.

In its motion to dismiss, CSEA asserts that the complaint should be dismissed on the following grounds: (1) the Charging Party failed to allege facts sufficient to state a cause of action based on a breach of duty of fair representation; (2) the complaint is defective as vague and ambiguous; (3) the Charging Party failed to exhaust internal union remedies; and (4) the complaint is moot.

The motion is granted as to the first of the grounds asserted. Having concluded that the Charging Party failed to establish a prima facie case, it is not necessary to address the other arguments raised in the motion.

Based upon all the evidence presented, and the credibility determinations made, it is concluded that the Charging Party has failed to establish a prima facie case of a breach of the duty of fair representation. Thus, the complaint must be dismissed on the merits because there is no factual support for the allegations.

PROPOSED ORDER

Based upon the foregoing findings of fact, the entire record herein, and the conclusions of law set forth above, it is found that the complaint must be dismissed because of the Charging Party's failure to establish a prima facie case of a breech of the duty of fair representation. It is thus concluded that the complaint issued against the California State Employees Association, Local 1000, must be DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later

than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

W. JEAN TH0MAS
Administrative Law Judge