

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PATRICK T. MACDONALD,)
)
Charging Party,) Case No. SF-CO-34-H
)
v.) PERB Decision No. 1046-H
)
CALIFORNIA FACULTY ASSOCIATION,) May 6, 1994
)
Respondent.)
_____)

Appearance: John C. Elsbree, Attorney, for Patrick T. Macdonald.
Before Blair, Chair, Caffrey and Garcia, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (Board) on appeal of a Board agent's dismissal (attached) of an unfair practice charge filed by Patrick T. Macdonald (Macdonald). The Board agent found that the charge, alleging that the California Faculty Association (CFA) violated section 3571.1(e) of the Higher Education Employer-Employee Relations Act (HEERA),¹ did not state a prima facie case and dismissed the charge.

¹HEERA is codified at Government Code section 3560 et seq. Section 3571.1 reads, in pertinent part:

It shall be unlawful for an employee organization to:

(e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.

The Board has reviewed the original and amended charge, the dismissal and warning letters, and Macdonald's appeal.² The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CO-34-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Blair and Member Caffrey joined in this Decision.

²CFA did not file a response to the appeal.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)557-1350



January 20, 1994

John C. Elsbree
Law Offices
One Embarcadero Center, Ste. 310
San Francisco, California 94111

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Patrick T. Macdonald v. California Faculty Association
Unfair Practice Charge No. SF-CO-34-H

Dear Mr. Elsbree:

The above-referenced unfair practice charge, filed on September 28, 1993, alleges that the California Faculty Association (Association) denied Patrick Macdonald the right to fair representation in connection with a grievance filed on his behalf. This conduct is alleged to violate Government Code section 3571.1(e) of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you, in my attached letter dated November 29, 1993, 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 December 7, 1993, the charge would be dismissed.

Following the granting of an extension of time, you filed an amended charge. The amended charge refers to the specific provisions of the Memorandum of Understanding alleged to have been violated by the University. The charge details the University's responses to each of the allegations raised the grievance through the first two informal levels. None of the responses appears to address the merits of Macdonald's claims. For example, in response to allegations that deal with appointment to teaching positions, the University asserted that it complied with the layoff provisions. In addition, the University contended that Macdonald lacked the requisite academic qualifications, when he had received an appointment letter and had the required academic credential, at least as stated in the job announcement. By letter dated October 9, 1992, Gail Holmes,

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Director of Field Operations for the Association, advised Macdonald that she had decided not to proceed to arbitration. Macdonald appealed that decision to the Association's Representation Committee. By letter dated March 29, 1993, Larry Giventer, Chairperson of the Representation Committee, advised Macdonald that the Committee had decided not to arbitrate the grievance. Macdonald contends that the University's failure to address the merits of his grievances "implies that either (a) [the Association] did not present the facts and the provisions of the MOU at the hearings or (b) [the University ignored them," and "[t]hat being the case, [the Association's] presentation of the grievance was perfunctory, or [the Association's] review of [the University's] responses was perfunctory or both." Finally, Macdonald alleges that Giventer had personal differences with him, although he does not allege a basis for this claim.

The new allegations fail to demonstrate that the Association's refusal to arbitrate the grievance was for arbitrary, discriminatory, or bad faith reasons. Macdonald attempts to rely on the theory that a "perfunctory" handling of a grievance constitutes "arbitrary" conduct. This theory, while not universally accepted by courts and never expressly embraced by the Public Employment Relations Board, is nevertheless a fairly narrow one. (See McKelvey, The Changing Law of Fair Representation (1985) at pp. 145-169; Dutrisac v. Caterpillar Tractor Company (9th Cir. 1983) 749 F.2d 1270; Hines v. Anchor Motor Freight (6th Cir. 1974) 680 F.2d 598 [110 LRRM 2939]; American Federation of State, County, and Municipal Employees (1993) PERB Dec. No. 982-H.) Assuming for argument's sake that the theory is viable, under the applicable authorities, a "perfunctory" handling of a grievance could result from a complete failure to investigate the facts underlying a grievance or an unexplained failure to perform a ministerial duty, typically resulting in a procedural default. The facts alleged in the instant charge fail to establish either of these theories. There is insufficient foundational evidence to support an inference that the Association's conduct was arbitrary. Therefore, I am dismissing the charge based on the facts and reasons above and those contained in my November 29, 1993 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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies

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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,

ROBERT THOMPSON
Deputy General Counsel

By

~~_____~~
DONN GINOZZA
Regional Attorney

Attachment

cc: Delia Bahan

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350



November 29, 1993

John C. Elsbree
Law Offices
One Embarcadero Center, Ste. 310
San Francisco, California 94111

Re: **WARNING LETTER**
Patrick T. Macdonald v. California Faculty Association
Unfair Practice Charge No. SF-CO-34-H

Dear Mr. Elsbree:

The above-referenced unfair practice charge, filed on September 28, 1993, alleges that the California Faculty Association (Association) denied Patrick Macdonald the right to fair representation in connection with a grievance filed on his behalf. This conduct is alleged to violate Government Code section 3571.1(e) of the Higher Education Employer-Employee Relations Act (HEERA).

Investigation of the charge revealed the following. Patrick Macdonald was employed by the California State University (University) until his termination in 1991. On or about August 23, 1991, the Association presented a grievance alleging violations of Articles 1, 12, and 38 of the Memorandum of Understanding (MOU) then in existence between the parties. The grievance was pursued through the various procedures set forth in the MOU. The Association made a demand for arbitration of the grievance. On or about March 29, 1993, the Association informed the University that it was withdrawing its demand for arbitration. A copy of the letter was also sent to Macdonald. Macdonald was not notified prior to the letter that the Association intended to withdraw its demand. Without specifying the basis, the charge alleges that the Association abandoned a meritorious grievance.

The undersigned provided the Charging Party with an opportunity to provide additional evidence to support the allegations in the charge, but no additional evidence has been submitted.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the HEERA for the reasons that follow.

In order to state a prima facie violation, the Charging Party must show that the Association's refused to process a meritorious grievance for arbitrary, discriminatory or in bad faith reasons. In United Teachers of Los Angeles (Collins) (1983) PERB Dec.

No. 258), the Public Employment Relations Board (PERB) stated:

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

It has also been stated that 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 Dec. No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Dec. No. 124.)

The charge fails to allege sufficient facts from which it can be concluded that a prima facie violation occurred under the standards articulated above.

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

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amended charge or withdrawal from you before ~~December 7, 1993~~ December 7, 1993, I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,


DONN GINOZA
Regional Attorney