

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PATRICIA L. ALLEN,)
)
 Charging Party,) Case No. SF-CO-458
)
 v.) PERB Decision No. 1065
)
 SAN JOSE TEACHERS ASSOCIATION,) November 4, 1994
 CTA/NEA,)
)
 Respondent.)
 _____)

Appearances: Patricia L. Allen, on her own behalf; California Teachers Association by Ramon E. Romero, Attorney, for San Jose Teachers Association, CTA/NEA.

Before Blair, Chair; Caffrey and Garcia, Members.

DECISION AND ORDER

CAFFREY, Member: This case is before the Public Employment Relations Board (Board) on appeal by Patricia L. Allen (Allen) of a Board agent's dismissal (attached hereto) of her unfair practice charge. In her charge, Allen alleged that the San Jose Teachers Association, CTA/NEA (Association) violated her right to fair representation guaranteed under section 3544.9 of the Educational Employment Relations Act (EERA) thereby violating EERA section 3543.6(b).¹

¹EERA is codified at Government Code section 3540 et seq. EERA 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.

Section 3543.6 states, in pertinent part:

The Board has reviewed the entire record in this case, including the warning and dismissal letters, Allen's unfair practice charge and appeal, and the Association's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SF-CO-458 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Blair and Member Garcia joined in this Decision.

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.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



June 27, 1994

Patricia L. Allen

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**

Patricia L. Allen v. San Jose Teachers Association. CTA/NEA
Unfair Practice Charge No. SF-CO-458

Dear Ms. Allen:

The above-referenced unfair practice charge, filed on April 25, 1994 and amended on April 29, May 24, and June 16, 1994, alleges that the San Jose Teachers Association (Association) failed to properly represent Patricia L. Allen with respect to certain disputes with the San Jose Unified School District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated June 10, 1994, 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 June 20, 1994, the charge would be dismissed.

I granted you an extension to file an amended charge until June 27, 1994. I received an amended charge on June 17, 1994 and additional documentation on June 17, 21, and 27, 1994.

The undersigned has reviewed the additional information but concludes that the evidence is insufficient to state a prima facie violation for the reasons stated in the June 10, 1994 letter.

Therefore, I am dismissing the charge based on the facts and reasons stated above and those contained in my June 10, 1994 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing

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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,

ROBERT THOMPSON
Deputy General Counsel

By: _____
DONN GINOZA
Regional Attorney

Attachment

cc: Ramon E. Romero

PUBLIC EMPLOYMENT RELATIONS BOARD



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



June 10, 1994

Patricia L. Allen

Re: **WARNING LETTER**

Patricia L. Allen v. San Jose Teachers Association. CTA/NEA
Unfair Practice Charge No. SF-CO-458

Dear Ms. Allen:

The above-referenced unfair practice charge, filed on April 25, 1994 and amended on April 29 and May 24, 1994, alleges that the San Jose Teachers Association (Association) failed to properly represent Patricia L. Allen with respect to certain disputes with the San Jose Unified School District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. Patricia L. Allen has been employed as a teacher since 1969. Allen's bargaining unit is exclusively represented by the San Jose Teachers Association CTA/NEA (Association). Allen underwent breast cancer surgery in January 1992 and subsequently went on disability leave for various periods thereafter. She was out for portions of the spring 1992 semester. Allen did not receive a classroom observation and evaluation during the 1991-92 school year.

Allen asked Association Executive Director Brian McKenna on several occasions during the period from April to June 1992 to prepare a grievance on her behalf regarding the District's failure to conduct the evaluation. McKenna informed Allen that she did not have a basis for a grievance because Allen had been on leave for portions of the year to receive chemotherapy treatments.

Allen filed her own grievance challenging the District's failure to conduct the classroom observation and evaluation. The grievance was not resolved. Allen later requested "closure" of the grievance in the spring of 1992.

Allen filed for a summer school position in the summer of 1992 but was rejected allegedly due to her disability. Returning to work in the fall of 1992, Allen again requested "closure" on the grievance with respect to the classroom observation and evaluation. Allen complained to McKenna about the District's

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failure to reach closure on the grievance. McKenna advised Allen that her grievance was without merit.

Allen was on leave for surgery from November 18, 1992 through January 6, 1993. Patti Gregory, Hoover Middle School Principal, instructed Allen that she would initiate the evaluation process anew and conduct two observations. Gregory observed Allen in March 1993, which resulted in a "good" written evaluation. Gregory announced that she would conduct a second observation on April 29, 1993. Allen objected. Allen alleges that the District violated unidentified procedural provisions of the collective bargaining agreement when it undertook the second evaluation. Allen requested representation from the Association. She was told that the District was entitled to conduct the second observation but that the Association would file a grievance to challenge the second evaluation if it were negative. McKenna refused to personally attend the assessment conference held in connection with the second evaluation. On March 23, 1993, Allen filed a complaint with the Equal Employment Opportunities Commission (EEOC), alleging racial discrimination in the conduct of the evaluations.

Gregory issued the second written evaluation on May 5, 1993. Allen filed a grievance Against this evaluation on May 27, 1993. Gregory refused to revise the evaluation. She told an Association representative not to assist Allen with the grievance. Allen alleges that because she had filed a grievance, the District began to collect complaints against her from students between May 1993 and September 1993. By letter dated May 27, 1993, Gregory issued Allen a letter of reprimand for allegedly threatening students if they were disruptive during the classroom observations. By letter dated May 27, 1993, Ken Yamasaki, Assistant Superintendent, issued a notice of unprofessional conduct reiterating the accusations of Gregory. Allen alleges that these acts occurred because she filed a grievance and were unfair because she was not provided with an opportunity to reform her conduct prior to the actions.

Allen requested that the McKenna file grievances against the letter of reprimand and notice of unprofessional conduct. He refused. Allen filed a grievance on June 21, 1993 challenging the evaluation on procedural grounds as well as the letter of reprimand and notice of unprofessional conduct. The Association only provided assistance in typing the grievance. As of August 1993, the letter of reprimand and notice of unprofessional conduct were no longer in Allen's personnel file. During the summer of 1993, McKenna told Allen that he had heard she had a "discipline problem." Allen alleges that the reason McKenna told her this was because he knew she was planning to complain to the

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Association Board of Directors about a physical confrontation between McKenna and herself during a meeting in his office on in June 1993. Following a meeting about McKenna's proposed changes to Allen's written response to her evaluation, McKenna ordered Allen out of his office at closing time, Allen refused, and McKenna then pushed Allen out of his office. Allen filed a complaint with the police, which was rejected by the District Attorney's office.

Allen alleges that McKenna concocted a series of events intended to result in the District terminating her because she complained about her unfair treatment and because she complained to the Association Board of Directors about their confrontation in June 1993.

Allen alleges that a District principal issued her a third letter of reprimand during the summer school session of 1993 three days after her father died. There is no allegation regarding McKenna's role in this action.

During the summer months, Allen retained the legal services of Priscilla Winslow. Winslow communicated to the District on Allen's behalf.

By letter dated September 17, 1993, Association President Linda Wilson informed Allen that the Association Board of Directors had met to discuss her complaints. The Association outlined various steps it intended to take to address some of her complaints, including requesting that the Association assign Winslow to represent her with regard to the letters of reprimand and notice of unprofessional conduct.

On September 26, 1993, McKenna attended a meeting regarding a parent complaint about a student who had failed Allen's class. McKenna wrote a letter to the District protesting the use of the letter against Allen. The District later noted the complaint in a 15-day suspension issued to Allen.

On September 27, 1993, Allen attended a meeting concerning the summer session letter of reprimand. Association representative Lora Traveler attended.

On September 30, 1993, the District issued Allen a notice of 15-day suspension. The notice was based on three student complaints and the parent complaint about the student who had failed her class. McKenna "lured" Allen to the District offices where the notice could be delivered. He insisted that Allen come to the offices to view her personnel file. McKenna told her that Gregory had "something terrible to give her." When Allen

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attempted to leave, McKenna told her to sit and wait or the Association would no longer assist her. Association President Mary Jo Pokriots, who was present until just before the notice was delivered, was wearing black as though to tell her that something negative was about to happen. Allen grieved the 15-day-suspension.

Also, sometime in September 1993, the Association recommended to its grievance committee that it proceed to arbitration on only the grievance involving the 15-day suspension and not proceed on any of the other grievances filed by Allen. On September 28, 1993, the Association's grievance committee met without Allen's knowledge and adopted this recommendation. The Association promised Allen the assistance of an attorney, but asserts that one was not present on September 30, 1993, when she was issued the 15-day suspension by the District.

McKenna later arranged for an appointment with Gregory to discuss Gregory's planned evaluation process. At the meeting Gregory indicated that Allen would be evaluated as though she were a starting teacher.

Allen injured her hand on October 5, 1993. Thereafter she went on medical leave from October 6, 1993 through June 17, 1994.

On October 18, 1993, McKenna called Allen into his office and wrote a settlement proposal to the District which called for a lifting of the 15-day suspension, Allen taking a medical leave for one year, and certain terms for District-paid health benefits and a partial salary. Allen alleges that she "left knowing that the proposal was accepted by the District." The settlement proposal, authorized by Allen, was later rejected by the District.

The 15-day suspension grievance was scheduled for arbitration on March 28 and 29, 1994. Allen was represented by Association-appointed attorney Priscilla Winslow. Allen requested that the arbitration be continued while she was on medical leave. The request was denied. Allen wrote a letter to the District's attorney stating that she would not attend because she was on disability, she felt that by participating in the proceedings she would be validating an otherwise unlawful suspension, and she could not negotiate a settlement with the District wherein it would not disavow any hidden agendas. When Allen failed to appear at the arbitration, the Association voted to withdraw its request for arbitration and notified the District. The District then notified Allen on April 11, 1994 that it intended to impose the 15-day suspension.

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On April 22, 1994, Allen wrote to the Association to request that it ask the District to reconsider its decision to implement the 15-day suspension. She proposed to drop her EEOC charges if the District would rescind the 15-day suspension. The Association did not act on her request.

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

Government Code section 3541.5(a) states that the Public Employment Relations Board (PERB) "shall not . . . 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."

PERB has held that the six month period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Dec. No. 359-H.) Since the charge was filed on April 25, 1994, the statute of limitations period began to run on October 25, 1993.

The events alleged to support the claim that McKenna conspired with the District to arrange for Allen's termination all occurred prior to October 25, 1993. The Association's decision to reject all grievances except the 15-day suspension was made on September 28, 1993. Therefore, these claims are untimely and no complaint may issue with respect to them.

The only allegations that are timely relate to the Association's withdrawal from arbitration and its failure to act on Allen's subsequent request for reconsideration.

PERB has held that breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. (Rocklin Teachers Professional Association (1980) PERB Dec. No. 124.) In the context of grievance handling, PERB has defined the scope of the duty as follows:

. . . 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 omitted.]

A union may exercise its discretion to determine how far to pursue a grievance in

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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. [Citations omitted.] (United Teachers - Los Angeles (Collins) (1982) PERB Dec. No. 258.)

In addition, in order to show a prima facie violation involving a breach of the duty of fair representation, the charging party must present facts which would justify a finding that the union acted without a rational basis or in a way that is devoid of honest judgment. (Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Dec. No. 332.)

In the present case, there are insufficient facts to demonstrate that the Association's decisions to withdraw from arbitration after Allen failed in her attempt to reschedule the hearing and not to act on her request for reconsideration were without a rational basis, devoid of honest judgment, or otherwise made for arbitrary, discriminatory or bad faith reasons.

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 June 20, 1994, I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,


DONN GINOZA
Regional Attorney