STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID L. CARLSON, Charging Party,	)	Case No. S-CO-318
v.	)	PERB Decision No. 1070
DAVIS TEACHERS ASSOCIATION, CTA/NEA, Respondent.	)	November 29, 1994

Appearances: David L. Carlson, on his own behalf; California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for the Davis Teachers Association, CTA/NEA.

Before Caffrey, Carlyle and Johnson, Members.

DECISION AND ORDER

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by David L. Carlson (Carlson) of a Board agent's partial dismissal (attached) of his unfair practice charge regarding the denial of religious objector status and the deduction and payment of agency fees. Carlson alleged that by engaging in this conduct, the Davis Teachers Association, CTA/NEA (Association) violated his rights under sections 3543.6(b) and 3546.3 of the Educational Employment Relations Act (EERA).[1]

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

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

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

Section 3546.3 holds:

> Notwithstanding subdivision (i) of Section 3540.1, Section 3546, or any other provision of this chapter, any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support any employee organization as a condition of employment; except that such employee may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious, nonlabor organization, charitable fund exempt from taxation under Section 501(c)(3) of Title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in the organizational security arrangement, or if the arrangement fails to designate such funds, then to any such fund chosen by the employee. Either the employee organization or the public school employer may require that proof of such payments be made on an annual basis to the public school employer as a condition of continued exemption from the requirement of financial support to the recognized employee organization. If such employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure.

The Board hereby AFFIRMS the Board agent's partial dismissal of the unfair practice charge in Case No. S-CO-318.

Members Caffrey and Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

July 15, 1994

David L. Carlson

Re: NOTICE OF PARTIAL DISMISSAL
David L. Carlson v. Davis Teachers Association. CTA/NEA
Unfair Practice Charge No. S-CO-318

Dear Mr. Carlson:

I indicated to you, in my attached letter dated June 15, 1994, that certain allegations contained in the 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 these allegations to state a prima facie case or withdrew them prior to June 27, 1994, the allegations would be dismissed. Your subsequent requests for additional time in which to respond were granted, and a First Amended Charge was filed by certified mail on July 12, 1994.[1]

The First Amended Charge consists of a six-page response to my June 15 letter, which reargues the facts alleged in the original charge. Though not specified therein, it is assumed that all facts originally alleged in the charge are incorporated in the First Amended Charge.

Denial of Religious Objector Status

You first dispute that this allegation should be held untimely, arguing that the Respondent's record of communications in this area has been too unreliable for you to be held accountable for knowing when their decision to deny you your religious objector status was final. You argue that the six months statute of limitations should toll only from the point in time (October 29, 1993) when agency fees were first withheld from your paycheck, and not from the August 9, 1993 letter informing you that religious objector status had been denied.

It is true that you sent a letter to Charging Party on September 15, 1993 seeking to reverse the decision communicated by the August 9 letter. The Respondent replied to that letter on October 3, 1993, however, and reiterated the decision to deny

[1]The amendment was received on July 13, 1994.

your request for religious objector status. Your original charge refers to the Respondent's October 3 letter as its "final response." In addition, the District sent you a letter on or about October 5, 1993 which notified you that the agency fee deduction would commence with your next paycheck.

Thus, you had knowledge of the conduct giving rise to this allegation in your charge as early as August 9, 1993, which was then reaffirmed by both the Respondent and your employer in early October 1993. Each of these dates falls outside the six months period preceding the filing of your charge, and this allegation must therefore be dismissed as untimely. (Regents of the University of California (1993) PERB Decision No. 1002-H; Fairfield-Suisun Unified School District (1985) PERB Decision No. 547; Healdsburg Union High School District (1984) PERB Decision No. 467.)

My June 15 letter also indicated that this allegation was subject to dismissal because it does not allege that the Respondent's requirements for obtaining religious objector status were greater than provided for by statute. Your response acknowledges that you have not alleged otherwise, and does not allege any additional information which would constitute prima facie evidence of a violation of the statute.

Lump Sum Payment Requirement

Your charge alleges that Respondent's requirement that religious objectors make a lump sum, annual payment of an amount equivalent to dues, rather than having an option of monthly payroll deductions, constituted unlawful interference with employees' protected right to not participate in an employee organization.

My June 15 letter indicates agreement with the basic theory, but finds the evidence presented, including that available from PERB's official files, does not support the claim that such a requirement was in effect during the six months period preceding the filing of the charge.

Your response to this point is in two parts: The Respondent did not communicate its change in policy to you until after the filing of the instant charge, and that the change in policy does not remedy the defect. This response is unpersuasive on both points.

The burden is on a charging party to allege facts which both establish a prima facie violation and the timeliness of the charge. (See, e.g., San Francisco Unified School District (1985) PERB Decision Nos. 501 and 502.) In the instant case, the July 12 amendment fails to allege facts which would show that Respondent maintained a policy arguably violative of employees'

rights in this respect after July 1, 1993, and this allegation must also be dismissed as untimely.

Rights of Religious Objectors

Your response in this area asserts that PERB has "read Hudson too narrowly." The response does not allege any facts not already considered in the analysis set forth in my June 15 letter, and this allegation must be dismissed for the reasons set forth in my earlier letter.

Duty of Fair Representation

Your response cites as missing from my June 15 letter any mention of how you have "documented [Respondent's] inability, or unwillingness, to represent [you] fairly either as a bilingually certificated teacher or as a religious objector." You then indicate that "the failure to represent fairly is the umbrella under which the other allegations fall."

Your original charge includes allegations relating to negotiated salary increases in 1990-91 which you believe reflect a lack of understanding on Respondent's part of the value of bilingual teachers, and also relates subsequent efforts on your part in 1991 to win approval of special compensation increases for Spanish Immersion teachers in your district. Your charge also includes allegations concerning Respondent's effort, in the fall of 1993, to exclude non members from a Site Liaison Committee at your school, but also relates that you were informed that a new committee would be elected without the restrictions.

The right to fair representation is guaranteed by EERA section 3544.9 and a breach of the duty thereby violates section 3543.6(b). 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) (1982) 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 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.)

Your charge, as written, does not allege conduct which states a prima facie violation of the duty of fair representation. The individual allegations discussed above, and in my June 15 letter, do not constitute evidence of a such a violation.

Summary

Therefore, I am dismissing those allegations which fail to state a prima facie case for the reasons set forth above as well as the facts and reasons contained in my June 15, 1994 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of certain allegations contained in 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.)

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 _____
Les Chisholm
Regional Director

Attachment

cc: A. Eugene Huguenin, Jr.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

June 15, 1994

David L. Carlson

Re: David L. Carlson v. Davis Teachers Association. CTA/NEA
Unfair Practice Charge No. S-CO-318
PARTIAL WARNING LETTER

Dear Mr. Carlson:

On April 29, 1994 David L. Carlson, a teacher in the Davis Joint Unified School District (District) filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board). Mr. Carlson alleges that the Davis Teachers Association, CTA/NEA (Association) has violated his rights under the Educational Employment Relations Act (EERA) at Government Code sections 3543.6 (b) and 3546.3.

Investigation of this charge has revealed the following pertinent information. Mr. Carlson has been a school teacher in the District for almost six years. He is a member of the bargaining unit exclusively represented by the Association but is not a member of the Association. An agency fee provision was negotiated by the Association and the District in 1992 and PERB conducted an organizational security election in October 1992. In that election the agency fee arrangement was approved by the voters and subsequently went into effect. Mr. Carlson requested and was granted religious objector status by the Association in January 1993. Mr. Carlson was informed at that time that he would be required to pay the equivalent of the full Association dues to a selected number of charities with all monies due and payable by February 15, 1993.[1] Mr. Carlson requested the

[1]in addition, the information from the Association stated that to obtain a religious exemption, one must provide to the Association a letter of proof that one is a member of a religious body whose teachings oppose payment of dues or agency fees to an employee organization.

Association provide him with a Hudson[2] notification so that he might reduce the amount of money he was going to pay to the charity accordingly. The Association did not reply to Mr. Carlson substantively until a letter dated August 9, 1993 which indicated that the Association had waived his obligation for fees for the school year 1992-93, revoked his religious objector status, and designated him as a fee payer for the school year 1993-94.

Mr. Carlson wrote the Association on September 15, 1993 indicating that he should still be granted religious objector status and that he should not be listed as an agency fee payer. The Association responded on October 3, 1993 indicating that Mr. Carlson had failed to comply with Article 4.3.6 of the collective bargaining agreement between the District and the Association.[3]

The letter concluded that since he had not satisfied this requirement he would be classified as a service fee payer and receive the appropriate Hudson notice informing him of the steps that he must take to request the rebate of the fees not used for representation purposes.

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[2]Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292. In this decision, the U.S. Supreme Court established three procedural safeguards to ensure that agency fee collection minimizes infringement on nonunion members' First Amendment Rights. First, the procedure must avoid the risk that the fees will be used to finance ideological activities unrelated to collective bargaining. Second, the plan must provide fee payers with adequate information about the union's expenditures. Third, the scheme must provide a reasonably prompt arbitration forum where nonmembers can object to the amount charged.

[3]Section 4.3.6 of the collective bargaining agreement states:

> [A]ny certificated employee who enunciates in a credible way religious tenets or teachings which include objections to joining or financially supporting employee organizations which qualify him or her as a religious objector shall pay an amount equal to the service fee to one of the three following non-religious, non-labor organization charitable funds:
>
> 4.3.6.1 American Heart Association
> 4.3.6.2 American Cancer Society
> 4.3.6.3 Alzheimer Society

On October 5, 1993, Mr. Carlson was notified by the District that it would begin deducting the Association's agency fee on October 29, 1993. The District also indicated that he could submit direct and full payment to the Association by October 15, 1993 and thus obviate the need for monthly withholding from his paycheck. On October 29, 1993 the District commenced withholding agency fees from Mr. Carlson's paycheck.

Mr. Carlson received a Hudson notification for the 1993-94 school year from the Association on May 20, 1994. On May 31, 1994, the Association refunded the agency fees collected from Mr. Carlson for September 1993 - April 1994 with 10% interest.

Mr. Carlson's Position

Mr. Carlson argues that the Association has violated the statute by revoking his status as a religious objector. He believes that the Association's publishing of requirements for a religious objector status that were more stringent than those contained in the contract constitutes intimidation of non-union members and a violation of the contract. For example, an Association representative indicated that religious objector status would not be granted without a signature of a pastor/leader of an organized religious body. He also asserts that religious objectors should be allowed the same payment process as agency fee payers, that is, allowing ten monthly payments rather than requiring religious objectors to pay the equivalent of the full union dues in a single lump sum payment. In addition he believes that religious objectors have the right to receive a Hudson notification and pay only the equivalent of fees used for representational purposes.

Generally Mr. Carlson also believes that agency fees should be found to be unconstitutional.

Discussion

This charge boils down to four allegations: (1) Mr. Carlson was illegally denied religious objector status by the Association in August 1993; (2) the Association's practice of requiring religious objectors to pay the entire amount equivalent to union dues in one lump sum payment interfered with employees' rights to not participate in the Association; (3) the Association illegally denied religious objectors the right to receive a Hudson notice and have their fees reduced to only those costs chargeable to representation purposes; and (4) agency fees were collected from Mr. Carlson prior to his receipt of a Hudson notification. This letter addresses only the first three allegations.

Denial of Religious Objector Status

Mr. Carlson's loss of religious objector status took place outside the statutory six month limitations period.[4] The charge was filed on April 29, 1994 and would encompass any alleged Association activities which occurred after October 29, 1993. Mr. Carlson was notified by the Association that he would not be granted religious objector status or, in the alternative, that his religious objector status had been withdrawn by letter dated August 9, 1993. This conduct is outside the statutory period and should be dismissed as untimely.

However, even if the claim was timely, it appears that it does not state a prima facie violation of the EERA. Government Code section 3546.3 states:

> Notwithstanding subdivision (i) of Section 3540.1, Section 3546, or any other provision of this chapter, any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support any employee organization as a condition of employment; except that such employee may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious, nonlabor organization,, charitable fund exempt from taxation under Section 501(c) (3) of Title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in the organizational security arrangement, or if the arrangement fails to designate such funds, then to any such fund chosen by the employee. Either the employee organization or the public school employer may require that proof of such payments be made on an annual basis to the public school employer as a condition of continued exemption from the requirement of financial support to the recognized employee organization. If such

[4]Government Code section 3541.5(a)(1) prohibits PERB from issuing 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."

> employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure. [Emphasis added.]

Based on the documents provided with the charge it appears that the Association requested that Mr. Carlson provide a written document indicating that his personal beliefs qualify him under the religious exemption in 4.3.6 of the contract. Mr. Carlson responded that he had not provided his beliefs in written form but that he had requested conscientious objector status based on lengthy telephone conversations he had with the Association president prior to the vote on organizational security.[5] He indicated that he repudiated not only the Association's judgment in the matter but also the process used and that if there were questions concerning his beliefs, he should be called to speak to the Association's Representative Council.

It does not appear that the Association's requirements for obtaining religious objector status are greater than those provided for by the statute. Accordingly, the Association's refusal to grant Mr. Carlson religious objector status does not violate the provisions of the EERA and should be dismissed.[6]

Lump Sum Payment Requirement

The allegation that a requirement for religious objectors to pay their fee in one lump sum as opposed to monthly payroll

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[5]Mr. Carlson's letter of December 30, 1992 to the Association indicated that he is "not a member of any organized, theistic society."

[6]Mr. Carlson's allegations focus not on the statutory language but rather on the assertion that the Association applied higher standards than the contract language allowed. PERB, however, does not have

> the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under [EERA] . (Government Code section 3541.5(b).)

deductions may, in theory, constitute an interference violation under the EERA. In Carlsbad Unified School District (1979) PERB Decision No. 89, the Board found that a section 3543.5(a) violation existed where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA. This test has been applied to actions of an employee organization. (Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.) An Association rule which requires religious objectors to pay the entire year's agency fee in a lump sum to a charitable organization is arguably more onerous than the procedure whereby agency fees are deducted for payment to the Association on a monthly payroll basis.

An individual employee has an EERA right to seek to become a religious or conscientious objector under Government Code sections 3543 (the right "to refuse to join or participate in the activities of employee organizations") and 3546.3. The lump sum payment rule would tend to discourage employees from seeking and/or remaining religious objectors because of the financial burden it imposes.

Mr. Carlson submitted a document with his charge which the Association circulated to unit members in late 1992. This document quotes section 4.3.7 of the agreement between the Association and the District which reads:

> A certificated employee paying an amount equal to the service fee to one of the organizations listed above [three charities] shall submit proof of such payments each year to the Association. If such proof is not submitted in a timely manner, then upon receipt of notice and proof from the Association, the District shall implement the provisions of 4.3.3 above [agency fee deduction].

This language is reasonably read to imply a requirement that the payment must be made in one lump sum. Mr. Carlson's February 12, 1993 letter to the Association clearly reflects such a reading on his part.

In order to find a violation, however, the charge must allege that this rule was in effect during the six months' period preceding the filing of the charge. A review of the current

agreement[7] between the Association and District reveals that it contains a revised section 4.3.7, reading as follows:

> A unit member authorized by the Association to pay the service fee to one of the organizations listed above [three charities] shall make payment in one of the following ways:
>
> 1. Submit proof to the Association of a lump sum payment to one of the organizations listed above on or before October 15 of each year.
>
> 2. Submit a written request for monthly payroll deduction of a full service fee, which shall be irrevocable for the current school year. Such request shall also contain a designation of one of the organizations listed above who will receive the service fee.
>
> If a unit member does not submit proof of a lump sum payment or a request for payroll deduction by October 15 of each year, the District shall withhold the service fee from the unit member's salary and submit such fee to the Association as provided in 4.4 below.

It thus appears that under the current agreement religious objectors have a monthly withholding option, and that this new policy has been in effect for more than six months preceding the filing of the charge. The alleged violation would have occurred prior to implementation of the new agreement, outside the six months statute of limitations, and must be dismissed.

Rights of Religious Objectors

The allegation that the union failed to provide Hudson notices to and an opportunity to pay a reduced fee to conscientious or religious objectors must also be dismissed. This issue was presented to the Board in Kings Canyon Educational Association (1992) PERB Decision No. 958, and the Board ruled that such a notice and reduction were not required. This finding was based upon the fact that protections such as Hudson notification and reduction of service fees are afforded agency fee payers as a

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[7]The agreement, though not signed until February 1 and 2, 1994, shows an effective date of July 1, 1993. Association representatives indicate that the agreement was ratified in June 1993, and, under section 1.4 of the agreement, its provisions take effect upon ratification, not upon signature.

method to avoid compulsory subsidization of non-chargeable activities of a labor organization. In Cumero v. Public Employment Relations Board (1989) 49 Cal.3d 575 the California Supreme Court stated:

> The procedures prescribed in [Hudson] for protecting non-members' constitutional rights against a union's improper uses of their agency fee are likewise sufficient and appropriate for protection of non-member employees' statutory rights to prevent improper use of their service fees collected under an EERA organizational security arrangement. [Emphasis added.]

If an employee has been designated as a conscientious or religious objector, his or her fees are paid to a charitable organization and are never used by the union. Accordingly, such objectors are not granted the rights of a Hudson notice or the ability to pay a reduced amount to a charity.

Conclusion

For these reasons the allegations that (1) Mr. Carlson was illegally denied religious objector status by the Association in August 1993; (2) the Association's practice of requiring religious objectors to pay the entire amount equivalent to union dues in one lump sum payment interfered with employees' rights to not participate in the Association; and (3) the Association illegally denied religious objectors the right to receive a Hudson notice and have their fees reduced to only those costs chargeable to representation purposes, as presently written, do 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 27. 1994. I shall dismiss the above-described allegations from your charge. If you have any questions, please call me at (916) 322-3198, ext. 359.

Sincerely,

Les Chisholm
Regional Director