

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DANIEL F. CUTSHALL AND CASEY WACK,)
)
Charging Parties,) Case No. LA-CO-49-H
)
v.) PERB Decision No. 1130-H
)
INTERNATIONAL UNION OF OPERATING)
ENGINEERS, LOCAL 501, AFL-CIO,)
)
Respondent.)
_____)

Appearances: Daniel F. Cutshall and Casey Wack, on their own behalf; Levy, Goldman & Levy by Adam N. Stern, Attorney, for International Union of Operating Engineers, Local 501, AFL-CIO.

Before Caffrey, Chairman; Garcia and Dyer, Members.

DECISION AND ORDER

DYER, Member: This case is before the Public Employment Relations Board (Board) on appeal of a Board agent's dismissal (attached hereto) of an unfair practice charge filed by Daniel F. Cutshall (Cutshall) and Casey Wack (Wack). In their charge, Cutshall and Wack alleged that the International Union of Operating Engineers, Local 501, AFL-CIO (IUOE) breached its duty of fair representation guaranteed by section 3578 of the Higher Education Employer-Employee Relations Act (HEERA), thereby violating HEERA section 3571.1(e),¹ in resolving the grievance

¹HEERA is codified at Government Code section 3560 et seq. Section 3578 states:

The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in

filed against their employer.

The Board has reviewed the entire record in this case, including the warning and dismissal letters, Cutshall and Wack's original and amended charge, their appeal and IUOE'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. LA-CO-49-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Garcia joined in this Decision.

representation is arbitrary, discriminatory,
or in bad faith.

Section 3571.1 states, 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.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



June 13, 1995

Daniel F. Cutshall

Casey Wack
Rt. 2, Box 129-R
Bishop, CA 93514

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair
Practice Charge No. LA-C0-49-H, Daniel F. Cutshall and
Casey Wack v. International Union of Operating
Engineers. Local 501, AFL-CIO _____

Dear Charging Parties:

In the above-referenced charge, you allege that the International Union of Operating Engineers, Local 501, AFL-CIO (IUOE) denied you the right to fair representation guaranteed by Government Code section 3578 of the Higher Education Employer-Employee Relations Act (HEERA) and thereby violated HEERA section 3571.1(e).

I indicated to you, in my attached letter dated May 23, 1995, 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 5, 1995, the charge would be dismissed. I later extended that deadline.

On June 12, 1995, you filed an amended charge. Although the amended charge argues strenuously against the dismissal of the charge, it does not allege significant additional facts that would alter the conclusion stated in my May 23 letter. I am therefore dismissing the charge, based on the facts and reasons contained in that 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

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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 Thomas J. Allen
THOMAS J. ALLEN
Regional Attorney

Attachment

cc: Adam N. Stern, Esq.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



May 23, 1995

Daniel F. Cutshall

Casey Wack
Rt. 2, Box 129-R
Bishop, CA 93514

Re: WARNING LETTER, Unfair Practice Charge No. LA-CO-49-H,
Daniel F. Cutshall and Casey Wack v. International
Union of Operating Engineers. Local 501. AFL-CIO

Dear Charging Parties: _____

In the above-referenced charge, you allege that the International Union of Operating Engineers, Local 501, AFL-CIO (IUOE) denied you the right to fair representation guaranteed by Government Code section 3578 of the Higher Education Employer-Employee Relations Act (HEERA) and thereby violated HEERA section 3571.1(e).

My investigation of the charge reveals the following relevant facts.

The charge, which was filed on February 21, 1995, alleges a series of events going back to 1988. Although the six-month statute of limitations in HEERA section 3563.2(a) limits PERB's jurisdiction to alleged unlawful practices occurring on or after August 21, 1994, some of the earlier events are relevant to an understanding of the more recent events.

You were employed by the University of California (University) in a unit for which IUOE is the exclusive representative. In 1988, the University laid you off. Your layoffs led to grievances which culminated in arbitration before arbitrator Louis Zigman. This arbitration was settled with a stipulated award (the "Zigman award"). Questions about implementation of the Zigman award ultimately led to additional arbitration before arbitrator R. Douglas Collins. This arbitration specifically addressed whether the University properly implemented the Zigman award by making pension contributions and giving seniority.

On August 10, 1994, arbitrator Collins issued an opinion and award in favor of the University, on the ground that there was insufficient evidence that the Zigman award was improperly implemented. Collins further stated as follows:

This is not to say, however, that Grievants have no remedy if they can secure persuasive evidence that the University has failed to properly implement the terms of the Zigman Award. The California Arbitration Law, Title 9 of the Code of Civil Procedure, provides in § 12 88 that, "A petition to confirm an [arbitration] award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner." The Zigman Award was issued on or about October 16, 1990, or approximately three years and 10 months prior to this award. It is therefore recommended that the parties review the University's records to assure that Grievants were properly credited with all pension contributions and seniority as required by the Zigman Award..

In a footnote, Collins added as follows:

The Zigman Award clearly and unambiguously provides that Grievants' pension contributions shall be deducted from wages. It further provides that Grievants' backpay shall be paid as wages for the period January 1, 1990, through October 31, 1990. It is thus clear that Grievants' pension contributions were to be made for that period only. It follows that the University's contribution to the pension fund for each Grievant was similarly limited; it would be unreasonable to require the employer to make pension contributions for a period during which Grievants earned no wages and made no employee contributions to the pension fund. Nothing in the Agreement or in the Zigman Award would compel such an order. The Zigman Award is also clear and unambiguous that Grievants "shall accrue seniority from November 1, 1988, to their date of return to work," which occurred May 9, 1991, "for all purposes covered by the collective bargaining agreement." Again, there is no cogent record evidence that either of these aspects of the Zigman Award was not implemented.

On October 11, 1994, IUOE filed in Superior Court a petition to confirm the Zigman award, as Collins had suggested. Thereafter, IUOE received a letter from the University dated November 28, 1994, stating in part as follows:

With regard to the pension contributions, I have learned that beginning on November 1, 1990, because of a change in the University's retirement system rules, employer and employee pension contributions were discontinued for all University employees in the retirement system.

Administratively, the back-pay checks for Wack and Cutshall were processed on different dates. Mr. Cutshall's checks were processed in October 1990. This means that both the employer and employee contributions were made to the pension fund for the 10-month period covered by the checks and he received retirement service credit for that time. Therefore, as he admitted at the hearing, he received pension contributions and service credit for the 10-month period from January 1990 through October 1990 as called for in the Zigman Award. He disputed the length of time for which the payments should have been made, but Arbitrator Collins confirmed the University's position on that point.

Mr. Wack's back-pay payments were made in November 1990. Because his payment was after the date on which employer and employee contributions to the retirement system ceased, no employer or employee pension contributions were made for Wack. However, he was credited with the 10 months of service in the retirement system. Because the University's retirement program is a defined benefit plan, retirement benefits are not based on pension contributions but rather on a combination of age, years of service (service credit) and salary. This means that Mr. Wack was not harmed in any way by the cessation of the pension contributions and the fact that no contributions were made for

On January 17, 1995, IUOE caused its Superior Court petition to be dismissed. It is alleged that IUOE notified attorney Olins of the dismissal only after the fact, although IUOE states that it had previously informed Olins of its intentions and the reasons therefor. IUOE did not directly notify either of you (Wack and Cutshall). IUOE states that it believed in the light of the University's letter of November 28, 1994, that the Superior Court petition "was not legally sustainable and could further expose [IUOE] Local 501 to the risk of sanctions for maintaining a meritless suit."

Based on the facts stated above, the charge does not state a prima facie violation of HEERA, for the reasons that follow.

As Charging Parties, you have alleged that IUOE, as your exclusive representative, denied you the right to fair representation guaranteed by HEERA section 3578 and thereby violated section 3571.1(e). 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 HEERA, a Charging Party must show that the exclusive representative'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

those ten months. He will receive retirement benefits at the time of retirement which will include the 10 months of service credit from January 1990 through October 31, 1990.

The University is in compliance with the Zigman Award because it specifically calls for pension contributions to be made in accordance with the collective bargaining agreement and in accordance with "the pension law." The University complied with the collective bargaining agreement and with the rules of the retirement system for both Wack and Cutshall. Therefore, as recommended by Arbitrator Collins, the University can assure you and them that they were properly credited with all the appropriate pension contributions (and more importantly, retirement service credit).

With regard to "seniority credit," when Wack and Cutshall returned to work in May 1991 their years of service was recalculated for vacation accrual purposes. The recalculation resulted in Wack receiving a higher vacation accrual rate. Mr. Cutshall was already receiving vacation credit at the higher rate.

The only other issue for which seniority would be significant would be in the case of a layoff. As I have explained to you, the University does not keep running seniority calculation lists. The only time such lists are prepared is in the case of imminent layoff. Since seniority and layoff are only relevant for career employees and Wack and Cutshall were casual employees, the issue of seniority points for this purpose is moot.

On December 5, 1994, IUOE forwarded a copy of this letter to Douglas F. Olins, attorney for Casey Wack, along with a cover letter asking Olins to review the matter with Wack and then discuss it with IUOE. According to IUOE, Olins did not respond to the letter. On December 19, 1994, IUOE also forwarded a copy of the University letter to Daniel F. Cutshall.

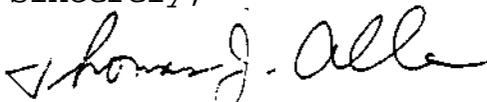
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representative's action or inaction was without a rational basis or devoid of honest judgment." [Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (19 80) PERB Decision No. 124.]]

In the present case, it is not apparent from the charge that IUOE's conduct within the six months before the charge was filed (that is, on or after August 21, 1994) was arbitrary, discriminatory or in bad faith. Even if IUOE was guilty of negligence or poor judgment in causing the Superior Court petition to be dismissed without communicating further with you, that would not establish a violation of IUOE's statutory duty.

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 5, 1995, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3542.

Sincerely,



Thomas J. Allen
Regional Attorney