STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANNETTE M. DEGLOW, Charging Party,	)	Case No. S-CO-314
v.	)	PERB Decision No. 1133
LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	)	January 19, 1996

Appearances; Annette M. Deglow, on her own behalf; Law Offices of Robert J. Bezemek by Adam H. Birnhak, Attorney, for Los Rios College Federation of Teachers.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Annette M. Deglow (Deglow) to a PERB administrative law judge's (ALJ) proposed decision (attached). The ALJ dismissed the complaint and Deglow's unfair practice charge which alleged that the Los Rios College Federation of Teachers (Federation) breached its duty of fair representation guaranteed by section 3544.9 of the Educational Employment Relations Act (EERA), thereby violating EERA section 3543.6(b),[1] when it took certain actions

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3544.9 states:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall

related to grievances filed by Deglow. The alleged unlawful actions are: making negative comments about Deglow to an official of the Los Rios Community College District (District); informing Deglow that the Federation would be interested in pursuing her grievances against the District only if she became a member of the Federation; refusing to meet with Deglow concerning her grievances; and refusing to pursue Deglow's grievances to a hearing by a District Board of Review.

The Board has reviewed the entire record in this case, including the proposed decision, transcript, exhibits, Deglow's exceptions and the Federation's response thereto.[2] The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

> fairly represent each and every employee in the appropriate unit.

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

[2]Deglow's request for oral argument before the Board was denied on January 5, 1996.

DEGLOW'S APPEAL

On appeal, Deglow asserts that the ALJ:

> . . . based his conclusions on intuition, speculation and personal bias rather than the facts within the record which outline an unmistakable and distinct pattern of discrimination, hostility and animosity by the Los Rios Federation of Teachers (hereafter "Federation") leaders toward Annette Deglow . . . .

Deglow cites dozens of "omissions" by the ALJ in his proposed decision, and restates her version of the circumstances surrounding the case.

Deglow contends that her grievances against the District concerning seniority, retirement credits, etc., are all well founded. Deglow asserts that the Federation has the resources necessary to pursue these grievances, but refuses to do so because of her continued refusal to join the Federation, and because of her continued filing of unfair labor practice charges against the District and the Federation.

Deglow also cites numerous circumstances through which she asserts that the Federation has been incompetent and/or disingenuous in representing her. She also reiterates that negative comments made about her in a conversation between District and Federation officials are a clear indication of the Federation's discriminatory motivation. And she objects to the ALJ's determinations with regard to her allegation that a Federation official conditioned action on Deglow's grievances on her becoming a member of the Federation.

FEDERATION'S RESPONSE

The Federation responds to Deglow's exceptions in large part by supporting the analysis presented by the ALJ in dismissing Deglow's charge.

The Federation also excepts to two of the ALJ's findings. First, the Federation excepts to the ALJ's conclusion that Deglow's testimony was forthright and credible concerning her allegation that a Federation official conditioned action on her grievances on her becoming a member of the Federation. Despite the ALJ's finding that no such conditional statement was made, the Federation asserts that the ALJ's conclusion concerning Deglow's credibility is not supported by his analysis, and asks the Board to overrule that determination.

Second, the Federation excepts to the ALJ's failure to award litigation expenses to the Federation in this case. The Federation asserts that Deglow's unfair practice charge largely repeats allegations which have been dealt with previously by PERB in other cases involving Deglow. Accordingly, the Federation asserts that Deglow is abusing PERB's process and litigation expenses should properly be awarded to the Federation.

DISCUSSION

EERA section 3544.9 requires that an exclusive representative "shall fairly represent each and every employee in the appropriate unit." Interpreting this section, PERB has held that the duty of fair representation attaches during contract negotiations (Los Angeles Unified School District (1986) PERB

Decision No. 599), and during grievance handling and contract administration. (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124 (Rocklin).) In order to prove a violation of the duty of fair representation, the Board has held that a charging party must show that the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. (United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) To prove arbitrary conduct, a charging party must show "how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment." (Rocklin.)

On appeal, Deglow cites numerous factual "omissions" by the ALJ. While the information offered by Deglow may result in a more comprehensive description of the background of her grievances and relationship to the Federation, Deglow fails to demonstrate through this information that the Federation's conduct toward her was arbitrary, discriminatory or in bad faith. In fact, much of the information offered by Deglow on appeal relates to actions of the District, which have no apparent bearing on the conduct of the Federation.

In citing actions by the Federation which Deglow alleges constitute a breach of its duty of fair representation, she is repeating allegations made to and considered by the ALJ. As noted by the ALJ, PERB has adopted the standard enunciated by the United States Supreme Court in Vaca v. Sipes (1967) 386 U.S. 171, 190 [64 LRRM 2369] affording the exclusive representative with

considerable discretion in the representation of employees within a grievance procedure. Moreover, the Board has found that this discretion includes the exclusive representative's ability to decide in good faith that even a meritorious employee grievance should not be pursued. (United Teachers of Los Angeles (Clark) (1990) PERB Decision No. 796.) Despite Deglow's assertion that her grievances against the District are well-founded, decisions by the Federation not to pursue them are not in and of themselves unlawful. Deglow must show that the Federation's actions concerning those grievances were without a rational basis or devoid of honest judgment. Deglow has failed to do so and, therefore, her exceptions are rejected.

Both Deglow and the Federation express concerns with the ALJ's consideration of the credibility of witnesses relating to the Federation's alleged conditioning of pursuit of Deglow's grievances on her Federation membership. It is a well-established principle of PERB case law that the Board grants great deference to the credibility determinations made by its ALJs. This principle recognizes the fact that, by virtue of having witnessed the live testimony, the ALJ is in a better position to accurately make such determinations than the Board itself, which only reviews the cold transcript of the hearing. (Temple City Unified School District (1990) PERB Decision No. 841.) ' Where there is no evidence in the record which supports overturning such credibility determinations, the Board defers to the ALJ's findings. (Whisman Elementary School

District (1991) PERB Decision No. 868.) The Board finds no evidence in the record to support the parties' exceptions to the ALJ's credibility determinations here. Therefore, those exceptions are rejected.

The Federation also excepts to the ALJ's failure to award litigation expenses, claiming that Deglow in this case is largely repeating allegations already rejected by the Board. The Board will award attorneys' fees and costs where a case is without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith or is otherwise an abuse of process. (Chula Vista City School District (1990) PERB Decision No. 834; United Professors of California (Watts) (1984) PERB Decision No. 398-H.) Attorney fees will be denied if the "issues are debatable and brought in good faith." (Chula Vista City School District (1982) PERB Decision No. 256, p. 8.)

In applying this standard, the Board is reluctant to order the payment of litigation expenses by employees who are representing themselves in PERB proceedings, because to do so might tend to discourage the legitimate pursuit of unfair practice charges. The charging party here, however, while representing herself, has extensive experience in PERB's unfair practice charge process. The repeated presentation of charges based on circumstances which have been considered by the Board in related cases previously suggests an abuse of that process.

On balance, the Board concludes that litigation expenses should not be awarded to the Federation in this case. However,

the Board cautions Deglow that pursuit of similar charges based on essentially the same circumstances presented by this case may be considered an abuse of PERB's process in the future.

ORDER

The complaint and unfair practice charge in Case No. S-CO-314 are hereby DISMISSED.

Members Johnson and Dyer joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ANNETTE M. DEGLOW, Charging Party, v. LOS RIOS COLLEGE FEDERATION OF TEACHERS, Respondent.	)	Unfair Practice Case No. S-CO-314 PROPOSED DECISION (4/6/95)

Appearances: Annette M. Deglow, in propria persona; Law Offices of Robert J. Bezemek by Adam H. Birnhak, Attorney, for Los Rios College Federation of Teachers.

Before Allen R. Link, Administrative Law Judge.

INTRODUCTION

The complaint states that in January 1993, Annette M. Deglow (Deglow), along with other part-time instructors who were employed by the Los Rios Community College District (District) prior to 1967 (pre-67 instructors), filed collective bargaining agreement (CBA) grievances. These grievances concern (1) seniority, (2) longevity pay, (3) sick leave credits, (4) retirement records, and (5) discrimination. The complaint alleges that the Los Rios College Federation of Teachers (Federation) took the following negative action(s) with regard to these grievances: (1) made negative comments about Deglow to the District's personnel director; (2) informed Deglow that it would only be interested in her grievances if she and the other pre-67 instructors became Federation members; (3) refused to meet with Deglow and her fellow grievants; and (4) refused to pursue the subject grievances to a Board of Review hearing.

The Federation responds that it fairly represented Deglow and that her grievances were either time-barred, collaterally estopped, or were outside the ambit of matters under Federation control.

PROCEDURAL HISTORY

On January 10, 1994, Deglow filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Federation alleging violations of various sections of the Educational Employment Relations Act (EERA or Act).[1]

On February 16, 1994, a first amended charge was filed alleging violations of the same sections of the EERA. On February 28, 1994, a second amended charge was filed, once again alleging violations of the same sections of the EERA.

On March 8, 1994, after an investigation of the charges, PERB's Office of the General Counsel issued a complaint alleging violations of subdivision (b) of section 3543.6.[2]

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[1]EERA is codified at Government Code section 3540 et seq. All section references, unless otherwise noted, are to the Government Code.

Subdivision (b) of 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 to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

On March 20, 1994, a third amended charge was filed alleging violations of section 3543.6. On March 25, 1994, the Federation filed its answer to the complaint. On March 28, 1994, an informal conference was held in an attempt to reach voluntary settlement. No settlement was reached.

On June 28, 1994, a motion to dismiss was filed by the Federation, alleging the complaint's failure to state a cause of action.

On July 11, 1994, Deglow filed a motion to amend the complaint to add other pre-67 instructors as charging parties. On July 21, 1994, the Federation filed its response to this motion. On that same date, Deglow filed her opposition to the Federation's motion to dismiss.

On July 26, 1994, the Federation filed a motion in limine, attempting to exclude evidence regarding a discussion involving Federation Executive Director Robert Perrone (Perrone), District Personnel Director Mary Jones (Jones), and District instructor Michael Lowman (Lowman) Ph.D.

On July 26, 1994, a pre-hearing conference was held, during which all previously filed motions were denied.

A formal hearing was held by the undersigned on August 2, 3, 25 and 26, 1994. Each side filed post-hearing briefs, with the last brief having been filed on December 2, 1994. The case was submitted for a proposed decision at that time.

FINDINGS OF FACT

Jurisdiction

It is found that Deglow is a public school employee, and the Federation is an employee organization and an exclusive representative, within the meaning of section 3540.1.

Background

On July 1, 1965, as a result of a general population election, the Los Rios Junior College District assumed the operation of the American River College and Sacramento City College. American River College was, at that time, an independent operating junior college district. Sacramento Junior/City College, however, had been a part of the Sacramento City Unified School District since 1916. Through this merger Deglow became an employee of the new district which was renamed Los Rios Community College District in 1970.

During this merger process both Deglow and the other pre-67 instructors believed they were not given the full quantum of rights they were entitled to by law. Most of the grievances that are the subject of this case involve allegations that the Federation breached its duty of fair representation when it failed to properly represent Deglow and the other pre-67 instructors in their attempts to attain these rights. On February 23, 1994, the District rejected all of the subject grievances at the District level.

The Federation and the District were parties to a CBA, effective from July 1, 1990 to June 30, 1993. On August 25,

1993, the parties signed a successor CBA, effective July 1, 1993 to June 30, 1996.

Seniority Grievance

In 1980-81, Deglow filed a grievance, similar to the one filed in 1993, over her seniority date on the certificated register (a chronological employment register of all District instructors). The Federation took the identical position on the previous grievance that it took with regard to this one, that the allegedly improper seniority date issue did not have an "adverse affect," on Deglow's employment status and therefore did not fall within the CBA definition of grievance.[3] On June 30, 1981, Deglow responded by filing an unfair practice charge over the Federation's refusal to take her grievance to a Board of Review, the last step in the CBA grievance procedure.

A PERB Administrative Law Judge (ALJ) held that Deglow was "seeking the expenditure of Federation funds to challenge an issue that might never arise." He went on to state that the Federation had legitimate reasons for not pursuing the grievance and that it informed Deglow of those reasons. (See Los Rios College Federation of Teachers, Local 2279, CFT/AFT, AFL-CIO (1982) PERB Decision No. HO-U-147, pp. 39-40.)

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[3]The CBA defines a grievance as a complaint by:

> a. a unit member that she/he has been adversely affected by a misrepresentation, misapplication or violation of the provisions of this Agreement, . . . [Emphasis added.]

Her 1993 grievance states that her "current seniority date for the Certificated Employment Register does not reflect my relative date of employment consistent with past policies and procedures utilized for others in my 'position'."

Longevity Pay

On December 5, 1990, Deglow and other pre-67 instructors collectively filed an unfair practice charge alleging the Federation violated EERA by agreeing to a CBA longevity provision. This CBA provision granted a "4% longevity increase after 20 years at Los Rios." Shortly thereafter, the Federation and the District modified this provision to read:

> After 20 years of full-time, tenure-track service with Los Rios, a longevity increment will be awarded which is 4% of the appropriate range and step.

The Board dismissed this charge in Los Rios College Federation of Teachers, CFT/AFT (Baker et al.) (1991) PERB Decision No. 877 (Baker et al.) for two reasons. The first stated that the pre-67 instructors, Deglow included, did not file their charge within six months after the subject Federation action. EERA prohibits PERB from issuing a complaint under such circumstances,[4]

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[4]Section 3541.5 states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
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> (1) 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; . . .

The second reason was that an exclusive representative is not obligated to bargain a particular item benefitting certain unit member(s). Therefore, PERB dismissed the charge because conduct under the "arbitrary, discretionary or in bad faith" standard requires a showing that the exclusive representative's conduct was without a rational basis or was devoid of honest judgment. The effect of the Board's decision in Baker et al. was to hold that the Federation's decision not to take the grievance to the Board of Review had a rational basis and was the result of an honest judgment.

On January 11, 1993, Deglow filed the grievance that is the subject of the instant complaint, alleging, once again, that the District was violating the CBA by not granting to her, and by implication the other pre-67 instructors, the CBA 4 percent longevity increase.

Retirement Credits Grievance

Deglow's January 11, 1993, retirement credits grievance states that her "STRS[5] records indicate that I have not been provided service credit consistent with my probationary/regular status in the early years of my employment" (emphasis added). Deglow's probationary period was completed in 1974. The Federation was first elected exclusive representative of the District's instructor bargaining unit in 1977.

[5]STRS is an acronym for the State Teachers Retirement System.

Sick Leave Credits Grievance

Deglow's sick leave credits grievance states that "[m]y sick leave records indicate that I have not been provided sick leave credit consistent with my probationary status in the early years of my employment" (emphasis added). Deglow's probationary period was completed in 1974. As stated above, the Federation became the exclusive representative in 1977.

Discrimination Grievance

Deglow's January 11, 1993, grievance complained that the District failed to assign her classes in excess of her tenure level and conversely increased the load of other part-timers who did not have a long history of litigation against the District or an affiliation with the California Teachers Association (CTA).

There is no provision in the CBA which requires the District to assign Deglow any classes over her tenure level. As a part of its investigation the Federation asked Deglow to provide evidence to support her contention that she was being denied increased classes. No such evidence was ever provided by Deglow.

Federation's Alleged Actions

Negative Perrone Comments about Deglow to Personnel Manager

This allegation concerns a conversation between a Federation employee, the District's personnel manager, and another District instructor. Deglow also filed a charge, based on this same conversation, against the District. PERB dismissed that charge, incorporating a board agent's warning and dismissal letters.

(See Los Rios Community College District (1994) PERB Decision No. 1048.) These letters described the conversation as follows:

> On July 20, 1993, Michael Lowman, a part time instructor for the Employer, Mary Jones, the Employer's Director of Personnel, and Robert Perrone, the Federation's Executive Director met for a grievance hearing concerning a separate matter involving Lowman.[6] According to Lowman, the following exchange took place between Jones and Perrone at that meeting:
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> Jones: "And also I had to deal with Deglow today too, so I'm not in a very good mood."
>
> Perrone: "Oh right, Deglow, I can understand why you wouldn't be in a very good mood."
>
> Jones: "Yeh, she's filing a grievance because she says nobody likes her and you know what? It's true, nobody does."
>
> Jones and Perrone: Laughter.
>
> Perrone: "Oh I've dealt with Deglow. I know what you're faced with."
>
> Jones and Perrone: Laughter.

Federation Conditioning Action on Membership

Deglow stated in her first amended charge that during a telephone conversation in late November 1993, Perrone told her that "the Union membership was not interested in her issue and pre-67 issues in general; however, if Deglow and the other Pre-67 instructors were to join the Union the issues could be considered." Perrone denies making this statement, or anything like it.

[6]Lowman is not a pre-67 instructor nor a grievant in any of the subject grievances.

As no one else was a party to this conversation and both Perrone and Deglow testified in a credible manner, a resolution of the conflict requires an examination of other factors.

First, in a letter dated December 11, 1993, several of the pre-67 instructors wrote to Federation President Linda Cullings-Hartin (Cullings-Hartin) complaining about the Federation's inactivity on behalf of their longevity grievances and requesting a meeting with her. No mention was made of Perrone's alleged statement conditioning Federation consideration on membership.

Second, on January 10, 1994, Deglow filed her initial charge. No mention was made of the Perrone statement. Certainly, this statement could have provided evidence to support an inference of animus towards the pre-67 instructors and would, if proven, be a factor in any failure to meet a duty of fair representation charge. However, it was not until February 16, when she filed her first amended charge, that the allegation regarding Perrone's statement was first made. Granted, the initial charge was not as detailed as the amended one, but there was sufficient detail in it to set forth other factual allegations that she deemed persuasive. Deglow's initial allegations included both the negative statement made by Perrone to the District's personnel director, and a slight that she perceived in a Perrone letter to one of the other pre-67 instructors. The "conditioning action on membership" allegation would have outweighed either of these incidents in any "inference of animus" scale.

Third, at the time Perrone allegedly made the subject statement, several of the pre-67 instructors were members of the Federation. Perrone was aware of that fact at that time.

Lastly, Perrone is an experienced, journeyman labor relations professional. Deglow has made no secret of her membership in, and preference for, the CTA becoming the unit's exclusive representative. She has been a leader in CTA's various attempts to decertify the Federation as the unit's bargaining representative. It would have been both stupid and foolhardy for him to overtly make such an improper statement to Deglow. Perrone is neither stupid nor foolhardy. He would have been very aware that (1) this type of statement would not cause Deglow, after years of battling the Federation, to join it, and (2) Deglow would use the statement against him in subsequent proceedings.

However, as stated above, Deglow's testimony was both forthright and credible. The evidence supports a finding that although Perrone did not make the alleged statement, Deglow misinterpreted something he said to arrive at a conclusion that the "conditioning action on membership" statement was made.

Federation's Refusal to Meet with Pre-67 Instructors

On December 11, 1993, Deglow and other pre-67 instructors requested a meeting with Cullings-Hartin to discuss their pending grievances. She had last met with Deglow on September 14, 1993, regarding the pre-67 instructor grievances. Cullings-Hartin discussed the request with Perrone. They sought the advice of

their attorney, Katherine Thomson, on both the grievances and the request for the meeting. A consensus developed that as there was nothing new to report, there would be no purpose to the meeting, and a status letter would be just as effective. In addition, Cullings-Hartin would have difficulty making such a meeting as she was leaving the state for the holidays.

On December 20, 1993, such a letter was sent to Deglow and all pre-67 instructors, explaining, among other things that only the seniority date and longevity grievances were still being discussed with the District. The other issues were not being pursued as they were outside the contractual time limits.

Federation's Refusal to Take Grievances to Board of Review

On February 23, 1994, the Federation refused to take any of the pre-67 instructor grievances to the District's Board of Review, the last step in the grievance procedure. Deglow believes that this decision was based on animus towards her and the other pre-67 instructors. The Federation insists that this decision was not based on animus but rather on two other factors. The Federation's attorney stated, first, that the grievances would probably not be successful at the grievance level, and second, even if there was a favorable decision from the Board of Review, it was likely the District's governing board would overturn such decision. The CBA has no provision for binding arbitration. The Federation has not taken a grievance to the Board of Review in the past six years.

ISSUES

Did the Federation fail to meet its duty of fair representation with regard to Deglow's grievances, thereby violating subdivision (b) of section 3543.6?

CONCLUSIONS OF LAW

Standard for Duty of Fair Representation

In order to prove a violation of the duty of fair representation[7], the charging party must show that the employee organization's conduct was arbitrary, discriminatory or in bad faith. (Rocklin Teachers Professional Association (1980) PERB Decision No. 124 (Rocklin), 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, affirmed this concept as 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 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

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[7]The duty of fair representation is set forth in section 3544.9. It 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.

> obligation, the breach of which may constitute the basis of civil action.
>
> . . . . . .
>
> The repeated references in Vaca to "arbitrary" union conduct reflected a calculated broadening of the fair representation standard. [Citations] 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.

Charging Party's Allegations

The complaint cites four factual examples of the Federation allegedly failing to meet its duty of fair representation. The first three will be discussed to determine if any of them constitute an independent or per se violation of the Act and/or support an inference of unlawful motivation on the part of the Federation towards Deglow. With regard to the fourth, the Federation's failure to take the above-described five grievances to the Board of Review, the merits of the grievances themselves will be evaluated to determine whether the Federation's action was arbitrary, discriminatory or in bad faith.

Negative Perrone Comments about Deglow to Personnel Manager

This conversation was discussed at length in the Board's decision in Deglow's charge against the District. (Los Rios Community College District, supra, PERB Decision No. 1048.) The Board states, in pertinent part:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same

> circumstances would consider the action to have an adverse impact on the employee's employment. (Emphasis added; footnote omitted.)
>
> The instant allegation does not meet the standard established under Novato, and Palo Verde Unified School District, supra, and Newark.[8] The charge does not allege facts to establish how (using an objective test) the action of the Employer in making disparaging remarks about Deglow in the presence of another employee caused harm or had "impact on the employee's employment." However understandable Deglow's subjective reaction to this incident, the facts alleged here do not bring the conduct within the ambit of a violation of EERA and the allegation must be dismissed.
>
> Statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No. 659; emphasis added; footnotes and citations omitted.)
>
> The allegations here are free of any statements or conduct which has, on its face, "coercive meaning."

Although the Board's decision concerned employer action, it was examining the same dialogue to which Deglow is objecting in this case.

An examination of the subject statements, viewed in there overall context, dictates a conclusion that they neither caused harm to, nor had an adverse impact on, the employee's employment. Nor did they have a "coercive meaning" within the context of Los Angeles Unified School District (1988) PERB Decision No. 659.

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[8]Novato Unified School District (1982) PERB Decision No. 210; Palo Verde Unified School District (1988) PERB Decision No. 689; and Newark Unified School District (1991) PERB Decision No. 864.

Granted, disparaging remarks about an employee to an employer by the exclusive representative does lend support to an inference of unlawful motivation, but the statements themselves are not an independent violation of the Act.

Federation Conditioning Action on Membership

It was found, supra, that Perrone did not make the statements Deglow attributed to him. As there was insufficient evidence to describe the actual statement that Deglow misinterpreted, there can be no conclusion drawn that (1) there was an independent violation of the Act, or (2) that this incident supported an inference of improper Federation motivation.

Federation's Refusal to Meet with Pre-67 Instructors

The Federation's decision not to meet with Deglow and the pre-67 instructors was a result of both the receipt of legal advice and a discussion of the matter between the Federation's elected leadership and the professional staff. These factors plus the difficulty of Cullings-Hartin in attending the meeting justifies the Federation's decision.

Every employee organization has limited time and financial resources. Perrone is the only full-time paid staff member of the Federation. He is primarily responsible for the employment relations of 1,300 to 1,400 unit members on numerous campuses throughout the Sacramento and surrounding areas. Absent some compelling reason, a union is free to allocate its resources as it sees fit.

There was insufficient evidence presented at the hearing to show that the Federation did anything improper when it declined to meet with Deglow and the other pre-67 instructors. Accordingly, it is concluded that the Federation did not violate the Act when it declined to meet with Deglow and the pre-67 instructors, nor is there any inference of unlawful motivation drawn from such decision.

Charging Party's Grievances

A union is not required to process a grievance if the chances of success are minimal. (United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.)

Seniority Grievance

In 1982, an ALJ held that Deglow's position on the certificated register was a hypothetical issue and that the Federation had legitimate reasons not to take it to the Board of Review. (Los Rios College Federation of Teachers, Local 2279. CFT/AFT. AFL-CIO, supra. PERB Decision No. HO-U-147, pp. 39-40.) Although this decision is not precedential, it is binding on the parties. In this case we have the same parties that litigated the issue in 1982.

Deglow insists that this grievance is different than the 1982 matter as she is presently complaining about her position on the certificated register, whereas before she was complaining about not being placed on the register at all. This argument sets forth a distinction without a difference. The existence of her name on the certificated register, or her place on it, will

affect her employment status only in the unlikely event a reduction in force were to jeopardize her continued employment status. Absent such a threat, which is rather remote considering the years of seniority she has with the District, the issue is only hypothetical.

Collateral estoppel traditionally has barred relitigation of an issue if "(1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]. [Citation.]" (People v. Simms, 32 Cal.3d 468, 484 [186 Cal.Rptr. 77].)

In this case, the three part collateral estoppel test has been met: (1) Deglow has raised the identical issue; (2) the previous proceeding resulted in a final judgment on the merits; and (3) Deglow was a party to the prior proceeding. Thus, the doctrine of collateral estoppel prohibits Deglow from complaining about the Federation breaching its duty of fair representation when it failed to take this grievance before the Board of Review.

The evidence supports a conclusion that the Federation's decision not to take this grievance to the Board of Review was neither without a rational basis, nor was it devoid of honest judgment.

Longevity Pay Grievance

The Federation is not obligated to bargain a particular item benefitting certain unit members. (Baker et al.) Deglow's allegation that the Federation's failure to rescind or renegotiate the 20-year bonus provision breaches its duty of fair representation is without any legal support. Therefore, she did not show that the Federation's actions were without a rational basis or were devoid of honest judgment.

In addition, the collateral estoppel discussion above is applicable to this grievance and effectively bars Deglow from using this grievance to support her allegations the Federation breached its duty of fair representation.

As a third and last reason this allegation must fail, Deglow is also barred by the provisions of section 3541.5(a)(1) (fn. 4, p. 6) which prohibits the issuance of a complaint based on acts occurring more than six months prior to the filing of the charge. Deglow is complaining about a Federation action that took place in the late 1980s. PERB determined in Baker et al. that the previous charge, filed on December 5, 1990, was time barred. There has been no credible evidence presented to show that anything has occurred since that time to negate that decision.

Retirement and Sick Leave Credits Grievances

Deglow's retirement and sick leave credit grievances complain of a District action that took place at the time of the creation of the District, long before the Federation became the exclusive representative and the first CBA was executed.

Therefore, the Federation owes no duty of fair representation to Deglow with respect to these matters. (San Francisco Classroom Teachers Association, CTA/NEA (1985) PERB Decision No. 544.)

Any claim she may have to sick leave and/or retirement credits for pre-collective bargaining service arises from District policy and/or Education Code provisions. "The duty of fair representation does not extend to a forum that has no connection with collective bargaining, . . ." (Los Rios College Federation of Teachers, Local 2279, CFT/AFT, AFL-CIO (1993) PERB Decision No. 992.) "There is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such employee can obtain a particular remedy. . . ." (California State Employees' Association (Darzins) (1985) PERB Decision No. 546-S.)

In addition, the retirement credit grievance does not adequately allege a violation of CBA provisions. Deglow's retirement credits grievance cites Article 3 and 17 as CBA provisions that were alleged to have been violated. Article 3 does not mention STRS contributions except in the retiree health benefit and pre-retirement workload areas. Article 17 is a one paragraph statement that the parties agree not to discriminate against any faculty member on the basis of race, color, creed, national origin, religion, sex, age, sexual preference, political beliefs, political activities, political affiliation, or marital status.

Allegations of a violation of these very general CBA provisions, given the specific nature of the complaint about inadequate retirement credits, is insufficient to meet the CBA definition of a grievance (fn. 3, p. 5) and are, therefore, not grievable.

The evidence supports a conclusion that the Federation's decisions not to take Deglow's retirement and sick leave credits grievances to the Board of Review were neither without a rational basis nor were they devoid of honest judgment.

Discrimination Grievance

The Federation determined that the grievance, as propounded by Deglow, failed to show which CBA provisions the District violated when it refused to increase her teaching load over her tenure level. It asked Deglow for further information and failed to receive anything new from her. It then declined to move forward with the grievance due to insufficient information and Deglow's failure to reply to a legitimate inquiry.

The evidence supports a conclusion that the Federation's decision not to take this grievance to the Board of Review was neither without a rational basis nor was it devoid of honest judgment.

Summary

It is determined that the Federation did not violate its duty of fair representation with regard to allegations about (1) negative comments by Perrone about Deglow, (2) conditioning grievance action on membership, (3) refusal to meet with Deglow

and other pre-67 instructors, and (4) failure to take specified grievances to the CBA Board of Review.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Los Rios College Federation of Teachers did not violate subdivision (b) of section 3543.6 of the Educational Employment Relations Act. It is ORDERED that all aspects of the charge and complaint in this case are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party filed a statement of exceptions with the Board itself at the headquarters office in Sacramento within twenty 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 no later than the last day set for filing. . ." (See Cal. Code of Regs., tit. 8, sec. 32315; Code Civ. Proc, sec. 1013.) Any statement of exceptions and supporting brief must be served concurrently with the filing upon each party to this proceeding. Proof of service shall accompany

each copy served on a party or filed by the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32410.)

ALLEN R. LINK
Administrative Law Judge