STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELIZABETH KISZELY,	)	
	)	
Charging Party,	)	Case No. LA-CO-773
	)	
v.	)	PERB Decision No. 1343
	)	
UNITED FACULTY ASSOCIATION OF NORTH ORANGE COUNTY,	)	August 19, 1999
	)	
Respondent.	)	
	)	

Appearances: Elizabeth Kiszely, on her own behalf; California Teachers Association, by Rosalind D. Wolf, Attorney, for United Faculty Association of North Orange County.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION AND ORDER

AMADOR, Member: This case is before the Public Employment Relations Board (Board) on appeal by Elizabeth Kiszely (Kiszely) to a Board agent's dismissal (attached) of the unfair practice charge. In the charge, Kiszely made a request for repugnancy review of an arbitration award, and also alleged that the United Faculty Association of North Orange County (Association) denied her the right to fair and impartial representation guaranteed by section 3544.9 of the Educational Employment Relations Act (EERA), in violation of section 3543.6(b).[1]

[1]EERA is codified at Government Code section 3540 et seq. Section 3544.9 states:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

Section 3543.6 states, in part:

The Board has reviewed the entire record in this case, including the Board agent's warning and dismissal letters, the original and amended unfair practice charge, Kiszely's appeal,[2] and the Association's response.[3] 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-773 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

> It shall be unlawful for an employee organization to:
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

[2]Kiszely's 6/27/99 request to provide additional materials is hereby denied.

[3]The Association made a request that the Board order Kiszely to pay the Association's costs and attorney's fees, "to deter the continuation of this pattern of vexatious litigation." The Board has considered this request and declines to order sanctions.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

May 4, 1999

Elizabeth Kiszely
142 Orange Blossom
Irvine, CA 92 62 0

Re: Elizabeth Kiszely v. United Faculty Association of North Orange County
Unfair Practice Charge LA-CO-773--First, Second & Third Amended Charges
DISMISSAL AND REFUSAL TO ISSUE A COMPLAINT

Dear Ms. Kiszely:

You have alleged that the United Faculty Association of North Orange County (Association) denied you the right to fair representation guaranteed by the Educational Employment Relations Act (EERA) section 3544.9 and thereby violated section 3543.6(b). The original charge in this case was a request for repugnancy review of the "arbitration hearing on April 15, 1997, that pertained to unfair practice charges LA-CE-3699 and LA-CO-714.[1]

As I indicated to you in my attached letter dated December 18, 1998, the above-referenced charge did not state a prima facie case because your request was untimely and the Public Employment Relations Board (PERB) lacked jurisdiction to do anything other than dismiss it. Further, the December 18, 1998 warning letter noted that you failed to demonstrate that the Association acted in an arbitrary or discriminatory manner, or in bad faith. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in the warning 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 January 8, 1999, the charge would be dismissed. On January 7, 1999, you filed your first amended charge by certified mail. On February 8, 1999, you filed a second amended charge. On March 16th you filed your third amended charge.

[1]Since a repugnancy review of the arbitrator's award is based on the arbitration provisions of the collective bargaining agreement (CBA) between the union and employer and deals solely with alleged contract violations by the employer, this charge against the Association was reviewed primarily as an alleged violation of the duty of fair representation.

After investigation, I conclude that the original and amended charges fail to state a prima face violation of the EERA within the jurisdiction of PERB for the reasons that follow.

The Charge is Untimely

As stated in the warning letter, the Board's jurisdiction is limited by a six-month statute of limitations period. EERA section 3541.5(a)(1) provides the Board shall not "[i]ssue 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." Your charge, which was filed on July 23, 1998, concerns the Association's processing of your grievance and arbitration which took place from August 23, 1996 through June 3, 1997. This charge is outside PERB's jurisdiction because it is untimely.

Not a Continuing Violation

In your first amended charge you assert that "[b]ecause this retaliation [by the union] is on-going and because the issues the union agreed to take to arbitration have not, in fact, been heard in arbitration, the unfair practice charge is timely." (First amended charge, Attachment A at p. 1.) In the second amended charge you state that the withholding of information by the Association on how to correctly grieve violations of Title V, affirmative action policies, etc., is "a continuing violation of the terms of the CBA because of the disparate treatment and unequal application of the contract that follow from it" (Second amended charge, Attachment A at p. 16.)

PERB has recognized "continuing violations" of certain types of claims- to bring them within its jurisdiction even if the original conduct was outside the six-month period. In San Dieguito Union High School District (1982) PERB Decision No. 194 (San Dieguito), the Board found that a continuing violation would only be found where active conduct or grievances occurred within the limitations period that independently constituted an unfair practice. Examples of continuing violations include the monthly withholding of union dues from the union since the failure of the employer to transmit the dues to the union was repeated each month upon receiving the union's request for the dues.(San Dieguito at p. 9, citing Beer Distributors (1972) 196 NLRB 165.)

A continuing violation is not found where the unlawful conduct during the limitations period constituted an unfair practice only by its relation to the original offense. (El Dorado Union High School District (1984) PERB Decision No. 382 at p. 4.) Here the conduct you complain about against the Association concerns the handling of your grievance and arbitration of the original filing

of the unprofessional conduct notice and is not a continuing violation.

The Association has not violated its Duty of Fair Representation

As previously stated in the warning letter, the duty of fair representation extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125.) To demonstrate a violation of that duty it must be shown that the Association's conduct was arbitrary, discriminatory or in bad faith. Case handling errors and simple negligence are not violations of the duty. (American Federation of State, County and Municipal Employees, Council 10 (Olson) (1988) PERB Decision No. 682-H.)

The allegations in your amended charges regarding the Association's conduct in processing the grievance similarly fails to demonstrate that the Association acted in an arbitrary, discriminatory or bad faith manner. You allege that the Association acted in bad faith by concealing information from you regarding how to grieve a statutory notice and how to grieve violations of shared governance rights. The Association's judgment in taking the statutory notice to arbitration does not establish that the Association acted in an arbitrary, discriminatory or bad faith manner.

As evidence of bad faith, you allege that the Association merely went through the motions of taking your grievance to arbitration and had deleted the substance of your issues. However, you provide no facts to support such a finding. I see no reason to disturb the earlier conclusion that the Association did not act in an arbitrary, discriminatory manner or in bad faith in its handling of your grievance.

In American Federation of State, County and Municipal Employees, International, Council 57 (Dehler) (1996) PERB Decision No. 1152-H,(AFSCME (Dehler)) the Board indicated isolated acts which did not alone establish a violation of the duty of fair representation, presented a pattern of conduct which, when considered in its entirety, demonstrated a prima facie violation. However, I do not find a pattern of bad faith from the totality of the material you presented. The Association's conduct, when considered in its entirety, does not demonstrate it acted in an arbitrary, discriminatory, or bad faith manner. Although the Association did not do everything as you would have liked, in retrospect, the charge does not demonstrate the Association's representatives were acting arbitrarily or in bad faith. The Association took your grievance through binding arbitration and hired outside counsel to represent you. Thus, under the analysis set forth in AFSCME (Dehler), the Association's conduct, when

considered in its entirety, does not demonstrate a prima facie violation of the EERA.

Association's actions are not bad faith

In your amended charges you allege that the warning letter did not make reference to the evidence you presented about the arbitration process. As mentioned previously, this is being considered a duty of fair representation charge, not a repugnancy review of the arbitrator's award, since a repugnancy review of the arbitrator's award is based on the arbitration provisions of the CBA between the union and employer and deals solely with charges against the employer.

The following is my analysis of your claim that the arbitration proceeding was unfair and that the Association acted in bad faith. It is your belief that the Association acted in bad faith because: (1) you were not given "formal" notice of the proceeding; (2) the Arbitration was not processed through the American Arbitration Association (AAA); (3) the tape of the proceeding was not intelligible so no record was made of the proceeding; (4) it was inappropriate for the Association to stipulate to the threshold question of arbitrability of the issue;[2] (5) the Association did not let you use your own attorney; (6) the Association did not give you copies of documents that were presented to the arbitrator; (7) the Association did not arbitrate the issues you had specified and that your evidence and witnesses were suppressed; and (8) the Association did not let you participate fully in planning the strategy of your arbitration. In addition, you argue that the Association acted in bad faith by not following up with the District's continuing retaliation against you.

As discussed in greater detail in the warning letter, 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

[2]The parties stipulated to arbitrate the following: Is the grievance of Elizabeth Kiszely, dated October 8, 1996, arbitrable? If so, did the notice of unprofessional conduct issued to Elizabeth Kiszely, dated June 27, 1996, violate the CBA? If so, what is the appropriate remedy?

Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

The facts alleged by you in the original and amended charges do not demonstrate that the Association acted irrationally or in bad faith. Accordingly, you do not state a prima facie case of a violation of the duty of fair representation under EERA.

Violations of the CBA

In your amended charge you repeatedly express your concerns about the Association's violations of the CBA, especially as they relate to academic freedom and shared governance issues. However, enforcement of CBA violations is expressly outside the purview of PERB unless they are also an unfair practice under EERA which has not been shown here.

Summary

Unfair Practice Charge LA-CO-773 was not filed in a timely manner; therefore, the Board lacks jurisdiction to issue a complaint against the Association on your behalf. Therefore, it is dismissed and no complaint will issue.

Further, the information you presented fails to state a prima facie violation of the EERA. For these reasons the charge, as presently written, does not meet the standards for a violation of the duty of fair representation against the Association.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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 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 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

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 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 Janice F. Hill
JANICE F. HILL
Board Agent

Attachment

cc: Rosalind Wolf

PUBLIC EMPLOYMENT RELATIONS BOARD

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

December 18, 1998

Elizabeth Kiszely
142 Orange Blossom
Irvine, CA 92620

Re: Elizabeth Kiszely v. United Faculty Association of North Orange County
Unfair Practice Charge LA-CO-773
WARNING LETTER

Dear Ms. Kiszely:

On July 23, 1998, you filed Unfair Practice Charge No. LA-CO-773, a request for repugnancy review of the "arbitration hearing on April 15, 1997, that pertained to unfair practice charges LA-CE-3699 and LA-CO-714."[1] Since a repugnancy review of the arbitrator's award is based on the arbitration provisions of the collective bargaining agreement (CBA) between the union and employer and deals solely with unfair practice charges against the employer, this charge against the United Faculty Association of North Orange County (Association) is being reviewed as an alleged violation of the duty of fair representation, not a request for repugnancy review. My investigation revealed the following information relevant to this charge.

You are an English Professor at the North Orange County Community College District (District) and are exclusively represented by the Association. During the 1995-1996 school year, you voiced concerns regarding faculty rights. You believed the District retaliated against you for those activities. As a result you filed grievances and unfair labor practice charges against the District.[2] During 1995 and 1996 you filed four grievances against the District. The Association did not pursue the first grievance but informed you that you could pursue it on your own. The Association took your second grievance through level III but refused to take it to binding arbitration. You were informed

[1] Unfair Practice Charge No. LA-CE-3699 was addressed in correspondence concerning charge number LA-CE-3965 because it involves the employer, North Orange Community College District, and not the employee organization, United Faculty Association, the subject of this charge.

[2]See Unfair Practice Charges Nos. LA-CE-3699, LA-CE-3837 and LA-CE-3965.

that your third claim, an academic freedom claim was not grievable.

The fourth grievance was taken to binding arbitration on your behalf by the Association. The arbitration hearing was held on April 15, 1997, and the arbitrator's opinion and award was issued on May 29, 1997. The parties had stipulated to putting the following three issues before the arbitrator:

> Is the grievance of Elizabeth Kiszely, dated October 8, 1996, arbitrable? If so, did the notice of unprofessional conduct issued to Elizabeth Kiszely, dated June 27, 1996, violate the Collective Bargaining Agreement? If so, what is the appropriate remedy?

The arbitrator found that the grievance was not arbitrable under the CBA. You indicated that you had received a copy of the arbitrator's opinion and award on June 3, 1997. The Association's conduct during this grievance and arbitration is the subject of this unfair practice charge.

On November 12, 1996, you filed unfair practice charge LA-CO-714 alleging that the Association violated Educational Employment Relations Act (EERA) section 3543.6(b) by denying your right to fair representation. LA-CO-714 was in abeyance from November 15, 1996, until the filing of an amended charge on December 2, 1997. Your allegations against the Association in LA-CO-714 contained your complaints about the Association's treatment of you during the three grievances; in addition, you complained in LA-CO-714 of the Association's conduct relative to the arbitration proceeding which is the subject of this charge. Pursuant to Board agent warning and dismissal letters dated February 18, 1998, and March 13, 1998, respectively, your charge in LA-CO-714 against the Association was dismissed. The Board adopted the dismissal without leave to amend on June 18, 1998, in United Faculty Association of North Orange County Community College District (1998) PERB Decision No. 1269.

On July 23, 1998, you filed this unfair practice charge which states:

> United Faculty/CTA (union) presented on my behalf none of the multitude of evidence it had--even when the arbitrator asked for it. The union informed me I could not speak to the merits of the case because the arbitration was "bifurcated" to determine only jurisdiction for hearing a grievance of a statutory notice--and not the merits of the

> grievance. [Much of this information is the basis for UPC #LA-CO-714.]

In your unfair practice charge No. LA-CO-714 you alleged, in part:

> United Faculty's representation was inadequate in that I was frequently not informed and/or misinformed of information pertinent to the processing of the grievance and arbitration and to protecting the violation of my rights. The representation was arbitrary, discriminatory, and lacking in good faith. Specifically, no rational basis was provided for much of the misinformation I received. A previous incident involving a unit member and a notice of unprofessional conduct received markedly different treatment. The meeting and conferring that took place in preparation for and during the grievance and arbitration hearings was not in good faith because there was no genuine possibility for agreement. The district's issuance of a statutory notice preempted the grievance from being heard in any meaningful way in the forum of arbitration. A tenured faculty member's right to seek redress by means of the grievance procedure was rendered moot. A tenured faculty member's right to participate in shared governance was ignored in the proceedings.

As we have discussed, the above-stated allegations do not state a prima facie violation within the jurisdiction of PERB for the reasons that follow.

PERB Jurisdiction

Untimeliness

The Board's jurisdiction is limited by a six-month statute of limitations period. EERA section 3541.5(a)(1) provides the Board shall not, "[i]ssue 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." It is your burden, as the Charging Party to demonstrate that the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.)

On July 23, 1998, you filed this unfair practice charge (LA-CO-773) calling it a repugnancy review of the arbitrator's opinion

and award. However, there was no grievance filed against the Association and no arbitrator's award against it. Thus, this is an alleged violation of the Association's duty of fair representation, not a request for repugnancy review of an arbitrator's award.

The statute of limitations begins running on the day of the alleged unlawful conduct; in this case, you are complaining about the Association's processing of your grievance and arbitration. Your grievance process began August 23, 1996 and ended with the receipt of the arbitration decision on June 3, 1997. This charge was filed July 23, 1998. More than a year passed between the complained of conduct and the filing of this charge. Your unfair practice charge is untimely and PERB lacks jurisdiction to do anything other than dismiss it.

But even if your request had been timely, the unfair practice charge should be dismissed for failing to state a prima facie case.

Duty of Representation

You allege that the exclusive representative denied you the right to fair representation guaranteed by EERA section 3544.9 and thereby violated 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.]

As previously stated, the duty of fair representation extends to grievance handling. A reasonable decision not to pursue a grievance, regardless of the merits of the grievance, is not a violation of the duty of fair representation. (California State Employees' Association (Calloway) (1985) PERB Decision No. 497-H.) Nor are case handling errors and simple negligence violations of the duty. (American Federation of State, County and Municipal Employees, Council 10 (Olson) (1988) PERB Decision No. 682-H.)

The allegation regarding the Association's conduct in processing the grievance similarly fails to demonstrate the Association acted in an arbitrary, discriminatory or bad faith manner. The Association appealed the District's denial of this grievance to binding arbitration. One of the issues in this grievance was whether a notice of unprofessional conduct issued pursuant to the Education Code was arbitrable. You alleged the Association's failure to explain to you that "statutory notices" were not grievable is tantamount to bad faith. However, it appears that whether the Association could grieve a "statutory notice" was then an unsettled legal question; a question which the arbitrator answered in the negative. In California School Employees Association (Dyer) (1984) PERB Decision No. 342a, the Board noted when the union took a calculated risk concerning an issue where there was emerging precedent, it did not engage in arbitrary, discriminatory, or bad faith conduct. Thus, the Association's judgment in taking the statutory notice to arbitration does not establish the Association acted in an arbitrary, discriminatory or bad faith manner.

In American Federation of State, County and Municipal Employees, International, Council 57 (Dehler) (1996) PERB Decision No. 1152-H, the Board indicated isolated acts which did not alone establish a violation of the duty of fair representation, presented a pattern of conduct which when considered in its entirety demonstrated a prima facie violation. There the Board

noted the union failed to respond to the employer's inquiry after indicating that it would do so, failed to schedule a level 2 meeting, failed to notify the employee or explain its actions to her, and failed to respond to its specific written inquiries. You allege the Association engaged in a similar pattern of conduct.

However, your charge is factually distinguishable. The Association's conduct, when considered in its entirety, does not demonstrate it acted in an arbitrary, discriminatory, or bad faith manner. Although it did not answer every question posed to it involving the arbitration, the charge does not demonstrate the Association's representatives were unresponsive to you. The Association took your grievance through binding arbitration. Thus, under the analysis set forth in Dehler. supra, the Association's conduct, when considered in its entirety, does not demonstrate a prima facie violation of the EERA.

The above-stated information fails to state a prima facie violation of the EERA. The filing of your charge is untimely therefore the Board lacks jurisdiction to issue a complaint against the Association on your behalf. For these reasons the charge, as presently written, does not meet the standards for a violation of the duty of fair representation against the Association.

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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before January 8. 1999. I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198 ext. 322.

Sincerely,

Janice F. Hill
Board Agent