STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HUGH McALPINE, et al.,	)	
	)	
Charging Parties,	)	Case No. LA-CO-817
	)	
v.	)	PERB Decision No. 1401
	)	
RIVERSIDE COUNTY OFFICE TEACHERS ASSOCIATION, CTA/NEA,	)	August 31, 2000
	)	
Respondent.	)	
	)	

Appearance: Allyn Auck, representative, for Hugh McAlpine, et al.

Before Dyer, Amador and Baker, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of the unfair practice charge filed by Hugh McAlpine, et al. (McAlpine). McAlpine's charge alleges that the Riverside County Office Teachers Association, CTA/NEA, violated section 3543.6(b) of the Educational Employment Relations Act (EERA)[1]

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

and thereby breached its duty of fair representation under section 3544.9.[2]

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge, the warning and dismissal[3] letters, and the appeal of McAlpine, et al. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-817 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Baker joined in this Decision.

---

[2]Section 3544.9 reads:

> 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.

[3]The Board notes that on page 4, line 9 of the dismissal letter, the Board agent omitted the citation for the case of South San Francisco Unified School District. This portion of page 4 of the dismissal letter is hereby modified to read "South San Francisco Unified School District (1990) PERB Decision No. 830."

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

February 7, 2000

Allyn Auck

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Hugh McApline, et al.[1] v. Riverside County Office Teachers Association, CTA/NEA
Unfair Practice Charge No. LA-CO-817; First Amended Charge

Dear Ms. Auck:

The above-referenced unfair practice charge, filed November 18, 1999, alleges the Riverside County Office Teachers Association (Association) breached its duty of fair representation by negotiating a 2% reduction in the salary augmentation for Special Education Instructors. You allege this conduct violates Government Code section 3543.6 of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated December 10, 1999, 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

[1] The following persons have filed a Notice of Appearance naming Ms. Auck as their representative and wish to be considered Charging Parties: Allyn Auck; Barbara Jackson Alvardo; Virginia Hodgson; Scott Morgan; Bernice Meyer; Warren Peterson; Patricia Trueba; Jolanda Karr; Michael Leivas; John Stocking; John Maurer; Julie Ch'iu; Hergard Eberhard; Ronald Matthews; Kent Lewis; Kim Gardner; Brenda Stockdale; Donna Abramson; Lynne Laumeister; Barbara Herzberg; Coleen Tomazin; Marilynn Henry; Josie Curiel; Mahlon Smith; Robert Riese; Sharon Brewer; Michell Jenkins; Annette Carrozzo; Elizabeth Santore; Linda Pollard; Richard McCausland; Anne Reyes; Alvin Butler; Audrey Anderson; Dennis Sheahan; Jennifer Hayes; Thomas Seider; Joel Morgan; Caroline Padilla; Stanley Bourgeault; Sally Hall; Cindee Adams; Peter Eck; Roy Austin; Sharyl Williams; Susan Hohwieser; Rebecca Poyner; Ernestine Ortiz;

charge to state a prima facie case or withdrew it prior to December 17, 1999, the charge would be dismissed.

On December 17, 1999, Charging Parties filed a first amended charge. With regard to the allegation that the Association breached its duty of fair representation by negotiating away part of the Special Education stipend, the charge adds legal arguments without providing any additional relevant facts. Specifically, Charging Parties contend the Association caused the District to engage in regressive bargaining by rejecting a salary proposal that would have kept intact Charging Parties' stipend. Additionally, Charging Parties argue the Association disparately treated them by reducing their stipend while increasing the salaries of all other employees. Finally, Charging Parties contend the Association entered into an agreement that went "beyond the scope of the existing three year agreement without publishing notice of the intent to ratify a successor agreement."

The amended charge also adds an allegation of discrimination by the Association. Specifically, Charging Parties contend:

> RCOTA President Michael Bochicchio stated in an open Executive Board Meeting on December 3,. 1999, that "Whoever is doing this is in big trouble!" when referring to the activities of the charging parties and in the presence of Martin Early, Vice President, a fully credentialed Special Education Teacher, thereby causing him to feel threatened with discrimination and reprisals.

Based on the facts presented in the original and amended charges, the charge still fails to state a prima facie violation of the EERA, for the reasons provided below.

With regard to Charging Parties' initial allegations concerning the Association's bargaining conduct, the amended charge still fails to demonstrate the Association engaged in arbitrary or bad faith conduct. Charging Parties allege the Association disparately treated the Special Education teachers by reducing their stipend while increasing the salaries of other teachers. However, as explained in my December 10, 1999, letter, an exclusive representative is not expected or required to satisfy all members of the unit it represents. (California State Employees Association (Chacon) (1995) PERB Decision No. 1108.) Moreover, the duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members, nor is an employee organization obligated to bargain a particular item benefitting certain unit members. (Id.; Los Rios College

Federation of Teachers (Violett) (1991) PERB Decision No. 889.) As such, the Association's conduct in making an agreement that favors some employees more than others does not violate the EERA. Additionally, facts provided demonstrate the Association made all members clear on its priorities and thoroughly explained their decision to reduce stipends for Special Education teaches. While some members may not agree with the Association's decision, such disagreement does not rise to the level of unlawful conduct.

Charging Parties also contend the Association entered into an agreement "beyond the scope of the existing three year agreement without publishing notice of the intent to ratify a successor agreement." It appears Charging Parties are complaining about provisions in the new Agreement which Charging Parties claim extend beyond the duration of the agreement. More specifically, the new Agreement contains a duration clause which states the Agreement will be in effect until June 30, 2001. The Agreement also contains a provision at Article 11, Wages, which states as follows:

> 11.4 The parties agree to the establishment of a Benchmark Advisory Committee. The committee shall be comprised of a representative from both parties. One of the management team members shall facilitate the committee. The committee shall make [sic] determination of benchmark adjustments to the salary schedules Dl and D2 which will now include certificated bargaining unit members to the median position by June 30, 2002.

It appears the parties agreed to set up an advisory committee charged with recommending adjustments in the salary schedules, with the ultimate goal of raising certificated bargaining unit members to the median level in the County. This provision is consistent with the Association's communications which stress this same point. For example, on September 2, 1999, the Association distributed a newsletter which stated the following:

> While the County remains "firmly committed" to honoring last year's agreement to bring County Office teachers to median among teachers in the twenty-three districts in Riverside County by 2001-2002, they insist that funding uncertainties prevent them from entering into a multi-year agreement to restructure and enhance the teachers' salary schedule.

As the provision is merely setting up an advisory committee whose goal is to recommend salary adjustments such that teachers will be at the median level by 2002, it is unclear how this provision violates the EERA, or demonstrates bad faith on the Association's part. Moreover, even assuming the provision somehow extended the duration of the agreement beyond three years, the Association's failure to publicly notice this clause is not properly adjudicated as an unfair practice charge. (See, South San Francisco Unified School District (PERB has no authority to find a public notice violation in the context of an unfair practice proceeding).) As such, this allegation fails to demonstrate the Association breached its duty of fair representation.

Charging Parties also allege the Association forced the District to bargain in bad faith, by allowing the District to engage in regressive bargaining. More specifically, Charging Parties contend the District's proposals which called for reductions in the stipend for Special Education teachers is a regressive proposal, and as such bad faith bargaining. Charging Parties further contend the Association caused the District to engage in regressive bargaining by rejecting a salary proposal that would have kept intact Charging Parties' stipend. As such, it appears Charging Parties are alleging the Association violated Government Code sections 3543.6(a) and (c), which state in relevant part, that it is an unfair practice to:

> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (c) Refuse or fail to meet in good faith with a public school employer of any of the employees of which it is the exclusive representative.

However, Charging Parties lack standing to allege allegations of Government Code sections 3543.6(c), and as such this allegation must be dismissed. (See, California State University (Wang) (1990) PERB Decision No. 813-H.) Moreover, the charge fails to provide any facts demonstrating the District violated the Act or that the Association caused the District to violate the Act. As such, the charge fails to state a prima facie violation of section 3543.6(a).

Finally, Charging Parties allege that Martin Early, another Special Education teacher and not a Charging Party, felt threatened and intimidated by Mr. Bochicchio's statement that Charging Parties were in trouble for filing the charge. On or about January 14, 2000, I spoke with Charging Party's representative Allyn Auck regarding this allegation. Specifically, I noted that Mr. Early denied Charging Parties'

allegation, and stated that he was not threatened or intimidated. Ms. Auck stated that she had spoken with Mr. Early after the union meeting and that Mr. Early was concerned about Mr. Bochicchio's statement. Ms. Auck assured Mr. Early that the Association would not take any adverse action against Charging Parties. As such, Mr. Early was no longer intimidated.

However, a January 24, 2000, declaration provided by Mr. Early presents a different set of circumstances. Mr. Early states that Mr. Bochicchio's statements were misquoted and pertained to grievances filed with the District. Additionally, Mr. Early states:

> 7. The statement in the Amended Charge also misrepresents how I felt about Bochicchio's jest. I did not feel intimidated and did not feel threatened. I had no fear whatsoever of reprisal from RCOTA.

Although Charging Parties were given an opportunity to address this inconsistency, Charging Parties have not refuted Mr. Early's own statements. As the charge alleges that Mr. Early felt intimidated and Mr. Early refutes that allegation, the charge fails to present facts demonstrating the Association interfered with or threatened bargaining unit members. Moreover, there is no perceptible impact on unit members rights. The quoted statement was not heard by any Charging Party and indeed, no Charging Party alleges they felt intimidated or threatened. As such, this allegation fails to state a prima facie case of interference.

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
Kristin L. Rosi
Regional Attorney

Attachment

cc: Robert Lindquist

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(41 5) 439-6940

December 10, 1999

Hugh McAlpine

Re: **WARNING LETTER**
Hugh McAlpine[1] v. Riverside County Office Teachers Association
Unfair Practice Charge No. LA-CO-817

Dear Mr. McAlpine:

The above-referenced unfair practice charge, filed November 18, 1999, alleges the Riverside County Office Teachers Association (Association) breached its duty of fair representation by negotiating a 2% reduction in the salary augmentation for Special Education Instructors. You allege this conduct violates Government Code section 3543.6 of the Educational Employment Relations Act (EERA or Act).

Charging Parties are employed by the Riverside County Office of Education (Office of Education) as Special Education Instructors or Speech Therapists for disabled students.[2] As credentialed

[1] Hugh McAlpine is the Charging Party who signed the charge. The charge also contains the names of 45 additional employees who wish to be considered Charging Parties. However, pursuant to PERB Regulation 32615(a), a charge must be signed by the party or its agent. This charge is signed only by Mr. McAlpine and does not include information necessary to elevate Mr. McAlpine to the status of an "agent" for the 45 named employees. On November 18, 1999, Mr. McAlpine informed me that Allyn Auck would be serving as the representative. On November 19, 1999, I requested Ms. Auck obtain the signatures of the 45 employees authorizing Ms. Auck as the Charging Parties' representative. To date, I have not received such authorization. As such, Mr. McAlpine is the only Charging Party.

[2] There are approximately 75 Special Education Instructors and Speech Therapists in a unit of nearly 240 instructors.

instructors, Charging Parties are exclusively represented by the Association.

In 1995 and 1996 salary negotiations, the Association secured additional salary allotments for Special Education Instructors. In 1997, salary schedules were combined and Special Education teachers were placed on the same salary schedule as other credentialed instructors. To compensate Special Education teachers for their specialized instruction, Special Education teachers received a $2,200 stipend per year in additional compensation.

Apparently, Special Education Instructors and Speech Therapists were unhappy with the stipend pay, and voiced their disapproval to the Association in the form of letters and survey responses. In 1998, during negotiations, the Office of Education and the Association agreed upon an 8% augmentation for Special Education Instructors. Not surprisingly, Special Education Instructors and Speech Therapists overwhelmingly supported this contract modification.

In 1999, the Association began contract negotiations for a successor three year agreement. On September 2, 1999, the Association distributed a newsletter updating bargaining unit members on the progress of negotiations. Included in the newsletter was the following statement:

> While the County remains "firmly committed" to honoring last year's agreement to bring County Office teachers to median among teachers in the twenty-three districts in Riverside County by 2001-2002, they insist that funding uncertainties prevent them from entering into a multi-year agreement to restructure and enhance the teachers' salary schedule.
>
> County officials propose a 1.14% cost-of-living adjustment plus a 1.59% benchmark increase (3% total) for 1999-2000. They propose that any additional salary increases would be funded by making "adjustments" to the current master's degree and special education credential stipends.
>
> Teachers remain opposed to any stipend adjustments unless they are instituted within the overall context of. a multi-year restructuring of the salary schedule.

On September 8, 1999, the Association and Office of Education reached a tentative agreement for a three-year successor agreement. On September 27, 1999, the Association distributed a newsletter which explained the salary provisions of the new agreement and the Association's decision to tentatively accept the agreement:

> The tentative agreement features a salary settlement of 1.14% COLA and 2.59% benchmark (4% total) for 1999-2000. In addition, for 2000-2001, the schedule will be increased by the statutory COLA + 2.5% benchmark. . . In the third year, the County has agreed to provide COLA plus a sufficient benchmark adjustment to bring County Office teachers to the median salary level of all 23 school districts in Riverside County.
>
> During each of the three years of the agreement, last year's 8% augmentation to recruit full-credentialed special education teachers will be reduced by 2%. Thus, these 140 teachers will receive a 6% enhancement for 1999-2000, a 4% enhancement for 2000-2001, and a 2% enhancement in the final year of the agreement. No further reduction of the special education bonus is planned.
>
> The County was insistent on this adjustment to special education stipends and was willing to use the dollars saved to fund an additional 0.5% benchmark increase for all bargaining unit members. Even with the 2% reduction, fully-credentialed special education teachers and speech therapists will rank third in the county, well above the median target for County Office teachers in correctional education, ROP and alternative education.
>
> Overall, RCOTA calculates that the three-year salary increases will push teacher's salaries up by an additional 12-13%.

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

Charging Parties allege:

> After the overwhelming support for the original 8% augmentation to the salary schedule for fully-credentialed Special Education Teachers and Speech Therapists and the subsequent dissatisfaction of unit members with regard to its reduction, it is clear that the negotiating team acted without due consideration of the facts of recent history and without rational basis and therefore breached their duty to fairly represent all employees.

A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture (1994) PERB Decision No. 1071-S.) Herein, Charging Parties state at the conclusion of their facts that the Association acted without rational basis. However, such a conclusion does not set forth facts from which it becomes apparent how or in what manner the Association acted without rational basis. As such, the mere conclusion that the Association acted without rational basis is insufficient to state a prima facie case.

Additionally, based on the facts provided, Charging Parties fail to demonstrate the Association breached its duty of fair representation. Charging Parties allege that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b).

As a general rule, an exclusive representative enjoys a wide range of bargaining latitude. As the Supreme Court has noted in Ford Motor Co. v. Huffman (1953) 345 U.S. 330, 338:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to good faith and honestly of purpose in the exercise of its discretion.

Acknowledging the need for such discretion, PERB has noted that an exclusive representative is not expected or required to satisfy all members of the unit it represents. (California State Employees Association (Chacon) (1995) PERB Decision No. 1108.) Moreover, the duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members, nor is an employee organization obligated to bargain a particular item benefitting certain unit members. (Id.; Los Rios College Federation of Teachers (Violett) (1991) PERB Decision No. 889.)

In the instant charge, the Association specified its bargaining strategy by stating that they would not agree to any reduction in Special Education pay without securing a three year agreement that raised the overall salaries of all bargaining unit members to the county median. Such a proposition is not devoid of honest judgment or without rational basis. Moreover, the Association specifically explained its decision to reduce the augmentation prior to the ratification vote and fully explained their rationale for accepting such a proposal. As such, nothing in the charge indicates the Association acted without rational basis. The mere fact that Charging Parties were not satisfied with the agreement is insufficient to demonstrate a prima facie violation. (Los Rios College Federation of Teachers (Violett), supra.) Further, the fact that the Association should have known the Special Education teachers would be dissatisfied is also insufficient to demonstrate a breach of the duty of fair representation. The Association is not obligated to negotiate a specific provision for a group of unit members, nor did the Association fail to explain their rationale in reducing the augmentation. As such, the charge fails to state a prima facie case.

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 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 December 17, 1999, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Kristin L. Rosi
Regional Attorney