STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GEORGE R. GERBER, JR., Charging Party, v. SWEETWATER UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4209-E PERB Decision No. 1417 January 26, 2001

Appearance: George R. Gerber, Jr., on his own behalf.

Before Amador, Baker and Whitehead, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by George R. Gerber, Jr. (Gerber) to a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Sweetwater Union High School District violated the Educational Employment Relations Act (EERA)[1] when it deducted agency fees from Gerber's paycheck on behalf of the California School Employees Association without Gerber's written authorization.

After reviewing the entire record, the Board hereby affirms the dismissal.

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

ORDER

The unfair practice charge in Case No. LA-CE-4209-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8385
Fax: (916) 327-6377

October 11, 2000

George R. Gerber, Jr.

Re: George R. Gerber, Jr. v. Sweetwater Union High School District
Unfair Practice Charge No. LA-CE-4209-E
DISMISSAL LETTER

Dear Mr. Gerber:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 19, 2000. Your charge alleges that the Sweetwater Union High School District violated the Educational Employment Relations Act (EERA)[1] when it deducted agency fees from your paycheck on behalf of the California School Employees Association (CSEA) without your written authorization.

I indicated in the attached letter dated August 29, 2000, 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, the charge should be amended. You were further advised that unless the charge was amended to state a prima facie case or was withdrawn prior to September 12, 2000, the charge would be dismissed. You requested and were granted an extension of time to file an amended charge. An amended unfair practice charge was timely filed on September 15, 2000.

The amended charge alleges that Article 3, the Organizational Security provision of the collective bargaining agreement (CBA) in effect between CSEA and the District, "is null and void due to its vague and ambiguous wording." Thus, the charge asserts that the District had no lawful authority under the CBA to deduct agency fees from your paycheck.

The charge reviews several sections of Article 3 and discusses the basis for the assertion that the organizational security provision is invalid. The charge alleges that sections 3.2, 3.3 and 3.9 contain similar language which provides, in essence, that nonmember employees must pay a fee "which is equal to CSEA's annual dues." The charge alleges that these provisions are invalid because PERB regulations permit agency fee payors who object to the payment of a service fee which is equal to the amount union dues, to pay a reduced service fee which covers

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

only representation activities. The charge alleges that these contract provisions are void because they do not reference the PERB regulations or clearly specify that agency fee objectors may pay a reduced service fee.

Under EERA, public school employees have a right to refrain from participating in the activities of the union.[2] Thus, an employee has no obligation to join the union as a condition of employment. However, EERA section 3546 permits an exclusive representative union and a public school employer to enter into an agreement to allow the union to collect a "fair share fee" or an "agency fee" from nonmember employees, requiring them to pay their "fair share" of the union's cost in representing all bargaining unit members before the employer.

EERA permits unions to charge agency fee payors an amount equal to union dues.[3] Since EERA was enacted, the courts have held that employees cannot be compelled to pay for political or nonrepresentational activities of a union. (Abood v. Detroit Board of Education 431 U.S. 209 (1977).) Thus, nonmembers have the option to pay the full dues amount or a reduced service fee which does not include nonrepresentational expenditures. The courts have also determined that agency fee payors are entitled to sufficient information to enable them to challenge the union's calculation of the amount of the reduced service fee. (Chicago Teachers Union v. Hudson 474 U.S. 292 (1986).)

PERB regulations are consistent with these requirements. And, as you state in the amended charge, exclusive representative unions are bound by both case law and PERB regulations which set forth these requirements. There is no requirement, however, that these procedural requirements be included in an organizational security agreement negotiated between a union and a school district. The absence of these requirements in negotiated agreements does not relieve a union of its obligation to provide bargaining unit members with proper notice to pay a reduced service fee or challenge the amount of the service fee.[4]

Accordingly, under EERA, a union may lawfully charge agency fee payors an amount equal to union dues. The union has an obligation, however, to provide agency fee payors with notice of their right to pay a reduced service fee and of their right to challenge the amount of the reduced service fee set by the union. Thus, the language in the organization security provision which specifies that the service fee amount is equal to union dues is not inaccurate and, therefore, the provision is not invalid under EERA.

The amended charge also alleges that sections 3.4 and 3.10 provide that written authorization is required before a school district can deduct agency fees on behalf of the union from nonmember paychecks.

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[2] EERA section 3543.

[3] EERA section 3540.1(i)(2)

[4] In a separate charge against CSEA, you allege the union failed to provide you with notice of your rights as an agency fee payor prior to taking the agency fee deduction.

As discussed in the attached letter, the Board has previously determined that written authorization is not required before an employer may withhold agency fee deductions from nonmember paychecks. (King City High School District (Cumero) (1982) PERB Decision No. 197; San Jose Unified School District (1984) PERB Decision No. 463.) Although you may argue that the language of Article 3 requires such written authorization, a school district does not violate EERA by taking agency fee deductions from nonmember paychecks.

The charge also alleges that both CSEA and the District violated section 3.5 which provides that, "CSEA agrees to furnish any information needed by the District to fulfill the provisions of this article." The charge states that had the parties complied with this provision, the District would have been able to provide you with the documentation you requested concerning your rights as an agency fee payor.

There is no evidence that the District requested information from CSEA. Thus, CSEA did not violate its obligation to provide requested information. Furthermore, as we have previously discussed, the District has no independent affirmative duty to ensure that CSEA has properly complied with its obligation to provide you with notice of your rights as an agency fee payor. As the Board stated in San Ramon Valley Unified School District (1989) PERB Decision No. 751:

> A public school employer simply does not have the authority or resources to review union procedures and determine if they are statutorily or constitutionally adequate.
>
> . . . . . .
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> The "arm's length" relationship required by collective bargaining recognizes that the employer and the union have conflicting interests. Those conflicting interests obviously render unworkable any scheme where the employer must police the union's actions, lest it be held liable for them. Moreover, since the exaction of agency fees is fundamentally a matter between the exclusive representative and bargaining unit members, the creation of a duty [requiring the employer to ensure the union provided proper notice] would conflict with the employer's statutory duty to refrain from interfering in the administration of the union.

Accordingly, the District did not violate EERA when it failed to ensure that CSEA had provided you with the required notice prior to taking agency fee deductions from your paycheck.

Finally, the amended charge alleges that CSEA failed to comply with section 3.7 which provides that CSEA shall indemnify the District for any claims or lawsuits arising out of the organizational security provision. The charge alleges that after the District initially agreed to

cease taking agency fee deductions from your paycheck, CSEA wrote to the District and threatened to take action against the District if it did not comply with the organizational security provision and withhold agency fees from your paycheck. The charge contends that by threatening the District with legal action, CSEA's conduct was contrary to section 3.7 which requires CSEA to indemnify the District from legal action. Thus, the charge alleges that this provision is void because it was not properly applied.

First, this allegation finds fault with CSEA and the present charge has been filed against the District. CSEA cannot be found liable for any alleged unlawful conduct under this charge. Secondly, the charge fails to demonstrate that section 3.7 is invalid on its face or that CSEA breached its duty under the provision. No legal action was taken against the District and CSEA did not fail to indemnify the District.

In summary, an exclusive representative union has the responsibility to provide nonmember employees with sufficient information concerning their rights as an agency fee payor. Public school employers have no duty under EERA to ensure that unions meet their obligation to provide such notice.

Furthermore, an exclusive representative union and a public school employer are not required to place all procedural requirements in an organizational security provision. The fact that these requirements are not included in a collective bargaining agreement does not invalidate the agreement under EERA. Nor does the absence of such language in an agreement relieve a union of its obligation under the law to meet its notice requirements.

Based on the above discussion, the charge fails to demonstrate that the District violated EERA when, at the request of CSEA, it withheld agency fees from your paycheck.[5] Therefore, the charge is dismissed.

Right to Appeal

Pursuant to PERB Regulations[6], 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. (Regulation 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

[5] By law, PERB's jurisdiction is limited to the determination of unfair labor practice claims arising under EERA. PERB makes no determination of the validity of the CBA under other principles of law.

[6] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 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. (Regulation 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 Regulation 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. (Regulation 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. (Regulation 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
Róbin W. Wesley
Regional Attorney

Attachment

cc: Kathleen Dahlen

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8385
Fax: (916) 327-6377

August 29, 2000

George R. Gerber, Jr.

Re: George R. Gerber, Jr. v. Sweetwater Union High School District
Unfair Practice Charge No. LA-CE-4209-E
WARNING LETTER

Dear Mr. Gerber:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 19, 2000. Your charge alleges that the Sweetwater Union High School District violated the Educational Employment Relations Act (EERA)[1] when it deducted agency fees from your paycheck on behalf of the California School Employees Association (CSEA) without your written authorization.

The charge makes the following factual allegations. George Gerber is employed by the District in the maintenance department. Mr. Gerber is a member of the bargaining unit exclusively represented by CSEA. In 1995, Mr. Gerber wrote to CSEA withdrawing from union membership. He also instructed the union to cease taking dues or service fees.

On May 31, 2000, Mr. Gerber noticed that the amount of $29.75 was deducted from his paycheck for "CSEA 258." Mr. Gerber immediately contacted Kathleen Dahlen, in the District's Labor Relations Office. Ms. Dahlen informed Mr. Gerber that CSEA had provided the District with a list of bargaining unit members who had not been paying their agency fees directly to the union. Mr. Gerber's name was on the list. The District was instructed to begin deducting agency fees from the listed employees' paychecks. Ms. Dahlen directed Mr. Gerber to contact to CSEA.

On June 1, 2000, Mr. Gerber spoke with CSEA President Lawrence Gilly. Mr. Gilly told Mr. Gerber that he did not believe notice of the payroll deduction was necessary. Mr. Gilly stated he would look into the matter and get back to him. Mr. Gilly made no further contact with Mr. Gerber, even after Mr. Gerber made numerous calls to Mr. Gilly and left several messages.

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[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

On June 6, 2000, Mr. Gerber wrote to the District informing it that the agency fees had been taken without notice and without his written authorization. He also reminded the District that he had withdrawn from the union in 1995.

Initially, the District agreed with Mr. Gerber and indicated it would cease the agency fee deduction. But on June 13, 2000, the District received a letter from CSEA which stated that the District would be in violation of the parties' collective bargaining agreement (CBA) "if dues are not deducted from Mr. Gerber or any other bargaining unit employees." Thereafter, the District reversed its previous position and directed that agency fees be deducted from Mr. Gerber's paycheck.

Mr. Gerber met again with Ms. Dahlen on June 19, 2000. Mr. Gerber provided her with various pages of the CBA and copies of selected California statutes and regulations. Ms. Dahlen told Mr. Gerber that the District was properly complying with CSEA's request to deduct agency fees.

Mr. Gerber received his June pay warrant on June 30, 2000. Agency fees were again deducted on behalf of CSEA.

The charge alleges that the District improperly deducted agency fees from Mr. Gerber's May and June 2000 paychecks without written authorization. The charge also alleges that Organizational Security provision, Article 3 of the CBA, "due to its ambiguous and fraudulent wording, is null and void" and, thus, is not enforceable.

Based on the facts stated above, the charge fails to state a prima facie case.

The Board has previously considered the issue of whether a school district may implement a negotiated organizational security provision and automatically deduct agency fees without employee authorization. (King City High School District (Cumero) (1982) PERB Decision No. 197 (King City); San Jose Unified School District (1984) PERB Decision No. 463.) In King City, the Board held that agency fee payroll deductions may lawfully be made without authorization from employees who are obligated under a CBA to pay such fees. The Board explained:

> Prior approval of the payor is not only unnecessary but inconsistent with the involuntary nature of such fees. Withholding approval would enable the nonmember to circumvent the legislative purpose and negotiated agreement. To provide involuntary payors with this option would inevitably lead to unduly burdensome collection problems and ultimately to the wholesale enforcement of the employment termination provisions of section 3540.1(i), a consequence that would be detrimental to the educational system and to peaceful labor relations in the districts. (p. 25)

This position was affirmed by the California Supreme Court in Cumero v. Public Employment Relations Board (1989) 49 Cal.3d 575, 605, 262 Cal.Rptr. 46, 778 P.2d 174.

Therefore, the allegation in your charge that the District violated EERA when it deducted agency fees from your paycheck without your prior written authorization fails to state a prima facie violation and must be dismissed.

The charge also alleges that the Organizational Security provision in the CBA is "null and void." Charging Party contends that because the language of the provision is "ambiguous and fraudulent," the provision is unenforceable.

As you are aware, agency fees are authorized by EERA section 3546 and PERB Regulations 32990-32997. The charge fails to demonstrate why the Organizational Security provision is inconsistent with the statutory authority to collect agency fees. Furthermore, there are no facts alleged which demonstrate that the District engaged in bad faith bargaining in entering into the agreement.

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 September 12, 2000, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney