STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MARTHA D. GARCIA, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Respondent.	Case No. LA-CO-864-E PERB Decision No. 1444 June 7, 2001

Appearance: Martha D. Garcia, on her own behalf.

Before Amador, Baker and Whitehead, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (Board) on appeal by Martha D. Garcia (Garcia) from a Board agent's dismissal (attached) of her unfair practice charge.

Garcia's charge alleged that the California School Employees Association (CSEA) violated section 3543.6 of the Educational Employment Relations Act (EERA)[1] by failing to represent her properly regarding her claims of sexual harassment.

[1] EERA is codified at Government Code section 3540 et seq. Section 3543.6 provides, in pertinent part, that:

> 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.

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters and Garcia's appeal. The Board finds the dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself.[2]

ORDER

The unfair practice charge in Case No. LA-CO-864-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Whitehead joined in this Decision.

[2] Garcia offers for the first time on appeal new specific charge allegations contending CSEA failed to file a grievance for her in "February/March 2000" as she requested. As her charge was filed on November 27, 2000, events occurring in February or March of 2000 are outside the six-month statute of limitations contained in EERA and are hereby dismissed as untimely.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
(510) 622-1016

March 2, 2001

Martha D. Garcia

Re: Martha D. Garcia v. California School Employees Association
Unfair Practice Charge No. LA-CO-864
DISMISSAL LETTER

Dear Ms. Garcia:

In the above-referenced unfair practice charge Martha Garcia alleges the California School Employees Association violated the Educational Employment Relations Act (EERA or Act) § 3543.6.

I indicated to you, in my attached letter dated February 13, 2001, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to February 22, 2001, the charge would be dismissed.

On February 21, 2001, my office received a letter from you indicating the warning letter summarized the facts of the charge incorrectly and requesting an opportunity to meet with me regarding the charge. On February 23, 2001, I left a message for you indicating I was in receipt of your letter, and that you should call me regarding this charge. You did not respond to my message. Nor did you request an extension of time to file an amended charge. I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my February 13, 2001 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days 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
Tammy L. Samsel
Regional Attorney

Attachment

cc: David Dolloff

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
(510) 622-1016

February 13, 2001

Martha D. Garcia

Re: Martha D. Garcia v. California School Employees Association
Unfair Practice Charge No. LA-CO-864
WARNING LETTER

Dear Ms. Garcia:

In the above-referenced unfair practice charge Martha Garcia alleges the California School Employees Association violated the Educational Employment Relations Act (EERA or Act) § 3543.6 by failing to adequately represent Garcia regarding claims of sexual harassment. My investigation of the charge revealed the following information.

Charging Party was employed by the Whittier Union High School District (District) as a Clerk III in the Purchasing Department. As a classified employee, Garcia was exclusively represented by CSEA. CSEA and the District are parties to a collective bargaining agreement, which does not include a Non-Discrimination provision. Thus, allegations of discrimination, including sexual harassment, cannot be pursued through the grievance machinery in the Agreement, and instead must be pursued through outside mechanisms. The charge includes more than 50 type-written pages and dozens of other attachments. The relevant facts are summarized below.

In September 1999, Garcia began receiving unsolicited sexual advances from co-worker Jack Martinez. At this time, both Martinez and Garcia were running for local CSEA officer positions; Martinez for President and Garcia for 2nd Vice-President. The sexual harassment continued through the election process, with both Martinez and Garcia being elected to CSEA Board positions.

Throughout January and February 2000, Martinez allegedly continued his harassment, which included sexual innuendos and belittling comments. On February 22, 2000, Garcia reported the harassment to Jim Downs, her immediate supervisor. Garcia stated that Martinez's conduct was "getting out of hand" and that something needed to be done about it. Downs apparently agreed with these statements, but Garcia states nothing was done. Instead, Garcia states Downs began treating her differently and not giving her credit for projects she completed.

It appears that the alleged harassment went on for several more months. On May 16, 2000, Garcia filed for Worker's Compensation benefits, citing increased stress as the triggering factor of her illness. The District informed Garcia that she would be required to use sick leave until her claim was approved.

In late May, 2000, Garcia received a Letter of Reprimand from Downs, regarding a May 15, 2000, "incident." A copy of the letter is not provided in the charge, nor does Garcia provide details regarding the May 15 incident.

During the Spring or early Summer of 2000, Garcia informed CSEA of the problems she was having with Martinez and Downs. Garcia does not provide a date upon which she requested CSEA conduct an investigation, but instead states that she believed Linda Carroll, a union job steward, was investigating the matter. It is unclear what this belief was based on, as the charge does not include any communication between Carroll and Garcia.

In June 2000, Garcia met with Carroll and Leo Baca, CSEA 1st Vice-President. During this meeting, Garcia and Carroll discussed possible witnesses in her complaint against Martinez and discussed the Letter of Reprimand. Carroll did nothing to assist her in filing the sexual harassment complaint and forced Garcia to draft the complaint herself.

On July 18, 2000, Garcia sent a draft of her complaint to CSEA representative Melanie Schafer, asking Schafer not to share the complaint with her immediate supervisor. On July 19, 2000, Schafer responded to Garcia's draft by stating that she should submit it to the District as soon as possible. Schafer also stated she would speak with her Field Director, Joan Verhoef regarding Garcia's confidentiality request.

On July 24, 2000, Garcia filed a sexual harassment complaint with the Equal Employment Opportunity Commission (EEOC). Additionally, Garcia sent an electronic message to Schafer regarding "harassing" messages left on Garcia's voice mail. On July 26, 2000, Shafer responded stating that Garcia should consider getting an attorney to handle the EEOC complaint and further stating that she would accompany Garcia to any interview the District held regarding her internal complaint.

On July 28, 2000, Garcia sent a message to Shafer regarding her use of sick and personal leave while on medical leave. On July 31, 2000, Shafer responded stating that the law required Garcia to use her personal, sick and vacation leave before her Worker's Compensation benefits kick in.

On August 28, 2000, Garcia informed Shafer that the EEOC has scheduled a mediation session for September 21, 2000. On that same date, Shafer informed Garcia that she was unavailable on that date, and as Garcia's attorney was also unavailable, the mediation should be rescheduled. Additionally, Shafer stated that CSEA's legal staff does not represent employees in EEOC complaints and thus Shafer would be available to advise until Garcia retained an attorney. Finally, Shafer stated that Garcia should provide the EEOC with a list of witnesses if Garcia wished for them to be subpoenaed.

On August 28, 2000, Garcia sent a list of questions to Shafer regarding the filing of grievances. Specifically, Garcia requested a grievance be filed over the harassment, and letter of reprimand. On August 29, 2000, Shafer responded to Garcia's questions by stating that a grievance cannot be filed regarding sexual harassment, as the contract does not contain any language regarding harassment or discrimination, nor does the contract allow employees to file against other employees. Finally, Shafer informed Garcia that although a representative would attend the mediation session with her, Garcia needed to get an attorney who specialized in these matters.

After receiving Shafer's response, Garcia sent Shafer another message stating she wanted a grievance filed against her supervisor for harassment and discrimination. Shafer responded that same day, again stating that CSEA could not file a grievance against Downs for discrimination or harassment as the contract did not allow for such grievances. Additionally, Shafer noted that the timelines under the contract state that a grievance must be filed within 20 days of the act or condition which is the basis of the complaint.

On August 30, 2000, Shafer informed Garcia that she needed a list of witnesses who had seen the alleged harassment first hand. Additionally, Shafer informed Garcia that she should file a harassment complaint as soon as possible, to comply with the District's policy. On that same date, Garcia sent Shafer an 11 page, single-spaced message with the names of witnesses, both friendly and hostile.

On September 1, 2000, Garcia sent a message to Shafer stating that although she had met with an attorney, she did not want to pay the retainer fee, and thus wanted CSEA to represent her at the mediation. On September 8, 2000, Garcia sent a message to Barbara Miller, the CSEA representative who would be accompanying Garcia to the EEOC mediation session. Garcia requested information regarding the contacting of witnesses, however it does not appear that Garcia requested the EEOC subpoena any witnesses. On Miller's advice, Garcia sought statements from

witnesses, including Carroll. However, it appears none of the witnesses were willing to give statements.

On September 20, 2000, Garcia met with Miller to discuss the mediation session scheduled for the next day. Garcia alleges CSEA was not prepared to represent her at the mediation session and that Shafer was not prepared. As Garcia was getting upset, she called the EEOC and rescheduled the mediation session for a future date.

On October 2, 2000, Garcia sent a message to Shafer regarding the status of her witness statements. On October 3, 2000, Shafer responded that CSEA would be sending letters to all the witnesses requesting statements on Garcia's behalf.

On November 16, 2000, Garcia was informed by the District that her employment would be terminated effective November 28, 2000, as she had used all of her available sick and personal illness leave. On November 28, 2000, Garcia was terminated from her employment with the District.

The above-stated facts fail to state a prima facie violation for the reasons that follow.

Charging Party has alleged 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). 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.]

The duty of fair representation is limited to contractually-based remedies under the union's exclusive control. (San Francisco Classroom Teachers Association (Chestanque) (1985) PERB Decision No. 544 (association not required to represent teacher in Education Code proceedings).) A contractually-based remedy is one found in the collective bargaining agreement between the District and the Association. As such, PERB will dismiss charges based on a union's failure to pursue noncontractual administrative or judicial remedies. (Id.) Since the employee may retain private counsel for representation in these noncontractual matters, the union's refusal does not bar the individual from seeking redress on his or her own. (California State Employees Association (Darzins) (1985) PERB Decision No. 546-S.)

Garcia alleges CSEA is obligated to provide her fair representation in both the EEOC matter and the sexual harassment complaints. However, as noted above, CSEA's duty is limited to contractually-based remedies under their exclusive control. As both the EEOC matter and the complaint procedure are outside CSEA exclusive control, they do not owe Garcia a duty of fair representation.[1] (San Francisco Classroom Teachers Association (Chestanque) (1985) PERB Decision No. 544 (association not required to represent teacher in Education Code proceedings).)

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

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[1] It appears Ms. Shafer attempted to inform Charging Party of such representation rights when she informed her that a grievance could not be filed as the allegations were outside the contract.

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 February 22, 2001, I shall dismiss your charge. If you have any questions, please call me at (510) 622-1023.

Sincerely,

TAMMY SAMSEL
Regional Attorney