STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RITA ANN SIMPSON, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 130, Respondent.	Case No. LA-CO-1087-E PERB Decision No. 1550 October 17, 2003

Appearances: Sherri L. Honer, Attorney, for Rita Ann Simpson; California School Employees Association by Douglas Herbek, Attorney, for California School Employees Association & its Chapter 130.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Rita Ann Simpson (Simpson) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleges that the California School Employees Association & its Chapter 130 (CSEA) denied Simpson the right to fair representation guaranteed by Section 3544.9 of the Educational Employment Relations Act (EERA)[1] and thereby also violated Section 3543.6(b).

[1] EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code. Section 3544.9 states:

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

EERA Section 3543.6(b) states, in part:

> It shall be unlawful for an employee organization to:

After reviewing the entire record in this case, the Board dismisses Simpson's charge based on the discussion below.

BACKGROUND

According to the charge, Simpson was a bus driver for the Fullerton School District (District) and in the bargaining unit represented by CSEA. On February 2, 2000, she was placed on administrative leave pending an investigation into her alleged intimidating behavior toward other employees. Simpson contacted CSEA President Daniel Smith (Smith) for assistance. Initially, he did not return her calls and later indicated that he knew nothing about the charges against her.

Upon Simpson's return to work on March 6, 2000, she received a notice of proposed disciplinary action for insubordination and threatening behavior. The notice was amended March 14, 2000, to include allegations of dereliction of duty and dishonesty, and again four days later for willful violation of rules. Simpson states in her charge that she attempted "to secure representation by the union and its representatives." However, because Simpson could not secure representation from Smith, she hired private counsel to challenge her dismissal before the employer's personnel commission (commission). In a letter, dated March 15, 2000, CSEA confirmed that it was not representing Simpson in the disciplinary proceedings.

In July and August 2001, a hearing was held before the commission. At the hearing, Smith testified that in December 1999, he had encouraged another employee, Teri Gonzalez

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(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.

(Gonzalez), to go to management with her concerns about Simpson. According to Simpson, this was the first time she became aware of Smith's "role" in the complaint filed by Gonzalez against her.

According to the charge, Simpson discovered during the commission hearings that Smith had encouraged Gonzalez to file a complaint with the employer. Simpson alleges that Smith did so without providing her any opportunity to defend herself or explain her side of the story. At the hearing, Smith also testified, "I could not handle the problem because it was over my head." Without providing details, the charge states that Smith testified "against" Simpson at the hearing, and made himself available to do so at a workers' compensation hearing.

The commission eventually exonerated Simpson. The unfair practice charge seeks reimbursement for attorney fees that Simpson incurred during the commission proceedings.

BOARD AGENT'S DISMISSAL

The Board agent dismissed the charge, in part, because the alleged unfair practice occurred more than six months prior to the filing of the charge. Specifically, Simpson was notified on March 15, 2000, that CSEA would not represent her during the disciplinary proceedings. However, Simpson did not file her charge until January 14, 2002. Simpson argued that her charge was not time-barred because she did not discover the full extent of Smith's involvement until the July 19, 2001, hearing. The Board agent agreed that the "new information" Simpson discovered during the July 19, 2001, hearing fell within the six-month limitations period.

Although part of the charge was found to be timely, the Board agent dismissed the remainder of the charge on the basis that Simpson had failed to demonstrate that CSEA, through Smith's actions, violated the duty of fair representation. The Board agent considered Simpson's allegation that Smith had advised another CSEA member to file a complaint against

her, yet Smith told Simpson he had no knowledge about the complaint. Smith also failed to represent Simpson during the disciplinary process and he testified "against" Simpson at the commission hearing. In addition, the Board agent considered Simpson's allegations that Smith had not performed his duties as described in CSEA training modules and had breached his "fiduciary duty" toward her. After considering all the allegations, the Board agent concluded that Smith's conduct, even if true, did not demonstrate sufficient "arbitrary, discriminatory or bad faith" representation as to demonstrate a breach of the duty of fair representation. Accordingly, the Board agent dismissed Simpson's charge.

SIMPSON'S APPEAL

In her appeal, Simpson argues that the Board agent erred in dismissing her charge. Simpson argues that the Board agent should have focused on Smith's failure to follow his CSEA training which required him to investigate the allegations against Simpson. Further, Simpson argues that Smith ignored his own admitted practice of mediating disputes between employees. Finally, Simpson points to the allegation that Smith instructed another employee to file a complaint against Simpson and accompanied that employee to the supervisor's office to ensure the complaint was lodged. Taken in total, Simpson argues, Smith's actions clearly violated his CSEA training as well as his duty to Simpson as her union representative.

CSEA'S RESPONSE

CSEA argues that Simpson's charge fails to state a prima facie case of the breach of the duty of fair representation. In addition, CSEA contends that Simpson has inappropriately added new factual allegations to her appeal without good cause being shown. Further, CSEA contests the factual allegations as set forth by Simpson. CSEA asserts that Smith did not initiate the proceedings against Simpson, but merely suggested to another employee that she take her complaint about Simpson to her supervisor. CSEA argues that Simpson has not

demonstrated that Smith had facts regarding the District's investigation in February 2000, when he told her he had no knowledge of it. Finally, CSEA argues that Smith's testimony at the commission hearing was not a violation of the duty of fair representation and that CSEA's case-handling manual is inapplicable to this case.

DISCUSSION

Duty of Fair Representation

Simpson alleges that CSEA violated its duty of fair representation by refusing to represent her at the commission hearing in July 2001. This charge must be dismissed, because the duty of fair representation does not apply in proceedings before the commission. This is because the duty of fair representation only applies to proceedings where representation is exclusively provided by the union.

The duty of fair representation applies to negotiation and administration of the labor agreement. (Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.) An exclusive representative violates this obligation when its conduct toward a bargaining unit member is "arbitrary, discriminatory, or in bad faith" in contract negotiations or grievances involving contract enforcement. (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.) The duty of fair representation arose from judicial concerns that the union's status as the exclusive representative could be abused. (Steele v. Louisville and Nashville Railroad (1944) 323 U.S. 192 [65 S.Ct. 226].) In Vaca v. Sipes (1967) 386 U. S. 171 [87 S.Ct. 903], the Supreme Court specifically recognized that the source of the duty of fair representation was the union's status as exclusive representative. Accordingly, the duty of fair representation requires that "a union represent fairly the interest of all bargaining-unit members during the negotiation, administration and enforcement of

collective bargaining agreements". (Electrical Workers (IBEW) v. Foust (1979) 442 U.S. 42 [99 S.Ct. 2121].)

Following private sector precedent, PERB has long held that the duty of fair representation is limited to negotiations and contractually based remedies under the union's exclusive control. (Los Angeles City and County School Employees Union, Local 99 (Morgan) (1987) PERB Decision No. 645 (charge alleging poor representation before personnel commission dismissed).) There is no duty of fair representation owed a bargaining unit member unless the union "possesses the exclusive means by which such employee can obtain a particular remedy." (San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 544 (duty not extended to mental illness proceeding under the Education Code); California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S (CAUSE) (no duty of fair representation in a disciplinary matter before the State Personnel Board).) One court has interpreted the Meyers-Milias-Brown Act (MMBA)[2] to impose a "duty akin" to the duty of fair representation if the union voluntarily chooses to represent an employee in a forum that does not require exclusive representation by the union. (Lane v. I.U.O.E. Stationary Engineers (1989) 212 Cal. App.3d 164 [260 Cal.Rptr. 634] (alleged poor representation before civil service commission) (Lane).)[3] However, PERB has interpreted Lane to be limited to that situation in which "the union had affirmatively undertaken representation" and not in a case in which the union considered and rejected representation. (CAUSE.)

[2] The MMBA is codified at Government Code section 3500 et seq.

[3] As noted below, the Board has not yet had the opportunity to consider whether the "duty akin" doctrine should be extended beyond the MMBA.

Accordingly, the general rule is that when bargaining unit members are free to represent themselves or hire an attorney to pursue their claim, the union is not bound by the duty of fair representation. Here, the record reveals that Simpson was successfully represented before the commission by a non-CSEA attorney. Thus, CSEA did not control the exclusive means by which Simpson could represent herself before the commission. Under the PERB precedent discussed above, the duty of fair representation does not apply in this situation.

Simpson also alleges that CSEA violated its duty of fair representation by choosing to represent Gonzalez in Gonzalez' complaint against Simpson and by allowing Smith to testify against Simpson at the commission hearing in July 2001. In essence, Simpson alleges that CSEA violated its duty of fair representation by choosing to represent one bargaining unit member over another. Simpson's appeal implicitly urges the Board to extend the "duty akin" doctrine recognized in Lane to EERA and to impose some sort of a duty on the union when it voluntarily chooses to represent one unit member to the detriment of another. Although there are strong arguments in favor of such an extension, the Board declines Simpson's invitation because, even assuming that her allegations are timely[4], Simpson has failed to allege facts to support her conclusory allegations. (PERB Reg. 32615(a)(5).[5])

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[4] Any alleged unfair practices that occurred prior to July 2001, must be dismissed as untimely. Simpson was notified in writing on March 15, 2000, that CSEA would not represent her in the disciplinary proceedings. Accordingly, any charge arising from those facts should have been filed by September 16, 2000. (EERA sec. 3541.5(a)(1).)

[5] PERB regulations are codified at California Code of Regulations, title 8, section 31001, et. seq. Regulation 32615(a)(5), states, in part:

> (a) A charge may be filed alleging that an unfair practice or practices have been committed. The charge shall be in writing, signed under penalty of perjury by the party or its agent with the declaration that the charge is true, and complete to the best of the charging party's knowledge and belief, and contain the following information:

First, despite being provided an opportunity, Simpson never articulates how Smith testified "against" her. In her brief, Simpson argues that Smith "voluntarily" testified against her. However, Simpson admits in a footnote that she had in fact subpoenaed Smith herself. Having subpoenaed Smith, Simpson cannot complain that the District took the opportunity to place him on the stand.

Further, the facts do not support Simpson's allegation that CSEA chose to "represent" Gonzalez. The original and amended charges merely allege that Smith suggested to Gonzalez that she could take her concerns to management. There is no evidence CSEA provided any representation to Gonzalez. Again, Simpson was provided an opportunity to cure this defect by filing an amended charge with more facts. However, Simpson's amended charge fails to provide any more facts about CSEA's "representation" of Gonzalez. Thus, Simpson has failed to allege facts demonstrating that CSEA provided representation to Gonzalez or that CSEA advocated against her before the commission. Accordingly, Simpson's charge must be dismissed.

ORDER

The unfair practice charge in Case No. LA-CO-1087-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

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(5) A clear and concise statement of the facts and conduct alleged to constitute an unfair practice

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8384
Fax: (916) 327-6377

April 11, 2002

Rita Ann Simpson

Re: Rita Ann Simpson v. California School Employees Association & its Chapter 130
Unfair Practice Charge No. LA-CO-1087-E
DISMISSAL LETTER

Dear Ms. Simpson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 14, 2002. As Charging Party, you allege that the California School Employees Association & its Chapter 130 violated the Educational Employment Relations Act (EERA)[1] by breaching its duty of fair representation.

I indicated to you in my attached letter dated March 11, 2002, 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 March 21, 2002, the charge would be dismissed. I spoke with you by phone on March 19, 2002, and you requested a one week extension to file an amended charge. I agreed and extended the deadline for amending this charge until March 28, 2002. I received the amended charge on April 2, 2002.

In brief the original charge alleges that CSEA through Chapter 130 President Daniel Smith breached its duty of fair representation by failing to assist you throughout the disciplinary process,[2] by breaching your right to confidentiality and by testifying against you at the disciplinary hearing.

The amended charge contains the following information. On July 19, 2001, during a hearing before the District's Personnel Commission, Mr. Smith testified against you and during his testimony you discovered the following information.[3] In December 1999, Mr. Smith met with Teri Gonzalez and another employee to discuss complaints against you. Although Mr. Smith

[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.

[2] In February 2000, you were placed on administrative leave due to complaints brought against you by co-workers.

[3] You are unaware of whether or not Mr. Smith was subpoenaed to testify before the Personnel Commission.

met with and discussed the complaint with Ms. Gonzalez, he failed to meet with you regarding the complaints. In February 2000, when you asked Mr. Smith about the complaints against you, he denied any knowledge of them. However, you discovered during his testimony in July 2001 that this statement was untrue. Mr. Smith testified that he had a duty to mediate when a problem arose between bargaining unit members. When asked why he had not tried to resolve the dispute between you and Ms. Gonzalez, Mr. Smith testified "...I could not handle this problem because it was way over my head."

In your amended charge you make the following allegations against Mr. Smith. First, you allege that Mr. Smith acted in an arbitrary manner by failing to provide a rational basis or explanation for his lack of representation on your behalf. Second, you allege that Mr. Smith breached the duty of fair representation by testifying against you. Third, you allege that CSEA through Daniel Smith violated CSEA's Modules 301 and 302 as they relate to and define the "Duty of Fair Representation."[4] These Modules are used by CSEA during the training of job stewards. Fourth, you assert that Mr. Smith violated CSEA policy 606 by not requesting assistance from the State Association with the complaints in late 1999 and early 2000. In the amended charge, you state that policy 606 provides that if a chapter refuses to provide assistance and/or request assistance for a member confronted by disciplinary action from the District, the member may appeal the chapter's refusal and request assistance from the State Association.[5] Finally, you argue that Mr. Smith's decision to testify against you was a breach of the union's fiduciary duty.

On April 9, 2002, at my request you faxed me a copy of a letter sent to you by CSEA Labor Relations Representative William A. Lokay on March 15, 2000. Therein Mr. Lokay states because you hired outside counsel to represent you in your disciplinary proceedings, CSEA was disassociating itself from any and all disciplinary representation efforts on your behalf.

Discussion

As stated in the March 11, 2002 warning letter, EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying

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[4] In your amended charge you cite the Modules as defining the Duty of Fair Representation as:

> **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.** (emphasis in amended charge.)

[5] You did not appeal to the State Association.

the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) The Board has found that in duty of fair representation cases, a claim accrues when the Charging Party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (California School Employees Association (LaFountain) (1992) PERB Decision No. 925.)

Because this charge was filed on January 14, 2002, only alleged misconduct of which you became aware on or after July 14, 2001 meets the requisite statute of limitations. CSEA sent you a letter on March 15, 2000, stating that it would no longer represent you. Thus you had six months from that day, until September 15, 2000, to argue that CSEA's lack of representation of you during the disciplinary process was violative of its duty of fair representation. Because you filed this charge on January 2002, this allegation is outside the requisite statute of limitations and must be dismissed.

However, the new information you acquired during the July 19, 2001 hearing is within the six month statute of limitation.

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). In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent'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 omitted.]

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 stated in the March 11 letter, you have not presented any facts to demonstrate that Mr. Smith's meeting and discussing matters with Ms. Gonzalez in December 1999 was "arbitrary, discriminatory or in bad faith." In addition, the fact that he met with Ms. Gonzalez and then

told you he knew nothing about the complaint does not in and of itself demonstrate bad faith on Mr. Smith's part and is thus not violative of the union's duty of fair representation.

In addition, you allege that Mr. Smith acted in an arbitrary manner by failing to provide a rational basis or explanation for his lack of representation on your behalf and that his testimony about being over his head is indicative of his arbitrary actions. As stated above in order to state a prima facie case of arbitrary conduct, as Charging Party you must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner CSEA's action or inaction was without a rational basis or devoid of honest judgment. You do not assert any facts to show how Mr. Smith's inaction, and that his being in over his head, was without a rational basis or devoid of honest judgment. Thus you have not shown that Mr. Smith's lack of an explanation violated CSEA's duty of fair representation.

Further, the fact that Mr. Smith testified against you in July 2001 does not in and of itself breach CSEA's duty of fair representation. It is not clear whether Mr. Smith testified against you voluntarily or because he was subpoenaed to testify. You present no facts to demonstrate that Mr. Smith's testifying against you was done in bad faith in violation of CSEA's duty of fair representation.

Again as stated in the March 11 warning letter, PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

You allege that Mr. Smith's violation of CSEA's training modules and CSEA policy 606 demonstrate a breach of the duty of fair representation. For a determination of whether or not CSEA violated the duty of fair representation under EERA and PERB case law, the training modules do not provide an independent standard. Thus as Charging Party it is your burden to demonstrate how Mr. Smith did not follow these modules and how that action by Mr. Smith was "arbitrary, discriminatory or in bad faith." You do not do so here. Instead you state the legal conclusion that he violated the modules which in turn violated CSEA's duty of fair representation, which is insufficient to state a prima facie violation of EERA. As for CSEA's policy 606, you note that under the policy that a member whose chapter refuses to provide assistance in a disciplinary action may appeal this decision to the State Association. You made no such appeal and therefore have not shown "how" or "what" Mr. Smith did to violate the policy and CSEA's duty of fair representation.

Finally you allege that CSEA violated its fiduciary duty. However, you do not provide sufficient facts to demonstrate how CSEA violated this duty. Nor have you demonstrated the "who, what, when, where and how" the breach of a fiduciary duty violates CSEA's duty of fair representation. You do not satisfy the PERB's requirement that an unfair practice charge

include a clear and concise statement of the facts and conduct alleged to constitute an unfair practice.

Therefore, I am dismissing the charge based on the facts and reasons contained above and in my March 11, 2002 letter.

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 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

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

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
General Counsel

By
Marie A. Nakamura
Regional Attorney

Attachment

cc: Douglas Herbek

MAN

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8384
Fax: (916) 327-6377

March 11, 2002

Rita Ann Simpson

Re: Rita Ann Simpson v. California School Employees Association & its Chapter 130
Unfair Practice Charge No. LA-CO-1087-E
WARNING LETTER

Dear Ms. Simpson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 14, 2002. As Charging Party, you allege that the California School Employees Association & its Chapter 130 violated the Educational Employment Relations Act (EERA)[1] by breaching its duty of fair representation.

Facts

You worked as a bus driver for the Fullerton School District and were a member of CSEA.

On February 2, 2000, you were placed on administrative leave. The entirety of the letter informing you of the administrative leave states:

> Effective immediately, you are placed on Paid Administrative Leave until further notice while an investigation is conducted concerning alleged intimidation of other Transportation Department employees.
>
> You are hereby directed to remain off District premises and to refrain from contact with District employees at the work site during the course of the investigation.

When you were placed on administrative leave, no one explained to you what was meant by "intimidation of other Transportation Department Employees." No union representative was present when you received the letter.

After being placed on leave, you attempted to call CSEA Chapter 130 President Daniel Smith for assistance. Initially he did not return your phone calls. When you did speak with him he was "cold" towards you and indicated that he knew nothing about the charges against you.

[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.

Because you had been placed on sedatives by your doctor, you were unable to return to work for a month. During the month you were taken off of work by the doctor, no one from CSEA contacted you.

On March 6, 2000, you returned to work. After your morning bus route, you found a document in your in-box entitled Notice of Proposed Disciplinary Action. The notice alleges that you violated the following rules:

> 160.1.4.3 Insubordination-Knowingly refusing to perform lawful and reasonably assigned duties.
>
> 160.1.4.13 Abusive or threatening behavior towards a pupil, a member of the public, another District employee, or a District official.

The notice sets forth three charges against you. The first charge alleges that on December 16, 1999, you spoke with Bus Driver Terry Gonzalez and that you became agitated and upset because Ms. Gonzalez wanted to drop one of her bus routes. Ms. Gonzalez felt intimidated by your aggressive and threatening response. The second charge alleges that on January 27, 2000, you confronted substitute Bus Driver Rosalva Cruz[2] and in a "threatening" manner you demanded to know how many hours Ms. Cruz was working. Ms. Cruz stated that she felt harassed and intimidated by your conversation and that she felt as though you were accusing her of "stealing someone else's hours." The third charge alleges that on January 31, 2000, Ms. Gonzales was speaking with Bus Driver Homer Sanchez and that you allegedly said in a loud voice, "Homer, have you heard anything about the senior drivers treating the new drivers badly?" Ms. Gonzalez felt uncomfortable and intimidated by the conversation.

The remainder of the notice addresses "Past Remediation," "Your Right To Representation," and your "Right To Hearing Before Superintendent."

On March 14, 2000, the District provided you with an Amended Notice of Proposed Disciplinary Action. The amended notice alleges that you violated two additional rules:

> 160.1.4.4 Inattention to or Dereliction of Duty-A pattern of continued or dereliction in the performance of assigned duties.
>
> 160.1.4.20 Dishonesty, theft, willful misuse, destruction or mishandling of District property.

The amended notice contains an additional alleged charge. On March 7, 2000, you were unable to locate the radio/cell phone assigned to you by the department. The amended notice states "[i]t is your responsibility to ensure that the phone is secured at all times."

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[2] In your charge you state that Ms. Cruz was not a member of CSEA.

On March 18, 2000, the District provided you with a Second Amended Notice of Proposed Disciplinary Action wherein the District alleges that you violated the following additional rule:

> 160.1.45 Willful and persistent violation of the Education Code, of rules and Regulations or procedures adopted by the District or a department when such procedures are made known to the employee in writing.

The second amended notice contains what the District characterizes as six additional charges. However, the six charges all relate to one incident on April 26, 2000 when you allegedly backed into a fence and broke the left rear turn signal and bulb of the bus you were driving. You reported the incident to Services Mechanic Jon Andrews, who replaced the lens. The second amended notice proceeds to explain that you did not follow the proper procedure for reporting accidents and that because you had more than one preventable accident a Performance Improvement Plan was developed for you.

Although you attempted to work in March and April 2000, by May 2000 your doctor removed you from work. After your sick leave and vacation time were exhausted, you resigned from the District in February 2001. Throughout the disciplinary process you received no assistance from Mr. Smith or CSEA.

On July 19, 20, and August 9 and 15, 2001, a hearing was held before the District's Personnel Commission. On July 19, Mr. Smith testified that he had met with Ms. Gonzalez in December 1999 and that he had encouraged her to go to management and file charges against you. This testimony contradicts Mr. Smith's statements to you in February 2000 that he was unaware of the charges against you. He also testified that during a meeting with Ms. Cruz he had apologized on your behalf. Prior to July 2001, you were unaware of either of these conversations.

After the hearing the Personnel Commission found that the testimony and evidence presented by the District failed to meet the District's burden of proof and therefore all charges against you were dropped.

Article 24.1 of the collective bargaining agreement states in part that "[p]rocedures for Disciplinary and Action and Appeal are governed by Chapter 160 of the Personnel Commission's Rules and Regulations of the Classified Service."

Discussion

Although you allege that CSEA through Daniel Smith breached its duty of fair representation by failing to assist you throughout this process, by breaching your right to confidentiality and by testifying against you at the hearing, this charge fails to establish that CSEA breached its duty of fair representation.

First, EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or

should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) The Board has found that in duty of fair representation cases, a claim accrues when the Charging Party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (California School Employees Association (LaFountain) (1992) PERB Decision No. 925.)

Because this charge was filed on January 14, 2002, only alleged misconduct of which you became aware on or after July 14, 2001 meets the requisite statute of limitations. You allege that CSEA breached its duty of fair representation when it failed to assist you throughout the disciplinary proceedings. You were originally placed on leave in February 2000, which was almost two years prior to the filing of this charge. You requested assistance from CSEA and Mr. Smith soon after you were placed on leave. Although you requested assistance from Mr. Smith in February 2000, assistance from Mr. Smith and CSEA was not forthcoming. You did not request further assistance from the union. By February 2001, when you retired from the District and had not yet received any assistance from CSEA, you should have known that further assistance from the union was unlikely. You had six months from February 2001 to file a charge based on that allegation. You have not met your burden of demonstrating that the allegation that CSEA breached its duty of fair representation when it failed to assist you was raised in a timely manner.

Second, PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

You allege that Mr. Davis breached your right to confidentiality. However, neither the charge nor the additional information received during this investigation provide any factual support to this allegation. Therefore as for that allegation you have not provided the requisite "clear and concise statement of facts and conduct" to constitute a breach of CSEA's duty of fair representation within the requisite statute of limitations.

Third, you allege that CSEA denied you the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b) when Daniel Smith met with Ms. Gonzalez and encouraged her to file a complaint against you and met with Ms. Cruz and apologized on your behalf. In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent'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 omitted.]

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.]

Because you did not learn of Mr. Smith's conversations until July 19, 2001 and you filed this charge on January 14, 2002, these allegations are within the six month statute of limitations. However, you have not presented any facts to demonstrate that Mr. Smith's meeting and discussing matters with Ms. Gonzalez and Ms. Cruz was "arbitrary, discriminatory or in bad faith." Nor have you presented any facts to demonstrate that Mr. Smith's initial denial in February 2000 regarding his knowledge of the basis of the charges against you was "arbitrary, discriminatory or in bad faith." Thus his actions do not amount to a breach of the union's duty of fair representation.

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 that 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 Thursday, March 21, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Marie A. Nakamura
Regional Attorney

MAN