



STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CORNELIU SARCA,

Charging Party,

v.

CALIFORNIA STATE EMPLOYEES
ASSOCIATION, CSU DIVISION,

Respondent.

Case No. SA-CO-18-H

PERB Decision No. 1626-H

April 29, 2004

Appearances: Corneliu Sarca, on his own behalf; California State Employees Association by Harry J. Gibbons, Attorney, for California State Employees Association, CSU Division.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Corneliu Sarca (Sarca) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the California State Employees Association, CSU Division (CSEA) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to properly calculate agency fees.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, Sarca's appeal and CSEA's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

¹HEERA is codified at Government Code section 3560, et seq.

ORDER

The unfair practice charge in Case No. SA-CO-18-H is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member 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



June 24, 2003

Corneliu V. Sarca

Re: Corneliu Sarca v. California State Employees Association, CSU Division
Unfair Practice Charge No. SA-CO-18-H
DISMISSAL LETTER

Dear Mr. Sarca:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 4, 2003. Your charge alleges that the California State Employees Association, CSU Division (CSEA) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to properly calculate agency fees.

I indicated in the attached letter dated May 23, 2003, 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 June 3, 2003, the charge would be dismissed. On June 2, 2003, you filed an amended charge.

The amended charge provides additional information in support of the allegations raised in your charge, including the 2002 agency fee notice, the arbitrator's award, a partial transcript of the agency fee arbitration hearing and the CSEA Financial Status Report dated April 30, 2002. In addition, at my request you provided me with a copy of the post-hearing brief you submitted following the arbitration hearing.

Your charge alleges that CSEA incorrectly calculated the 2002 agency fee because the Union did not account for the prior year's surplus of revenues. You contend that agency fees can only be used for chargeable expenses and any surplus at the end of the year must either be returned to fee payers or be used to reduce the following year's agency fee. PERB Regulation 32992 states, in relevant part:

- (a) Each nonmember who will be required to pay an agency fee shall annually receive written notice from the exclusive representative of:

¹ HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

(1) The amount of the agency fee which is to be expressed as a percentage of the annual dues per member based upon the chargeable expenditures identified in the notice;

As discussed in the attached letter, the amount of an agency fee is based on the expenditures made by a union. Until the monies set aside in a reserve fund are spent, they are not used as a basis for calculating the percentage of an agency fee. The financial documents you provided indicate that the CSEA CSU Division maintains four reserve funds, including the General Fund, Long Term Debt Fund, Strike Fund and Defense Fund. As previously stated, I am not aware of any case law which precludes the Union from maintaining a reserve fund of surplus income. You agree that a union may maintain reserve funds, but contend that only revenues from union member dues can be placed in reserve funds. You assert that income from dues and agency fees should be kept in separate accounts. The charge did not identify any legal support for the theory that agency fees cannot be placed in reserve funds. Thus, this allegation does not state a prima facie case and is dismissed.

The charge also alleges that the independent auditor did not follow accounting standards because he did not include the prior year surplus as the beginning balance for the 2002 financial reports. Had the auditor done this, the surplus would have been applied toward the chargeable expenses, thus reducing the amount of the agency fee necessary to cover the remaining chargeable expenses.

The April 30, 2002 financial status report indicates that the surplus was divided among the reserve funds. As discussed above, nothing precludes the Union from maintaining fiscal reserves. Once these monies are spent, the expenditures are characterized as chargeable or non-chargeable to agency fee payers. Under PERB Regulation 32992, characterization of chargeable and non-chargeable expenditures determines what percentage of union dues an agency fee payer will be assessed. The calculation of the chargeable percentage does not limit the amount that a union can charge its members for dues. Therefore, this theory does not demonstrate a violation of HEERA.

The charge also alleges that the auditor made misleading statements. The auditor testified that he had read court decisions concerning the calculation of agency fees and was familiar with the chargeable/non-chargeable expenditure requirements. However, when you asked him if he was familiar with federal and state statutes relating to agency fee calculations, the auditor testified that he was not aware of any applicable statutes. You contend that this demonstrates that the auditor's testimony was misleading. These facts do not demonstrate a material misrepresentation in the audit of CSEA's financial records. A lack of knowledge of agency fee statutes does not render the audit of CSEA's expenditures invalid under HEERA.

Finally, the charge alleges that the arbitrator's award is repugnant under HEERA. You contend that the arbitrator would not allow you to question the CSEA attorney or ask questions of law. Further, the American Arbitration Association did not forward your post-hearing brief to the arbitrator.

As stated in the attached letter, PERB will defer to an arbitrator's decision in an agency fee case and dismiss an unfair practice charge where: (1) the arbitration proceedings were fair and regular, and (2) the arbitrator's decision is not clearly repugnant to the purposes of HEERA. (ABC Federation of Teachers, AFT Local 2317 (Murray, et al.) (1998) PERB Decision No. 1295.)

First, an agency fee arbitration hearing is held to determine whether a union has properly calculated its agency fee based on its past expenditures. An arbitrator makes this determination based on the facts gathered at the hearing through testimony and documentary evidence. The arbitrator and the parties are presumed to know the applicable law. Thus, a discussion of the law during the hearing is usually unnecessary. Further, an attorney cannot be compelled to testify on behalf of his client in an agency fee arbitration proceeding. The arbitrator did not improperly prohibit your questioning of counsel for CSEA. Therefore, this allegation does not state a prima facie violation of HEERA and is dismissed.

Second, you contend that the proceedings were not fair and regular because the American Arbitration Association did not forward your post-hearing brief to the arbitrator. During the arbitration hearing you questioned both the CSEA controller and the independent auditor. Further, you made a closing argument on the record. In your closing argument, you discussed the surplus and the failure to reflect the surplus as the beginning balance on CSEA's financial statements. You stated that the surplus must be used to reduce the amount of the chargeable expenses before the agency fee is calculated. You also submitted a document you prepared, titled "Fee Calculations for CSU Division for fiscal year 2002/2003," which was excepted as an exhibit.² Using this document, you explained on the record that after the surplus is subtracted from the chargeable expenses, the agency fees should properly be calculated at 34% of union dues.

The arguments in your post-hearing brief mirror your closing argument. You reiterated that agency fees must be restricted to the cost of representation and you asserted that a surplus is not a cost of representation. You stated that the surplus should be reflected as the beginning balance in the financial statements and should be subtracted from the chargeable expenses prior to the calculation of the agency fee. You also included a copy of your "Fee Calculation" document and explained how you reached an agency fee of 34%.

It is clear that the arguments discussed in your post-hearing brief were also raised in the arbitration hearing. The arbitrator had the opportunity to consider your arguments before issuing his decision in award. Thus, the charge does not demonstrate that the arbitration proceedings were not fair and regular. This allegation is, therefore, dismissed.

² This document is attached to your unfair practice charge.

Right to Appeal

Pursuant to PERB Regulations,³ 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 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).)

³ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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 _____
Robin W. Wesley
Regional Attorney

Attachment

cc: Harry Gibbons

PUBLIC EMPLOYMENT RELATIONS BOARD



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



May 23, 2003

Corneliu V. Sarca

Re: Corneliu Sarca v. California State Employees Association, CSU Division
Unfair Practice Charge No. SA-CO-18-H
WARNING LETTER

Dear Mr. Sarca:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 4, 2003. Your charge alleges that the California State Employees Association, CSU Division (CSEA) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to properly calculate agency fees.

Based on the information you provided, your charge makes the following factual allegations. You are employed by California State University, Northridge. Your job classification is included in a bargaining unit which is exclusively represented by CSEA. You have elected not to become a union member, thus, you are required to pay "fair share" or agency fees to CSEA.

After you received the 2002 agency fee notice, you filed an objection to the Union's calculation of its agency fees. A hearing was held before an arbitrator to determine whether CSEA properly calculated its agency fees. You attended the arbitration hearing and had the opportunity to question witnesses. Following the hearing, you submitted a post-hearing brief by sending it to the American Arbitration Association. The American Arbitration Association did not forward your brief to the arbitrator. On an unspecified date, the arbitrator issued a decision. The arbitrator's decision was not included with your charge.

Your charge alleges that CSEA has received income for 2000 and 2001, primarily from union dues and agency fees, far in excess of its expenditures. You provided a page from the agency fee notice which shows a surplus from operations of \$1,569,412 for 2000 and \$1,407,843 for 2001.² The CSEA controller testified at the arbitration hearing that the "surplus is recorded as an asset of the union . . . and could be spent at the union[']s discretion." You contend that the auditor did not properly identify the surplus as income for the following year. Had this been

¹ HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² This page also shows that the surpluses for each year were distributed into three different reserve funds: General Fund, Long Term Debt and Defense Fund.

done, the agency fee for the following year would have been reduced to accommodate the large surplus.

Your charge also alleges that the auditor made misleading statements. The charge did not include a copy of the audit, nor did it describe the auditor's statements or explain why they were misleading.

The charge alleges that the American Arbitration Association obstructed the arbitration process when it failed to forward your post-hearing brief to the arbitrator. Finally, you assert that the arbitrator "blocked references to the law and accounting standards." The charge alleges that "[the arbitrator's] statement that the calculation of the fee is based solely on the expenses does not have any legal base."

Based on the facts stated above, the charge does not state a prima facie violation of the HEERA.

HEERA section 3583.5 and PERB Regulation 32990(d) permit an exclusive representative to "initiate implementation of an organizational security provision for the payment of 'fair share' or 'agency shop' fees by covered employees." PERB Regulation 32992 states, in relevant part:

(a) Each nonmember who will be required to pay an agency fee shall annually receive written notice from the exclusive representative of:

(1) The amount of the agency fee which is to be expressed as a percentage of the annual dues per member based upon the chargeable expenditures identified in the notice; [Emphasis added.]

In Cumero v. PERB (1989) 49 Cal.3d 575, the California Supreme Court held that agency fees may be assessed,

to assure that nonmembers pay their fair share of the labor organization's cost of "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" (Ellis v. Railway Clerks, *supra*, 466 U.S. 435, 448 [80 L.Ed.2d at p. 442], quoted in Communication Workers v. Beck (1988) 487 U.S. 735, 762-763 [101 L.Ed.2d 634, 657, 108 S.Ct. 2641, 2657]), and the nonmembers' residual statutory right not to participate entitles them to refuse payment of more than their fair share of such *expenses*. Those *expenses* include "not only the direct cost of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the *expenses* of activities or undertakings normally or reasonably employed to implement or effectuate the

duties of the union as exclusive representative of the employees in the bargaining unit" (Ellis, supra, 466 U.S. at p. 448 [80 L.Ed.2d at p. 442]). [Emphasis added.]

These rulings demonstrate that the courts have protected the rights of agency fee payers by prohibiting unions from spending their agency fees on activities unrelated to collective bargaining. Holding unspent fees in a savings account, however, is not an expenditure.

We discussed your charge on several occasions. As I understand, you contend that the Union has collected a large surplus which should either be returned to agency fee payers or be used to reduce the amount of the agency for the subsequent year. As stated in PERB Regulation 32990(d), the amount of an agency fee is based on the expenditures made by a union. Until the monies in a reserve fund are spent, it is not used as a basis for calculating future agency fees. Further, I am not aware of any case law which precludes a union from maintaining a reserve fund.³ Any challenge to whether CSEA properly characterized its expenditures as chargeable to agency fee payers must be considered in the agency fee arbitration hearing. Accordingly, this allegation does not state a prima facie case and must be dismissed.

The charge also alleges that the independent auditor who audited CSEA's financial records made misleading statements. The charge contends that the auditor did not comply with the American Institute of Certified Public Accountants Principles and Standards. As previously noted, the charge does not include a copy of the audit, nor does it describe the auditor's statements or explain why they are misleading. Thus, there is insufficient information to establish a violation under this theory and this allegation must be dismissed.

Finally, the charge alleges that the American Arbitration Association failed to forward your post-hearing brief to the arbitrator and the arbitrator "blocked references to the law and accounting standards." You also disagree with the arbitrator's statement that the calculation of agency fees is based solely on the Union's expenditures.

PERB will defer to an arbitrator's decision in an agency fee case and dismiss an unfair practice charge where: (1) the arbitration proceedings were fair and regular, and (2) the arbitrator's decision is not clearly repugnant to the purposes of HEERA. (ABC Federation of Teachers, AFT Local 2317 (Murray, et al.) (1998) PERB Decision No. 1295.)

It appears that you may be suggesting that the arbitration proceedings were not fair and regular. As previously noted, the arbitrator's decision was not included in the charge. Furthermore, you attended the arbitration hearing, had the opportunity to question witnesses and made your concerns known to the arbitrator at the hearing. There are no facts which demonstrate that the arbitrator did not consider your concerns. In fact, although you disagree,

³ The Union explained to me that the surplus is unusually large due to a dispute over assessments between CSEA and its affiliate, Service Employees International Union (SEIU). Most of the surplus is due to SEIU. However, until the dispute is resolved, CSEA is withholding payment.

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the arbitrator's statement that the calculation of agency fees is based solely on expenditures, expressly addresses your issue concerning the surplus. In addition, the facts provided do not demonstrate that the decision was repugnant to the purposes of HEERA. Thus, this allegation also fails to demonstrate a violation of HEERA and must be dismissed.

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 June 3, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney