STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LEE PETERSON, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 36, Respondent.	Case No. LA-CO-1142-E PERB Decision No. 1683 August 27, 2004

Appearances: Lee Peterson, on his own behalf; California School Employees Association by Sonja J. Woodward, Attorney, for California School Employees Association & its Chapter 36.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Lee Peterson (Peterson) from a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the California School Employee Association & its Chapter 36 (CSEA) violated the Educational Employment Relations Act (EERA)[1] by breaching its duty of fair representation.

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

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

ORDER

The unfair practice charge in Case No. LA-CO-1142-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8381
Fax: (916) 327-6377

October 21, 2003

Lee Peterson

Re: Lee Peterson v. California School Employees Association & its Chapter 36
Unfair Practice Charge No. LA-CO-1142-E
DISMISSAL

Dear Mr. Peterson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 11, 2003. Lee Peterson alleges that the California School Employees Association & its Chapter 36 violated the Educational Employment Relations Act (EERA)[1] by discriminating and retaliating against you for serving as President of the Classified Senate and barring you from simultaneously serving as an elected member of the union's Negotiating Committee or as Chief Job Steward on CSEA's Executive Board. The charge also alleges that CSEA attempted to cause the District to restrain you from exercising rights and discriminate against you for exercising rights under the EERA.

I indicated to you, in my attached letter dated September 5, 2003, that the allegations contained in the 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 these allegations to state a prima facie case or withdrew them prior to September 12, 2003, the allegations would be dismissed.

You amended your charge on September 19, 2003. The amended charge contains additional facts. However, I am dismissing the charge because the allegations fail to state a prima facie case based on the facts and reasons contained in this letter and my September 5, 2003 letter.

The amended charge presents additional information concerning your relationship with Phil Hendricks, the President of respondent. It also describes in detail the correspondence between yourself and various officers of respondent prior to the election of members of the negotiating committee in December 2002.

Your charge presents three theories of violation: 1.) respondent discriminatorily refused to permit you to run for a seat on the negotiating committee, 2.) respondent violated EERA

[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.

section 3543.1 by unreasonably prohibiting you from running for a seat on the negotiating committee because you held a position with the Classified Senate, and 3.) respondent interfered with your right to participate in the respondent's activities by prohibiting you from running for a seat on the negotiating committee.

Discrimination

PERB has long held that the standard applied in cases involving employer discrimination is appropriate in cases alleging discrimination by an employee organization. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S; California Faculty Association (Hale, et al.) (1988) PERB Decision No. 693-H; California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S.) To demonstrate a violation of EERA section 3543.6(b), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employee organization had knowledge of the exercise of those rights; and (3) the employee organization imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

In the warning letter two theories of discrimination were discussed. The first theory is that respondent discriminated against you because you held an office with the Classified Senate. The amended charge does not present any further information on this theory and there is no information that supports a finding that the Classified Senate is an employee organization under the EERA. Thus, discrimination based on participation in the Senate is not a violation of the EERA.

The second theory is that respondent discriminated against you because of your activities as the Chief Job Steward. Your amended charge presents additional information regarding this theory. However, the Board has held that in order to establish a prima facie case of discrimination by an employee organization, the charging party must demonstrate that the employee organization took adverse action. Such adverse action must impact the charging party's relationship with his/her employer. (California State Employees Association (Barker and Osuna) (2003) PERB Decision No. 1551-S.) Here, there is no demonstration that the respondent's refusal to allow you to run for the negotiating committee had an impact on your relationship with your employer. Accordingly, this allegation is dismissed.

Violation of EERA section 3543.1

There are no new facts regarding this alleged violation. Therefore, this allegation is dismissed because respondent did not suspend your membership or dismiss you from membership. Such action is a prerequisite to a prima facie violation of this section. (California State Employee Association (Barker and Osuna) (2003) PERB Decision No. 1551-S.)[2]

[2] Although this decision concerns an interpretation of Dills Act section 3515.5, it is applicable here because that section is identical to EERA section 3543.1.

Interference

The test for whether a respondent has interfered with the rights of employees under the EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

Under the above-described test, a violation may only be found if EERA provides the claimed rights.

The Board has been reluctant to interfere in the internal union affairs of an employee organization unless those affairs impact the member's relationship with his employer. (California State Employee Association (Barker and Osuna) (2003) PERB Decision No. 1551-S.) Here the employee organization choose not to allow you to run for a position on the negotiating committee. The act of running for a position on the negotiating team did not impact your relationship with your employer and is therefore not protected. Consequently, there is no violation of the EERA.

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

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

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. (Regulation 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
General Counsel

Attachment

cc: Sonja Woodward, Attorney
California School Employees Association

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8381
Fax: (916) 327-6377

September 5, 2003

Lee Peterson

Re: Lee Peterson v. California School Employees Association & its Chapter 36
Unfair Practice Charge No. LA-CO-1142-E
WARNING LETTER

Dear Mr. Peterson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 11, 2003. Lee Peterson alleges that the California School Employees Association & its Chapter 36 violated the Educational Employment Relations Act (EERA)[1] by discriminating and retaliating against you for serving as President of the Classified Senate and barring you from simultaneously serving as an elected member of the union's Negotiating Committee or as Chief Job Steward on CSEA's Executive Board. The charge also alleges that CSEA attempted to cause the District to restrain you from exercising rights and discriminate against you for exercising rights under the EERA.

My investigation revealed the following information. You are a classified employee at Santa Monica College. You served as an elected member of CSEA's Negotiating Committee and also as the elected Chief Job Steward on CSEA's Executive Board with the responsibility of processing grievances. Your term of office for these positions was January 1 through December 31, 2002. In early October 2002, you volunteered for and accepted a position as President of the District's Classified Senate, an advisory committee to the Santa Monica College District Board of Trustees which assists in developing school policies but is explicitly barred from deciding issues within the scope of representation.

Immediately following your decision to become the President of the Classified Senate, CSEA Chapter President Phil Hendricks caused a Notice of Special Membership Meeting to be posted and distributed to Chapter 36 members, pursuant to Art. IV, Sec. 5 of the Chapter Constitution, which states the following:

> Elected officers shall take office and assume their duties on the January 1 following their election and shall continue to serve for one year or until their successors are elected or appointed, provided that any officer shall automatically forfeit such office if

[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.

> they cease to be an eligible member in good standing, or if they become an elected (or interim appointed) officer or executive of another Classified Employee organization.

After the Special Meeting held on October 8, 2002, the positions of Chief Job Steward and Negotiating Committee member were filled by election. Subsequently, Mr. Hendricks and two additional members of the five-member Negotiating Committee refused to allow you to participate in the Committee's activities, including contract negotiations with the District, for the stated reason that you were then continuing to serve as President of the District's Classified Senate. Mr. Hendricks also did not allow you to complete your term as Chief Job Steward on the Executive Board.

In December 2002, you accepted nomination for reelection to the Negotiating Committee for the 2003 term. On December 31, 2002, CSEA removed your name from the list of candidates and substituted a new ballot. An unnamed CSEA member told you that Mr. Hendricks did not want you on the negotiating team because you were "too willing to settle with the District."

You filed an application for a new election and, in March 2003, the CSEA Area Director conducted a hearing and ultimately denied your request. At the hearing, the CSEA Public Relations Officer testified that she and other officers had determined that your name would be omitted from the ballot unless you resigned from serving as an officer of the Classified Senate. Former chapter officers, Deborah Jansen and Joanne Guercio, also testified, stating that they had each simultaneously served on CSEA elected office (Executive Board and Negotiating Committee, respectively) and Classified Senate office. On May 17, 2003, the CSEA Board of Directors denied your appeal of the Area Director's decision.

The charge asserts that CSEA's removal of your name from the 2003 ballot and its refusal to allow you to serve on either its Negotiating Committee or its Executive Board violate the EERA.

This information presents three possible theories under which the union's actions against you may constitute an unfair practice: union discrimination under EERA section 3543.6(a), union attempts to force the employer to violate the EERA, and union failure to comply with its obligations under EERA section 3543.1. The possible theories will be discussed in order.

PERB has long held that the standard applied in cases involving employer discrimination is appropriate in cases alleging discrimination by an employee organization. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S; California Faculty Association (Hale, et al.) (1988) PERB Decision No. 693-H; California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S.) To demonstrate a violation of EERA section 3543.6(b), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employee organization had knowledge of the exercise of those rights; and (3) the employee organization imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees

because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employee organization's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employee organization's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employee organization's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employee organization's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employee organization's cursory investigation of the employee's misconduct; (5) the employee organization's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Here, it appears that CSEA prevented you from running for a position on the Negotiating Committee because you held an office in the Classified Senate. EERA Section 3543 reads in pertinent part:

> (a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

There is no information that demonstrates that the Classified Senate is an employee organization within the definition of EERA section 3540.1(d).[2] Therefore, the holding of an office with the Classified Senate is not activity protected by the EERA.

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[2] EERA section 4540.1 reads in relevant part:

> (d) "Employee organization" means any organization which includes employees of a public school employer and which has as one of its primary purposes representing those employees in their relations with that public school employer. "Employee organization" shall also include any person such an organization authorizes to act on its behalf.

Although the charge states that CSEA's conduct was taken because you served as Chief Job Steward and sought to run for the Negotiating committee, there was no information provided that would demonstrate a nexus between these protected activities and CSEA's actions. Thus, there is no prima facie case under the theory of union discrimination.

The second theory is that CSEA violated the Educational Employment Relations Act (EERA) at section 3543.1 by unreasonably prohibiting you from running for a position on the CSEA Negotiating Committee because you held a position with the Classified Senate.

To demonstrate a violation under this theory, the charging party must show that: (1) the suspension of membership rights was equivalent to dismissal of membership from the union; and (2) the dismissal was not within the right of the union to impose "reasonable restrictions" on membership.

The right of employees to participate in employee organizations is not absolute and EERA section 3543.1(a) provides that "[e]mployee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership." In order to state a valid unfair practice involving internal union affairs, the charging party must present facts showing that the employee organization's dismissal of the employee from membership was unreasonable.

The Board has held that employee organizations have latitude to make decisions about their internal management, including discretion to strip an organizational representative of authority to act on behalf of the organization, so long as such action is not unlawfully motivated. (California State Employees Ass'n. (O'Connell) (1989) PERB Decision No. 753-H.) In California State Employees Association (Hard, et al.) (2002) PERB Decision No. 1479-S PERB's authority to determine the reasonableness of a membership provision must include not just the reasonableness of the provision itself, but the reasonableness of the provision as it was applied in the case pending before the Board. (California Correctional Peace Officers Association (Colman) (1989) PERB Decision No. 755-S.)

Your charge fails to meet this criteria. CSEA has not dismissed you from membership or suspended your rights as a member. Rather it has prevented you from becoming a member of CSEA's negotiating committee. Thus, it appears that this provision of the EERA does not apply to your situation and this allegation must be dismissed.

Finally, you assert that CSEA violated EERA section 3543.6(a) by attempting to cause the District to restrain you from exercising rights and discriminate against you for exercising rights under the EERA. There is no information provided with the charge nor discovered during the investigation that indicate how CSEA violated this provision. There is nothing in the charge that describes any actions by Santa Monica College or any action by CSEA toward the College. Therefore this allegation must be dismissed.

For these reasons the unfair practice charge, as presently written, does not state a *prima facie* case of discrimination or retaliation. 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 you, as the charging party, and 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, 2003, I shall dismiss this allegation from your charge. If you have any questions, please call me at the above number.

Sincerely,

Robert Thompson
General Counsel