STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MELANIE J. WELCH, Charging Party, v. CALIFORNIA TEACHERS ASSOCIATION AND OAKLAND EDUCATION ASSOCIATION, Respondent.	Case No. SF-CO-686-E PERB Decision No. 1850 August 17, 2006

Appearances: Melanie J. Welch, on her own behalf; Priscilla Winslow, Attorney, for California Teachers Association and Oakland Education Association.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (Board) on appeal by Melanie J. Welch (Welch) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the California Teachers Association (CTA) and Oakland Education Association (OEA) violated the Educational Employment Relations Act (EERA)[1] by breaching its duty of fair representation.

The Board has reviewed the entire record in this case including the original and amended unfair practice charge, the warning and dismissal letters, Welch's appeal and CTA's response to the appeal.[2] The Board agent properly dismissed the charge on the basis that CTA

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

[2]The Board did not consider appellant's request for late filing for good cause as Welch failed to demonstrate good cause.

is not the exclusive representative of the certificated bargaining unit in which Welch is included, and that OEA did not breach its duty of fair representation to Welch. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CO-686-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Shek joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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

March 9, 2006

Melanie J. Welch

Re: Melanie J. Welch v. California Teachers Association & Oakland Education Association
Unfair Practice Charge No. SF-CO-686-E
DISMISSAL LETTER

Dear Ms. Welch:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 27, 2006. Your charge alleges that the California Teachers Association (CTA) violated the Educational Employment Relations Act (EERA)[1] by breaching its duty of fair representation.

I indicated in the attached letter dated February 17, 2006, 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 28, 2006, the charge would be dismissed. You were granted an extension of time and an amended charge was timely filed on March 3, 2006.

Your charge alleges that CTA breached its duty of fair representation in the manner in which it represented you in matters with your employer, the Oakland Unified School District (District), including the termination of your employment in February 1999. In the amended charge, you add the Oakland Educators Association (OEA) as a separate Respondent in this case.

Briefly, as more fully summarized in the attached letter, you were hired as an intern teacher by the District in September 1998. Your employment was terminated in February 1999, after you notified the District of serious health and safety violations involving your classroom and school site.

Initially, you contacted OEA for assistance in reporting the health and safety violations. OEA representatives contacted the District, filed a grievance on your behalf and assisted you with your concerns. In addition, OEA represented you when the District falsely accused you of

[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.

erratic behavior, placed you on administrative leave and eventually terminated your employment.

At some point, rather than taking your grievance to arbitration, OEA referred you to CTA, which assigned an attorney to represent you. Over the next five years, CTA attorney David Weintraub used the circumstances of your termination to file lawsuits to establish legal precedents granting rights for intern teachers and defining "reinstatement." Despite your repeated requests, Mr. Weintraub refused to address your complaints about negligence, safety violations, defamation and other retaliation for whistleblowing. Mr. Weintraub also failed to challenge the District's assertion that it had non-reelected you, resulting in the court affirming the District's refusal to reinstate you to a teaching position.

Ultimately, on August 5, 2005, Mr. Weintraub notified you that he and CTA General Counsel Beverly Tucker had decided not to appeal the court's final decision denying you reinstatement to your previous position with the District.

As amended, you contend that all of the allegations in your charge are timely under the statute of limitations. In cases alleging a breach of the duty of fair representation, the six month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.) (1991) PERB Decision No. 889.)

The charge was filed on January 27, 2006. CTA notified you on August 5, 2005 that it did not intend to file an appeal and would not pursue your case any further. This date falls within the six-month statutory limitations period. As previously discussed, all other allegations occurring before July 27, 2005, including the decision not to take your grievance to arbitration, occurred outside the statutory time period and are dismissed.

Furthermore, the charge continues to assert a separate theory of a violation of the duty of fair representation against CTA. You contend that CTA had a duty independent of OEA to fairly represent you when it initiated and pursued litigation on your behalf.

For the reasons discussed in the attached letter, PERB has held that CTA is not an exclusive representative and does not owe a duty of fair representation to the certificated employees of the District. (California Teachers Association, CTA/NEA (Torres) (2000) PERB Decision No. 1386.) Thus, this allegation is dismissed.

The amended charge also alleges that based on the conduct described in the charge, OEA breached its duty of fair representation.

Even if this allegation were timely, it does not state a prima facie case. As previously addressed, the duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a

prima facie violation of EERA, a 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.]
>
> 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 charge alleges that you brought your health and safety concerns to OEA. OEA representatives contacted the District, filed a grievance on your behalf and assisted you with representation when the District falsely accused you of erratic behavior, placed you on administrative leave and terminated your employment. The charge alleges, however, that OEA decided to refer your case to CTA to file a lawsuit on your behalf rather than take your grievance to arbitration. This conduct does not demonstrate arbitrary, discriminatory or bad faith conduct by the Union. The charge suggests that OEA was responsive to your requests for assistance by contacting the District, representing you at meetings and filing a grievance on your behalf. There is no evidence that OEA's decision not to take your grievance to arbitration was "without a rational basis or devoid of honest judgment." Thus, this allegation is dismissed.

Finally, as more fully discussed in the attached letter, an exclusive representative does not owe a duty of fair representation to bargaining unit employees in extra-contractual forums. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) OEA obtained a CTA attorney to file a lawsuit on your behalf to challenge the termination of your employment. Because court proceedings are extra-contractual forums, the duty of fair representation does not attach to OEA's representation of your interests in court.

The amended charge alleges, however, that once OEA volunteered to represent you in an extra-contractual forum by filing a lawsuit on your behalf, the duty of fair representation attaches.

This theory has previously been brought before the Board. The theory arises under the Meyers-Milias-Brown Act (MMBA),[2] the labor statute governing local government agencies, in Lane v. IUOE Stationary Engineers, Local 39 (1989) 212 Cal.App.3d 164. PERB has never adopted the Lane theory, however, as a basis for an unfair practice. In Oakland Education Association (McKeel) (2000) PERB Decision No. 1383, the Board stated:

> PERB has viewed such a theory as implicating a cause of action in state court rather than a matter within its jurisdiction. (California State Employees Association (Cohen) (1993) PERB Decision No. 980-S.) This follows logically from the notion that such a breach of duty does not arise out of the union's status as an exclusive representative, as noted in Lane.

Accordingly, the allegation that OEA breached its duty of fair representation in the manner in which it represented you in litigation filed on your behalf, does not state a prima facie case and is dismissed.

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. (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

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

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

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

By .
Robin W. Wesley
Regional Attorney

Attachment

cc: Priscilla Winslow

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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

February 17, 2006

Melanie J. Welch

Re: Melanie J. Welch v. California Teachers Association
Unfair Practice Charge No. SF-CO-686-E
WARNING LETTER

Dear Ms. Welch:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 27, 2006. Your charge alleges that the California Teachers Association (CTA) violated the Educational Employment Relations Act (EERA)[1] by breaching its duty of fair representation.

The charge makes the following factual allegations. You were hired as an intern teacher by the Oakland Unified School District in September 1998. In October 1998, you reported to the District that your classroom was contaminated with asbestos and dangerous levels of mold. Subsequently, you filed a complaint with CalOSHA about the condition of your classroom.

On October 23, 1998, you were transferred to another school. This school was alleged to be an extremely dangerous school where many students and teachers had been attacked by gangs of boys.

On October 29, 1998, you were attacked, beaten and injured by a gang of boys at the school. When you complained that the school was unsafe and you were afraid to teach there, you were falsely accused of "erratic behavior, including hitting and kicking students." An internal investigation exonerated you of the false accusations. Nonetheless, your employment was terminated in February 1999.

You sought assistance from the Oakland Educators Association and were assigned legal representation by CTA. CTA General Counsel Beverly Tucker informed you that CTA would provide you with legal representation only if you withdrew the complaints you filed with CalOSHA and the EEOC. You withdrew your complaints and CTA filed a lawsuit on your behalf. You discovered later that CTA was interested in using your case to establish precedent on probationary rights for intern teachers. Despite your numerous requests, CTA's contract

[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.

attorney David Weintraub refused to address in the lawsuit your complaints about negligence, safety violations, defamation and other retaliation for whistleblowing. Mr. Weintraub made it clear that CTA's interest was in obtaining legal precedent that established that certain temporary teachers were entitled to the rights and protections of probationary teachers under the Education Code. Mr. Weintraub assured you that he would get you reinstated so that you could obtain an administrative hearing and raise the issues you wanted to address.

While your first case was pending in the Court of Appeal, the District sent you a letter in March 2001 stating that you were non-reelected for the 2001-02 school year in case the District lost the appeal and you were determined to be a probationary teacher. You immediately provided the letter to Mr. Weintraub who refused to challenge the validity of the letter. You continued to give Mr. Weintraub lists of the arguments he could make to challenge legal defects in the letter.

After the Court of Appeal issued an unpublished decision upholding CTA's position, CTA initiated an effort to convince the court to publish its decision. When you finally obtained a copy of the decision, you were shocked to find that it contained false accusations against you and that CTA had never filed a motion to strike these allegations.

After the decision was published, CTA refused to pay for any more legal representation to enforce the court order for your reinstatement because you had not maintained your union membership by paying dues.

Eventually, CTA agreed to pay for further legal representation only on the condition that Mr. Weintraub sought a second legal precedent that would define "reinstatement." The District claimed that you had been reinstated and non-reelected for the 2001-02 school year based on its March 2001 letter.

The charge alleges that in August 2002, Mr. Weintraub deliberately prevented you from being rehired by the District so he could pursue the second case and establish legal precedent defining "reinstatement."

On August 13, 2002, Mr. Weintraub filed a contempt motion based on the District's refusal to reinstate you. Despite at least five contempt hearings, the court dismissed the motion for contempt.

In April 2004, Mr. Weintraub filed a new case seeking to enforce the order for your reinstatement. However, Mr. Weintraub again refused to challenge the March 2001 non-reelection letter. The court held that you had been non-reelected based on the March 2001 letter only because Mr. Weintraub had never challenged it. The Court of Appeal affirmed the trial court's ruling on July 28, 2005.

On August 5, 2005, Mr. Weintraub notified you that he and Ms. Tucker had decided not to appeal the latest decision denying you reinstatement to your previous position with the District.

Based on the facts stated above, the charge does not state a prima facie case.

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 statute of limitations is an affirmative defense which has been raised by the Respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, Charging Party bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

The charge was filed on January 27, 2006. Thus, the statute of limitations period extends six months prior to the filing of the charge to July 27, 2005. Accordingly, only alleged unfair practices which occurred on or after July 27, 2005, are timely filed. On August 5, 2005, CTA notified you that it did not intend to file an appeal in your final case. This is the only allegation in your charge which falls within the statutory limitations period.

On the merits, the charge alleges that CTA breached its duty of fair representation in the manner in which it handled the litigation involving your case, including legal strategy.

As an initial matter, the charge is filed against CTA rather than the Oakland Education Association (Association). Under EERA, the Association has been designated as the exclusive representative of the District's certificated employees. As the exclusive representative, the Association bears the duty to fairly represent bargaining unit members. Oftentimes, local teachers unions affiliate with other organizations such as CTA. However, CTA is not the exclusive representative of the certificated employees and it has no independent obligation to represent bargaining unit members or negotiate with the District. As such, under the law, CTA does not owe a duty of fair representation to the District's certificated employees. (California Teachers Association, CTA/NEA (Torres) (2000) PERB Decision No. 1386.) Since CTA does not owe you a duty of fair representation, your charge alleging that CTA breached its duty of fair representation in the manner in which it handled your case, must be dismissed.

Even assuming your charge was properly filed against the Oakland Education Association, the charge does not demonstrate a breach of the duty of fair representation under EERA.

EERA imposes upon an exclusive representative a duty to fairly represent all bargaining unit members in matters involving contract negotiations, administration of the collective bargaining agreement and grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) However, an exclusive representative does not owe a duty of fair representation to bargaining unit employees in forums outside these specific areas of responsibility. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) This is because the employee may obtain representation other than the exclusive representative in extra-contractual

forums. Accordingly, while a union may voluntarily represent employees in extra-contractual forums, the duty of fair representation does not attach to an exclusive representative in proceedings outside the collective bargaining agreement such as PERB or the courts.

Therefore, the Association does not owe a duty of fair representation to bargaining unit employees when it represents them in matters filed in the courts. Accordingly, assuming your charge alleged that the Association breached its duty of fair representation when it failed to provide you with adequate representation in the manner in which it handled your case in court, it does not demonstrate a violation of the EERA. Thus, your charge 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 February 28, 2006, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney