

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PATRICIA GUTIERREZ,

Charging Party,

v.

SEIU LOCAL 99,

Respondent.

Case Nos. LA-CO-1265-E
LA-CO-1272-E

PERB Decision No. 1899

April 16, 2007

Appearance: Patricia Gutierrez, on her own behalf.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by Patricia Gutierrez (Gutierrez) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that SEIU Local 99 (SEIU) violated the Educational Employment Relations Act (EERA)¹ by failing to meet their duty of fair representation and failing to meet and negotiate in good faith. Two separate charges were filed by Gutierrez, but both charges involve the same underlying conduct and were therefore appropriately consolidated by the Board agent.

The Board has reviewed the entire record in this case including the original and amended unfair practice charges, the warning and dismissal letters, and Gutierrez's appeal of the dismissal.² The Board finds the Board agent's warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

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

²No response was filed by SEIU to the charge or appeal of the Board agent's dismissal.

ORDER

The unfair practice charges in Case Nos. LA-CO-1265-E and LA-CO-1272-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shek and Neuwald joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-3008
Fax: (213) 736-4901



December 4, 2006

Patricia Gutierrez

Re: Patricia Gutierrez v. SEIU Local 99
Unfair Practice Charge No. LA-CO-1265-E & LA-CO-1272-E
DISMISSAL LETTER

Dear Ms. Gutierrez:

The above-referenced unfair practice charges were filed with the Public Employment Relations Board (PERB or Board) on September 11 and 29, 2006. Since the charges appear to involve the same underlying conduct, they are consolidated herein and this letter pertains to both charges. You allege that SEIU Local 99 (SEIU) violated the Educational Employment Relations Act (EERA)¹ by failing to meet their duty of fair representation and failing to meet and negotiate in good faith.

I indicated to you in my attached letter dated November 6, 2006, that the above-referenced charges 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 charges. You were further advised that, unless you amended the charges to state a prima facie case or withdrew them prior to November 17, 2006, the charges would be dismissed. On or about November 17, 2006, I granted an extension to November 30, 2006 to file amended charges. On November 30, 2006, you faxed me an amended charge which revealed the following.

On or about February 24, 2003, a lawsuit against LAUSD alleging wage and benefit violations resulted in LAUSD implementing a policy wherein part time bus drivers would be restricted from working more than 139 hours per pay period. Prior to that time, part time bus drivers worked up to 160 hours per pay period. LAUSD has since developed a practice of utilizing bus driver contractors from outside the bargaining unit to do all the work that was taken from 1,000 part time bus drivers as a result of the 139 hour policy. This has caused financial harm to part time bus drivers. You believe SEIU should challenge LAUSD's practice of contracting out and that SEIU should have filed an unfair practice charge since LAUSD failed to meet and confer with SEIU before it began contracting out the extra bus driver work. On some unspecified date, you sent a letter to SEIU bringing this issue to their attention but they never responded. Your amended charge includes a copy of a memo dated January 16, 2004

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.

addressed to LAUSD drivers stating "Local 99 has failed to respond and defend its members regarding the recent policy changes...."

You also state "All the claims against the district for contracting out our employees, their lost income and service hour's credit, for the last six years are being forgiven in a settlement in which our union participated. This is a failure to represent. Our work continues to be contracted out; our union continues to stand by with inaction."

You also state "We protest the new higher dues structure for the same continued non representation."

Discussion

As I stated in my November 6, 2006 letter, PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice charge occurring more than six months prior to the filing of the charge. The limitation period begins to run once the charging party knows, or should have known of the conduct underlying the charge. The January 16, 2004 memo you provided addressed to LAUSD drivers states that "Local 99 has failed to respond and defend its members regarding the recent policy changes...." This indicates that on or about January 16, 2004, you knew, or should have known, that SEIU was allegedly failing to represent members with regard to the 139 hour limitation. Since January 16, 2004 is more than six months prior to September 11 and 29, 2006, the dates you filed these unfair practice charges, the allegation contained in your amended charge is untimely.

As for your "protest" against higher dues, this allegation fails to meet your burden of specifying the "who, what, when, where and how" of an unfair practice, as explained in my November 6, 2006 letter.

Therefore, I am dismissing the charges based on the facts and reasons contained here and in my November 6, 2006, letter.

Right to Appeal

Pursuant to PERB Regulations,² 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 during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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
(916) 322-8231
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.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also 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,

ROBIN WESLEY
Acting General Counsel

By _____
Mary Creith
Regional Attorney

Attachment

cc: Thomas M. Beatty

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-3008
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November 6, 2006

Patricia Gutierrez

Re: Patricia Gutierrez v. SEIU Local 99
Unfair Practice Charge Nos. LA-CO-1265-E & LA-CO-1272-E
WARNING LETTER

Dear Ms. Gutierrez:

The above-referenced unfair practice charges were filed with the Public Employment Relations Board (PERB or Board) on September 11 and 29, 2006. Since the charges appear to involve the same underlying conduct, they are consolidated herein and this letter pertains to both charges. You allege that SEIU Local 99 (SEIU) violated the Educational Employment Relations Act (EERA)¹ by failing to meet their duty of fair representation and failing to meet and negotiate in good faith.

You are a Bus Driver employed by the Los Angeles Unified School District (District) and you are represented by SEIU.

There was a past practice wherein bus driver hours totaled up to 160 per pay period, however, about three years ago, the District reduced bus driver hours to 139 or less per pay period. The District did this without giving SEIU notice or an opportunity to bargain. Moreover, the reductions were not made in accordance with seniority rules and the District transferred bargaining unit work to contractors. SEIU did not respond to member complaints about the District's above-described actions and SEIU did not respond to certified return mail on this subject. The reduction in hours has caused irreparable financial harm and SEIU "almost ignored" the situation "until we sought our own outside representation."

You also allege SEIU does not attend to grievances and "extremely serious classification, seniority rights, and many other violations that continue. Retaliation and poor treatment of employees, due to arrogance of our department's administration, combined with a high turn over of weak and inexperienced exclusive representatives, makes it almost impossible to attain fair representation.... We often believe our exclusive representative's action or inactions are occurring without a rational basis or devoid of honest judgment. The conduct of our local toward our bus driving employees has been to [sic] often arbitrary, discriminatory, and in bad faith. Our local has to [sic] often ignored, meritorious complaints and often fails to process

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.

these complaints in a perfunctory fashion [sic]." You also state political campaign contributions seem to take precedence instead of member meetings or returning calls. You conclude by stating "We are demanding that the union hierarchy to [sic] be more accountable to the rank and file workers. Due to poor union representation, many of our employees have already, or are planning on leaving their careers."

Duty of Fair Representation

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). 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 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.]

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.]

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v.

Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270 [113 LRRM 3532], at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090].)

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.)

You allege that three years ago the District unilaterally changed the past practice wherein bus driver hours totaled up to 160 hours per pay period. It appears you are alleging SEIU failed to properly represent you when this happened and continues to fail in their representation. To the extent that your allegations involve SEIU's action or inaction that occurred more than six months before you filed these charges, the allegations are untimely and will be dismissed.

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 SEIU does not attend to grievances, failed to respond to a certified mailing and fails to retain strong representatives. You often believe SEIU's actions are without a rational basis or devoid of honest judgment and are arbitrary, discriminatory or in bad faith. Apart from your allegation that SEIU failed to respond to a certified mailing, these are legal conclusions and they fail to meet your obligation under PERB Regulation 32615(a)(5) to provide a clear and concise statement of the facts. Therefore, unless you amend the charges and provide specific facts that would demonstrate SEIU failed to meet their duty of representation, the charges will be dismissed.

Alleged failure to meet and confer in good faith

The employee organization is obligated to meet and confer with the public school employer in good faith. (Gov. Code, §3543.6, subd. (c).) However, the Board has held individual employees lack standing to allege that an employee organization has failed to bargain in good faith. (Oxnard Educators Association (1988) PERB Decision No. 664.)

Since you are an individual employee, you do not have standing to allege that SEIU failed to meet and confer in good faith with the District and your allegation that SEIU violated Government Code section 3543.6, subdivision (c) will be dismissed.

For these reasons the charges, as presently written, do not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies

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November 7, 2006
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explained above, please amend the charges. The amended charges 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 charges must have the case number written on the top right hand corner of the charge form. The amended charges must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive amended charges or withdrawals from you before November 17, 2006, I shall dismiss your charges. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Creith
Regional Attorney

MC