STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL M. BURNETT, Charging Party, v. SEIU LOCAL 1000, CSEA, Respondent.	Case No. SA-CO-297-S PERB Decision No. 1914-S June 26, 2007

Appearance: Michael M. Burnett, on his 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 Michael M. Burnett (Burnett) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that SEIU Local 1000, CSEA (SEIU) violated the Ralph C. Dills Act (Dills Act)[1] by breaching its duty of fair representation.

The Board has reviewed the entire record in this matter, including the unfair practice charge and amended charge, SEIU's response, the warning and dismissal letters, and Burnett's appeal of the dismissal. The Board finds the Board agent's warning and dismissal letters to be without prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SA-CO-297-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shek and Neuwald joined in this Decision.

[1]The Dills Act is codified at Government Code section 3512, et seq.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-7242
Fax: (916) 327-6377

March 5, 2007

Michael M. Burnett

Re: Michael M. Burnett v. SEIU Local 1000, CSEA
Unfair Practice Charge No. SA-CO-297-S
DISMISSAL LETTER

Dear Mr. Burnett:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 3, 2007. Michael Burnett, alleges that SEIU Local 1000, CSEA (SEIU) violated the Ralph C. Dills Act (Dills Act)[1] by breaching its duty of fair representation.

I indicated to you in my attached letter dated January 11, 2007, 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 January 22, 2007, the charge would be dismissed. On January 17, 2007, I granted your request to extend the deadline to February 22, 2007.

In my January 11, 2007 letter, I emphasized that in order to show a prima facie violation of the duty of fair representation, the charging party must show that the union's conduct was arbitrary, discriminatory or in bad faith. My letter also cited Coalition of University Employees (Buxton) PERB Decision No. 1517-H which is on point with the facts in this case. [A union's failure to respond to a grievance for some 10 months does not meet the arbitrariness standard required for a breach of duty of fair representation.]

On February 22, 2007, you amended the charge to allege the following relevant facts in support of a Dills Act violation: (1) that you called Joe Barnes (SEIU Central Coordinator) on or about August 29, 2006 and asked him for the status of your grievance in writing, and he told you to keep checking periodically with SEIU headquarters for any further updates; (2) that you did not know that your arbitration request was denied until January 18, 2007, when Paul Harris (SEIU Chief Counsel) filed a response to this unfair practice charge; and (3) that you never received a copy of the arbitration denial by SEIU. The amended charge essentially pleads the same facts presented in the original charge. As such, the charge fails to overcome

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

the standard outlined in Buxton that is more fully discussed in my January 17, 2007 letter. Although your amended charge express great frustration with SEIU's failure to notify you about your arbitration request, the facts do not demonstrate that such conduct was arbitrary, discriminatory or in bad faith. As such, the amended charge fails to demonstrate a prima facie violation.

Conclusion

Therefore, I am dismissing the charge based on the facts and reasons set forth above and those contained in my January 11, 2007 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 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).)

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

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,

TAMI R. BOGERT
General Counsel

By _____
Yaron Partovi
Regional Attorney

Attachment

cc: Paul Harris

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-7242
Fax: (916) 327-6377

January 11, 2007

Michael M. Burnett

Re: Michael M. Burnett v. SEIU Local 1000, CSEA
Unfair Practice Charge No. SA-CO-297-S
WARNING LETTER

Dear Mr. Burnett:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 3, 2007. Michael Burnett, the charging party, alleges that the SEIU Local 1000, CSEA (SEIU) violated the Ralph C. Dills Act (Dills Act)[1] by breaching its duty of fair representation.

SEIU is the exclusive representative of bargaining unit 15 employees. Michael Burnett is a dues paying bargaining unit 15 member and a certified SEIU union steward.

Charging Party Requested SEIU to Submit A Contract Grievance to Arbitration.

On July 26, 2006 you filed a 4th level grievance. On August 20, 2006, after your grievance was denied, you requested Joe Barnes (hereafter Barnes), SEIU Central Coordinator, to appeal your grievance to arbitration. Barnes indicated to you that he did not see any contract violations. You disagreed with Barnes' assessment of the grievance, and argued that there is "mountains of evidence" to prove a contract violation. Regardless, Barnes forwarded the arbitration request to Paul Harris (hereafter Harris), SEIU's Chief Legal Counsel. During our telephone conversation on January 8, 2007, you indicated that you did not discuss nor attempt to discuss the arbitration request with Barnes until September 6, 2006. Barnes told you that he would not give you anything in writing regarding the arbitration request.

To date, SEIU has not formally notified you about the status of the arbitration request. However, you stated that in the past you have made many requests to have grievances submitted to arbitration against the state, and that it was common practice for SEIU not to provide written correspondence concerning the status of arbitration requests.

Harris, on behalf of SEIU, has indicated that when a request for arbitration is made to the Department of Personnel Administration (DPA) a copy of the request is sent to the grievant.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

After corresponding with DPA, SEIU legal staff evaluates whether the request for arbitration has merit. If the request has no merit, SEIU informs appellant in writing of the reasons for the denial of the arbitration request. Furthermore, in our conversation, you stated that you were well aware that arbitration requests can take over six months to process before ultimately reaching a hearing.

Charging Party Submitted an Unfair Practice Charge To SEIU For Review.

According to your charge, on September 6, 2006, you submitted a completed unfair practice charge (UPC) to SEIU for review as required by the Union procedure. The UPC was related to the grievance you filed against the state. You indicated that the charge was not filed, and the October 17, 2006 deadline to file the UPC had lapsed because SEIU refused to file the charge with PERB. You further alleged in your charge that, "Union HQ and its legal office officials continue verbally to tell me that this matter is being taken care of by the union, but after all this elapsed time has failed to present anything to me in [writing] regarding it stating these facts." You allege that SEIU committed an unfair practice charge by, "needlessly letting time laps [sic] on [your] filed UPC."

Given the above facts you are alleging that SEIU, as the exclusive representative of bargaining unit 15 employees, denied you the right to fair representation guaranteed by Dills Act section 3515.7(g) and California State Employees' Association (Norgard) (1984) PERB Decision No. 451-S and thereby violated section 3519.5(b).

DISCUSSION

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 the Dills Act, 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].)

As a general rule, PERB will dismiss charges that the duty of fair representation has been breached by refusal to pursue a grievance if a union has made an honest, reasonable determination that the grievance lacks merit. (See, e.g., Service Employees International Union, Local 616 (Jeffers) (2004) PERB Dec. No. 1675-M.) In analyzing whether an "honest judgment" has been made, PERB does not judge whether the union's assessment was "correct," but only whether that judgment "had a rational basis, or was reached for reasons that were arbitrary or based upon invidious discrimination." (International Union of Operating Engineers (Siroky) (2004) PERB Dec. No. 1618-M.) Thus, the favorable outcome of a grievance pursued by an individual employee does not justify a finding that a union's prior refusal to handle the case deprived the employee of fair representation. (IUOE Local 501 (Reich) (1986) PERB Dec. No. 591-H.)

The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (United Teachers-Los Angeles (Wyler) (1993) PERB Decision No. 970.)

A. The Duty of Fair Representation Was Not Breached When SEIU Did Not Respond to Charging Party's Arbitration Request.

As we discussed on the phone on January 5, 2007, you allege that SEIU breached their duty of fair representation when SEIU failed to communicate (in writing) with you regarding the status of your arbitration request and that SEIU was "stalling due process of your grievance." Indeed, it has been about four months and SEIU has not yet notified you in writing about the status of your arbitration request.

In Coalition of University Employees (Buxton), *supra*, PERB Decision No. 1517-H , a union failed to inform an employee of the employer's response to her grievance for some ten months [emphasis added.] The Board found that the union's conduct "approache[d]" the standard for

arbitrariness, but did not meet it. The Board observed that the union "incompetently handled Buxton's grievance but its conduct and the resulting consequences to Buxton do not meet the standard for arbitrariness under established state and federal precedent." (Id. at p. 7.) In reaching its conclusion, the Board determined that duty of fair representation claims based on mere negligence or unintentional omissions, as opposed to a "reckless disregard for employee rights," will be upheld only 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." (Id. at p. 10.)

You have knowledge that it is a practice of SEIU not to provide written correspondence concerning the status of arbitration requests. As you know, arbitration requests can take over six months to process before ultimately reaching a hearing. Although it is a lengthy process, there is no evidence that the union has failed to follow its procedure to determine whether to submit your grievance to arbitration.

You also disagree with Barnes' statement and allege that there is "mountains of evidence" in support of a contract violation and that the matter should proceed to arbitration. However, a disagreement between the grievant and the union as to whether a grievance should proceed to arbitration does not establish a breach of the duty of fair representation. (Service Employees International Union, Local 250 (Hessong) (2004) PERB Dec. No. 1693-M, 28 PERC 257.)

Based on the above facts, the charge does not demonstrate a prima violation of §§ 3515.7(g) and 3519.5(b) of the Dills Act. Furthermore, the charge does not show that SEIU engaged in "arbitrary, discriminatory or in bad faith" conduct in processing your arbitration request. (Collins, *supra.*) The charge also fails to present facts that demonstrate that SEIU conduct was without a "rational basis or devoid of honest judgment." (Reed District Teachers Association, CTA/NEA (Reyes), *supra,* PERB Decision No. 332.) Mere legal conclusions are insufficient. (*See* State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S.)

B. SEIU Does Not Owe a Duty to File an Unfair Practice Charge

You allege that SEIU breached its duty of fair representation when SEIU failed to file an unfair practice charge with PERB on your behalf over the same allegations made in the grievance.

Under the Dills Act an exclusive representative is given the exclusive right to represent employees before the employer in matters involving contract negotiations, administration of the contract and grievance handling. Since the union has the exclusive authority to deal with the employer over these matters, the Dills Act imposes upon the exclusive representative a duty to fairly represent all bargaining unit members in these areas.

PERB has held that an exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) Since PERB is a forum outside the contract, SEIU does not owe members a duty

of fair representation in proceedings involving PERB. Thus, SEIU's refusal to file an unfair practice charge with PERB on your behalf does not violate the duty of fair representation.

For these reasons, this allegation does not state a prima facie violation and will be dismissed.

C. Charging Party Has No Standing Under Section 3519.5(a).

You allege in your charge that SEIU has committed an unfair practice charge under section 3519.5(a) of the Dill's Act. You further indicate that SEIU has, "caused or attempted to cause the State to violate section 3519(a), (b), and (d) of this said Act." You state that SEIU needs to be "held strictly accountable for it because it has definitely acted in bad faith of the rank and file who are paying it to represent them."

Section 3519.5(a) provides: "It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause the state to violate 3519" [emphasis added.]

The United States Supreme Court stated, "...the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' [citation omitted] as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." [Citation omitted.] (Sierra Club v. Morton (1972) 405 U.S. 727 at p. 732). In addition, the Board has held that an individual employee does not have standing to pursue violations of the rights of an employee organization. (State of California (Department of Corrections) (1993) PERB Decision No. 972-S.) The Board has also held that an individual employee does not have standing to challenge the violation of another employee's rights. (United Teachers of Los Angeles (Hopper) (2001) PERB Decision No. 1441.) By the same token, individual employees lack standing to allege that the employee organization violated the rights of an employer.

For these reasons, the allegation that SEIU violated § 3519.5(a) will be dismissed.

CONCLUSION

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 January 22, 2007, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Yaron Partovi
Regional Attorney

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