

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LOUIS DE PACE,

Charging Party,

v.

UNITED TEACHERS OF LOS ANGELES,

Respondent.

Case No. LA-CO-1320-E

PERB Decision No. 1964

June 18, 2008

Appearance: Louis DePace, on his own behalf.

Before Neuwald, Chair; McKeag and Rystrom, Members.

DECISION

McKEAG, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Louis DePace (DePace) of a Board agent's dismissal (attached) of his unfair practice charge. The unfair practice charge alleged that the United Teachers of Los Angeles (UTLA) violated the Educational Employment Relations Act (EERA)¹ by declining to file grievances on his behalf regarding paycheck errors caused by the implementation of a new payroll system by the Los Angeles Unified School District (LAUSD or District). DePace alleged this conduct constituted a violation of EERA but did not identify any particular section.

Specifically, DePace claims UTLA failed to file grievances in connection with the District's alleged violations of Education Code sections 45038 and 45049 and alleged breach of Article XIV, Section 31, of the collective bargaining agreement (CBA) between the District

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

and UTLA. DePace further alleged UTLA's conduct violated Article XIV, Section 31, of the CBA and sections 45038 and 45049 of the Education Code.²

The Board has reviewed the entire record, including the unfair practice charge, UTLA's position statement, the Board agent's warning and dismissal letters, and DePace's appeal. Based on this review, the Board finds the dismissal of this case was proper and adopts the warning and dismissal letters as a decision of the Board itself, subject to the following discussion regarding the Board's review of the instant appeal.

REQUEST TO REOPEN THE RECORD

Although not expressly stated in his moving documents, DePace essentially asked the Board to reopen the record to permit the late filing of documents for consideration by the Board agent as part of the initial charge. Ironically, the Board recently addressed a similar situation in Regents of the University of California (2008) PERB Order No. Ad-370-H (Regents). As in the instant case, Regents involved a request by the charging party to reopen their case to permit the filing of additional facts for consideration by the Board agent. The Board in Regents held that the request is more appropriately considered an appeal of the dismissal of the charge. Thus, the instant request is properly treated as an appeal. (Regents; Los Angeles Unified School District (2007) PERB Order No. Ad-368.)³

²In addition to the instant charge, DePace simultaneously filed a charge against LAUSD alleging the District's conduct constituted a violation of EERA. DePace further alleged LAUSD violated Article XIV, Section 31 of the CBA and sections 45038 and 45048 of the Education Code. This companion case is entitled Louis DePace v. Los Angeles Unified School District, Case No. LA-CE-5127-E.

³PERB Regulation 32635(b) states: "[u]nless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.) We find that DePace has not shown the requisite good cause to present additional documentary evidence on appeal. Accordingly, we have not considered the new evidence submitted by DePace in the instant appeal.

Treating the request as an appeal, this case was dismissed on December 28, 2007. Pursuant to the 20-day deadline for filing appeals set forth in PERB Regulation 32635(a), plus the five-day extension for service by mail set forth in PERB Regulation 32130(c), the deadline for DePace's appeal was January 22, 2008. Because it was filed on January 22, DePace's appeal was timely filed and, therefore, is properly before the Board.

ORDER

The unfair practice charge in Case No. LA-CO-1320-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Neuwald and Member Rystrom joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-2907
Fax: (213) 736-4901



December 28, 2007

Louis De Pace

Re: Louis De Pace v. United Teachers of Los Angeles
Unfair Practice Charge No. LA-CO-1320-E
DISMISSAL LETTER

Dear Mr. De Pace:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 16, 2007. Louis De Pace alleges that the United Teachers of Los Angeles (UTLA) violated the Educational Employment Relations Act (EERA)¹ by declining to file grievances on his behalf regarding errors on his paycheck. This dismissal letter addresses one of two unfair practice charges filed by De Pace. The other, case number LA-CE-5127-E is discussed in another dismissal letter of the same date, referencing that case number.

I informed you in my attached letter dated December 13, 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 December 21, 2007, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my December 13, 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

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.

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

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 95811-4124
(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

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December 28, 2007
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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 _____
Eric J. Cu
Regional Attorney

Attachment

cc: Erica Deutsch

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-2907
Fax: (213) 736-4901



December 13, 2007

Louis De Pace

Re: Louis De Pace v. United Teachers of Los Angeles
Unfair Practice Charge No. LA-CO-1320-E
WARNING LETTER

Dear Mr. De Pace:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 16, 2007. Louis De Pace alleges that the United Teachers of Los Angeles (UTLA) violated the Educational Employment Relations Act (EERA)¹ by declining to file grievances on his behalf regarding errors on his paycheck. This letter addresses one of two unfair practice charges filed by De Pace. The other, case number LA-CE-5127-E is discussed in another letter of the same date, referencing that case number.

UTLA is the exclusive representative of certificated employees at the Los Angeles Unified School District (LAUSD). De Pace is a certificated employee at LAUSD. UTLA and LAUSD are signatories to a Collective Bargaining Agreement (CBA) that contains a grievance procedure. The CBA also contains a provision requiring LAUSD to correct problems regarding paycheck errors promptly.

In or around January 2007, LAUSD implemented a new computerized payroll system. Errors in the new system resulted in non-payment, underpayment, or overpayment to several unit members, as well as erroneous deductions from unit member paychecks. De Pace requested that UTLA file grievances regarding paycheck errors on March 6, 2007 and July 3, 2007, but UTLA did not do so. On May 22, 2007 and October 1, 2007, two other unit members, Annemarie Ralph and Georgia Weir, requested that UTLA file similar grievances but UTLA did not do so. On September 24, 2007, however, UTLA did file a grievance on behalf of all affected unit members regarding LAUSD's payroll errors.

In addition to the grievance, on February 23, 2007, UTLA filed a lawsuit in superior court seeking to compel LAUSD to correct the payroll errors. In or around July 5, 2007, UTLA and LAUSD negotiated agreements regarding a repayment plan for unit members, the opening of additional payroll centers, and correction of errors regarding unit member retirement accounts.

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.

On September 12, 2007, UTLA requested assistance from the Los Angeles County Superintendent of Schools to compel LAUSD to correct the payroll errors.

Discussion:

De Pace contends that UTLA's conduct violated EERA, the CBA, and Education Code sections 45038 and 45048.

De Pace contends that UTLA denied him the right to fair representation by failing to file grievances on his behalf on March 6, 2007 and July 3, 2007.² 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.) In addition, the burden is on the charging party to establish that the charge is timely. (See Los Angeles Unified School District, (2007) PERB Decision No. 1929.) PERB may not issue a complaint based on allegations occurring more than six months prior to the filing of the charge. (EERA, § 3541.5(a)(1).) In this case, the charge was filed on October 16, 2007, meaning PERB may not issue a complaint based on conduct occurring before April 16, 2007. De Pace alleges that on March 6, 2007, UTLA declined his request to file a grievance. De Pace has not established that this allegation is within the six month statutory period or that an exception to the statute of limitations applies. Therefore, this allegation does not state a prima facie case for a timely violation of EERA.

Under EERA section 3544.9, UTLA owes De Pace and other certificated unit members a duty of fair representation. Breaching this duty violates EERA 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.]

² De Pace further contends that UTLA failed to file grievances on behalf of two other unit members, but as those unit members are not signatories to this unfair practice charge, these allegations will only be considered as background information to UTLA's representation of De Pace. (See Regents of the University of California (2004) PERB Decision No. 1592-H (holding that PERB Regulations do not provide for class action unfair practice charges and that only those individuals who signed the charge will be considered as charging parties).)

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, 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, 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082.)

In this case, De Pace contends that UTLA declined his requests to file a grievance regarding errors in De Pace's pay. However, De Pace does not present facts establishing that UTLA's decisions were arbitrary, discriminatory, or made in bad faith. (See Collins, supra, PERB Decision No. 258.) Thus, De Pace has not established that UTLA breached its duty to represent him.

In addition, the Board has held that a party does not establish a breach of the duty of fair representation where the exclusive representative attempted to resolve disputes underlying the charging party's grievance for the benefit of the bargaining unit as a whole. (County of Alameda (2004) PERB Decision No. 1708-M.)³ In this case, UTLA alleges that it attempted to resolve the issue over LAUSD's payroll errors by pursuing an action in superior court, negotiating with LAUSD, filing a grievance on behalf of all affected unit members, and seeking assistance from the Los Angeles County Superintendent of Schools. De Pace does not dispute that UTLA took these actions. Nor does he provide facts establishing that UTLA's

³ When interpreting the statutes PERB enforces, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

decision to resolve the payroll issue through these actions, as opposed to filing his requested grievances, was arbitrary, discriminatory, or made in bad faith. (See Collins, supra, PERB Decision No. 258.)

De Pace next alleges that UTLA's decision not to pursue his grievance request violated the CBA between UTLA and LAUSD. EERA section 3541.5(b) states:

The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

As stated above, De Pace does not establish that UTLA's conduct violated EERA. Accordingly, PERB is without jurisdiction to address this allegation.

Regarding the allegation that UTLA violated the Education Code, "PERB has no jurisdiction to enforce provisions of the Education Code, it [only] has jurisdiction to interpret the Education Code as necessary to carry out its duty to administer EERA." (Whisman Elementary School District (1991) PERB Decision No. 868 (citing San Bernardino City Unified School District (1989) PERB Decision No. 723); see also Desert Community College District (2007) PERB Decision No. 1921, fn. 13.) Education Code section 45038 concerns the frequency of payments to certificated employees by school districts. Education Code section 45048 concerns the time of payment for certificated employees by school districts. PERB does not have jurisdiction to determine whether LAUSD or UTLA violated these sections and De Pace does not explain how interpretation of these sections implicates UTLA's responsibilities to De Pace under EERA. Therefore, De Pace does not demonstrate how these allegations establish that a violation of EERA occurred.

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 December 21, 2007, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Eriç J. Cu
Regional Attorney