

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



KENNETH MEREDITH,

Charging Party,

v.

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 221,

Respondent.

Case No. LA-CO-1322-E

PERB Decision No. 1982

October 24, 2008

Appearance: Kenneth Meredith, on his own behalf.

Before Neuwald, Chair; Wesley and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Kenneth Meredith (Meredith) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the exclusive representative of Meredith's bargaining unit, Service Employees International Union, Local 221 (SEIU), violated the Educational Employment Relations Act (EERA)¹ by: (1) violating the collective bargaining agreement (CBA) between SEIU and Meredith's employer, the Grossmont Union High School District (District); (2) failing to fairly represent Meredith regarding a demotion; (3) causing or attempting to cause the District to violate EERA; and (4) failing to meet and confer in good faith with the District. The Board agent dismissed all allegations.

The Board has reviewed the entire record in this case, including but not limited to, the original and amended unfair practice charge, SEIU's position statement, the Board agent's

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

warning and dismissal letters, and Meredith's appeal. Based on this review, the Board remands this case to the General Counsel for issuance of a complaint on the duty of fair representation allegation consistent with the discussion below. Additionally, the Board affirms the dismissal of the remaining three allegations for the reasons discussed below.

BACKGROUND

The District hired Meredith as an hourly custodian in 2003. In 2005, he was promoted to "Classified, Permanent Custodian." As a result of this promotion, Meredith became a member of the bargaining unit represented by SEIU. In April 2007, the District promoted Meredith to head custodian at Santana High School. The promotion was subject to a 180-day probation period. If Meredith passed probation, he would attain permanent status in the position.

Between April and August 2007, SEIU filed grievances with the District on behalf of employees supervised by Meredith regarding Meredith's conduct. The charge alleged that SEIU Treasurer and Shop Steward Elena Long (Long) was the driving force behind these grievances. More specifically, Meredith alleged that Long "led a crusade to sabotage my employment by making a hostile environment for me by filing grievances against me and undermining my authority to direct staff."

On July 18, 2007, Meredith met with Principal Timothy Schwuchow (Schwuchow), who asked Meredith "to resign or receive a poor evaluation." By letter dated July 29, 2007, Meredith informed Schwuchow that he refused to resign "for several reasons and that I was not afforded representation."

On the morning of August 1, 2007, before Meredith reported for work, SEIU Representative Ken Geary (Geary) met with Meredith's staff, Schwuchow and Meredith's supervisor, School Facility Manager Therese Torres (Torres). When Meredith arrived for

work, Torres called him into her office. Meredith had no advance notice of this meeting. Sometime during the meeting, Torres asked Meredith if he wanted union representation; Meredith responded “yes.” Despite Meredith’s request for representation, the meeting continued without an SEIU representative being present. During the meeting Torres gave Meredith an unsatisfactory performance report; the charge does not indicate whether anything else was discussed during the meeting.

Immediately after his meeting with Torres, Meredith was called in to meet with Schwuchow. When he arrived, he saw Geary exiting Schwuchow’s office. Geary told Meredith that he had met earlier that day with Meredith’s staff regarding complaints against Meredith.

During the meeting, Schwuchow told Meredith that Geary was called to this meeting to represent Meredith’s staff, not him. Schwuchow then informed Meredith that he was rejected on probation and as a result would return to his prior custodian position.² Meredith placed his keys and radio on Schwuchow’s desk and exited through the back door. Sometime later, Long replaced Meredith as head custodian.

On or about August 21, 2007, Meredith met with SEIU representative Joe (no last name given) about grieving his rejection on probation. SEIU Chapter President Luis Giorgi (Giorgi) interrupted the meeting. Giorgi and Joe argued over Joe’s right to meet with Meredith regarding the matter. Giorgi then told Joe to “make it fast.” Joe resigned from SEIU soon after the meeting.

Sometime in late October 2007, Meredith met with SEIU representative Alexis (no last name given). After this meeting, Alexis did not return Meredith’s calls.

²Though the charge characterizes this action as a “demotion,” it is clear from the facts alleged in the charge that Meredith was rejected on probation.

SEIU's Position Statement

SEIU asserts that Long and Geary had a legal right to meet with Meredith's employees regarding their complaints against him and to present those complaints to District management. SEIU claims this conduct did not violate the CBA nor did it constitute an unfair practice.

SEIU claims that Meredith never contacted SEIU about representation for either the July 18 or August 1, 2007 meetings with Principal Schwuchow. SEIU also points out that the charge indicates Meredith "was fully aware that Geary was not there to represent him" at the August 1 meeting with Schwuchow.

Regarding the allegation that SEIU caused or attempted to cause the District to commit an unfair practice, SEIU notes that the charge is unclear about what unfair practice the District committed. However, assuming the charge alleged that Meredith's poor evaluation or demotion was caused by SEIU, SEIU reiterates that it had a legal right to bring grievances against Meredith and therefore its conduct was not unlawful.

Finally, SEIU asserts that Meredith as an individual has no standing to bring a charge alleging that SEIU failed to bargain in good faith with the District.

Dismissal

After stating that PERB has no authority to enforce a CBA, the Board agent analyzed whether the charge alleged a prima facie case of any unfair practices by SEIU.

Looking first at the allegation that SEIU breached its duty to fairly represent Meredith, the Board agent observed that while the charge showed that Meredith asked for representation on August 1, 2007, the charge did not state whether or how SEIU responded to the request. The Board agent also concluded that the charge failed to establish that Geary or Long "acted in bad faith or without a rational basis" by representing Meredith's staff in their grievances against him. Regarding Meredith's attempts to obtain SEIU representation after his rejection

on probation, the Board agent concluded that the charge did not establish a violation because it did not detail the extent of Meredith's contacts with SEIU nor did it show that SEIU's assistance was required for Meredith to file a grievance over the matter.

Turning to the allegation that SEIU caused or attempted to cause the District to commit an unfair practice, the Board agent read the charge to allege that the District committed an unfair practice by demoting Meredith. The Board agent concluded that while the District demoted Meredith shortly after his request for representation on August 1, 2007, this was insufficient to establish that the District demoted Meredith because of his protected activity. Moreover, the Board agent found no evidence that SEIU had taken any affirmative action to cause or attempt to cause the District to discriminate against Meredith. Nor did the Board agent find any evidence that SEIU itself had discriminated against Meredith.

Finally, the Board agent found that Meredith lacked standing to allege that SEIU failed to bargain in good faith with the District or to allege violations of SEIU's rights under various EERA provisions.

Meredith's Appeal

On appeal, Meredith does not challenge the dismissal of the allegations that the Board agent found he had no standing to raise. In his appeal letter, Meredith reiterates his argument that Long's violations of the CBA's union access provision constituted an unfair practice under EERA. As for the allegation that SEIU caused or attempted to cause the District to violate EERA, Meredith merely states that SEIU's "bad faith and/or inaction aided and/or directed the clear EERA violation/s by the District's representatives."

Regarding the fair representation allegation, Meredith argues that "Geary could not have provided me with any representation because I had no related discussion with him about my evaluation or demotion before, during, or after my demotion date." Additionally, he

contends that Geary could not have provided him with the individual representation to which he was entitled because Geary was working with Meredith's staff to demote him. Meredith further asserts that SEIU's failure to provide him with representation after his demotion prevented him from filing a grievance over the demotion.

DISCUSSION

1. Alleged Union Access Violations

The unfair practice charge alleged that SEIU Shop Steward Long violated the union access provision of the CBA by not providing Meredith 24 hours' notice before meeting with his staff during work hours or obtaining his permission to do so. PERB has no jurisdiction to remedy a violation of a CBA unless the violation also constitutes an unlawful unilateral change. (Grant Joint Union High School District (1982) PERB Decision No. 196.) Thus, to the extent the charge alleged an isolated breach of the CBA, PERB had no jurisdiction over the charge. Further, Meredith does not have standing to allege a unilateral change because SEIU has no statutory duty to meet and confer in good faith with him as an individual. (Union of American Physicians and Dentists (Menaster) (2007) PERB Decision No. 1918-S.) For these reasons, the Board agent properly dismissed the allegation that SEIU's alleged violation of the union access provision of the CBA also violated EERA.

2. Duty of Fair Representation

The unfair practice charge alleged that SEIU breached its duty of fair representation by: (1) not providing Meredith with representation during the August 1, 2007 meetings about his unsatisfactory performance evaluation and rejection on probation; and (2) not providing him with representation so that he could file a grievance over these issues. Meredith renews these arguments on appeal.

“The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.” (EERA sec. 3544.9.) A breach of this duty of fair representation constitutes an unfair practice under EERA section 3543.6(b). In order to state a prima facie violation of this section, Meredith must show that SEIU's conduct was arbitrary, discriminatory or in bad faith. (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.) To establish arbitrary conduct by SEIU, Meredith must allege “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.” (Reed District Teachers Association (Reyes) (1983) PERB Decision No. 332 [emphasis added].)

When a charge alleges that the exclusive representative’s failure to act on behalf of an employee constituted a breach of its duty of fair representation, PERB looks to whether “the cumulative actions of the exclusive representative, considered in their totality, [are] sufficient to constitute a prima facie showing of an arbitrary failure to fairly represent the employee.” (American Federation of State, County and Municipal Employees, International, Council 57 (Dehler) (1996) PERB Decision No. 1152-H (AFSCME (Dehler))). A prima facie case may be established based on an overall pattern of conduct even if any one of the exclusive representative’s actions by itself would not breach the duty of fair representation. (AFSCME (Dehler); San Francisco Classroom Teachers Association (Bramell) (1984) PERB Decision No. 430 (San Francisco Classroom Teachers Association)).

During Meredith’s meeting with his supervisor, Torres, on August 1, 2007, after being asked, he indicated that he wanted union representation. SEIU Representative Geary was on campus at that time but did not represent Meredith in, nor did he attend, the meeting with Meredith and Torres. Immediately after his meeting with Torres, Meredith was called in to

meet with Principal Schwuchow. On his way into Schwuchow's office, Meredith ran into Geary. Geary told him that earlier that day he had met with Meredith's staff regarding complaints against him. During the meeting, Schwuchow told Meredith that Geary was called into that meeting to represent Meredith's staff, not Meredith. Thus, Geary appropriately did not act as an advocate for Meredith during the meeting with Schwuchow. However, as a result, Meredith was not represented by SEIU in this meeting either. Thus, the charge alleges facts showing that SEIU provided Meredith with no representation at all on August 1.

After his rejection on probation, Meredith twice contacted SEIU about grieving his rejection. Each time he met briefly with an SEIU representative. Chapter President Giorgi interrupted the first meeting and argued with the representative, Joe, over whether Joe had a right to meet with Meredith regarding the rejection on probation. The chapter president then told Joe to make the meeting "fast." Joe resigned from the union approximately a week after this meeting. It took almost two months for SEIU to assign another representative to Meredith's case. After meeting once with Meredith, this representative did not return Meredith's calls.

When viewed as a whole, the above alleged facts show that SEIU made no effort to represent Meredith regarding his rejection on probation despite Meredith's multiple attempts to enlist SEIU's assistance. Under these circumstances, SEIU could not have made an "honest and reasonable determination" about the merits of Meredith's case. (See Oxnard Federation of Teachers (Torres) (2002) PERB Decision No. 1494 [a union "may refuse to pursue a grievance if the union makes an honest and reasonable determination that the grievance lacks merit"].) Indeed, SEIU's lack of representation falls below that of the unions in both AFSCME (Dehler) and San Francisco Classroom Teachers Association, where in each case the union filed a grievance on behalf of the employee and then abandoned it without explanation. In both cases,

the Board found that the charge established a prima facie case of arbitrary failure to represent the employee. Similarly, Meredith's charge alleged a pattern of conduct by SEIU which demonstrated that the union arbitrarily failed to represent him regarding his rejection on probation. Because this is sufficient to establish a prima facie case of a breach of the duty of fair representation, the Board agent should have issued a complaint on this allegation.

3. Causing or Attempting to Cause the District to Violate EERA

The unfair practice charge alleged that the District demoted Meredith in retaliation for his protected activity. It further alleged that SEIU caused or attempted to cause the District to demote Meredith. More specifically, the charge asserted that Long and Geary's solicitation of grievances against Meredith from his staff caused the District to demote him.

Under EERA, it is unlawful for an employee organization to cause or attempt to cause an employer to commit an unfair practice. (EERA sec. 3543.6(a).) A violation of this provision may only be established by a clear showing of how and in what manner the employee organization affirmatively acted to cause or attempt to cause the unfair practice. (Tustin Unified School District (1987) PERB Decision No. 626.) In addition, the facts must establish a causal connection between the employer's unlawful conduct and the employee organization's behavior. (State of California (Department of Personnel Administration) (1987) PERB Decision No. 609-S.)

Thus, before examining SEIU's actions, it is necessary to determine whether the charge established an unfair practice by the District. The charge alleged that the District rejected Meredith on probation in retaliation for his engagement in protected activity. To demonstrate retaliation in violation of EERA section 3543.5(a), Meredith must show that: (1) he exercised rights under EERA; (2) the District had knowledge of the exercise of those rights; and (3) the District imposed or threatened to impose reprisals, discriminated or threatened to discriminate,

or otherwise interfered with, restrained, or coerced Meredith 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 employer'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 (North Sacramento)), 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 employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (Trustees of the California State University (1990) PERB Decision No. 805-H); (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (McFarland Unified School District (1990) PERB Decision No. 786); (6) employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (Novato; North Sacramento.)

The only protected activity alleged in the charge is Meredith's request for union representation on August 1, 2007. (San Diego Unified School District (1991) PERB Decision No. 885.) Meredith's rejection on probation that same day constituted adverse action.

(Madera County Office of Education (1999) PERB Decision No. 1334; State of California (Department of Industrial Relations) (1998) PERB Decision No. 1299-S.) While the adverse action certainly occurred close in time to Meredith's protected activity, the charge fails to establish that the District rejected Meredith because of his request for union representation. On July 17, 2008, Schwuchow gave Meredith the option to resign in lieu of receiving a poor performance review. This indicates that the District had already decided as of this date to reject him on probation. Accordingly, the rejection was not the result of Meredith's later request for union representation.³

Nonetheless, even if Meredith's rejection on probation was retaliatory, the charge fails to establish that SEIU acted affirmatively to cause the District to retaliate against him. The charge alleged that SEIU filed grievances against Meredith with the aim of having him removed as head custodian. Even assuming that SEIU had such a motive, the charge fails to establish that by filing these grievances SEIU caused or attempted to cause the District to retaliate against Meredith because of his protected activity. Thus, even if the grievances played a part in the District's decision to reject Meredith on probation, the charge does not establish that those grievances induced, or attempted to induce, the District to violate EERA.

On appeal, Meredith argues that SEIU's "bad faith and/or inaction aided and/or directed the clear EERA violation/s by the District's representatives." In essence, Meredith asserts that by failing to fairly represent him, SEIU caused or attempted to cause the District to violate EERA. PERB rejected a similar argument in Los Rios College Federation of Teachers

³The charge asserts that in rejecting Meredith, the District failed to follow proper procedures, conducted a cursory investigation of his alleged misconduct, and failed to provide him with "unambiguous and unexaggerated reasons" for his rejection. The charge provides no factual support for these assertions. Because mere legal conclusions are not sufficient to state a prima facie case (Charter Oak Unified School District (1991) PERB Decision No. 873), these assertions do not establish the required nexus between Meredith's protected activity and the District's adverse action.

(Deglow) (1999) PERB Decision No. 1651. In that case, PERB found an allegation that the union failed to represent the charging party in grievance matters insufficient to establish a violation of EERA section 3543.6(a) because it did not show that the union had acted affirmatively “to encourage or assist” the employer in discriminating or retaliating against the charging party. The Board made this finding even though the General Counsel had issued a complaint against the union alleging a breach of the duty of fair representation based on the same facts. Therefore, even though we find the charge established a prima facie case of a breach of the duty of fair representation by SEIU, this is not enough to establish that SEIU caused or attempted to cause the District to violate EERA. Accordingly, we affirm the Board agent’s dismissal of this allegation.

ORDER

The Board partially AFFIRMS the dismissal in Case No. LA-CO-1322-E and REVERSES and REMANDS the remainder of the charge to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Chair Neuwald and Member Wesley joined in this Decision.