STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HUGO ARTEAGA, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 99, Respondent.	Case No. LA-CO-1342-E PERB Decision No. 1991 December 9, 2008

Appearance: Hugo Arteaga, on his own behalf.

Before McKeag, Rystrom and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (Board) on appeal by Hugo Arteaga (Arteaga) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Service Employees International Union, Local 99 (SEIU), violated the Educational Employment Relations Act (EERA)[1] by: (1) failing to file a grievance over Arteaga's termination; (2) improperly calculating/deducting his agency fees; and (3) retaliating against him for attempting to decertify SEIU. The Board agent dismissed each of the allegations for failure to state a prima facie case.

The Board has reviewed the entire record in this matter, including but not limited to, the original and amended unfair practice charges, SEIU's position statements, the Board agent's warning and dismissal letters, and Arteaga's appeal. Based on this review, the Board finds the

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

Board agent's warning and dismissal letters to be a correct statement of the law and well reasoned, and therefore adopts them as the decision of the Board itself.[2]

ORDER

The unfair practice charge in Case No. LA-CO-1342-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Rystrom joined in this Decision.

[2]Although the first paragraph of the dismissal letter did not list retaliation as one of Arteaga's allegations, the Board agent nonetheless analyzed that allegation thoroughly in the Discussion section of the letter. Accordingly, this minor omission does not preclude the Board from adopting the dismissal letter as part of its decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-7508
Fax: (213) 736-4901

August 18, 2008

Hugo Arteaga

Re: Hugo Arteaga v. SEIU Local 99
Unfair Practice Charge No. LA-CO-1342-E
DISMISSAL LETTER

Dear Mr. Arteaga:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 17, 2008 and was amended on May 28, August 8 and 14, 2008. Hugo Arteaga alleges that the SEIU Local 99 (Local 99 or Union) violated the Educational Employment Relations Act (EERA or Act)[1] by failing to file a grievance on his behalf and by improperly calculating/deducting his agency fees.

Mr. Arteaga was informed by the attached Warning Letter dated July 17, 2008, that the above-referenced charge did not state a prima facie case. Mr. Arteaga was advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in the Warning Letter, he should amend the charge. Mr. Arteaga was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to July 28, 2008, the charge would be dismissed.

On July 28, 2008, Mr. Arteaga requested an extension of time to file an amended charge. Mr. Arteaga's request was granted and this office received an amended charge on August 8, 2008.

Mr. Arteaga's August 8 amended charge states in its entirety:

> Once again[,] facts given by the [L]ocal 99 are incorrect. In reference to Article V, yes it states that a grievance may be filed by an employee or by the [U]nion on behalf of an employee; however, it doesn't state that the [U]nion may ignore pertinent information to avoid filing a claim. As an employee and a [U]nion member, I do have rights to fair representation. The [U]nion states that Ms. Bovell told me the [U]nion would not pursue a grievance on my behalf. This information is incorrect

[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.

> because Ms. Bovell told me that Jerome Gibbons would be filing my grievance on my behalf. The [U]nion states the CBA permits the District to lay off an employee who is unable to return to work and who has exhausted his leave, (Article XII, Section 11.5). Again[,] this information is incorrect. The primary physician's [sic] had released me on 6/18/07 to full duty with no restrictions, which was well before my time had expired. [(]See copy of doctor's note attached to this amendment.[)]
>
> On July 9, 2007, I received a letter from the Personnel Commission indicating my paid leave benefits have been exhausted effective June 26, 2007. [(]See copy of letter attached.[)] I had already been back to work and working full duty since 6/18/07. All [of] these facts were given to the [U]nion. Also, on July 23, 2007[,] around 10:00 a[.]m[.], I told Blanca in Personnel Commission about the whole incident and she said if I had turned in all my paperwork and was released from the primary physician, then I should have never been released from work. Even the District acknowledged that Truck Operations made an error in terminating me.
>
> In conclusion, the [U]nion has not represented me fairly throughout the wrongful termination and is now giving wrong information to PERB. Since Ms. Bovell told me that Jerome Gibbons would be handling my grievance claim, I strongly believed that the matter would be handled timely and professionally. I attempted to take the proper steps in filing a claim by beginning with the [U]nion. The [U]nion is my representative between my employer and me. I am also attaching a copy of a time line that was given to Ms. Bovell back on 7/22/07. Ms. Bovell was also given doctor's notes and other crucial information.

Attached to the August 8 amended charge is a letter from Cedar-Sinai Medical Center dated June 18, 2007, a letter from the Personnel Commission dated July 9, 2007, and a timeline written by Mr. Arteaga.

On August 14, 2008, Mr. Arteaga filed a third amended charge. Mr. Arteaga's August 14 amended charge states in its entirety:

> The fallowing [sic] is another contributor leading to the lack of and misrepresentation from Local 99. I, Hugo Arteaga, am involved in an attempt to separate from Local 99. After this action was taken, the [U]nion retaliated by failing to fairly represent me with my dealings with LAUSD.

Discussion

1. The Duty of Fair Representation

As stated in the July 17 Warning Letter, EERA requires that exclusive representatives fairly represent each and every employee in the bargaining unit. (Gov. Code, § 3544.9.) This duty of fair representation extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258 (Collins).) However, a breach of the duty of fair representation is not stated merely because an exclusive representative declines to proceed or negligently forgets to file a timely appeal of a grievance. (SEIU Local 99 (Jones) (2007) PERB Decision No. 1882; San Francisco Classroom Teachers Association, CTA/NEA (Bramell) (1984) PERB Decision No. 430.) The Board has recognized an exception to this rule where the exclusive representative's negligence foreclosed any remedy for the grievant. (Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H.)

Here, Mr. Arteaga alleges that Local 99 violated the duty of fair representation by forgetting to file a grievance on his behalf. While Local 99 may have been negligent in forgetting to file a grievance on Mr. Arteaga's behalf, nothing Local 99 did, or failed to do, completely extinguished the right of Mr. Arteaga to pursue his claim. On the contrary, Mr. Arteaga stipulates that Article V, Section 1.0 of the CBA provides that a grievance may be filed by an employee or Local 99 on behalf of an employee. Accordingly, Mr. Arteaga has failed to establish that Local 99 breached its duty of fair representation.

2. Agency Fees

Mr. Arteaga's August 8 and 14 amended charges are devoid of new facts and arguments regarding his allegation that Local 99 incorrectly calculates/deducts his agency fees. Accordingly, this allegation is dismissed for the reasons stated in the attached July 17 Warning Letter.

3. Retaliation

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the respondent had knowledge of the exercise of those rights; and (3) the respondent imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced the employees 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 respondent'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), 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 respondent's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the respondent's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the respondent's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the respondent's cursory investigation of the employee's misconduct; (5) the respondent's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) respondent animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the respondent's unlawful motive. (Novato, supra, PERB Decision No. 210; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the [respondent's] action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

While Novato, supra, PERB Decision No. 210, and its progeny concerned employer discrimination, PERB has held that the same standard applies to allegations of employee organization discrimination. (California School Employees Association & its Chapter 36 (Peterson) (2004) PERB Decision No. 1683.)

In the August 14 amended charge Mr. Arteaga asserts that Local 99 failed and/or refused to file a grievance on his behalf because he is "involved in an attempt to separate from Local 99." While attempting to decertify an exclusive representative is protected activity under EERA, there is no evidence that Local 99 knew that Mr. Arteaga exercised his rights under EERA by attempting to decertify. Consequently, Mr. Arteaga has not established that Local 99 failed to file a grievance on his behalf because he attempted to decertify it. Consequently, this allegation must be dismissed because Mr. Arteaga has not satisfied the elements set forth in Novato, supra, PERB Decision No. 210.

Right to Appeal

Pursuant to PERB Regulations,[2] Mr. Arteaga 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 Gov. Code, § 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 Mr. Arteaga files 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).)

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

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 _____
Sean McKee
Regional Attorney

Attachment

cc: Jonathan Cohen, Attorney

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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July 17, 2008

Hugo Arteaga

Re: Hugo Arteaga v. SEIU Local 99
Unfair Practice Charge No. LA-CO-1342-E
WARNING LETTER

Dear Mr. Arteaga:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 17, 2008 and was amended on May 28, 2008. Hugo Arteaga alleges that the SEIU Local 99 (Local 99) violated the Educational Employment Relations Act (EERA)[1] by failing to file a grievance on his behalf and by improperly deducting his agency fees.

Background

Local 99 is the exclusive representative of a bargaining unit of operations and support services employees at the Los Angeles Unified School District (LAUSD).[2] Arteaga is employed by LAUSD as a heavy truck driver and is a Local 99 bargaining unit member.

Local 99 and LAUSD are parties to a collective bargaining agreement (CBA). Article V of the CBA sets forth Local 99's and LAUSD's grievance procedure. Article V, Section 1.0 of the CBA provides that a grievance may be filed by an employee or Local 99 on behalf of an employee.

Local 99 has a grievance hotline. Griselda Bovell is the name of the Local 99 employee who answers the grievance hotline and provides information to bargaining unit members.

[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] Nothing in PERB case law requires a Board agent to ignore facts provided by the Respondent and consider only the facts provided by the Charging Party. (Service Employees International Union #790 (Adza) (2004) PERB Decision No. 1632-M.)

The original charge states in its entirety:

> I was fired from work wrongfully and Local 99 did not return my calls or help me file [a] grievance. After many attempts[,] I took matters in to my [own] hand[s] and got my job back. [Local 99] turned [its] back on me.

The amended charge states in relevant part:

> On July 16, 2007[,] I began my lengthy journey of phone calls. I spoke with Griselda about being terminated . . . . She was going to talk with Truck Operations to get more details. I called her almost on a daily basis to follow up. On [July 18, 2007,] she spoke with Andrew Guerrero in Truck Op[erations] to see what they were going to do and asked Andrew why I was given a [s]eparation notice prematurely. I had no responses from Andrew or Griselda on the process or steps needed. I was always told they were waiting for responses from other people. I began to make calls myself to Personnel Commissions to try and resolve the matter after getting the run around.
>
> After going thr[ough] the rehire process and getting my job back in August, the Personnel Commissions department got involved and had me reinstated rather than rehired. On [August 10, 2007,] I spoke with Griselda again and stated [that] I wanted to file a grievance. She told me the case would be passed to Jerome Gibson to file the grievance. I attempted to call him several times but [I] never received a return call. Therefore, a grievance was never filed. This is how Local 99 turned [its] back on me. I was never told I didn't have a case. I never received any resolution in this matter.
>
> There is also another issue regarding agency fees. I am an agency fee payor [sic] that should be paying half the dues of a union member. I have been an agency fee payor [sic] over the last year and a half without resolution. I thought this deduction was a [p]ost-tax deduction and half the dues of a union member, in which I was told, resulted to 1.1%.

Discussion

1. The Duty of Fair Representation

EERA requires that exclusive representatives fairly represent each and every employee in the bargaining unit. (Gov. Code, § 3544.9.) This duty of fair representation extends to grievance

handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258 (Collins).) In order to state a prima facie violation of the duty of fair representation, a bargaining unit member must show that his or her exclusive representative's conduct was arbitrary, discriminatory or in bad faith. In Collins, the 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 bargaining unit member:

> ". . . 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 (Buxton) that, under federal precedent, an exclusive representative'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, at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082.)

The Board has held that an exclusive representative's case-handling error (e.g., missing the deadline for filing a grievance) only constitutes negligence and does not rise to the level of arbitrary conduct sufficient to establish a breach of the duty of fair representation. (California School Employees Association (Ciaffoni, et al.) (1984) PERB Decision No. 427.) The Board has recognized an exception to this rule where the exclusive representative's negligence foreclosed any remedy for the grievant. (Buxton, supra, PERB Decision No. 1517-H.)

In SEIU Local 790 (Chan) (2007) PERB Decision No. 1892-M (Chan), the Board held that allegations that an exclusive representative failed to return an employee's phone calls

regarding the employee's request that his exclusive representative arbitrate his grievance is not sufficient evidence that the exclusive representative acted in a manner that was arbitrary, discriminatory, or in bad faith.

Here, Arteaga contacted Local 99 and inquired about filing a grievance. Arteaga was informed by Bovell that Gibson would contact Arteaga about his inquiry. Thereafter, neither Bovell nor Gibson contacted Arteaga about his inquiry or returned his phone calls. Arteaga alleges that the issue was never formally grieved because no one from Local 99 ever contacted him to discuss his case.

Arteaga does not provide facts explaining why he did not file a grievance on his own behalf. Article V, Section 1.0 of the CBA provides that a grievance may be filed by an employee or Local 99 on behalf of an employee. Thus, while Local 99 was negligent in not returning Arteaga's phone calls, Local 99's failure to return Arteaga's phone calls or file a grievance on Arteaga's behalf did not completely extinguish Arteaga's right to pursue his claim. (Chan, supra, PERB Decision No. 1892-M; Buxton, supra, PERB Decision No. 1517-H.) Accordingly, Arteaga has not demonstrated that Local 99's conduct rose to a level of arbitrary conduct sufficient to establish a breach of the duty of fair representation.

2. Agency Fees

PERB Regulation 32615(a)(5)[3] 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." 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.)

PERB Regulation 32994(a) requires that an agency fee payer who wishes to challenge the amount of the fee by filing an unfair practice charge with PERB must first exhaust his or her exclusive representative's agency fee appeal procedure unless the procedure is insufficient on its face. (Teachers Association of Long Beach (Aragon, et al.) (1999) PERB Decision No. 1311.) In this case, there is no evidence that Arteaga filed an agency fee appeal through Local 99's agency fee appeal procedure. In addition, Arteaga has not alleged or shown that Local 99's agency fee appeal procedure is insufficient on its face. Accordingly, this allegation 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 Second Amended Charge, contain

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

all the facts and allegations Arteaga wishes to make, and be signed under penalty of perjury. 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 an amended charge or withdrawal is not received from Arteaga before July 28, 2008, the charge shall be dismissed. Questions concerning this matter should be directed to me at the above telephone number.

Sincerely,

Sean McKee
Regional Attorney

SM