STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ROYCE P. DUNN, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 379, Respondent.	Case No. SA-CO-545-E PERB Decision No. 2028 May 27, 2009

Appearances: Petrie Dorfmeier & Morris by J. David Petrie, Attorney, for Royce P. Dunn; California School Employees Association by David J. Dolloff, Staff Attorney, for California School Employees Association & its Chapter 379.

Before Neuwald, Wesley and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Royce P. Dunn (Dunn) of a Board agent's dismissal of his unfair practice charge. The charge alleged that California School Employees Association & its Chapter 379 (CSEA) violated the Educational Employment Relations Act (EERA)[1] by withdrawing Dunn's grievance one week before a scheduled arbitration hearing. The Board agent dismissed the charge for failure to state a prima facie case of a breach of the duty of fair representation.

The Board has reviewed the dismissal and the record in light of Dunn's appeal, CSEA's response and the relevant law. Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

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

BACKGROUND

On February 1, 1999, the State Center Community College District (District) hired Dunn and Michael Hopkins (Hopkins) as job developers. In early 2000, the District notified CSEA of a possible layoff of employees in the job developer classification. At all times relevant to this charge, CSEA has been the recognized employee organization representing the District's classified employees.

Article 35, Section 4, of the 2000-2003 collective bargaining agreement (CBA) between CSEA and the District provided that "[t]he order of layoff shall be based on seniority (within classification) throughout the District." Section 6 of that article provided the following procedure for breaking ties in seniority:

> If two (2) or more employees in a class subject to layoff have equal seniority, the determination as to who shall be laid off will be made on the basis of the greater bargaining unit seniority, or if that be equal, the greater hire date seniority, and if that be equal, then the determination shall be made by lot.

Because Dunn and Hopkins were hired into the same bargaining unit on the same day, the seniority tie could only be broken by lot. Accordingly, on May 8, 2000, Dunn attended a meeting at which CSEA President Jerry Loheide, CSEA Labor Relations Representative Derek Pullinger (Pullinger), District Vice-Chancellor for Personnel Henry M. Padden (Padden), and Patt Taylor[2] drew lots to break the tie. As a result of the drawing, Dunn was deemed to have seniority over Hopkins. The charge alleged "there was no mention during that meeting of re-establishing seniority at a later date."

On June 5, 2000, Padden sent a memorandum to all employees facing layoff which summarized the May 8 meeting and answered questions employees had posed about the possible effects of the layoff. Regarding the breaking of the seniority tie, the letter stated:

[2] The charge does not identify whether Taylor was a District or CSEA representative.

"That seniority lottery applies only to this layoff and not to any future layoff. A new lottery would be conducted each time there is a layoff in the future, if any."

On June 15, 2000, CSEA and the District executed a memorandum of understanding (MOU) which stated: "The following shall amend and be added to the provisions of the June 5, 2000 memorandum executed by Vice Chancellor Henry M. Padden regarding impacts and effects of Layoff." The MOU went on to discuss rehiring preference for laid off employees. A copy of Padden's June 5, 2000 memorandum was attached to the MOU, which was signed by Padden and Pullinger.

On June 30, 2000, the District laid off employees in the job developer classification. Based on the results of the seniority lottery, Dunn was not laid off but was transferred to the Disabled Student Program and Services department where he continued to work as a full-time, permanent job developer.

On May 21, 2002, the District notified CSEA of a proposed layoff of five job developers. By this time, Terry Flanagan (Flanagan) was CSEA's labor relations representative in the area. On a December 11, 2002 list of job developers prepared by the District for the layoff, Dunn had a higher seniority number than Hopkins. As a result, Dunn was able to avoid the layoff by "bumping" the least senior job developer from a full-time position.

The 2003-2006 CBA between CSEA and the District took effect on July 1, 2003. It contained the following modified version of Article 35, Section 6:

> Equal seniority shall be determined on the first day of hire (first day of work). If two (2) or more employees in a class subject to layoff have equal seniority, the determination as to who shall be laid off will be made on the basis of the greater hire date seniority, (the first day of work); if that be equal it will be made on the highest rank on the eligibility list (combination of score and oral interview, etc.); if that be equal it will be made on the

highest score; and if that be equal, then the determination shall be made by lot.

On October 31, 2005, the District reduced Dunn's hours from 40 to 19 per week based on his status as the least senior employee in the job developer classification. On November 28, 2005, Dunn filed a grievance over the reduction in hours. Dunn argued in the grievance that he was not the least senior employee in the job developer classification because his seniority over Hopkins was determined "once and forever" by the May 8, 2000 drawing.[3] The District denied the grievance on the ground that it had properly applied the procedure for breaking seniority ties contained in Article 35, Section 6, of the 2003-2006 CBA.

CSEA requested arbitration of Dunn's grievance. The District responded that the arbitration request was untimely. On December 14, 2006, the arbitrator mutually selected by the parties ruled that the arbitration request was properly submitted within the time limits set forth in the CBA. Subsequently, CSEA and the District scheduled a hearing on Dunn's grievance for April 17 and 18, 2008.

While preparing for the hearing, Flanagan discovered a June 19, 2000 Field Office Contract Review Form in CSEA's files. Attached to the form were Padden's June 5, 2000 memorandum and the June 15, 2000 MOU. After discussing the documents with the CSEA field director, the two decided that Dunn's grievance was without merit.[4] CSEA withdrew the grievance on April 10, 2008, one week before the scheduled arbitration hearing.

[3] Though not explicitly stated in the charge, it appears from the references to Hopkins' seniority contained therein that Hopkins retained his full-time position while Dunn's hours were reduced.

[4] The charge and CSEA's position statements indicate that CSEA had not considered whether Dunn's grievance conflicted with the equal seniority provision of the 2003-2006 CBA prior to its discovery of the June 2000 documents.

Unfair Practice Charge and Dismissal

On October 1, 2008, Dunn filed his unfair practice charge alleging that CSEA breached its duty of fair representation by withdrawing his seniority grievance one week before the arbitration hearing. Dunn claimed CSEA withdrew his grievance in bad faith because: (1) the May 8, 2000 seniority lottery had established his seniority over Hopkins for all time; (2) Padden's June 5, 2000 memorandum could not change the CBA's procedure for breaking a seniority tie because the memorandum was not negotiated with, or signed by, CSEA; and (3) CSEA's claim that it did not know of the June 19, 2000 Contract Review Form until one week before the arbitration hearing is false.

In its position statement, CSEA offered no reason for its delayed discovery of the June 19, 2000 Contract Review Form, but stated that once it found the document it determined "the grievance was without merit and was in contravention of the seniority provisions in the parties' current collective-bargaining agreement." CSEA further stated that if it had known of the contract review form earlier, "the grievance would not have been pursued at all, saving everybody involved time, frustration and expense."

The Board agent dismissed the charge for failure to state a prima facie case of a breach of the duty of fair representation. The Board agent concluded that CSEA's decision to withdraw Dunn's grievance was based on the terms of the 2003-2006 CBA and that Padden's June 5, 2000 memorandum and the June 15, 2000 MOU did not require CSEA to ignore the terms of the CBA.

Dunn's Appeal

On appeal, Dunn argues there was no rational basis for CSEA's decision to withdraw his grievance because the June 2000 documents upon which CSEA relied did not alter the terms of the 2000-2003 CBA. The appeal also alleges for the first time that: (1) CSEA had a

history of selectively enforcing the CBA's equal seniority provision; (2) CSEA's field representative had a conflict of interest regarding the withdrawal decision; and (3) the withdrawal decision was based on Dunn's race.

CSEA's Response to Appeal

CSEA responds that, prior to withdrawing Dunn's grievance, it "had already gone to arbitration regarding the arbitrability of the seniority grievance, which CSEA won on Mr. Dunn's behalf." CSEA also for the first time claims that it "zealously represented" Dunn in two hearings before the District's personnel commission. Finally, CSEA asserts that Dunn's appeal violates PERB regulations by raising new issues on appeal.

DISCUSSION

1. Procedural Issues

a. *New Allegations On Appeal*

Dunn's appeal contains new allegations not presented to the Board agent. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b).)[5] "The purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case." (*Regents of the University of California* (2006) PERB Decision No. 1851-H.) The Board has found good cause to consider new allegations or new supporting evidence presented on appeal when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's

[5] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)

The new allegations in Dunn's appeal involve conduct by CSEA that occurred before or at the time of its withdrawal of his grievance in April 2008. This information clearly existed prior to the Board agent's dismissal of the charge and nothing in the appeal indicates that Dunn could not have discovered this information by exercising "reasonable diligence" prior to the dismissal. Accordingly, Dunn has failed to establish good cause for the Board to consider the new allegations raised in his appeal.

b. *Late Filed Addendum to Appeal*

PERB Regulation 32635(a) requires that an appeal of a dismissal of an unfair practice charge be filed within 20 days of the date the dismissal is served on the charging party. The charging party is free to supplement the appeal during the 20-day period. (See *San Leandro Unified School District* (2007) PERB Decision No. 1924 [Board accepted three addendums to appeal filed during 20-day appeal period].) However, an addendum filed after the 20-day period has expired is untimely unless good cause is shown for the late filing pursuant to PERB Regulation 32136.[6] (*San Leandro Unified School District* (2007) PERB Order No. Ad-366.) The Board has found good cause when the party made a conscientious effort to timely file and the late filing was caused by circumstances beyond the party's control, such as a mailing or clerical error. (*United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325.) If the reason for the untimely filing is "reasonable and credible," the Board evaluates whether the opposing party suffers any prejudice as a result of the excused late filing. (*Barstow Unified School District* (1996) PERB Order No. Ad-277.)

[6] PERB Regulation 32136 states in full: "A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations."

The Board's Appeals Assistant granted Dunn an extension until February 17, 2009 to file his appeal in this matter and he did so on that date. Dunn then filed an addendum to his appeal on March 9, 2009. The addendum provides no reason for the late filing. Further, nothing in the addendum indicates Dunn intended for it to be filed within the 20-day appeal period and that it arrived at PERB late as a result of circumstances beyond Dunn's control. Therefore, Dunn has failed to establish good cause for the Board to accept his late-filed addendum.

c. *Request for Administrative Notice*

In its response to the appeal, CSEA asks the Board to take "administrative notice" of two decisions by the District's personnel commission in proceedings where CSEA represented Dunn. PERB has declined to take judicial notice of material from outside proceedings when the material "would add nothing of probative value to the record." (*The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H.) The two personnel commission decisions involve appeals of disciplinary actions; neither is related to Dunn's seniority grievance. Thus, while the decisions show that CSEA provided representation to Dunn in those proceedings, they shed no light on whether CSEA fairly represented Dunn with regard to his seniority grievance. We therefore decline to exercise our discretion to take judicial notice of the personnel commission decisions.

2. Duty of Fair Representation

Dunn's unfair practice charge alleged that CSEA denied him the right to fair representation guaranteed by EERA section 3544.9, and thereby violated section 3543.6, subdivision (b), by withdrawing his seniority grievance one week before a scheduled arbitration hearing. In order to state a prima facie violation of this section of EERA, Dunn

must show that CSEA's conduct was arbitrary, discriminatory or in bad faith. (*Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124.)

The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified School District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In *United Teachers of Los Angeles (Collins)*, *supra*, 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 regards to grievance arbitration, the Board has held that a union's decision not to take a grievance to arbitration is lawful where a rational basis for the decision exists. (*Castro Valley Unified School District* (1980) PERB Decision No. 149.) Accordingly, PERB will dismiss a charge alleging a violation of the duty of fair representation if it is shown that a union has made an honest, reasonable determination that the grievance lacks merit. (*Sacramento City Teachers Association (Fanning, et al.)* (1984) PERB Decision No. 428.) In determining whether that standard is met, PERB does not determine whether the union's decision was correct but whether it "had a rational basis or was reached for reasons that were arbitrary or based upon invidious discrimination." (*Ibid.*; see *Vaca v. Sipes* (1967) 386 U.S. 171, 195 [holding that "a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious"].)

Dunn argues that CSEA's decision to withdraw the grievance was irrational because the documents upon which CSEA relied in making the decision did not clearly abrogate or modify

the equal seniority provision of the 2000-2003 CBA. Though framed in terms of rationality, Dunn's argument is essentially that CSEA incorrectly interpreted Padden's June 5, 2000 memorandum and the June 15, 2000 MOU. However, a union does not breach its duty of fair representation by erroneously interpreting a collective bargaining agreement when the interpretation is reasonable under the circumstances. (*Ethier v. U.S. Postal Service* (8th Cir. 1979) 590 F.2d 733, 736; *Oil Workers Local 8-398 (Spruance Co.)* (1986) 282 NLRB 374, 377.) The June 15, 2000 MOU was signed by CSEA Labor Relations Representative Pullinger and purported to amend Padden's June 5, 2000 memorandum. Because Article 35, Section 6, of the 2000-2003 CBA was silent regarding whether the results of a seniority lottery would remain binding in future layoffs, the June 2000 memorandum and MOU could reasonably be read as an agreement between CSEA and the District that seniority would be determined each time a layoff occurred. Thus, CSEA's interpretation of those documents was not irrational under the circumstances.

Further, a union does not breach its duty of fair representation by declining to pursue a grievance when the result, although beneficial to the grievant, "would not be beneficial to the majority of the members of the unit." (*Castro Valley Unified School District, supra.*) As noted in the warning letter, CSEA contends that it decided to withdraw Dunn's grievance in part because Dunn's position was contrary to the equal seniority provision of the 2003-2006 CBA. Because a favorable result for Dunn could result in the invalidation of seniority determinations made under the 2003-2006 CBA, CSEA could have reasonably determined that the grievance was not in the best interests of the bargaining unit as a whole. For these reasons, the charge failed to allege facts showing that CSEA had no rational basis for deciding to withdraw Dunn's grievance and thus the charge failed to establish that CSEA acted arbitrarily in making that decision.

Dunn also argues that CSEA acted in bad faith by waiting until one week before the scheduled arbitration hearing to withdraw his grievance. A union does not breach its duty of fair representation by withdrawing a grievance after it discovers facts that cast doubts on the merits of the grievance. (*AFT Local 1521 (Paige)* (2005) PERB Decision No. 1769; *California State Employees Association (Cohen)* (1993) PERB Decision No. 980-S.) CSEA asserts that it withdrew Dunn's grievance after it discovered the June 2000 memorandum and MOU and determined from those documents that the grievance lacked merit. Dunn contends that CSEA was previously aware of Padden's June 5, 2000 memorandum and the June 15, 2000 MOU because the latter was signed by Pullinger. However, the charge provided no facts establishing that Flanagan, the CSEA labor representative handling the arbitration, was aware of the documents before April 2008, other than a vague statement that "witnesses had been prepared to testify to the document." Accordingly, the charge fails to show that CSEA acted in bad faith by withdrawing Dunn's grievance one week before the scheduled arbitration hearing.

While CSEA's eleventh hour discovery of the June 2000 documents, as well as its apparent failure prior to that discovery to determine what effect Dunn's successful grievance would have on the bargaining unit, are troubling, the facts alleged in the charge do not establish anything more than negligence on the part of CSEA. PERB has held that a union's negligent conduct breaches the duty of fair representation only when it "completely extinguishes the employee's right to pursue his claim." (*Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H, quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, 1274.) Thus, a union's negligent handling of a grievance does not constitute a breach when the collective bargaining agreement allows the employee to pursue the grievance on his or her own. (*Service Employees International Union, Local 99 (Arteaga)* (2008) PERB Decision No. 1991; *Eichelberger v. NLRB* (9th Cir. 1985) 765 F.2d 851, 856.)

Typically, a union has exclusive control over access to the arbitration step of the grievance machinery. (E.g., *Amalgamated Transit Union, Local 1704 (Buck)* (2007) PERB Decision No. 1898-M; *East Side Teachers Association, CTA/NEA (Hernandez)* (1997) PERB Decision No. 1223.) In this case, however, Article 27, Section 5.D.5, of the 2003-2006 CBA provides:

> An individual representing himself/herself may elect to take his/her case to arbitration. In such instances, he/she shall follow the procedures of this section, and the Association shall not be responsible for any expenses incurred.

Because the CBA allows Dunn to take his case to arbitration without CSEA's participation, CSEA's negligent conduct did not extinguish his right to arbitrate his seniority grievance. Consequently, CSEA's withdrawal of his grievance based on its late discovery of the June 2000 documents did not constitute a breach of its duty to fairly represent Dunn.

In sum, Dunn's charge failed to establish that CSEA's decision to withdraw his grievance one week before a scheduled arbitration hearing was arbitrary, discriminatory, or in bad faith. Accordingly, CSEA did not breach its duty of fair representation by withdrawing the grievance.

ORDER

The unfair practice charge in Case No. SA-CO-545-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Neuwald and Wesley joined in this Decision.