

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ELIZABETH TSAI,

Charging Party,

v.

CALIFORNIA TEACHERS ASSOCIATION,
SOLANO COMMUNITY COLLEGE CHAPTER,
CTA/NEA,

Respondent.

Case No. SF-CO-720-E

PERB Decision No. 2096

February 4, 2010

Appearances: Galen T. Shimoda, Attorney, for Elizabeth Tsai; Joseph R. Colton, Attorney, for California Teachers Association, Solano Community College Chapter, CTA/NEA.

Before Dowdin Calvillo, Acting Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Elizabeth Tsai (Tsai) of a Board agent's dismissal of her unfair practice charge. The charge alleged that the California Teachers Association, Solano Community College Chapter, CTA/NEA (Association) violated the Educational Employment Relations Act (EERA)¹ by refusing to submit her grievance to arbitration. The charge alleged that by this conduct the Association breached its duty of fair representation guaranteed by EERA section 3544.9, and thereby violated section 3543.6(b).² Additionally, the charge

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

² EERA section 3543.6(b) provides that it is unlawful for an employee organization to:

Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

alleged that the Association's refusal to submit the grievance to arbitration was retaliation against Tsai in violation of EERA section 3543.6(b). The Board agent dismissed the charge for failure to state a prima facie case.

The Board has reviewed the dismissal and the record in light of Tsai's appeal, the Association's response and the relevant law.³ Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

BACKGROUND

Tsai is employed as a librarian by the Solano County Community College District (District). She is a member of the bargaining unit comprised of all regular and adjunct faculty that is exclusively represented by the Association. The Association and the District are parties to a collective bargaining agreement (CBA) that contains a grievance procedure which ends in binding arbitration. The CBA states that an individual employee may file a grievance on their own behalf, but only the Association may submit a grievance to arbitration.

EERA section 3544.9 states:

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.

³ Tsai's request for oral argument is denied.

The CBA includes a provision that allows regular faculty, including librarians, to take on additional overload/hourly assignments.⁴ In May 2007,⁵ Tsai and other librarians on staff submitted requests for summer assignments/overload hours. Tsai was assigned her third schedule choice (July 2 to July 12 from 7:30 a.m. to 4:00 p.m.). Her first choice was given to a co-worker with less seniority.⁶ Tsai contacted Quentin Duval (Duval), Association grievance committee chair, to file a grievance alleging a violation of CBA Article 19.301. After failing to get a response from Duval, Tsai hired outside counsel who prepared and filed the grievance on her behalf on May 23, 2007 (Tsai grievance).

In addition to the above issue, the grievance also alleged that Tsai's secondary request, to work an additional four hour shift following the end of her assigned shift (for a total of 12 hours each day), was denied by her supervisor, Jay Field (Field). According to the amended charge, Field told Tsai that he was "not assigning any librarians to work a twelve hour day during the summer."

On May 14, 2007, Tsai's co-worker, Librarian Quent Carter (Carter), filed a grievance similar to the second issue in Tsai's grievance, alleging a violation of the same CBA provision.

⁴ CBA Article 19.301 (Regular Faculty) states:

A. Regular faculty will be contacted for each semester and summer session to inquire of their interest in teaching adjunct/hourly assignments. Interested regular faculty will have first priority. If two or more requests for the same class are received from faculty within the teaching discipline, the assignments will be distributed equitably to faculty by seniority on a rotation basis. This section is not intended, however, to allow a senior faculty member to select all available overload/hourly assignments. The term 'class/hourly assignments' shall include overload assignments in counseling and library services.

⁵ Hereafter all dates refer to 2007.

⁶ During the prior year, Tsai received her first schedule choice.

Carter's grievance alleged that he had been denied his request to add a four hour shift to his assigned regular shift because Field assigned the shift to adjunct staff instead of a regular faculty member. Tsai's name was added to Carter's grievance before it was submitted (Carter/Tsai grievance).

Tsai and her attorney attended level one and level two grievance meetings with the District. Ultimately, the District denied both the Tsai grievance and the Carter/Tsai grievance.

Both Tsai and Carter made a request to the Association to submit the above grievances to arbitration. On October 10, the Association submitted the Carter/Tsai grievance to arbitration.

In a letter dated October 31, Duval informed Tsai of the Association Grievance Committee's decision to deny her request to submit her grievance to arbitration. Regarding Tsai's first grievance issue, Duval explained that the Association had investigated Tsai's claims, including interviewing other librarians and staff, and determined the District had followed a long-standing practice of assigning overload assignments, including summer hours, by a system of seniority rotation. The Association concluded that because the District had followed established practice, no violation of the CBA had occurred.

Duval's letter also made reference to Tsai's secondary issue, her claim the District improperly denied her request that an additional four hour shift be added to her regular assigned hours. The letter stated:

You also seem to allege that you were denied a twelve hour shift. The Grievance Committee does not see [the] contract violation you claim. It may be the case that you object to some of the hours in this twelve hour block being awarded to adjunct faculty rather than full[-]time as required by Article 19.301, as you signed another grievance that alleges this; however, you do not clearly assert the same claim. Nonetheless, if you are concerned with that issue and wished to raise it, be advised that the Association intends to arbitrate a case that challenges that incident in your department.

Tsai alleges the Association's refusal to submit her May 23 grievance to arbitration was in retaliation for her filing the grievance on her own with assistance from outside counsel.

Tsai's charge states that she learned from other employees that Chapter President, Diane White (White) disapproved of her seeking outside counsel. Furthermore, the closing paragraph of Duval's October 31 letter states:

In the future should you wish to pursue your rights under the collective bargaining agreement, the Association's Grievance Committee is ready to assist you. The Grievance Committee is disappointed that the Association was denied the opportunity to represent you in a matter which is obviously of great concern to you. . . .

In addition, Tsai alleges that an Association newsletter dated November 30 directly criticized her use of outside counsel when it stated, in part:

We have had a couple of instances of members filing grievances without allowing anyone from the grievance team to review it. While this is their right to file on their own, it makes it much more difficult for us when the District comes to us with questions. It also means that members without grievance experience can and do overlook important filing requirements and contractual issues. We strongly advise you to consult with the Association before filing because it is almost always better to get several people, often cooler heads, to look at a grievance and see if anything is being overlooked.

BOARD AGENT'S DISMISSAL

In dismissing the charge, the Board agent noted that a union is not required to advance a grievance to arbitration if it reasonably believes the claim does not have merit. The Board agent found the alleged facts showed the Association investigated Tsai's charge and determined her grievance did not demonstrate a contract breach. Thus, the Board agent concluded the charge failed to state a prima facie case of a breach of the duty of fair representation.

The Board agent also found the charge failed to show that the Association's refusal to forward Tsai's grievance to arbitration was in retaliation for the exercise of protected activity. The Board agent determined that seeking legal representation from private counsel outside of the union is not a protected activity under EERA. However, the Board agent went on to determine that even if protected activity had been shown, the allegations submitted by Tsai in support of her reprisal argument were insufficient to demonstrate nexus.

TSAI'S APPEAL

In her appeal, Tsai argues that the secondary issue in the Tsai grievance is exactly the same as that found in the Carter/Tsai grievance, but that she is unable to recover damages from a favorable award under the Carter/Tsai grievance. Tsai concludes, therefore, the Association breached its duty of fair representation by not pursuing both grievances.

Tsai also disputes the Board agent's determination that seeking legal counsel outside of the union is not protected activity under EERA, stating that EERA section 3543(b) permits an employee to present grievances to the employer "without the intervention of the exclusive representative." Further, Tsai argues that although none of the facts submitted in support of the reprisal claim may by themselves support a nexus, they are more than sufficient when taken as a whole.

The Association opposed the appeal, arguing that the facts Tsai claims the Board agent overlooked are actually conclusions unsupported by facts, and that the Association did not breach its duty of fair representation.

DISCUSSION

Duty of Fair Representation

EERA section 3544.9 provides that "[t]he employee organization . . . shall fairly represent each and every employee in the appropriate unit." The Board has determined that

this duty extends to grievance handling. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258 (*UTLA (Collins)*.) However, a union is not required to process a grievance to any level if it has a reasonable belief that the claim is meritless. (*Los Angeles Unified School District* (1985) PERB Decision No. 526.) A union has broad discretion to determine whether or not to pursue a grievance as long as its determination is not arbitrary, discriminatory or in bad faith. (*UTLA (Collins)*.)

In *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124, the Board stated that in order to show a prima facie violation of this section of EERA, 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.

Tsai's grievance alleged that Field: (1) assigned overload hours to a regular staff member with less seniority than Tsai; and (2) denied Tsai's request to work an additional four hour shift following the end of her assigned shift (for a total of 12 hours). Regarding the first issue, the charge demonstrated that the Association investigated Tsai's grievance and concluded there was a practice of making overload assignments on a seniority rotation basis. The Association informed Tsai it did not believe it would prevail on this issue.⁷ The Board does not determine whether a union's assessment was correct, but only whether the determination had a rational basis. (*Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Deglow)* (1997) PERB Decision No. 1241.) The Association investigated Tsai's

⁷ On appeal, Tsai does not appear to challenge the Association's determination not to pursue her grievance with respect to the seniority issue. In fact, she informed the Association that she was willing to drop any issues that were not consistent with the Carter/Tsai grievance.

first issue, including interviewing other staff, and ultimately concluded the District had not violated the contract. Based on these facts, the charge does not demonstrate the Association's decision, declining to submit this issue to arbitration, was without a rational basis.

Upon review of the second issue in Tsai's grievance (refusal to grant her a 12-hour day), the Association found the claimed breach of contract in Tsai's grievance to be ambiguous.⁸ Assuming it was similar to the issue described in the Carter/Tsai grievance, the Association informed Tsai that the issue would be addressed when it submitted the Carter/Tsai grievance to arbitration. A union has the discretion to decide in good faith that even a meritorious grievance should not be pursued. (*Los Rios College Federation of Teachers (Deglow)* (1996) PERB Decision No. 1133.) As the Association had already decided to address this issue through the Carter/Tsai grievance, it was free to determine the best allocation of its resources. (*Ibid.*)

In her appeal, Tsai asserts that the secondary issue in her grievance is essentially identical to the issue in the Carter/Tsai grievance, but that she will not be able to recover damages under the Carter/Tsai grievance. However, the charge does not provide facts that demonstrate how or why Tsai would be excluded from any remedy under the Carter/Tsai grievance, which she signed as a named grievant. The Board has held that "[m]ere speculation, conjecture or legal conclusions are insufficient" to support a prima facie case. (*United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944; *Regents of the University of California* (2005) PERB Decision No. 1771-H.) Therefore, the charge fails to state a prima facie case of a breach of the duty of fair representation.

⁸ Tsai's grievance alleged that her supervisor denied her request for the additional work hours. In contrast, the Carter/Tsai grievance alleged the District breached the contract when it assigned the hours to adjunct faculty rather than regular faculty.

Reprisal

EERA section 3543.6(b) states that it is unlawful for an employee organization to “[i]mpose or threaten to impose reprisals on employees . . . because of their exercise of rights guaranteed by [EERA].” In analyzing allegations of reprisal in violation of the duty of fair representation, the Board follows the standard applicable to allegations of reprisal by an employer under Section 3543.5(a). (*Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Deglow)* (1999) PERB Decision No. 1350; *Service Employees International Union, Local 99 (Kimmitt)* (1979) PERB Decision No. 106.)

To demonstrate that an employee organization discriminated or retaliated against an employee in violation of EERA section 3543.6(b), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employee organization had knowledge of the exercise of those rights; (3) the employee organization took adverse action against the employee; and (4) the employee organization was motivated by the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S.)

Protected Activity

Tsai asserts the Association retaliated against her by refusing to advance her grievance to arbitration because she obtained private counsel to assist her with her grievance. Tsai contends EERA section 3543 confers a statutory right to private counsel.⁹

⁹ EERA section 3543 states, in relevant part:

(a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall have the right to represent themselves individually in their employment relations with the public school employer, . . .

EERA section 3543 grants public school employees a limited right to self representation with their employer. Once an employee organization is recognized as the exclusive representative, individual employees do not have the right to meet and confer with the public school employer. (*Oxnard School District (Gorcey and Tripp)* (1988) PERB Decision No. 667.) However, the statute provides that employees retain a right to present their grievances to the employer without the intervention of the exclusive representative.

Nevertheless, the right of an individual employee to present grievances to their employer is limited. For example, an employee may not be represented in the grievance process by an employee organization other than the exclusive representative. (*Mount Diablo Unified School District, et al.* (1977) EERB¹⁰ Decision No. 44.) Furthermore, the Board has held under a similar statute,¹¹ that the right to self representation does not include the right to

(b) An employee may at any time present grievances to his or her employer, and have those grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect, provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

¹⁰ Prior to 1978, PERB was known as the Educational Employment Relations Board (EERB).

¹¹ The Ralph C. Dills Act (Dills Act) is codified at Section 3512 et seq. Dills Act section 3515 states, in part:

Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . . In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.

Dills Act section 3515.5 provides, in part:

be represented by private counsel. (*State of California (Department of Consumer Affairs)* (2005) PERB Decision No. 1762-S.) Thus, EERA does not confer a protected right of representation by private counsel.

Therefore, although Tsai did not have a protected right to representation by private counsel, she did engage in protected activity when she presented her grievance without the intervention or assistance of the Association. (EERA § 3543(b).)

Knowledge and Adverse Action

The Association was aware that Tsai's private attorney prepared and filed her grievance with the District when the Association was copied on the grievance. Furthermore, the Association's refusal to arbitrate Tsai's grievance was adverse to her interests.

Nexus

Having found that Tsai engaged in protected activity, we must also examine whether the charge alleged sufficient facts to establish a nexus between the protected activity and the Association's refusal to pursue arbitration of Tsai's grievance.

In *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M, the Board stated, "Typically, the closeness in time (or lack thereof) between the protected activity and the adverse action goes to the strength of the inference of unlawful motive to be drawn and is not determinative in itself." Tsai filed her grievance on May 23 and was represented by private counsel at meetings through the first two levels of the grievance

Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. . . . Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state.

procedure. Thereafter, Tsai requested that the Association arbitrate her grievance. After investigation of her claims, the Association notified Tsai on October 31, that it would not advance her grievance to arbitration. These facts support a sufficiently close temporal proximity between Tsai's own representation of her grievance throughout the grievance procedure, and the Association's decision not to arbitrate the grievance.

However, while timing 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) disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) departure from established procedures and standards (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) a cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) failure to offer justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); or (6) any other facts that might demonstrate unlawful motive. (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato*.)

Tsai's unfair practice charge fails to allege facts showing these or any other additional factors sufficient to establish an improper motive by the Association.

Tsai contends the Association engaged in disparate treatment because it advanced an identical grievance to arbitration, but not her own individual grievance. However, the evidence does not support a determination that the Tsai grievance was identical to the Carter/Tsai grievance. The Association pointed out in its October 31 letter, that Tsai's claim was ambiguous. Tsai's grievance alleged a denial of her request for additional work hours. The Carter/Tsai grievance alleged the District improperly assigned the additional hours to adjunct faculty rather than regular faculty. Thus, the charge does not demonstrate disparate treatment of identical grievances.

The charge also asserts that nexus is established because the Association disapproved of Tsai obtaining private counsel. Tsai contends that three incidents when taken as a whole are sufficient to demonstrate improper motive by the Association. The charge alleges that: (1) the Association's October 31 letter denying Tsai's request to submit her grievance to arbitration, essentially states that the Association is disappointed in Tsai for submitting a grievance without the assistance of the Association; (2) unspecified comments by Tsai's co-workers show that White disapproved of Tsai's use of outside counsel; and (3) a November 30 newsletter, which espoused the benefits of going through the Association for grievance processing rather than handling complaints individually, "implicitly condem[s] Tsai and others for failing to utilize the union" in presenting grievances. For each of these incidents, however, the charge rests its claim on conclusions which either misstate the facts entirely, or fail to set forth facts which bridge the gap between the Association's alleged conduct and the conclusion of unlawful motivation. Here again, PERB Regulation 32615(a)(5)¹² requires that the charge include at the very least "[a] clear and concise statement of the facts and conduct alleged to

¹² PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

constitute an unfair practice.” Mere speculation or legal conclusions are not sufficient to state a prima facie case. (*United Teachers-Los Angeles (Ragsdale)*, *supra*, PERB Decision No. 944.)

Furthermore, the facts do not show that the Association objected to Tsai’s representation by private counsel. Tsai and her attorney met at least twice with District representatives to discuss her grievance. There is no evidence on record that the Association attempted to intervene or otherwise objected when Tsai’s attorney attended the grievance meetings. As such, the charge fails to state a prima facie case of reprisal for the exercise of protected activity under EERA.

ORDER

The unfair practice charge in Case No. SF-CO-720-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Acting Chair Dowdin Calvillo and Member McKeag joined in this Decision.