

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JAMES FREDERICK TARVIN,

Charging Party,

v.

UNITED FACULTY OF GROSSMONT-
CUYAMACA COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case No. LA-CO-1361-E

PERB Decision No. 2133

September 21, 2010

Appearance: James Frederick Tarvin, on his own behalf.

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

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by James Frederick Tarvin (Tarvin) of a dismissal (attached) of an unfair practice charge by a Board agent. The charge alleged that the United Faculty of Grossmont-Cuyamaca Community College District (United Faculty) violated the Educational Employment Relations Act (EERA)¹ by failing to adequately represent Tarvin in the grievance process. Tarvin alleged that this conduct constituted a breach of the duty of fair representation in violation of EERA sections 3543.6(b) and 3544.9.

The Board agent found that Tarvin failed to plead sufficient facts to demonstrate the charge was timely. In addition, the Board agent found that even if the charge was timely, Tarvin failed to plead sufficient facts to demonstrate that United Faculty breached its duty of

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

fair representation. Accordingly, the Board agent dismissed the charge for failure to establish a prima facie case.

We have reviewed the entire record in this matter and find the warning and dismissal letters were well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, we adopt the warning and dismissal letters as a decision of the Board itself, subject to the following discussion regarding Tarvin's appeal.

DISCUSSION

PERB Regulation 32635(b)² provides: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (See, e.g., *Fremont Unified School District* (2003) PERB Decision No. 1571; *Lodi Unified School District* (2002) PERB Decision No. 1486.) The purpose of this regulation "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." (*South San Francisco Unified School District* (1990) PERB Decision No. 830.)

Relevant to the instant appeal, the Board has denied finding good cause to consider new allegations presented on appeal when the evidence underlying the allegations was available to the charging party prior to the dismissal of the charge and the appeal fails to explain why the allegations could not have been made to the Board agent during the investigation. (See e.g., *California School Employees Association & its Chapter 183*

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

(Richards) (2004) PERB Decision No. 1716; *University of California (Lawrence Berkeley Laboratory)* (1993) PERB Decision No. 998-H.)

Here, Tarvin's appeal contains a myriad of new facts and allegations. The timeframe for this new evidence generally ranges from 2004 to 2008. Because the dismissal letter was issued on January 8, 2009, these allegations clearly predate the dismissal, and there is nothing in the record to suggest they were not known to Tarvin prior to the dismissal of his charge. Tarvin's appeal fails to explain why this new evidence could not have been presented to the Board agent prior to the dismissal of his charge. Accordingly, since Tarvin knew of this information prior to the issuance of the dismissal, we do not find good cause to consider Tarvin's new evidence and allegations on appeal. (*Coalition of University Employees (Hall)* (2010) PERB Decision No. 2095-H.)

In his appeal, Tarvin claims he should be excused from failing to file an amended charge because he is not a lawyer, and he is unfamiliar with PERB process. The Board, however, has ruled that ignorance of the law is no excuse and, therefore, insufficient to warrant a finding of good cause. (*Public Employees Union Local 1 (Coleman)* (2005) PERB Decision No. 1780-M.)

Last, Tarvin claims he should be excused from failing to file an amended charge because the warning letter was issued during the holiday season. Notwithstanding this bare assertion, the charge fails to explain how the timing of the issuance of the warning letter precluded Tarvin from timely filing an amended charge. Accordingly, this claim does not warrant a finding of good cause.

Based on the foregoing, we do not find good cause to consider Tarvin's new allegations and new supporting evidence and, therefore, do not consider this new information in adopting the warning and dismissal letters as a decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-1361-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member Wesley joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-7697
Fax: (213) 736-4901



January 8, 2009

James Frederick Tarvin

Re: James Frederick Tarvin v. United Faculty of Grossmont-Cuyamaca Community College District
Unfair Practice Charge No. LA-CO-1361-E
DISMISSAL LETTER

Dear Mr. Tarvin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 4, 2008. Mr. James Frederick Tarvin (Tarvin or Charging Party) alleges that the United Faculty of Grossmont-Cuyamaca Community College District (Union or Respondent) violated sections 3543.6(b) and 3544.9 of the Educational Employment Relations Act (EERA)¹ by breaching its duty of fair representation.

Charging Party was informed in the attached Warning Letter dated December 15, 2008, that the above-referenced charge did not state a prima facie case. Tarvin was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Tarvin should amend the charge. Tarvin was further advised that, unless he amended the charge to state a prima facie case or withdrew it prior to December 24, 2008, the charge would be dismissed.

On January 5, 2009, the undersigned left a voice-mail message with Tarvin to confirm his receipt of the December 15, 2008 Warning Letter. On January 7, 2009, Tarvin spoke with Sean McKee, PERB Regional Attorney, confirming Tarvin's receipt of the Warning Letter and his understanding that because he did not file an amended charge within the prescribed time, his case would be dismissed. Accordingly, the above-referenced unfair practice charge is hereby dismissed for the reasons stated in the December 15, 2008 Warning Letter.

¹EERA 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.

Right to Appeal

Pursuant to PERB Regulations,² Charging Party 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. (Cal. Code Regs, tit. 8, sec. 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. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 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 PERB 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. (Cal. Code Regs, tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 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 Tarvin 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. (Cal. Code Regs, tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 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. (Cal. Code Regs, tit. 8, sec. 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. (Cal. Code Regs, tit. 8, sec. 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 _____
Truc Nguyen
Board Agent

Attachment

cc: Michael P. Baranic

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-7697
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December 15, 2008

James Frederick Tarvin

Re: James Frederick Tarvin v. United Faculty of Grossmont-Cuyamaca Community College District
Unfair Practice Charge No. LA-CO-1361-E
WARNING LETTER

Dear Mr. Tarvin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 4, 2008. Mr. James Frederick Tarvin (Tarvin or Charging Party) alleges that the United Faculty of Grossmont-Cuyamaca Community College District (Union or Respondent) violated sections 3543.6(b) and 3544.9 of the Educational Employment Relations Act (EERA)¹ by breaching its duty of fair representation.

Background

Tarvin is a faculty member in the Mathematics department at Grossmont-Cuyamaca Community College (District). The Union is the exclusive representative for the faculty at the District.

Tarvin has an HIV-related disability, which he was aware of for five years before he disclosed his disability to the District and to the Union. During this time, he did not request accommodation for his disability.

Upon disclosure of his disability, Tarvin met with the District representatives in a series of meetings Tarvin refers to as the "interactive process" in order obtain reasonable accommodation for his disability. According to the charge, the Union did not participate in the "interactive process." Further, the charge also alleges that Tarvin has been "denied access to the grieving [sic] process, denied access to union lawyers" by the Union.

¹EERA 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.

Discussion

I. Statute of Limitations

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to “any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.” The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) The statute of limitations has also been raised by the respondent as an affirmative defense in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.)

It is not clear from the charge filed whether the charge was timely filed and thus, whether PERB has jurisdiction over the unfair practice. The charge filed with PERB does not provide the date of when Tarvin and the District engaged in the “interactive process.” Further, the charge does not provide the dates of when Tarvin was “denied access to the grieving [sic] process, denied access to union lawyers.” In order to determine whether the alleged unfair practice was timely filed, the charge must provide dates of when the alleged unfair practice occurred.

In cases alleging a breach of the duty of fair representation, the six month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (Los Rios College Federation of Teachers, CFT/AFT (1991) PERB Decision No. 889; United Teachers of Los Angeles (2001) PERB Decision No. 1441.)

However, even if the charge was timely filed, the Charging Party has not demonstrated that the Union has violated the EERA for the following reasons.

II. The Duty to Bargain and Scope of Representation

Tarvin alleges that the Union breached its duty of fair representation. EERA section 3544.9 expressly imposes a statutory duty of fair representation upon employee organizations, providing that:

[t]he employee organization recognized or certified as exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

In order to state a prima facie violation of this section of EERA, the Charging Party must show that the Respondent’s conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board stated:

Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]

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.

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082.)

A. Duty to Union to Engage in the "Interactive Process"

Tarvin alleges that the Union breached its duty of fair representation by refraining from participation in the so-called "interactive process." Respondent asserts that the "interactive process" regarding accommodation of an employee's disability is a component of the Fair Employment and Housing Act (FEHA) and thus is not within the scope of its duty of fair representation.

The 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.) However, the Board has long held that the duty of fair representation is limited to contractually-based remedies under the union's exclusive control. (Capistrano Unified Education Association, CTA/NEA (La Marca) (2001) PERB Decision No. 1422.) Accordingly, the duty of fair representation does not attach to an exclusive representative in extra-contractual proceedings before agencies such as the Department of Fair Employment and Housing or the State Personnel Board. (California State Employees Association (Carrillo) (1997) PERB Decision No. 1199-S; California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S; see also SEIU Local 790 (Hein) (2004) PERB Decision No. 1677 (a union is not obligated to assist an employee with matters before a civil service commission or in an ADA action).)

As stated above, the duty of fair representation is limited to contractually-based remedies under the exclusive control of the Union. In this case, Tarvin, has not specified the terms of the collective bargaining agreement. Therefore, Tarvin has not demonstrated whether the collective bargaining agreement addresses violations under the FEHA or that the "interactive process" is otherwise associated with the collective bargaining agreement. Hence, Tarvin does not establish that the Union possesses exclusive control over the "interactive process" and that

the Union breached its duty of fair representation by its lack of participation in the “interactive process.”

B. Duty of Union to Provide Access to Grievance Process

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative’s action or inaction was without a rational basis or devoid of honest judgment. (Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, quoting Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124; emphasis in original.)

In addition, PERB Regulation 32615(a)(5)² 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.)

In this case, Tarvin has not provided a “clear and concise statement of the facts” regarding how the Union denied him access to the grievance process. (See PERB Regulation 32615(a)(5).) Tarvin has not provided facts as to *what* he requested from the Union, *when* he made the request and *how* his request was related to the grievance process. (State of California (Department of Food and Agriculture), supra, PERB Decision No. 1071-S.) Instead, Tarvin has only stated he was denied access to the grievance process. The instant charge fails to provide sufficient facts to indicate that the Union has acted arbitrarily, discriminatorily, or in bad faith by denying him access to the grievance process. (Reed District Teachers Association, CTA/NEA (Reyes), supra, PERB Decision No. 332.) Tarvin has asserted a mere legal conclusion, which is insufficient to state a prima facie case. (Charter Oak Unified School District, supra, PERB Decision No. 873.)

C. Duty of Union to Provide Access to Lawyers

As stated above, the Charging Party has the burden of providing at minimum, sufficient facts to determine in what manner the exclusive representative’s action or inaction was without a rational basis or devoid of honest judgment. (Reed District Teachers Association, CTA/NEA (Reyes), supra, PERB Decision No. 332.)

In this case, Tarvin has not provided a “clear and concise statement of the facts” regarding how the Union denied him access to union lawyers. (Reed District Teachers Association,

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

CTA/NEA (Reyes), supra, PERB Decision No. 332.) Tarvin has not alleged that he made a request for a lawyer and that the Union has denied a request to have a union provided lawyer. Even assuming the duty of representation includes some responsibility to provide Tarvin with legal representation, Tarvin does not establish that the Union's decision not to do so in this case was arbitrary, discriminatory or made in bad faith. Tarvin has only stated he was denied access to lawyers; which is a mere legal conclusion that is insufficient to state a prima facie case. (Charter Oak Unified School District, supra, PERB Decision No. 873.)

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, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before December 24, 2008, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Truc Nguyen
Board Agent

TN