

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



GERARD K. ZELNIK,

Charging Party,

v.

PROFESSIONAL ENGINEERS IN CALIFORNIA
GOVERNMENT,

Respondent.

Case No. SF-CO-73-S

PERB Decision No. 2665-S

August 27, 2019

Appearances: Gerard K. Zelnik, on his own behalf; Matthew C. Hanson, Legal Counsel, for Professional Engineers in California Government.

Before Banks, Krantz, and Paulson, Members.

DECISION¹

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal from the attached dismissal letter issued by PERB's Office of the General Counsel (OGC). On June 26, 2019, Gerard K. Zelnik (Zelnik), former Compliance Officer at the Office of Statewide Health Planning and Development, filed an amended charge against his exclusive representative, Professional Engineers in California Government (PECG). Zelnik's charge, as amended, alleges that PECG violated the Dills Act² by breaching its duty of fair representation during the course of representing him in a State Personnel Board (SPB)

¹ PERB Regulation 32320, subdivision (d) provides, in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." The Board has not designated the decision herein as precedential because it meets none of the criteria enumerated in the regulation. PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.

² Ralph C. Dills Act is codified at Government Code section 3512 et seq.

matter. OGC dismissed the charge on the basis that it failed to state sufficient facts to establish a prima facie case, as matters before the SPB are extra-contractual and PECG therefore had no duty of fair representation with respect to Zelnik's SPB matter.

Based on our review of the case file in its entirety, Zelnik's appeal, and PECG's response, we find the warning and dismissal letters accurately describe the allegations included in the amended unfair practice charge, and are well-reasoned and in accordance with applicable law. We therefore adopt the warning and dismissal letters as the decision of the Board itself and affirm the dismissal of the unfair practice charge.

ORDER

The amended unfair practice charge in Case No. SF-CO-73-S is DISMISSED WITHOUT LEAVE TO AMEND.

Members Banks and Krantz joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1030
Fax: (510) 622-1027



July 5, 2019

Gerard Zelnik

Re: *Gerard K. Zelnik v. Professional Engineers in Calif. Govt.*
Unfair Practice Charge No. SF-CO-73-S

DISMISSAL LETTER

Dear Mr. Zelnik:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 8, 2018. Gerard K. Zelnik (Zelnik or Charging Party) alleges that the Professional Engineers in California Government (PECG or Respondent) violated the Ralph C. Dills Act (Dills Act)¹ by breaching its duty of fair representation. On May 7, 2019, Charging Party filed a First Amended Charge.

Charging Party was informed in the attached Warning Letter dated May 28, 2019 (Warning Letter), that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, he should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it on or before June 11, 2019, the charge would be dismissed.

After receiving an extension of time, Charging Party filed a timely Second Amended Charge on June 26, 2019. That same day, PECG filed a response to this recent amendment.

THE EARLIER ITERATIONS OF THE CHARGE AND PERB'S WARNING LETTER

In both the earlier iterations of his charge, Charging Party alleged that PECG violated its duty of fair representation by first failing to adequately represent him during a mediation at the State Personnel Board (SPB), then signing off on an agreement at the mediation that negatively impacted his pension benefits, and finally failing to either enforce this agreement or rectify its deficiencies. Charging Party also alleged that throughout this same period of time PECG breached this duty by not responding to his inquiries. The SPB proceeding in this charge

¹ The Dills Act is codified at Government Code section 3512 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov. All further statutory references are to the Dills Act unless specified otherwise.

concerned Charging Party's claim that he had been wrongly demoted by his employer, the State of California's Office of Statewide Health Planning and Development (OSHPD).

The Warning Letter informed Charging Party that because all of PECG's alleged misconduct related to actions or omissions in a matter before SPB, the duty of fair representation did not apply and thus the charge did not state a prima facie violation. As to these points, the Warning Letter stated that a union's duty of fair representation "covers only [] those proceedings and remedies that are negotiated and contractually agreed to by the union and employer." (*Cal Fire Local 2881 (Tobin)* (2018) PERB Decision No. 2580-S.) And as the Warning Letter further explained, because SPB matters are "noncontractual proceedings," the duty of fair representation does not apply to them. (*Ibid.*) That Warning Letter also informed Charging Party that a union's voluntarily choice to represent an employee in an extra-contractual forum does not bring with it a concomitant legal obligation to comply with the duty of fair representation. (*United Teachers Los Angeles (Le Mere)* (2018) PERB Decision No. 2581; *Cal Fire Local 2881 (Tobin)*, *supra*, PERB Decision No. 2580-S.) This is because "PERB does not have authority to impose or enforce the duty of fair representation in extra-contractual proceedings." (*Cal Fire Local 2881 (Tobin)*, *supra*, PERB Decision No. 2580-S.)

DISCUSSION

The Second Amended Charge concerns the same general dispute as the initial iterations of the charge did. Most notably, the recent amendment asserts that PECG violated its duty of fair representation because it did in fact represent Charging Party in the relevant SPB matter, and the provided poor advice in that capacity. The Second Amended Charge additionally asserts PECG acted unlawfully by failing to advise Charging Party that he could be represented by outside counsel in his underlying dispute with OSHPD and then neglecting to inform him "of the limitation of PECG's representation of noncontractual proceeding . . ." Charging Party also now argues that the duty of fair representation applies to PECG's present misconduct because "PECG under the Memorandum of Understanding (MOU) agreement, has a duty to represent their members . . ."

For the reasons explained in the Warning Letter, none of these new allegations are sufficient to demonstrate a prima facie violation of PECG's duty of fair representation. As stated before, the duty of fair representation does not attach when a union voluntarily chooses to represent an employee in a non-contractual forum. (*United Teachers Los Angeles (Le Mere)*, *supra*, PERB Decision No. 2581; *Cal Fire Local 2881 (Tobin)*, *supra*, PERB Decision No. 2580-S.) Consequently, the claim that PECG did actually represent Charging Party in the relevant SPB mediation does not mean that any misconduct in that forum violated Respondent's duty of fair representation.

Nor can a prima facie case derive from the claims that PECG failed to inform Charging Party of the extent of its representational obligations in an SPB matter. Plainly, these claims do not demonstrate that PECG engaged in deficient representation in a proceeding "negotiated and contractually agreed to by the union and employer." Those claims thus cannot serve as the foundation for a valid duty of fair representation claim. (*Cal Fire Local 2881 (Tobin)*, *supra*, PERB Decision No. 2580-S.)

The claim that the MOU bound PECG to a duty of fair representation also cannot be the basis for a prima facie case. This is because regardless of whatever the terms of this agreement between PECG and OSHPD might be, “PERB does not have authority to impose or enforce the duty of fair representation in extra-contractual proceedings.” (*Cal Fire Local 2881 (Tobin)*, *supra*, PERB Decision No. 2580-S.)

Because the charge does not show that any of the alleged misconduct occurred in a contractually based proceeding in which the Dills Act’s duty of fair representation applies, it does not state a prima facie violation.²

Right to Appeal

Pursuant to PERB Regulations, 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, § 32635, subd. (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, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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) 327-9425

² In an e-mail message sent to the undersigned, the relevant electronic filing account with PERB’s Office of the General Counsel, and PECG’s representative on the evening of June 26, 2019, Charging Party further stated that “PECG has violated Dills Act, Section 3515.7(g) and 3519.5(b).” Notwithstanding any potential procedural issues with this attempt to further modify the present charge, those claimed statutory violations do not warrant further discussion. (See PERB Regulation 32615(a) [an unfair practice charge “shall be in writing, signed under penalty of perjury by the party . . .”].) As stated in the Warning Letter, a union violates sections 3515.7(g) and 3519.5(b) if it breaches its duty of fair representation. Charging Party has not shown such a breach occurred here.

If you file 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, § 32635, subd. (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, § 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, § 32135, subd. (c).)

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, § 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,

J. FELIX DE LA TORRE
General Counsel

By _____
Jeremy Zeitlin
Regional Attorney

Attachment

cc: Christiana Dominguez, Professional Engineers in California Government

PUBLIC EMPLOYMENT RELATIONS BOARD

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May 28, 2019

Gerard Zelnik

Re: *Gerard K. Zelnik v. Professional Engineers in California Government.*
Unfair Practice Charge No. SF-CO-73-S

WARNING LETTER

Dear Mr. Zelnik:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 8, 2018. Gerard K. Zelnik (Zelnik or Charging Party) alleges that the Professional Engineers in California Government (PECG or Respondent) violated the Ralph C. Dills Act (Dills Act)¹ by breaching its duty of fair representation. On May 7, 2019, Charging Party filed a First Amended Charge.

FACTS AS ALLEGED

For many years, Charging Party had worked for the State of California's Office of Statewide Health Planning and Development (OSHPD). That position is exclusively represented by PECG, and Charging Party had long been a fee paying member of this union.

Since approximately December 2017, Charging Party has been on approved medical leave from this job. Charging Party also became eligible to be on long term disability status in or around May 2018.

On May 23, 2018, Charging Party participated in a mediation at the State Personnel Board (SPB). This mediation concerned OSHPD's decision to demote Charging Party in December 2017. Charging Party maintains that this demotion was improper.

At the mediation, Charging Party was represented by PECG labor relations specialist Chris Codioli (Codioli). Codioli is not a lawyer, and at the mediation Codioli did not raise Charging Party's physical condition despite knowing about these maladies.

¹ The Dills Act is codified at Government Code section 3512 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov.

During the mediation Charging Party and OSHPD agreed to a settlement, and reduced this agreement to a signed document that same day. According to Charging Party, this agreement required OSHPD to “[restore] ALL pay and ALL benefits” to Charging Party.

Charging Party further asserts that after the parties entered into this settlement agreement, OSHPD failed to comply with all of its terms. As a result, Charging Party sought PECG’s assistance to enforce the agreement throughout the summer and fall of 2018. PECG, however, did not take any further action on Charging Party’s behalf. PECG generally justified this inactivity on the ground that it could not identify a breach by OSHPD.

Charging Party also asserts that throughout this period of time PECG often failed to reply to his inquiries about the state of the settlement.

Charging Party additionally alleges that in April 2019 he received a letter from the California Public Employees’ Retirement System (CalPERS) informing him that it had reduced his monthly benefit by approximately \$268.00.

Later, Charging Party learned from a CalPERS representative that the money he previously received under the aforementioned SPB settlement agreement could not be factored into his monthly retirement benefit under CalPERS’s rules. This representative further informed Charging Party that PECG, OSHPD, and SPB all “had been previously trained” on this rule, and that it had been announced formally in a December 2016 circular letter from CalPERS.

Charging Party adds that before signing the settlement agreement in May 2018, he had “repeatedly asked” PECG representative Codioli if its terms would affect his “CalPERS retirement.” In response, Codioli “repeatedly assured [Charging Party] that there was no problems with the terms of the Settlement Agreement with regard to his CalPERS retirement benefits.” Charging Party further asserts that PECG’s counsel, Christiana Dominguez, also failed to apprise him of the “unlawful nature and consequences contained in the Settlement Agreement.” To the contrary, it is alleged that in September 2018 she informed him that “CalPERS will be able to retroactively change your retirement benefits to increase them based on what you should’ve been compensated,” and that even if “the paperwork doesn’t look correct now, doesn’t mean it won’t be made correct.”

DISCUSSION

Charging Party has alleged that PECG denied him the right to fair representation guaranteed by Dills Act section 3515.7(g) and *California State Employees’ Association (Norgard)* (1984) PERB Decision No. 451-S, and thereby violated section 3519.5(b).

The duty of fair representation imposed on the exclusive representative may extend to grievance handling. In these circumstances, the duty of fair representation “is limited to contractually based procedures and remedies over which the union has exclusive control.” (*Cal Fire Local 2881 (Tobin)* (2018) PERB Decision No. 2580-S.) In other words, an exclusive representative’s duty of fair representation “covers only [] those proceedings and remedies that are negotiated and contractually agreed to by the union and employer.” (*Ibid.*)

Consequently, this duty “does not apply in noncontractual [] proceedings, where the forum is not connected to negotiations or administration of the collective bargaining agreement, and the union does not exclusively control the means to the particular remedy.” (*Ibid.*)

This limitation on the reach of the duty of fair representation extends to proceedings before SPB. (*Ibid*; *California Union of Safety Employees (John)* (1994) PERB Decision No. 1064-S.) An exclusive representative’s voluntarily choice to represent an employee in such an extra-contractual proceeding does not bring with it a concomitant legal obligation to comply with the duty of fair representation. (*United Teachers Los Angeles (Le Mere)* (2018) PERB Decision No. 2581; *Cal Fire Local 2881 (Tobin)*, *supra*, PERB Decision No. 2580-S.) This is because “PERB does not have authority to impose or enforce the duty of fair representation in extra-contractual proceedings.” (*Cal Fire Local 2881 (Tobin)*, *supra*, PERB Decision No. 2580-S.)

Here, Charging Party asserts that PECG acted unlawfully by: representing him poorly during the SPB mediation, failing to advise him of the negative ramifications of the settlement agreement produced there, refusing to seek to enforce the terms of that agreement, and neglecting to reply to many of Charging Party’s related inquiries.

All of the presently alleged misconduct by PECG relates to its involvement in a matter before SPB. In that forum, the duty of fair representation does not attach to an exclusive representative’s actions or omissions. (*Cal Fire Local 2881 (Tobin)*, *supra*, PERB Decision No. 2580-S; *California Union of Safety Employees (John)*, *supra*, PERB Decision No. 1064-S.) While the charge may well show that PECG made mistakes in providing assistance to Charging Party in this proceeding and its aftermath, SPB is not one of those “contractually based procedures and remedies over which the union has exclusive control.” (*Cal Fire Local 2881 (Tobin)*, *supra*, PERB Decision No. 2580-S.)² Because the charge has not shown that the duty of fair representation applies to the alleged misconduct by PECG, it does not state a violation.

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case.³ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies

² When the duty of fair representation does apply, it is only violated if the union’s conduct is arbitrary, discriminatory or in bad faith. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) When a union acts negligently, the conduct will be deemed arbitrary 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.” (*Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517.)

³ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make “a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or

explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second 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 June 11, 2019,⁴ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Jeremy Zeitlin
Regional Attorney

JGZ:jz

contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing.” (*Ibid.*)

⁴ A document is “filed” on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)