

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MALLORY LYN WILLIS AND PAMELA SUE MILLS-WILLIS,)	
)	
Charging Parties,)	Case No. LA-CO-90
)	
v.)	PERB Decision No. 232
)	
EL CENTRO ELEMENTARY TEACHERS ASSOCIATION,)	August 11, 1982
)	
Respondent.)	
)	

Appearances: William F. Macklin (Ewing, Kirk and Johnson), for Mallory Lyn Willis and Pamela Sue Mills-Willis; Charles Gustafson for El Centro Elementary Teachers Association.
Before Jaeger, Tovar and Jensen, Members.

DECISION

Mallory Lyn Willis and Pamela Sue Mills-Willis except to the attached hearing officer dismissal of the unfair labor practice charges filed by them. After considering the entire record in light of the exceptions, the Public Employment Relations Board (Board) affirms the hearing officer's conclusions of law and dismissal of the charges.

The Board also reviewed the charging parties' exceptions concerning the substitution of hearing officers in this case. Having reviewed the record as a whole, we conclude that the parties suffered no prejudice and that the delegation and substitution of hearing officers was within the powers of the Board, Fremont Unified School District (4/5/78) PERB Order No. Ad-28.

ORDER

Upon the foregoing decision and the entire record in this case, the Public Employment Relations Board ORDERS that: the charges filed by Mallory Lyn Willis and Pamela Sue Mills-Willis, in Case No. LA-CO-90 are DISMISSED without leave to amend.

PER CURIAM

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



MALLORY LYN WILLIS AND)
PAMELA SUE MILLS-WILLIS,) Unfair Practice
) Case No. LA-CO-90
Charging Parties,)
) PROPOSED DECISION
v.) (7/15/80)
)
EL CENTRO ELEMENTARY TEACHERS)
ASSOCIATION,)
)
Respondent.)
_____)

Appearances: William F. Macklin (Ewing, Kirk and Johnson), for Mallory Lyn Willis and Pamela Sue Mills-Willis; Charles Gustafson for El Centro Elementary Teachers Association.

Before Sharrel J. Wyatt, Hearing Officer.

PROCEDURAL BACKGROUND

Mallory Lyn Willis and Pamela Sue Mills-Willis (hereafter Charging Parties) filed unfair practice charges against the El Centro Elementary Teachers Association (hereafter Association) on June 25, 1979, alleging violation of sections 3543.6(b) and 3544.9¹. The essence of the charge is that the Association, as exclusive representative of a unit of certificated employees which includes Charging Parties, had permitted both members and non-members to attend the meeting and vote on proposals and on ratification of negotiated agreements. Without prior notice, the Association changed this policy and excluded non-members from voting. Charging Parties are not Association members.

¹All references are to the Government Code unless otherwise indicated.

Following an informal conference on July 11, 1979, which failed to resolve this matter, the Association filed its answer on July 16, 1979 and a formal hearing was conducted on September 12 and 13, 1979 at El Centro. Briefs were filed November 19 and 21, 1979. Hearing officer Diane Spencer conducted the formal hearing. Pursuant to California Administrative Code, title 8, part III, section 32168(b), the case was reassigned for decision on June 16, 1980.

FINDINGS OF FACTS

Charging Parties allege and the Association admits that the El Centro Elementary Teachers Association is a recognized employee organization representing all elementary teachers in the El Centro School District.² Implicit in these pleadings and in the facts as hereafter found, is the fact that the Association is an employee organization within the meaning of the Educational Employment Relations Act (hereafter EERA) and is the exclusive representative of the unit of certificated employees. The unit contains approximately 190 teachers of whom 160 were Association members at the date of hearing.

Charging Parties, Mr. and Mrs. Willis, are both speech and language specialists who began teaching at the El Centro

²The El Centro Elementary School District is located in Imperial County and has an enrollment of approximately 4050 attending elementary schools at nine sites. 1979 California Public School Directory, Cal. State Department of Education at p. 131.

Elementary School District at the start of the 1978-79 school year. Prior to that, they taught in Hillsboro, Texas.

Neither has ever been a member of the Association. Mr. Willis indicated that in Texas, they knew nothing about collective negotiations for teachers or representation in the processing of grievances. Both Willises were approached by Association representatives at the start of the school year and invited to join the Association. Glenice Waters, who was Association president during the 1978-79 school year,³ testified that Mallory Willis inquired about whether the Association would still have to represent him in grievances and in negotiations if he were not a member and that she told him they would. Willis denied this conversation. Willis testified that when he first came to the District, he was approached at least once and usually two or three times daily by members and given literature and information on what the Association could do for him, but the only information he received was on insurance and travel benefits to him if he were a member. He had never heard of "grievance."

Because the Willises were admittedly very naive in relation to the concept of collective negotiations, there is no reason to doubt the testimony of either witness. Rather, Association representatives spoke to Willis in words of art common to

³She presided at Association meetings, was spokesperson in negotiations and had held numerous other offices.

negotiations and assumed Willis understood. Those conversations were not comprehended by Willis because he was totally lacking in the necessary framework to grasp the concept of what was being said.

Willis was initially assigned to Lincoln Elementary School. About the third week of school, he received notice that Superintendent Brautingam wished to see him. At the meeting, he was informed that it was necessary to transfer him to another school and transfer a native American speech and language therapist to his school to achieve racial/national origin balance. He objected to the transfer and in exchange, the superintendent agreed to provide a phone for his office and that the District would provide a District vehicle for the move or pay his expenses and that they would pay him if he moved on the weekend.

Willis acknowledged that it was permissible under the agreement for the superintendent to make the transfer. Willis described the meeting as a grievance. Under the agreement, assuming this was a grievance, he would represent himself at this stage in the proceeding. Willis was satisfied with the resolution and agreed with the superintendent not to pursue the matter further.

In addition to Willis and the superintendent, Association President Waters was among those present at the meeting. She had been given notice and attended as an observer. Neither

transferee requested her presence. She said nothing at the meeting and testified that when she is the representative in a grievance, she does the talking and all the work and research necessary for the presentation. She did not understand this conference to be a grievance hearing.

Following the meeting, Willis testified that he and Waters had the following conversation on the way back to school:

(By Waters) You know, if you had been a member, you might have received better representation.

(By Willis) You mean to tell me that you would have done something more had I been a member?

(By Waters) Well, who knows?

This conversation was not denied by Waters. Nor was she asked about it by Charging Parties in cross examination.

At the time of this meeting, Willis testified:

I think I knew there was a contract, but it was something that I fully didn't understand. In Texas, where I had been, there was no such thing as a contract that was negotiable by teachers. It was between the teacher and the district.

Because the superintendent was within the contract to make the transfer and because Willis would represent himself at this stage under the grievance procedure in any event, this conversation is found to be nothing more than an inducement by innuendo or puffing to get Willis to join the Association, erroneous though it may have been.

During the 1978-79 school year, the Willises attended every meeting of the Association. Notice was given by word of mouth, by posting on the bulletin board, and in May and June, by telephone tree. The flyer, "Straight Talk" was distributed to members first, then nonmembers. One hundred and ninety were ordered and there were times when there were not enough for all nonmembers. After school was out they did not attend meetings or receive notice as found hereafter.

Until April of 1977, nonmembers of the Association were not permitted to vote at Association meetings. At that time, the right to vote was extended to nonmembers for contract ratification but not for contract proposals that were presented to the District in negotiations. However, members of the negotiating team set up meetings in the school to obtain faculty input and those meetings were open to all teachers in the unit, both members and nonmembers.

During 1978-79, nonmembers did vote on contract proposals in approximately January, February and part of March. The vote was permitted as the result of settlement of an unfair practice charge challenging the Association's interpretation of its constitution. Nonmembers, including Willis, voted on proposals relating to class size, retroactive pay, school calendar, and a 5 percent differential for speech therapist, special education, and bilingual teachers. Notice was given by posting minutes of general meetings, special meetings, representative council

meetings, and notices of upcoming meetings including the agenda. In addition, meetings were conducted at an established time and place each month.

At the end of the 1977-78 school year, some members approached Waters regarding proposed changes in the constitution. In response, a constitution committee was set up early in the 1978-79 school year. That committee was ready to make its presentation at the January 1979 meeting, but it was deferred until February because only 15 to 20 people showed up in January. On March 20, 1979, the constitution was changed to delete the right of nonmembers to vote on proposals for negotiations and contract ratification. The president denied that any officer, member of the representative council or any Association governing body encouraged or promoted this change. There is no evidence that they did. Nonmembers continue to have the right to attend meetings and give input or approach members of the negotiating team with their concerns.

Willis was of the opinion that the vote was taken away from nonmembers because the Association did not like the way a vote had gone on organizational security. First, the Association conducted a vote of all teachers involving two choices: maintenance of membership or agency shop. Because this vote was run inconsistently, verbally in some schools and by ballot vote in others and it did not offer the option "neither," the vote was re-run two weeks later. The result of the vote was

not announced to members or nonmembers. The reason given was that they did not want the District to know the vote. Willis felt that he should have been told the result, but never expressed this feeling to any Association representative.

Mel Ramsey was one of three who counted the vote. He recalls there were 70 votes for "neither," 50-55 for "agency shop" and 20-30 for "maintenance of membership." He stated he felt the nonmember vote was determinative but later recalled that he and the others on the tallying committee had discussed the fact that the result reflected that teachers clearly wanted some form of organizational security clause. The vote was directional and not intended to be binding on the negotiating team. Waters determined the combined "agency shop" and "maintenance of membership" votes outweighed the choice of "neither." Three years earlier, the vote was nearly the same and the Association negotiated what they considered to be a form of maintenance of membership. This was ratified by the teachers indicating, in Waters' opinion, that they wanted some form of organizational security.

The votes on organizational security occurred just before the constitutional change of March 20 which took the vote away from nonmembers. It is not inferred, however, that the Association changed its constitution to take the vote away because they did not like the way nonmembers voted on this issue. The reasons are threefold: (1) the vote was

directional, not binding; (2) the constitutional committee was ready to report in January and was not directed on this issue by Association officers; and (3) the vote was nearly the same as it had been three years earlier when only members voted on the issue. If the combined vote of members and nonmembers is essentially the same as the only members vote had been, it cannot be inferred that the Association was reacting to the inclusion of nonmembers in the vote.

From April or May through June, a telephone tree was utilized to give notice. On June 20, a meeting was held to explain the provisions of the tentative agreement. School was out and notice of this meeting was by telephone tree. At this meeting people were informed that the ratification meeting would be held on June 26. The telephone tree was again used to contact members and nonmembers for the June 26 meeting. It was not directed that any names be deleted from the list by the Association president. At the June 26 meeting, a voice vote was taken for ratification and it was not possible to determine if nonmembers, who were present at the meeting, voted although they were not supposed to do so.

The Willises did not receive notice or attend either of these meetings. No one was home to answer the phone for four days, June 18 through the 22nd. Mrs. Willis was on Mark Laine's phone list. Teachers on his list were contacted five times by telephone tree in May or June. She received two calls

from him and her husband received two calls on her behalf. Laine's phone log reflects checks representing four calls completed to Mrs. Willis and two dashes reflecting he was unable to get in touch with her on two occasions. He was not sure of the reason for the two dashes but indicated they may have been attempts to call her for the ratification meeting. He made no calls on June 26th because his daughter was born that day.

Elizabeth Durham, who set up the telephone tree, said no distinction was made between members and nonmembers. She simply directed others working on the tree to call the teachers on their list.

Mr. Willis was on Loris Baker's list. She never understood that she was to call people on her list. Rather, she would tell them the information face to face or leave a note in their mailbox. In June, when school was out, Baker asked Eileen Walker to make her calls because she was going to be out of town. She said she and Walker went over the list and deleted the names of people they knew would be out of town and no effort was made to contact those people. She could not recall if Willis told her he would be out of town or if his name was deleted.

While the Willises did not receive notice in June, no evidence was presented from which it could be inferred that the Willises were intentionally denied notice because of their nonmembership. Rather, the record reflects that other

nonmembers were at the meetings, that no one was home for four critical days to receive notice, and that the telephone tree is not the most reliable vehicle for reaching teachers, be they members or nonmembers, especially during the summer months.

Other than failing to receive notice of the two June meetings, the Willises received notice and attended all other meetings. They were also asked to support Association activities in other ways. Mallory Willis responded by filling out a form reflecting what he was willing to do in support of collective negotiations; Pamela Sue Willis agreed verbally that she would wear a black rose to symbolize unity in grieving over the state of negotiations. Mallory Willis turned in three stamped, self-addressed envelopes to receive information during the summer months. Two of the three were used over the summer. No mailings were made to the Willises or others, either members or nonmembers, as notice of the ratification meetings. Pamela Sue did not turn in envelopes because that would have been duplication. In summary, other than becoming members, the Willises were supportive participants in Association activity in every other way.

Mallory Willis did attempt to participate in the tally of ballots dealing with 5 percent differential pay at the Association meeting and was told he could not do so because he was not a member, nor could he observe the tally of ballots. Only Association members observed the actual counting of

ballots because it was the Association's responsibility. The 5 percent differential involved speech and language specialists, among others. The great majority of those covered by the proposal were members. The vote was to drop this proposal in negotiations. It was later picked up and included in the final agreement because an unfair practice charge was filed and a temporary restraining order to prohibit ratification of the agreement was threatened.

Willis felt he had been harassed or ridiculed because he was not a member. Another teacher called him a freeloader in the teachers' lounge. On another occasion when the 5 percent pay differential was up for vote, he was asked if he had joined yet, said he had not, and was told "Okay. Thank you. I just wanted to know how to vote on this." Willis felt that taking the vote away was an indirect attempt to keep him from attending Association meetings. No evidence was presented in support of this feeling.

The Association has represented nonmembers by filing a grievance on behalf of a nonmember in December 1977, and by affirmatively approaching a nonmember who had problems with evaluations, making suggestions to her and telling her to let the Association know if she had problems down the line.

ISSUE

Whether the Association denied the right to fair representation to the Charging Parties, a violation of sections 3544.9 and/or 3543.6(b) by prohibiting them from voting on proposals for negotiations and contract ratification under its by-laws.

CONCLUSIONS OF LAW

The Association is charged with violation of section 3544.9 which reads:

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.

It is also charged with violation of section 3543.6(b) which reads:

It shall be unlawful for an employee organization to

(b) 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.

An employee organization's breach of its duty of fair representation found in section 3544.9 constitutes a violation of section 3543.6(b). (See Mt. Diablo Unified School District (8/21/78) PERB Decision No. 68.) In the instant case, it is alleged that the Association has breached its duty of fair representation pursuant to section 3544.9, consequently

committing an unfair practice in violation of section 3543.6(b) and that there is an independent violation of section 3543.6(b) for discriminatory treatment of nonmembers.

The Board itself has had occasion to address the duty of fair representation as it relates to internal union matters. (Jules Kimmett (10/19/79) PERB Decision No. 106.) The Board's analysis recognizes that the Legislature, in conferring the right upon an exclusive representative to be the only employee organization empowered to represent unit members in their employment relations with the public school employer, also imposed the duty to exercise its power fairly on behalf of all of those for whom it acts. The duty of fair representation thus clearly extends to meeting and negotiating, consulting on educational objectives and administering the agreement. As to questions which do not involve the employer or which are strictly internal union matters, only those activities that have a substantial impact on the relationship of unit members to their employer are subject to the duty of fair representation.

In Thomas A. Romero (3/26/80) PERB Decision No. 124, the Board itself analyzed the federal standard under which a breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory or in bad faith with approval. The facts in this case will be analyzed with the foregoing precedent in mind.

While admitting that the activity surrounding Mallory Willis' transfer in September of 1979 is beyond the six-month limitation period for filing a claim (section 3541.5(a)), Charging Parties urge the finding that it constitutes evidence of intent on the part of the Association to discriminate against nonmembers. Based on the findings of fact, no such intent is inferred. The grievance procedure did not provide for representation at the initial step for members or nonmembers. Thus, there can be no disparate treatment in failing to represent a nonmember. The comment by Waters following the meeting was inaccurate and obviously designed to induce Willis to join, but it was remote in time and does not, standing alone, support a finding of intent to discriminate.

The failure of the Association to properly interpret its by-laws voluntarily to permit nonmembers to vote on proposals for negotiations was corrected in early 1979. Subsequently the by-laws were changed to remove the right to vote on both proposals for negotiations and contract ratification on March 20, 1979.⁴ As the Board itself indicated in Kimmett, supra, p. 14, the duty of fair representation implies some consideration of the views of various groups of employees and

⁴As indicated in the findings of fact, the change in by-laws was not in retaliation for the vote on the union security proposal. (See discussion, supra, p. 8.

some access for communication of those views, but there is no requirement that formal procedures be established. Here, there were formal procedures for a vote on proposals and ratification and those procedures were taken away. Since the Association was not required to provide such procedures, deleting those procedures does not breach the duty of fair representation provided some consideration of the views of various groups of employees and some access for communication of those views is still provided. Such access was provided in this instance. While Mallory Willis "felt" the Association did not want nonmembers at meetings, there is no evidence to support this feeling. In fact, the Association holds regularly scheduled meetings which nonmembers attend. Word of mouth, posting on bulletin boards of meeting notices with agenda, as well as minutes of general meetings, special meetings and representative council meetings are used to give notice. While the flyer, "Straight Talk" is distributed to members first, generally nonmembers also receive copies. The telephone tree was also used. Obviously, it is only as accurate as those who participate in it, but there is no evidence that it was abused to keep nonmembers from receiving notice. Since nonmembers were present at the two June meetings, lack of notice to the Willises must be attributed to their absence on four critical days combined with oversight or error in the telephone tree itself. Additionally, members of the negotiating team are

available to receive input. With all the foregoing means of notice and communication available, it is found that the denial of formal voting structure to nonmembers does not have a substantial impact on the relationship of unit members to their employer.

The vote to drop the 5 percent differential for speech and language specialists, special education teachers and bilingual education teachers was conducted among members and nonmembers. The majority of those covered by this provision were members. Because the conduct of the vote and those affected by the vote included members and nonmembers, it is impossible to see how this could constitute failure to represent.

Finally, Willis complains of being subjected to harrassment or ridicule because of his nonmembership. The evidence fails to show how this relates to his employment relationship or how comments by fellow teachers are attributable to the Association. Again, this evidence will not support a failure to represent charge under any possible analysis.

Based on the foregoing discussion, it is found that the Association did not breach its duty of fair representation.

In Kimmett (supra, p. 14), the Board itself set forth the standard for finding a violation of section 3543.6(b), applying the test in Carlsbad Unified School District (1/30/79) PERB

Decision No. 89, to the rights provided in sections 3540⁵ and 3543⁶. For the reasons stated in Kimmett (supra, p. 14), and based on the conclusion of law relative to the alleged violation of section 3544.9 stated herein, no violation of section 3543.6(b) is found.

PROPOSED ORDER

Based on the findings of fact, conclusions of law and the entire record in this matter, the unfair practice charges filed by Mallory Lyn Willis and Pamela Sue Mills-Willis against the El Centro Elementary Teachers Association are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on August 4, 1980, unless a party files a

⁵Section 3540 recognizes

[T]he right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit

⁶Section 3543 states

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. . . .

timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting briefs must be actually received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on August 4, 1980 in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, sections 32300 and 32305, as amended.

DATED: July 15, 1980

Sharrel J. Wyatt
Hearing Officer