

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



THERESE M. DYER,)	
)	
Charging Party,)	Case No. SF-CO-180
)	
v.)	PERB Decision No. 342
)	
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,)	September 2, 1983
)	
Respondent.)	

Appearances: Therese M. Dyer, representing herself.
Before Gluck, Chairperson; Jaeger and Morgenstern, Members.

DECISION

JAEGER, Member: Therese M. Dyer excepts to the regional attorney's administrative determination dismissing her complaint against the California School Employees Association (CSEA or Union) for a breach of the duty of fair representation under section 3544.9 of the Educational Employment Relations Act (EERA).¹

PROCEDURAL HISTORY

In August 1978, Dyer filed a charge with the Public Employment Relations Board (PERB or Board) (SF-CO-65) against

¹The EERA is codified at Government Code section 3540 et seq. Section 3544.9 provides:

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.

CSEA because she was dissatisfied with the representation she received in a dispute with Laguna Salada Union School District (District) over a transfer and reassignment. In October of 1979, she filed another charge with PERB (SF-CE-319) against the District in which she principally alleged violations of the Education Code. The two charges were consolidated.

In July of 1980, CSEA filed a complaint for declaratory relief in the Superior Court in San Mateo County (Civil No. 244809). CSEA claimed that the District violated the transfer requirements of the Education Code when they moved Dyer to a new position which resulted in a reduction in her hours.

While CSEA was pursuing its action in superior court the charge before PERB was held in abeyance at the request of the parties.

On October 26, 1981, the hearing officer sent out a letter which indicated to the charging party that the unfair practice issues might not be settled by the court action and that the parties should proceed with the unfair practice hearing. He then gave the charging party a third opportunity to clarify the charge and requested that the charging party submit a statement of issues and legal theories, including citations and other authority, to support the charge. The charging party did not respond to the hearing officer's letter; instead, on November 12, 1981, Dyer's attorney submitted a "Notice of Withdrawal" with prejudice.

On February 22, 1982, the San Mateo County Superior Court dismissed CSEA's lawsuit on behalf of Dyer on the ground that the conduct complained of arguably constituted an unfair practice. The Court, therefore, declined to take jurisdiction because the plaintiff had not exhausted her administrative remedies before PERB.

After receiving oral and written argument, the PERB hearing officer denied the charging party's request to reopen the charge before PERB. Dyer then asked CSEA to further litigate the Superior Court ruling that PERB preempted their jurisdiction. In July 1982, the CSEA attorney informed Dyer that CSEA did not intend to pursue litigation of the Superior Court decision. He indicated that the ruling would stand unless there was exhaustion of the administrative remedy before PERB and that that requirement had been foreclosed by the withdrawal with prejudice of the original unfair practice charge against the District.

In September 1982, Dyer, on her own behalf, filed this unfair practice charge (SF-CO-180) against CSEA charging that the Union breached its duty of fair representation when it refused to pursue to the appellate level the civil action it had filed on her behalf against the District. The regional attorney dismissed the charge and Dyer appealed the dismissal to the Board.

DISCUSSION

The issue presented here is whether the complainant has alleged facts which establish a prima facie violation of EERA. In Rocklin Teachers Professional Association (Romero) (3/26/80) PERB Decision No. 124, the Board, following precedent set by the National Labor Relations Board and affirmed by the Supreme Court in Vaca v. Sipes (1967) 386 U.S. 171, noted:

. . . 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.

Rocklin, supra, p. 7.

In Reed District Teachers Association, CTA/NEA (Reyes) (8/15/83) PERB Decision No. 332, the Board cites Rocklin for the prima facie requirements necessary to show that a union's conduct was arbitrary and thus a violation of the duty of fair representation.

A prima facie case alleging arbitrary conduct violative of the duty of fair representation 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. (Emphasis in original.) (Citing Rocklin, supra.)

Reed, supra, p. 9

In the instant case, Dyer asserts no facts which would indicate in any way that CSEA's decision not to appeal the Superior Court's dismissal was discriminatory, made in bad

faith, or made "without a rational basis or devoid of honest judgment." Rocklin, supra.

ORDER

The complaint is therefore DISMISSED for failure to state a prima facie case.

Chairperson Gluck and Member Morgenstern joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350



December 1, 1982

(ATTACHED FOR INFORMATION ONLY)

Therese M. Dyer
1408 Crespi Drive
Pacifica, CA 94044

Luis Saenz
California School Employees Association
P. O. Box 640
San Jose, CA 95106

Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
Dyer v. California School Employees Association, Charge No. SF-CO-180

Dear Parties:

Pursuant to Public Employment Relations Board (PERB) Regulation section 32730, a complaint will not be issued in the above-referenced case and the pending charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Educational Employment Relations Act (EERA).¹ The reasoning which underlies this decision follows.

On September 13, 1982 Ms. Therese M. Dyer, on behalf of herself, filed an unfair practice charge against the California School Employees Association (CSEA) alleging violations of EERA sections 35449 (sic) and 34369(b) (sic). More specifically, charging party alleged that she was employed by the Laguna Salada Union School District (District), that CSEA was her exclusive representative, and that CSEA breached the duty of fair representation owed to her when it abandoned the civil action it had filed on her behalf against the District.

My investigation of the charge revealed the following. On July 2, 1980, CSEA filed a Complaint for Declaratory Relief in the Superior Court of California, County of San Mateo (Civil No. 244809). In that lawsuit, CSEA challenged the District's failure to transfer Ms. Dyer, a cafeteria cook-manager, to a position within the District that would have assured her seven hours daily employment, rather than the reduced hours she was working in her current assignment. CSEA asserted that her seniority status entitled her to such a transfer, and that the employer's failure to respond to her request violated

¹References to the EERA are to Government Code section 3540 et seq. PERB Regulations are codified at California Administrative Code, Title 8.

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Education Code section 45308. Additionally, Ms. Dyer filed an unfair practice charge with PERB claiming that the District's conduct violated the EERA.

On February 22, 1982, the San Mateo County Superior Court dismissed CSEA's lawsuit on the ground that the conduct complained of arguably constituted an unfair practice and therefore the Court was preempted by PERB, the administrative agency empowered to decide issues arising under the EERA. Ms. Dyer's unfair practice charge, however, had been withdrawn with prejudice, on November 10, 1981, at the request of her private attorney, Mr. William B. Peavey, Jr. Consequently, the Superior Court's dismissal instructed Ms. Dyer to pursue what, by that time, had ceased to be a PERB action.

CSEA lawyers concluded that they were precluded from exhausting administrative remedies before PERB and therefore could not satisfy the Superior Court's precondition to reactivating the civil suit. Further, they concluded that the legal authority favoring preemption could not be overcome and consequently that the Superior Court's ruling would not be reversed by the Court of Appeal. CSEA has taken no further action in regard to this matter.

Whether CSEA's failure to pursue the civil matter constitutes a breach of the duty of fair representation owed to Ms. Dyer depends on resolution of two issues: (1) Was CSEA legally obliged to file and pursue the civil action -- alleging Education Code violations on charging party's behalf? (2) Was CSEA's decision not to take further action reasonable?

The duty of fair representation, codified in EERA section 3544.9, has a parallel under the National Labor Relations Act (NLRA) (29 U.S.C. sections 151 et seq.). There, the doctrine was fashioned by the courts as a quid pro quo for the rights and powers granted by that statute to an employee organization which, by reason of its majority status, is entitled to act as the exclusive representative for the bargaining unit. International Brotherhood of Electrical Workers v. Foust (1979) 442 U.S. 42 [101 LRRM 2363, 2367] (citing Steel v. Louisville & Nashville RR Co. (1944) 323 U.S. 192 [15 LRRM 708]; Humphrey v. Moore (1964) 375 U.S. 335 [55 LRRM 2031]; Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369]). It follows that the union's obligation does not extend beyond its duty to represent fairly the interests of all bargaining unit members during the negotiation, administration and enforcement of collective bargaining agreements. IBEW v. Foust, supra, p. 2367. PERB has accepted this rationale. Kimmett v. Service Employees International Union, Local 99 (10/19/79) PERB Decision No. 106.

CSEA has no obligation under the EERA to represent unit members concerning infringements of non-contractual rights, such as those arising under the Education Code. The individual unit member is free to secure representation

from other sources. Here, the civil action was undertaken by CSEA on behalf of charging party as a benefit of membership rather than as a part of the obligation to protect her employment interests in its capacity as an exclusive representative. Therefore, because CSEA had no obligation under the EERA to initiate a civil action alleging violations of the Education Code, there is no statutory impediment to abandoning such action. Consequently, CSEA did not breach its duty of fair representation when it chose not to pursue the civil suit subsequent to the Superior Court's dismissal.

Assuming that CSEA did have the duty to represent Ms. Dyer in the civil action, the next question is whether such representation was undertaken fairly. In Castro Valley Unified School District (12/17/80) PERB Decision No. 149, PERB held that the exclusive representative could justify its refusal to proceed to arbitration on an employee's grievance if the organization had a reasonable basis for doing so. The Board explained its reasonableness standard as follows:

. . . [t]he complete satisfaction of all who are represented [is not contemplated]. A wide range of reasonableness must be allowed to a statutory bargaining representative in serving the unit it represents subject always to complete good faith and honesty of purpose in exercise of its discretion. Ford Motor Co. v. Huffman (1953) 345 U.S. 330 [31 LRRM 2548, 2551].

The facts involved in this case do not establish a prima facie violation of this standard. (See Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].) First, CSEA's evaluation of the likelihood of success on appeal was reasonable in light of California appellate cases requiring exhaustion of PERB remedies before bringing suit. See, Council of School Nurses v. Los Angeles Unified School District (1980) 113 Cal.App.3d 666 [169 Cal.Rptr. 893] (PERB has initial exclusive jurisdiction when employees seek to challenge provisions of the collective bargaining agreement as being violative of the Education Code); Leek v. Washington Unified School District (1981) 124 Cal.App.3d 483 (violations of the EERA other than unfair practices must first be heard by the administrative agency); and Fresno Unified School District v. National Education Association, et al. (1981) 125 Cal.App.3d 259 (actions alleging breach of collective bargaining agreement must be heard first by PERB).

Second, it might be argued that CSEA should have filed a charge with PERB and exhausted PERB remedies after the Superior Court dismissed the lawsuit. In light of the fact that Ms. Dyer's own attorney had withdrawn this charge with prejudice, however, CSEA's refusal to refile was not unreasonable.

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It thus does not appear that CSEA's conduct towards Ms. Dyer was "arbitrary, discriminatory or in bad faith." Rocklin School District (3/26/80) PERB Decision No. 124. Nor is there an indication that CSEA's judgment was inconsistent with "complete good faith and honesty of purpose." The facts alleged accordingly do not establish that CSEA breached the duty of fair representation owed to Ms. Dyer. No complaint will be issued and the charge is dismissed.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You 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 Notice (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on December 21, 1982, or sent by telegraph or certified United States mail postmarked not later than December 21, 1982 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 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 the document filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

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

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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 (section 32132).

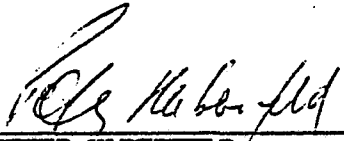
Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

DENNIS M. SULLIVAN
General Counsel

By



PETER HABERFELD
Regional Attorney

cc: General Counsel