

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



JOSEPH GORDON BULLER, )  
 )  
 Charging Party, ) Case No. LA-CO-287  
 )  
 v. ) PERB Decision No. 438  
 )  
 UNITED TEACHERS OF LOS ANGELES, ) November 21, 1984  
 )  
 Respondent. )  
 )  
 \_\_\_\_\_ )

Appearance: Joseph Gordon Buller, on his own behalf.

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.\*

DECISION

This case is before the Public Employment Relations Board on an appeal by Joseph Gordon Buller of the Board agent's dismissal, attached hereto, of his charge alleging that the United Teachers of Los Angeles violated sections 3543.6(b), 3544.9, and 3543 of the Educational Employment Relations Act (Government Code section 3540 et seq.).

We have reviewed the dismissal and, finding it free from prejudicial error, adopt it as the Decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-287 is  
DISMISSED WITHOUT LEAVE TO AMEND.

By the Board

\*Members Tovar and Burt did not participate in this Decision.



## PUBLIC EMPLOYMENT RELATIONS BOARD

LOS ANGELES REGIONAL OFFICE  
3470 WILSHIRE BLVD., SUITE 1001  
LOS ANGELES, CALIFORNIA 90010  
(213) 736-3127



May 10, 1984

Joseph Gordon Buller  
7012 McLennan Avenue  
Van Nuys, CA 91406

Leo Geffner, Esq.  
Geffner & Satzman  
3055 Wilshire Blvd., Suite 900  
Los Angeles, CA 90010

RE: LA-CO-287, Joseph Buller v. United Teachers of  
Los Angeles, DISMISSAL OF UNFAIR PRACTICE CHARGE

Dear Parties:

The above charge was filed on February 14, 1984. Briefly stated, it alleges that United Teachers of Los Angeles breached its duty of fair representation and violated Government Code sections 3543.6(b) and 3544.9 in the manner in which it processed Joseph G. Buller's grievance, the manner in which it presented his grievance to management (lack of effective advocacy) and by refusing to take his case to arbitration.

Charging Party has provided the following facts. Joseph Gordon Buller had been teaching at Jane Addams Continuation High School since February, 1979. In July, 1983, Buller received word from Jack Thompson, Los Angeles Unified School District Staff Relations consultant, that Lucille Caruso, Principal, would be issuing a Notice of Unsatisfactory Performance against him, and that he should arrange to receive it during the summer months. Buller immediately attempted to find out the basis for the Notice and protested the fact that he be required to receive the notice during his vacation.

Buller contacted UTLA Representative Will Mechem on August 1, 1983, and generally explained the problems. Buller told Mechem that, if the District filed an unsatisfactory notice against him, that he wanted to file a grievance. He also asked Mechem to appear with him at the meeting where he was to receive the Unsatisfactory Notice. Mechem informed Buller that he (Buller) did not have to appear on his vacation time to receive the Notice.

On August 3, 1983, a short meeting took place, at which time Buller provided Mechem with copies of correspondence relating to the problems, and at which time Mechem read and discussed their contents with Buller. The same day, UTLA lawyer Larry Trygstad's office and Buller arranged a meeting with attorney Rich Schwab for the purpose of exploring the possibility of filing an unfair practice charge against the District.

On August 10, 1983, a school official informed Buller that the meeting where he was to receive the Notice had been rescheduled to September 12, 1983, the first day of duty for the school year. Buller stated that he did not know whether the rescheduling resulted from UTLA pressure against the District.

On August 15, 1983, Buller went to the UTLA office, and spoke to Francis Haywood, UTLA Vice President, regarding his case, outlining what he considered to be anti-union harrasment against him, since he was the union's Chapter Chairman at Jane Addams High. Buller explains that Mechem and Richard Estes are the main persons who handle grievances, with Richard Segure being the head of the grievance office. But his main reason for speaking directly to Haywood was "to make sure Mechem would follow up on my problem with vigor". Haywood suggested that Buller call Gerald Canales, a teacher in one of the other continuation schools so he could give Buller information or help with his problem.

Buller received a letter from UTLA on August 31, 1983 advising him to attend the September 12 meeting, but not to say anything to the District, just to receive the Notice, and to forward it to them to determine if a grievance was advisable. Buller explains that he realizes that it is standard UTLA procedure not to attend these meetings with members, but feels that UTLA should have sent a representative because the school principal "could have made a statement or blunder" that he (Buller) could use later.<sup>1</sup>

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<sup>1</sup>Buller explains that he has filed two previous grievances through Mechem in September, 1981 against this same principal. Both grievances were won.

Therefore, on September 12, 1983, Buller attended the meeting with a non-employee friend, and received the Notice of Unsatisfactory Performance without much comment. The purpose of the meeting, according to Buller, was simply to officially receive the Notice, and to verify that the papers containing the allegations (50+ pages) were included. There was no discussion regarding the merits of the charges. Soon after being issued the Notice, Buller was transferred to Venice High School on September 20, 1983.

On September 16, 1983, Buller personally presented to Mechem's secretary the documents he'd received at the September 12 meeting, and included an outline of what he believed to be violations of the contract, including articles dealing with District reprisals, discrimination, and transfers. He included a list of possible remedies, since it was Buller's wish that UTLA proceed to file a grievance on his behalf.

On about September 19, 1983, Buller received a letter from Mechem, attaching a grievance form, stating that UTLA intended to file the grievance as Buller had insisted. The letter advised him that the union needed specific evidence, not arguments, refuting the 37 allegations against him. It further admonished him that, in the absence of such evidence, Mechem would advise that the grievance not be processed by the union beyond Step 1 of the procedure.<sup>2</sup> Attached to the letter was a grievance form which was completed, except for Buller's signature, in substantially the same form that Buller had suggested, and stating that UTLA was representing him.

A few days later, Buller wrote to Mechem, telling him that he had specific written evidence to provide, and that Mechem should not agree to "toll the time" with the District.<sup>3</sup>

Will Mechem appeared on behalf of Buller at the grievance Step 1 meeting held on October 13, 1983, with District representatives Anne Falotico and Principal Caruso. Buller,

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<sup>2</sup>Buller claims that he'd already given Mechem voluminous documents dating from 1982 and 1983 to support his claim of harrassment.

<sup>3</sup>Principal Caruso was on sick leave due to an operation.

also present, explains that although Mechem brought up some of the points he had told Mechem about, he mentioned them "with no vigor at all, and no drive". Buller also complains that Mechem did not aggressively emphasize the District's failure to provide him with a pre-notice conference, and that Mechem did not refer to Buller's earlier memos in response to previous complaints from his principal. Buller states that Mechem asked questions, "but not the probing-type questions that would have put them on the spot". Mechem's refusal to adhere to Buller's continuous insistence on tape-recording the session is another source of Buller's dissatisfaction with the representation he received.

Admittedly, Buller explains, he met with Mechem at a preparatory meeting before this conference, where they went over the stack of documents, including Buller's exhibits, "in a fair amount of detail". The documents number some 81 sheets of paper, including charges by the District and responsive memos from Buller.<sup>4</sup> Buller's main claim is that Mechem did not use these materials "aggressively or effectively", that he was "not an aggressive advocate". Buller further complains that the October 13 meeting was improper because it was held one day or so beyond the contract time limits due to Mechem's agreement to toll the time, contrary to his wishes.

After the one-hour meeting, the District representatives stated that they would think about the grievance, but no decision was immediately rendered.

On October 17, 1983, Buller wrote to Mechem asking that he strongly press for immediate rescission of the Notice. He attached copies of two letters from Buller's colleagues, praising Buller's organizational and cooperative qualities. These letters were forwarded for the purpose of helping to win the grievance.<sup>5</sup>

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<sup>4</sup>The District's charges against Buller range from failure to perform assigned duties, not doing curriculum development, failure to accept suggestions, et al, occurring during 1982-1983.

<sup>5</sup>Between the first and second levels of the grievance, Mechem told Buller, on more than one occasion, that he had a weak case.

A Step II grievance meeting was held on November 7, 1983 with District representatives, including the Superintendent of the high school division, Paul Possemato. Prior to the meeting, Mechem met with Buller and discussed strategy, tactics, what items "to go light on", and "things that an advocate and a client would talk about". It was agreed at this preparatory meeting that the strategy would be "not to give away all their ammunition".

Once the meeting was underway, Mechem went through the enumerated accusations against Buller. He would refer to each and explain how each underlying order to Buller by the District was unreasonable. Mechem referred to the contract, stated what sections were violated, and explained why there was a violation. He also asked questions. Buller was allowed to participate as well, to ask questions, and provide explanations. Possemato also asked Buller a good deal of questions, though Buller concedes that they were reasonable ones, and therefore not objected to by Mechem.

With respect to this meeting, Buller contends that Mechem's questions were not "probing ones", that the questions were not on the points he (Buller) thought should be brought out. Additionally, Buller argues that they (he and Mechem) had so much "ammunition" that they could have made more arguments.

The Step II meeting ended with no resolution. On about November 28, 1983, Buller received a copy of a letter from the District, sent to Mechem, wherein Mechem and the District agreed to "toll the time at Step Three". Buller claims that he had no contact with Mechem between November 7 and the date he received the letter. He asserts that the tolling of the time was improper and hurt him because every day he was forced to work at Venice High School was prejudicial to him since the transfer was a disciplinary one based upon the Notice of Unsatisfactory Performance and because Venice High School required a longer commute (21 miles v. 6 miles).

Subsequent to his receipt of the letter, Buller states that he called Mechem to find out the reasons for the tolling. It should be noted that November 28, 1983 was the date that Step III (arbitration) would have been invoked if the Union had decided to proceed to arbitration.

Although Buller states that he does not recall Mechem's response to his question, nor whether he merely left such a message with his secretary, Mechem did write a responsive letter, dated December 6, 1983, to Buller. The letter states the following:

Your grievance has been processed through Steps 1 and 2 of the grievance procedure and is now being tolled at Step 3. I am confident that the District will continue to deny the allegations at that step as well. I have reviewed the materials relevant to the charges contained in the Notice of Unsatisfactory Service and have concluded that the matter should not be processed beyond Step 3 to arbitration. I have presented this recommendation to the Grievance Committee, which has offered you the opportunity to appeal this decision at 4:00 p.m. on January 4, 1983 at UTLA headquarters.

Should you wish to accept this opportunity, you are advised to bring specific factual evidence that would refute the specific charges in the Notice of Unsatisfactory Service. If there are witnesses who would be willing to appear before an arbitrator to refute the charges, it is important that you bring written, signed statements from them indicating exactly what factual testimony they would be willing to offer in person at some later date.

Please be advised that the committee will allot thirty minutes to hear your appeal and to ask you questions related to your presentation. Therefore, it is advisable that you organize your presentation with that in mind. Bring 15 copies of any documents you wish the committee to consider.

If you intend to accept this invitation, please indicate that in writing to Sam Kresner, Director of Negotiations and Staff Services, prior to December 16, 1983.

According to Buller, there are some 13-14 members on UTLA's Grievance Committee. He explains that the existence of such a Committee is a new concept, and that the 30 minute appeal meeting is of standard duration for UTLA members.

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Buller thus accepted the offer to appear before the committee, by letter dated December 9, 1983, and further requested that Sam Kresner do some preliminary inquiry on his own. UTLA responded by stating that it was up to Buller to investigate or present material to the Committee which may refute a staff member's (Mechem) recommendation to the Committee.

On January 4, 1984, Buller had the meeting with the Grievance Committee. Some 7-8 members were present, and Buller was not able to provide the copies of documents he wanted to present, but did provide copies of what he believed to be key items. Mechem and Mike Bennet, UTLA Grievance Committee Chairperson were also present.

Although Buller was granted his allotted time with the Committee, he contends that because his is a "non-standard case", he should have been given more time. However, Buller admits that he did not ask for a longer period. He admits that he outlined his theory of retaliation and provided the Committee with copies of pertinent documents during the first 15 minutes. Then, he took questions from the Committee. Buller claims that the Committee's questions indicated that they did not understand his case. He adds that he became involved in an argument about whether the grievance should proceed to arbitration, with Union representatives arguing that an arbitrator would credit an administrator over him, and asking Buller whether he had witnesses. Buller further concedes that his was one of several other cases scheduled to be heard in 1/2-hour slots that day by the Committee. However, he believes that his appeal did not receive proper consideration.

On January 5, 1984, the Chairman of the Grievance Committee wrote to Buller, informing him that his presentation and all available data had been considered, but that the Committee had voted to concur with the recommendation that the matter not be pursued to arbitration. After receiving this notice, Buller wrote to Committee Chairman Mike Bennet and to Will Mechem on January 13, asking that the Committee provide him with another meeting so he could appeal the decision.<sup>6</sup>

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<sup>6</sup>Buller has stated that he is not aware of an appeal process from a Committee decision internal within the Union.

Mike Bennet responded, on January 20, 1984, writing that Buller's January 13 letter had been received, that the Committee had met on January 18 and carefully reviewed all of the facts in his case, including evidence presented "jointly and severally", and decided to let the Committees' decision stand.<sup>7</sup> The Union followed-up this notice by informing the District on February 28, 1984, that it had decided not to pursue the case to arbitration, that any hearing dates, if any, be cancelled, and that the matter be considered closed.

Charging party has alleged that UTLA violated his section 3544.9 right of fair representation and thereby violated section 3543.6(b). The fair representation duty imposed on the exclusive representative extends to grievance handling (Fremont Teachers Association (King) (4/21/80) PERB Decision No. 124; United Teachers of Los Angeles (Collins) (1/17/83) PERB Decision No. 258). However, PERB has held that an employee does not have an absolute right to have a grievance taken to arbitration and that an exclusive representative's reasonable refusal to proceed with arbitration is essential to the operation of a grievance and arbitration system. Castro Valley Unified School District (12/17/80) PERB Decision No. 149; Los Angeles Unified School District (5/20/83) PERB Decision No. 311. Additionally, PERB explicitly has followed decisions of the federal courts and the National Labor Relations Board (NLRB) interpreting the National Labor Relations Act (NLRA) duty of fair representation (Fire Fighters Union v. City of Vallejo (1974) 12 Cal. 3d 608 [16 Cal. Rptr. 507]; and see SEIU, Local 99 (Kimmitt) (10/19/79) PERB Decision No. 106). For example, PERB has adopted the standard that, whether a union has met its duty depends upon whether the union's conduct in processing or failing to process the grievance was discriminatory, arbitrary, or in bad faith. United Teachers of Los Angeles, supra.

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<sup>7</sup>Bennet's letter noted that one of several considerations that the Committee reviewed was Buller's failure to provide written evidence of who his witnesses were and what they would say, as Buller had promised to provide to the Committee. There was a dispute during the January 4 hearing as to whether two "character references" had been provided. Therefore, Buller told the Committee he would provide them by the end of the business day on January 4. Buller did not do so because he felt "tired and discouraged".

Mere negligence or poor judgment in handling a grievance does not constitute a breach of that duty. Ibid. The NLRB has pointed out that the relationship between the union representative and an employee is not that of attorney and client. Beverly Manor Convalescent Center, 229 NLRB 629, 95 LRRM 1156 (1977). If a contract provision supports the employee under one interpretation, and the Union reasonably gives the contract another interpretation, the fact that the union's interpretation may be "wrong" does not establish the violation. Washington-Baltimore Newspaper Guild (CWA), 239 NLRB No. 175 (1979).

In Buchanan v. NLRB (1979), the U.S. Court of Appeals for the Fourth Circuit stated that:

"The duty to avoid arbitrary conduct does not require a union to take every employee grievance to arbitration, and it has considerable discretion in sifting out grievances which it regards as lacking merit. Without such discretion, a union's effectiveness as bargaining agent would be undermined . . . That a grievance was meritorious or that the union was negligent in not taking the grievance to arbitration does not, per se, constitute a showing that the union engaged in arbitrary conduct." 111 LRRM 3142, at 3146.

Nor are unions required to obtain explanations from every grievant or discharged employee regarding facts that are ambiguous and susceptible of more than one interpretation, in deciding whether to proceed to arbitration. San Francisco Web Pressmen and Platemakers Union No. 4 (1980) 249 NLRB No. 23. In the above case, discharged employees claimed that a Union's processing of their grievance was arbitrary and perfunctory because it accepted as fact "accounts of a dispute which are ambiguous and susceptible of more than one interpretation without making at least an effort to obtain the grievant's explanation of his conduct." In dismissing that claim, the Board held, inter alia, that: where a union undertakes to process a grievance, but decides to abandon the grievance short of arbitration, the finding of a violation turns on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations.

The facts of this particular case, even if viewed in the light most favorable to Charging Party, indicate that the Union's

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handling of the grievance came to less than negligence, judged by legal precedent. The quality of representation, while less aggressive than Buller would have liked, did not reach the level of arbitrariness or bad faith, especially since PERB does not judge the Unions' effectiveness by comparing it to what an attorney would have done for his/her client.

The facts show that the Union presented Buller's grievance at two levels, discussed the case with him at length, received documents from him and submitted them in support of his case, asked questions of adverse witnesses, and argued that the District had violated the contract. When the Union found that there were weaknesses and problems with the case, it admittedly did not hesitate to bring them to Buller's attention to give him a chance to correct deficiencies. Having reached a level where it was necessary to decide whether it should continue to press the grievance to more formal levels, including binding arbitration, the Union provided Buller with an opportunity to convince the Grievance Committee why it should reverse a staff recommendation not to go to arbitration.

Although Buller claims he was prejudiced by the Union's agreement to "toll the time", such claim is unfounded because tolling the time in actuality gave him an opportunity to submit his appeal to the Union's Grievance Committee, rather than the Union simply informing him that his grievance was being dropped. Under the contract, UTLA must submit the grievance to arbitration, not Buller. Whether or not the Union "tolled the time", Buller would still have been forced to remain working at Venice High School, because the Union ultimately chose not to proceed further with the grievance.

Finally, the evidence produced by Charging Party indicates that the Union's handling of the grievance and its refusal to submit it to arbitration was not motivated by ill will. Although Buller states that the Union may have had cause to discriminate him because, for example - he has openly spoke out against forced busing in 1981 (some Union officials strongly favor busing); he once told Will Mechem (September - December 1983) that the Union sometimes gets too involved in politics and not enough with standing up for principles; he is a National Education Association affiliate (whereas the top UTLA hierarchy are allegedly affiliated with the American Federation of Teachers); and he told Will Mechem that he (Buller) had told Union President Judy Solkovitz that he (Mechem) was not being assertive enough and effective enough in handling the grievance,

to which Mechem reacted angrily - the evidence which Buller provided himself fails to establish any inference that the Union's attitude towards him was discriminatory.

Mechem has represented Buller on two prior grievances and won those. Buller has never filed charges against the Union before. He has been a union chapter chairperson since December, 1981, and handled minor union matters prior to the grievance stages at his school site. Indeed, his underlying grievance was based on a theory of discrimination by the District because of Buller's strong UTLA activity.

Additionally, not only was Buller provided with a consultation appointment with UTLA lawyer Schwab on August 3, 1983 for the purpose of filing an unfair practice charge, but he was also given a free Consultation with another union-retained attorney, Roberta Coyl for the purpose of filing what is termed a "verification of charges", on September 8, 1983. Again on August 4, 1983, he was granted another half-hour meeting with Roberta Coyl for the purpose of filing a reverse sex discrimination suit against principal Lucille Caruso. Later, attorney Schwab called Buller to discuss the difficulty of establishing the sex discrimination case.

Although Buller has never been in the Union hierarchy so as to be involved directly in negotiations, he has done many things to support the Union cause. In November, 1983, he gave Union President Judy Solkovitz a copy of a speech made by the District's Paul Possemato, which proved to be helpful to the Union in determining the administrations approach toward the bargaining unit. He wrote articles and submitted them to the Union's newsletter. He participated in "Boycott Day" on September 16, 1983 with other union members against the District. He attended Union meetings, and participated in a massive District-wide strike in 1970. He has written to the union president to promote unity among teachers.

Although Buller is opposed to forced busing, he admits he is just one of many others that openly oppose it. And, although he told Mechem that the Union got too involved in politics, Buller explains that this was a "philosophical" discussion, and Mechem did not get outwardly angry. And, although Buller has spoken out against UTLA endorsing political candidates, he adds that other union members have spoken out at union meetings sharing that view.

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UTLA members are free to affiliate with either AFT or NEA, explains Buller. He states that there are some 13,000 NEA affiliates in UTLA and some 3,000 AFT affiliates. However, Buller adds the AFT people are activists. He admits that union officials such as Frances Haywood and Cathy Jensen are also NEA affiliates, but claims that there is an "uneasy alliance" between these groups in UTLA. Nevertheless, Buller's theory of retaliation based on his NEA affiliation was unsupported by evidence and is tenuous at best, further disapproved by the many instances where UTLA has gone out of its way to provide him with benefits, including legal services.

He concedes that Mechem's attitude toward representing him did not change before or after he made the comments to Mechem about the quality of advocacy he was providing nor when he told him that the Union involved itself too much in politics. Even if Mechem had cause to feel angry at Buller, he provided Buller with an opportunity to convince a third, neutral body, the Grievance Committee, to proceed to arbitration.

In view of the Union's efforts on Buller's behalf, both before and after his receipt of the Notice of Unsatisfactory Performance and his transfer, and in view of the above facts provided solely by him, Buller has failed to establish that UTLA handled his grievance in a way other than in good faith and without hostility or discrimination. For all of the foregoing reasons, the charge is hereby dismissed for failure to establish a prima facie violation of the EERA.

Pursuant to Public Employment Relations Board regulation 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 \_\_\_\_\_, or sent by telegraph or certified United States mail postmarked not later than \_\_\_\_\_ (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, any other party may file with the executive assistant to 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 except for amendments to the charge must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Regional Office or the Board itself (see section 32140 for the required contents and a sample form). The documents 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 executive assistant to the Board at the previously noted address. A request for an extension in which to file a document with the Regional Office should be addressed to the Regional Attorney. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the subject document. The request must indicate good cause for 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 Sullivan  
General Counsel

*Manuel M. Melgoza*

Manuel M. Melgoza  
Regional Attorney

MMM:djm

