STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PAUL NORGARD,	)	
	)	
Charging Party,	)	Case No. S-CO-29-S
	)	
v.	)	PERB Decision No. 451-S
	)	
CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	December 7, 1984
	)	
Respondent.	)	
	)	

Appearances: Michael Rothschild, Attorney for Paul Norgard; Gary P. Reynolds, Attorney for the California State Employees' Association.

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by Paul Norgard of a regional attorney's dismissal, attached hereto, of his unfair practice charge alleging that the California State Employees' Association (CSEA) violated its duty of fair representation by affiliating with the Service Employees International Union, AFL-CIO (SEIU).[1] For the reasons set forth below, we affirm the dismissal of the unfair practice charge.

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[1]The duty of fair representation under the State Employer-Employee Relations Act (SEERA or Act, Government Code section 3512 et seq.), unlike that under the Educational Employment Relations Act (Government Code section 3540 et seq.), is not expressly set forth in a specific section of the Act. We do not consider this omission to reflect an intention on the part of the Legislature to deny SEERA-covered employees the right to be fairly represented by their employee

PROCEDURAL HISTORY AND FACTS

On October 20, 1983, CSEA's Ad Hoc Committee on AFL-CIO Affiliation proposed to the Board of Directors that CSEA affiliate by contract with an appropriate AFL-CIO international union. One of the primary purposes of the affiliation was to gain protection of the no-raiding provisions of Article XX of the AFL-CIO Constitution and thereby prevent "raids" by AFL-CIO unions.

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organizations. Rather, the duty of fair representation under SEERA arises as a quid pro quo for the granting of exclusive representational rights to employee organizations. Such has long been the view held by the federal courts in implying a duty of fair representation under the National Labor Relations Act. See Morris, The Developing Labor Law, Chap. 28; Steele v. Louisville & Nashville Railroad (1944) 323 U.S. 192 [15 LRRM 708]; Textile Workers v. Lincoln Mills (1957) 353 U.S. 448 [40 LRRM 3113]; Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].

Under SEERA, violations of the duty of fair representation are actionable under section 3519.5(b). That section provides, in pertinent part:

> 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.

In this case, the charging party appropriately alleged a violation of section 3519.5(b). However, in addition, the charging party alleged violations of sections 3515, 3518.5, and 3522.2. These sections do not involve the duty of fair representation and, as the charging party alleges no facts to support a finding of violations of these sections, his unfair practice charge with respect to them is dismissed.

Thereafter, CSEA entered into negotiations with a number of AFL-CIO international unions, including SEIU. On December 10, 1983, the CSEA General Council, its highest representative body, approved affiliation with SEIU. On February 4, 1984, CSEA's Board of Directors ratified the affiliation agreement.

At no time has CSEA filed a petition to amend its certification to reflect its affiliation with SEIU.

The CSEA Constitution provides that the General Council "is the supreme and continuing governing body of the Association, limited in its authority only by the rights of representation concerning wages, hours and other terms and conditions of employment." (CSEA Constitution, Art. VIII, Section I.) It also provides that the Board of Directors "may enter into contractual agreements . . . as shall be required to meet the needs of the Association." (CSEA Bylaws Article II, Section 8.)

On February 3, 1984, prior to the affiliation vote, Norgard, a member of CSEA, filed the instant unfair practice charge.

On February 28, 1984, the regional attorney issued his decision dismissing the unfair practice charge.

DISCUSSION

The charging party advances three arguments as to why CSEA's decision to affiliate with SEIU violated its duty of fair representation. First, the charging party asserts that, as a general matter, the affiliation decision violated the Act because, under the "no-raiding" provisions of Article XX of the

AFL-CIO Constitution, employees will be barred from seeking representation by other AFL-CIO affiliates during the life of the affiliation agreement. Moreover, the charging party asserts that CSEA "materially misrepresented" the nature of its affiliation agreement by failing to inform the membership that the AFL-CIO Constitution prohibits raiding should an employee organization disaffiliate from the AFL-CIO. Second, the charging party asserts that the affiliation was unlawful because there is no provision in CSEA's Constitution or Bylaws permitting affiliation. Third, the charging party argues that, as a matter of statutory right, a lawful affiliation requires a vote of the entire membership.

The Board has long held that a prima facie violation of the duty of fair representation is stated where the charging party alleges sufficient facts to demonstrate that an employee organization engaged in conduct which is arbitrary, discriminatory, or evidences bad faith. Redlands Teachers Association (Faeth) (9/25/78) PERB Decision No. 72; Rocklin Teachers Professional Association (Romero) (3/26/80) PERB Decision No. 124; Reed District Teachers Association, CTA/NEA (Reyes) (8/15/83) PERB Decision No. 332; California School Employees Association (Dyer) (9/2/83) PERB Decision No. 342; Service Employees International Union, AFL/CIO, Local 99 (Sponza) (8/31/84) PERB Decision No. 402. Where the alleged conduct involves the internal activities of the employee

organization, a prima facie violation of the duty of fair representation is not stated unless the charging party alleges facts sufficient to demonstrate that the employee organization's decision "would have a substantial impact on employees' relationship with their employer . . . ." Service Employees International Union, AFL/CIO, Local 99 (Kimmett) (10/19/79) PERB Decision No. 106.

Assuming, arguendo, that CSEA's affiliation decision impacted sufficiently upon employees' relationship with their employer as to implicate the duty of fair representation, we find that the charge does not allege a prima facie violation of that duty.

As a general matter, we find nothing unlawful in CSEA's decision to seek affiliation with an AFL-CIO international union in order to take advantage of the no-raiding provisions of the AFL-CIO Constitution. Certainly, the mere allegation that an employee organization had a self-defensive motivation for seeking to affiliate with an international union does not state a prima facie violation of the duty of fair representation.

Nor does the allegation that CSEA's affiliation with an AFL-CIO affiliate might make it more difficult for employees to seek alternative representation from other AFL-CIO unions state a violation of CSEA's duty of fair representation. Clearly, the duty of fair representation does not prevent an employee organization from discouraging raiding by other unions.

Whether other employee organizations wish to abide by the restrictions on raiding set forth in the AFL-CIO Constitution is their own affair and does not raise an issue concerning CSEA's duty of fair representation.

With respect to the charging party's allegation of "material misrepresentation," no facts are alleged which would support the charging party's assertion that the AFL-CIO Constitution protects an employee organization from raiding even after disaffiliation from the AFL-CIO or that CSEA withheld this information from its members. Indeed, the charging party states no facts which would support a finding that CSEA was ever less than forthright in admitting that its affiliation decision was grounded in an attempt to seek protection from raiding by other unions.

Next, the charging party asserts that the CSEA Constitution and Bylaws do not permit an affiliation of this sort. We disagree. Article VIII, Section I of the CSEA Constitution provides that the General Council is the "supreme and continuing governing body of the Association." Article II, Section 8 of the CSEA Bylaws provides that the Board of Directors may "enter into contractual agreements . . . as shall be required to meet the needs of the Association." Considering the above sections, we find nothing in CSEA's Constitution and Bylaws which would prohibit it from entering into an affiliation agreement with an international union based on a

vote of the General Council. Charging Party fails to allege facts to the contrary.

Finally, the charging party asserts that, as a matter of statutory right, an affiliation decision must be based on a vote of the entire membership. In support of this contention, the charging party cites Ventura Community College District (6/30/82) PERB Order No. Ad-130.

In Ventura Community College District, supra, the Board considered an appeal of a regional director's refusal to amend a certification to reflect a disaffiliation of a local union from an international union. Citing the authority of a Meyers-Milias-Brown case, North San Diego County Transit Development Board v. Vial (1981) 117 Cal.App.3d 27, the Board held that a change in certification in such circumstances is appropriate where:

> (1) there must be acceptance by the original certified union, (2) the bargaining unit must remain substantially the same, i.e., there is continuity of bargaining representatives, and (3) the employees are shown to be able to fully and democratically consider and vote on affiliation, i.e. in accordance with due process.

In fashioning its three-part test for approving a change in certification, the Court in North San Diego County Transit Development Board, supra, relied on longstanding federal precedent in this area. See, e.g., North Electric Co. (1967) 165 NLRB 942 [65 LRRM 1379]; Providence Medical Center (1979) 243 NLRB 714 [102 LRRM 1099]; East Dayton Tool and Die Co.

(1971) 190 NLRB 577 [77 LRRM 1274]; McDermott Co. (1978) 571 F.2d 850 [98 LRRM 2191]; St. Vincent Hospital (1980) 621 F.2d 1054 [104 LRRM 2288]. These cases stand for the proposition that the National Labor Relations Board (NLRB) may refuse to amend a certification or an employer may refuse to negotiate with an employee organization where

> . . . the possibility of a question concerning representation remains open because the affiliation took place under circumstances that do not indicate that the change reflected a majority view. North Electric Co., supra.

A question concerning representation may exist where the affiliation decision was not attended by "adequate due process." In a number of cases, the NLRB and the federal courts held that the adequate due process standard requires a vote of the membership. U.S. Steel Corp. (1972) 457 F.2d 660 [79 LRRM 2877]; NLRB v. Winchester, Inc. (1978) 588 F.2d 211 [100 LRRM 2971]; Amoco Production Co. (1982) 262 NLRB 1240 [110 LRRM 1419]; but see Fox Memorial Hospital (1980) 247 NLRB 356 [103 LRRM 1151]; House of the Good Samaritan (1980) 248 NLRB 539.

We have yet to consider whether a vote of the membership would be required to comply with the adequate due process standard for a certification change as set forth in Ventura, supra. However, no question of CSEA's certification or representational status is before us. Nevertheless, even if we were to assume, arguendo, that a question as to the

certification is raised where an affiliation decision is not subjected to a vote of the entire membership, it does not necessarily follow that the affiliating employee organization has in any way breached its duty of fair representation. Absent some evidence that, as a result of the affiliation, an employee organization has abandoned its representational duties or, at the very least, that the affiliation has impaired its ability or willingness to represent employees effectively, no prima facie violation of the duty of fair representation is stated. In this case, there is no evidence that, as a result of the affiliation, CSEA has in any way been impaired in its ability to represent employees. Accordingly, we find that the charging party has failed to allege a prima facie violation of the Act.

ORDER

The unfair practice charge in Case No. S-CO-29-S is DISMISSED.

Chairperson Hesse and Member Morgenstern joined in this Decision.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
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February 28, 1984

Michael Rothschild
Law Offices of Michael Rothschild
1303 H Street
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Gary Reynolds
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RE: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
Paul Norgard v. California State Employees Association;
Charge No. S-CO-29-S

Dear Parties:

Pursuant to Public Employment Relations Board (PERB) Regulation section 32620(5) 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 State Employer-Employee Relations Act (SEERA).[1] The reasoning which underlies this decision follows.

On February 3, 1984, Paul Norgard (hereafter charging party) filed unfair practice charge number S-CO-29-S against the California State Employees Association (hereafter CSEA). The unfair practice charge alleges violation of SEERA sections 3519.5(b), 3515, 3518.7, and 3522.2. Specifically, the charge alleges that CSEA has interferred with charging party's right to join or participate in activities of employee organizations by its decision to affiliate with SEIU AFL/CIO.

It is not disputed that an Ad Hoc Committee on AFL-CIO Affiliation has proposed to the CSEA Board of Directors that CSEA affiliate by contract to an appropriate AFL-CIO international union. The primary purpose of the affiliation was to assure the survival of CSEA by gaining the protection of Article XX (no raid).

After negotiating with AFSCME, SEIU, CWA, IUOE, and MEBA, the CSEA chose to propose affiliation with SEIU. The affiliation vote was conducted on February 4 and resulted in approval.

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[1]References to the SEERA are to Government Code sections 3512 et seq. PERB Regulations are codified at California Administrative Code, Title 8.

The leading PERB case in this area is Kimmett v. SEIU, PERB Decision No. 106 (10/19/79). At pages 15-16, the Board states:

> Thus, we must decide whether employees have any rights under sections 3540 and 3543 to have an employee organization structured or operated in any particular way.
>
> The EERA gives employees the right to "join and participate in the activities of employee organizations" (sec. 3543) and employee organizations are prevented from interfering with employees because of the exercise of their rights (sec. 3543.6(b)). Read broadly, these sections could be construed as prohibiting any employee organization conduct which would prevent or limit employee's participation in any of its activities. The internal organization structure could be scrutinized as could the conduct of elections for union officers to ensure conformance with an idealized participatory standard. However laudable such a result might be, the Board finds such intervention in union affairs to be beyond the legislative intent in enacting the EERA.

On page 17, the Board continues:

> Thus, unless the internal activities of an employee organization have such a substantial impact on employees' relationship with their employer as to give rise to a duty of fair representation, we find that public school employees do not have any protected rights under the EERA in the organization of their exclusive representative. In brief, sections 3540 and 3543 do not give employees more rights in the internal activities of an employee organization than they have under section 3544.9.

The Board has not yet addressed a similar question under SEERA. In light of sections 3512 and 3515 (the counterparts of 3540 and 3543) plus the express duty of fair representation to

non-members found in 3515.7(g), however, I believe that the above rationale is equally applicable to employee rights under SEERA.

Breach of the duty to fairly represent employees occurs only when a union's conduct toward a member of the unit is arbitrary, discriminatory or in bad faith. Redlands Teachers Assn. (9/25/78) PERB Decision No. 72, citing Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369]. A prima facie charge alleging arbitrary conduct 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." Rocklin Teachers Assn. (3/26/80) PERB Decision No. 124 citing Sindicato de Trabajadores Packing (1st Cir. 1970) 425 F.2d 281 [74 LRRM 2028].

Charging party argues that, by affiliation, CSEA has acted to disenfranchise its members in violation of its duty of fair representation. His argument is that disenfranchisement occurs because of the operation of Article XX of the AFL-CIO Constitution. He theorizes that, since no other AFL-CIO union can seek to decertify CSEA, his rights to form, join, and participate have been abridged. As noted in Kimmett, however, this analysis is incorrect.

Assuming, arguendo, that PERB were prepared to review an affiliation decision under the duty of fair representation theory, we would look to see whether the action was "without a rational basis or devoid of honest judgment." In the instant case, such a conclusion cannot by justified. As charging party notes, CSEA's own "Recommendation of the CSEA ad Hoc Committee on AFL-CIO Affiliation," dated October 20, 1983, states:

> "The very real possibility that CSEA could be decertified in one or more civil service bargaining units in 1984 and thus suffer a substantial revenue loss prompted our union's leadership to re-evaluate the question of affiliating to an AFL-CIO union.
>
> "This re-evaluation was ordered for only one reason: to determine whether it is in the Association's best interest to affiliate in order to gain the AFL-CIO Constitution's Article XX protections against

> decertification attempts by other AFL-CIO unions -- our major challengers."
> (Recommendtion of the CSEA Ad Hoc Committee on AFL-CIO Affiliation, page 2.)
>
> "Protection Against Raiding -- The committee concludes that if CSEA remains unaffiliated with the AFL-CIO, we will fact very costly, unhill (sic) decertification battles whose outcome is very uncertain at best. The major reason for affiliation would be to stop most AFL-CIO decertification attempts and to enable us to fight off any that do occur.

Such reasoning belies any argument that the decision to affiliate was without rational basis or devoid of honest judgment. Nor does the alleged lack of standards in the Constitution, By-Laws, or Policies of CSEA regarding affiliation make the decision arbitrary and capricious.

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 dismissal (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 Monday, March 19, 1984, or sent by telegraph or certified United States mail postmarked not later than Monday, March 19, 1984 (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 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 _____
Robert Kingsley
Attorney