

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MARY L. CALLOWAY,)
)
Charging Party,) Case No. S-CO-3-H
)
V.) PERB Decision No. 497-H
)
CALIFORNIA STATE EMPLOYEES')
ASSOCIATION,) March 14, 1985
)
Respondent.)
_____)

Appearances: Mary L. Calloway, on her own behalf; Howard Schwartz, Attorney for California State Employees' Association, Before Hesse, Chairperson; Jaeger, Morgenstern and Burt, Members.

DECISION

This case is before the Public Employment Relations Board on appeal by charging party of the Board agent's dismissal, attached hereto, of her charge alleging that the California State Employees' Association violated the Higher Education Employer-Employee Relations Act (Gov. Code sec. 3560 et seq.).

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

ORDER

The unfair practice charge in Case No. SF-CO-3-H is DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, California 95814
(916) 322-3088



October 26, 1984

Mary Calloway
Chico, CA 95926

Howard Schwartz, Esq.
CSEA
1108 "O" Street
Sacramento, CA 95814

Re: Calloway v. California state Employees Association; Charge
No. S-C0-3-H

Dear Parties:

The above-referenced charge alleges that the California State Employees Association (CSEA) failed and/or refused to process your grievance and other employment related complaints due to unfair, invidious, arbitrary, capricious, and/or discriminatory reasons. This conduct is alleged to violate section 3578 of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to charging party in my letter dated October 11, 1984 that the above-referenced charge did not state a prima facie case and that unless she amended the charge to state a prima facie case or withdrew it prior to October 19, 1984 it would be dismissed. More specifically, I informed her that if there were any factual inaccuracies in the letter or additional facts which would correct the deficiencies explained in that letter, she should amend the charge accordingly.

I have not received either a request for withdrawal or an amended charge and am therefore dismissing this charge based on the facts and reasons stated in my October 11, 1984 letter which is attached as Exhibit 1.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), the charging party 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 November 15, 1984, or sent by telegraph or certified United

States mail postmarked not later than November 15, 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

Jorge A. Leon
Staff Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, California 95814
(916) 322-3088



October 11, 1984

Mary Calloway

Re: Calloway v. CSEA, S-CO-3-H

Dear Ms. Calloway:

The charge you have filed against CSEA alleges that California School Employees Association failed and/or refused to process your grievance and other employment related complaints due to unfair, invidious, arbitrary, capricious, and/or discriminatory reasons. My investigation revealed the following facts. During the period 1973-1980, you were employed by California State University, Chico Associated Students (A.S.) as a window cashier and as an intermediate account clerk. During this period, your duties became progressively more complex and numerous. You became dissatisfied with the large volume of work required by your employer. You desired advancement but came to the opinion that A.S. hired and promoted on the basis of favoritism or friendship. A performance evaluation done by your then supervisor, Mrs. Friedman, rated you "very low," and you were dissatisfied with it.

In September 1980, you resigned your position with A.S. "due to stress, continued longstanding accounts receivable problems beyond [your] control and discrimination" and took a parallel job with CSU, Chico. The job change resulted in a loss of seven years seniority, loss of accumulated sick leave and an unused personal holiday.

A job audit report issued on September 16, 1980 concluded that your position was correctly classified. However, you noted that the audit did not include all the duties which your supervisor required you to perform. You initiated a contact in September 1980 with CSEA Job Representative Chuck Oliver to discuss a possible grievance regarding the audit. No grievance resulted from this meeting.

In June 1981, you filed a claim with FEBC after unsuccessfully requesting unspecified CSEA representatives to assist you in pursuing a complaint against your employer for discrimination

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on the basic of sex and race. In February 1982, you received and filed a "Request for Services," seeking legal representation assistance from CSEA. In March 1982, you met with Chuck Oliver again to discuss the audit, the job evaluation, and the lost seniority and personal holiday. Oliver told you that these were probably not transferable. He stated he would not be able to help with respect to the discrimination allegation "since the investigation is underway." This apparently is a reference to the pending FEPC investigation. In June 1932, you were informed by Mrs. Hall that SPB had concluded that your job had been properly classified. Again, you noted discrepancies between their findings and your actual duties.

In June 1982, you requested assistance from Oliver in the working out-of-class matter. Oliver responded that there was nothing he could do. Also in June 1982, the FEPC investigation came to a conclusion; that agency having found insufficient evidence of discrimination. You then took the matter to the EEOC. That agency reviewed the matter and determined to accept FEPC's statement of the matter, i.e., that there was insufficient evidence of discrimination.

In September 1932, you contacted CSEA field representative Sherry Hunt. She assisted you in putting together an out-of-class claim to be filed with the State Board of Control. She advised you at that point that the Board of Control may not accept the case and that the matter may have to be taken to small claims court. During that same month, you "learned" that the discrimination complaint and the out-of-class claim should be pursued separately and that the discrimination complaint should have been first presented to the SPB. You asked CSEA to act on your request for representation. In December 1982, CSEA Attorney Bradley G. Booth sent you a letter denying your request for representation on the basis that the evidence of discrimination was very weak and on the further basis that FEPC's investigation had resulted in a finding of insufficient evidence of discrimination. Mr. Booth's letter of December 1932 advised you that you could appeal his determination by writing a letter to Gary Reynolds, executive secretary, Representation Appeals Panel.

In February 1983, you returned the signed out-of-class claim to Sherry Hunt, which she had given to you in November 1982. Apparently, miscommunications led you to believe that CSEA had

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filed the claim on your behalf in December 1932. The matter was assigned in April 1933 to Al Riolo, CSEA representative.

In May 1983, you learned from Mr. Riolo that the Board of Control had denied or would deny your out-of-class claim because the Associated Students was a private firm, and not a government employer. You asked him why CSEA had not filed the claim in court since everyone knew A.S. was a private entity. Riolo responded that that had been the only alternative.

A Board of Control hearing on your claim was set for June 1983. You advised the Board that you would attend. Riolo called and said he would go to the hearing with you. However, on the day before the scheduled hearing, a Board of Control representative called to reschedule the hearing in July. In July, you received another call from the Board saying that the hearing had been cancelled altogether as your claim had been denied.

In July 1983, you set out to seek a private lawyer to help you with the discrimination claim and the out-of-class claim. You were unable to engage the services of any private attorney because they charged too much money. One attorney you contacted, David Seales, unsuccessfully tried to get CSEA to pay his fees to represent you.

Sometime before December 1983, you filed an *in propia persona* claim of discrimination in the federal district court. In February 1984, you went to CSEA's office to seek legal assistance in the federal court matter. You spoke to Steven Bassoff. Upon learning that CSEA Attorney Booth had already denied legal assistance, Bassoff advised you that you would have to appeal Booth's denial to his supervisor. You requested that you be allowed to speak with the supervisor. That request was denied. The charge herein was filed on July 30, 1984.

Statute of limitations: There is a statute of limitations problem with your charge. To state a prima facie violation, you must allege and ultimately establish that the alleged unfair practice either occurred or was discovered within the six-month period immediately preceding the filing of the charge with PERB. HEERA section 3563.2(a); Danzansky-Goldbgrg Memorial Chapels, Inc. (1982) 264 NLRB 11.2 [112 LRRM 1103]; Co. (1982) 285 NLRB No. 206 [112 LRRM 1080]; A.F.C. Industries, Inc. (Amcar Division) (1978) 234 NLRB 1063

[98 LRRM 1287], enfd as modified (3 Cir. 1979) 595 F.2d 1344 [100 LRRM 3074]. The national labor Relations Board cases cited here hold that the six-month period commences on the date the conduct constituting the unfair practice is discovered. It does not run from the discovery of the legal significance of that conduct.

In some decisions interpreting the National Labor Relations Act, it has been held that a charge concerning allegedly unlawful conduct which occurred, and was known to charging party, more than six months before the charge was filed was not time barred as long as the conduct recurred within the six-months preceding filing. San Dieguito Union High School District (2/25/82) PERB Decision No. 194. In that case, a school district unilaterally implemented a policy requiring teachers to sign out every time, they left the campus. This policy was implemented during the fall of 1977. A charge of unfair practice was not filed by the union until May 1979 - two years later. The district argued that the union's charge exceeded the statutory limitation of six months. The union argued that the time bar should not apply because a new violation occurred each day that the district enforced its policy and, therefore, it was a continuing violation. PERB disagreed. Although PERB adopted the "continuing violation" concept, upon reviewing the federal cases, it held that this case did not present a continuing violation. Examples of instances that have been held to be a continuing violation are an employer's monthly withholding of union dues (Beer Distributors (1972) 196 NLRB 165) and discriminatory refusals to hire (NLRB v. Textile Machine Works, Inc. (3d Cir. 1954) 214 F.2d 929). ~~However, the refusal to rehire a discriminatorily discharged employee is not a continuing violation~~ (San Dieguito, supra, p. 9).

CSEA first denied your request for representation in writing on December 20, 1982 in a letter signed by Bradley Booth. You filed your unfair practice charge on July 30, 1984, almost two years after the alleged occurrence of the unfair practice. Although you renewed your request for representation in July 1983, through Attorney Seales, and in February 1984, those actions do not start a new six-month statute of limitations running. It was way back in December 1982 that you first learned of the union's refusal to provide representation in the discrimination matter. The facts of your case more closely resemble those cases where a continuing violation was not found to exist.

PERB, in some instances, has ruled that the pursuit by the charging party of an alternate remedy "equitably tolls" the statute of limitations. San Dieguito Union High School District, supra; Los Angeles Unified School District (9/20/82) PERB Decision No. 237; Regents of the University of California (Berkeley) (9/27/83) PERB Decision "No. 353-H. The test is whether charging party has pursued a remedy "reasonably and in good faith." PERB stated in San Dieguito Union High School District, supra.

The alternate chosen must represent a practical effort to resolve [the] dispute expeditiously. San Dieguito Union High School District, supra.

It could be argued that equitable tolling may apply to your case in that you filed a federal court suit and the Board of Control claim was pending; however, the federal suit was not filed until near December 1983 while CSEA informed you that they would not represent you in December 1982.

Failure to State a Prima Facie Case

Assuming, arguendo, that there were no statute of limitations bar on this charge, you have still failed to make out a prima facie case of a violation of Government Code section 3578, which is the provision addressing an employee's right to be represented fairly and impartially.

The National Labor Relations Board has pointed out that the relationship between a union representative and an employee is not that of attorney and client. Beverly Manor Convalescent Center, 229 NLRB 629, 95 LRRM (1977).

The union's stated reasons for refusing to represent you seem to be based upon a reasoned assessment of the factual evidence available to support either the out-of-class claim or the discrimination claim. The out-of-class claim is weakened by the several findings already against you, as is equally true of the discrimination claim. CSEA's claim thus appears to be based upon rational, objective, and practical considerations. I have been unable to uncover any evidence of discriminatory, arbitrary or bad faith motive. The voluminous documents you have submitted in support of the charge do not contain any evidence of such wrongful motivation. Without such evidence, according to PERB precedent, there is no prima facie case. See

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Theresa M. Dyer v. California School Employees Association
(9/23/83) PERB Decision No. 342; Reed District Teachers
Association, CTA/NEA (Reyes) (8/15/83) PERB Decision No. 332.
Thus, there is no evidence that CSEA acted in a discriminatory,
arbitrary manner or in bad faith sufficient to make out a
violation of its duty of fair representation.

1?. you feel that there are any factual inaccuracies; in this
letter or any additional facts which would correct the
deficiencies explained above, please amend the charge
accordingly. The amended charge should be prepared on a
standard PERB unfair practice charge form clearly labeled First
Amended Charge, contain all the facts and allegations you wish
to make, and be signed under penalty of perjury by the charging
party. The amended charge must be served on the respondent and
the original proof of service must be filed with PERB. If I do
not receive an amended charge or withdrawal from you before
October 19, 1984, I shall dismiss your charge. If you have any
questions on how to proceed, please call me at (916) 323-7990.

Sincerely yours,

Jorge Leon
Staff Attorney