

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



GEORGE E. REICH,)
)
 Charging Party,) Case No. LA-CO-6-H
)
 v.) PERB Decision No. 591-H
)
 INTERNATIONAL UNION OF OPERATING) October 3, 1986
 ENGINEERS, LOCAL 501,)
)
 Respondent.)
 _____)

Appearance: George E. Reich, on his own behalf.

Before Hesse, Chairperson; Morgenstern and Porter, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Charging Party George E. Reich to a dismissal of his unfair practice charge against the International Union of Operating Engineers, Local 501 (Union or Local 501). In his charge, Reich alleges that the Union failed to fairly represent him in contesting the decision of the University of California at Los Angeles (University) to place him on an investigatory leave pending dismissal from employment.

SUMMARY OF FACTUAL ALLEGATIONS

In May 1984, the University placed Reich on investigatory leave for allegedly sleeping on the job. Reich had a back problem that had become apparent several months before May 1984,

and he claims he was performing exercises to relieve back pain when his supervisor entered the room. Reich claims he had no prior reprimands and his work performance had been highly rated.

After being placed on leave, Reich met with Fred W. Lowe, a representative of Local 501.¹ Lowe advised Reich to resign, apparently in lieu of dismissal. According to the allegations in the charge, Lowe told Reich that his case had been reviewed by three Union lawyers, all of whom were of the opinion that Reich would not succeed in reversing the University's decision in arbitration. Reich told Lowe he had engaged a representative outside the Union, and that individual told Reich he could definitely win the case. Lowe's pessimistic view of the likelihood of success remained unchanged.

Thereafter, Reich was represented by Lloyd Napier.² Napier took Reich's case to arbitration on June 10, 1985. After the University presented its case, the arbitrator ordered Reich reinstated with back pay.

In the instant unfair, filed on December 4, 1985, Reich asks that Local 501 reimburse him for Napier's fees in the amount of

¹Although the precise date of this meeting is not clear, the charge places it during the summer of 1984.

²Reich does not allege in his charge that the Union refused to represent him or to take his case to arbitration. By letter dated July 16, 1984, Lowe advised Reich that the Union was withdrawing as his representative per Reich's request. Although Reich asserts he did not receive this letter, he does not challenge its factual content.

\$6,420, as well as an additional fee of \$1,300 to which Reich maintains Napier is entitled.

In a letter dated March 27, 1986, the Board's regional attorney dismissed Reich's charge, finding that the charge was both untimely filed and that the allegations contained in the charge failed to establish a prima facie violation of the duty of fair representation (DFR).

Reich appealed the dismissal on April 15, 1986, claiming that, because he lacks legal training and could not properly evaluate the Union attorneys' opinions of his case,

[i]t was not until the actual hearing was heard on June 10, 1985, and the arbitrator found in my favor at the conclusion of the university's case (without requiring one bit of testimony from me or anyone on my behalf) that I became aware of the fact that the union had misrepresented [sic] to me their reason for not wishing to represent me

Calculating the six-month statute of limitations as beginning on June 10, 1985 (the date of the successful hearing), Reich views his December 4, 1985 PERB filing as timely.

DISCUSSION

Section 3571.1(e) of the Higher Education Employer-Employee Relations Act (HEERA)³ imposes on an exclusive representative the duty to fairly and impartially represent all unit employees for whom the employee organization is the exclusive

³HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

representative.⁴ The employee organization is said to violate its DFR when its conduct is arbitrary, discriminatory or in bad faith. Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124. As with any unfair practice, however, the instant DFR charge must conform to the requirements of HEERA section 3563.2(a)⁵ and, therefore, must include allegations that the conduct occurred no more than six months prior to the filing of the charge. Here, since the charge was filed on December 4, 1985, only Reich's hearing, held on June 10, 1985, falls within the statutory period. In our view, the favorable outcome rendered by the arbitrator affords no basis to entertain this charge filed nearly 17 months after the Union assessed Reich's case.

In general, a DFR claim accrues on the date when the employee, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely.

⁴Section 3571.1(e) makes it unlawful for an employee organization to:

Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.

⁵Section 3563.2(a) states:

Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

Hill v. Georgia Power Co. (11th Cir. 1986) 786 F.2d 1071 [122 LRRM 2779], The statutory six-month limitation period under the National Labor Relations Act begins to run when the employee receives notice that the union will proceed no further with the grievance. Hungerford v. United States (9th Cir. 1962) 307 F.2d 99, 102. See, also, Hersh v. Allen Products Co. (3rd Cir. 1986) ____ F.2d ____ [122 LRRM 2730].

In the instant case, Reich contends that Local 501 violated its DFR by erroneously assessing the merits of his case, and that he became aware of this erroneous assessment only at the conclusion of the arbitration hearing. However, in the private sector, the courts have soundly rejected the notion that the favorable outcome of a grievance, or the merits of a grievance not pursued, demonstrates a breach of the DFR. See, for example; Stanley v. General Foods Corp. (5th Cir. 1975) 508 F.2d 274 [88 LRRM 2862]. The Supreme Court stated in Vaca v. Sipes 386 U.S. 171, 192-93 [64 LRRM 2377-78]:

[I]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.

Further, a breach of the DFR cannot be based on a later tribunal's view regarding the probability of success on the merits. Freeman v. O'Neal Steel, Inc. (5th Cir. 1980) 609 F.2d

1123 [103 LRRM 2398]. Here, assuming arguendo that the charge establishes a prima facie case, the complained-of conduct is the Union's alleged misassessment of the merits of Reich's case. That event occurred during the summer of 1984. There are no allegations in Reich's charge that would support a finding that Local 501 misrepresented its underlying assessment. To the contrary, Lowe's interaction with Reich was straightforward. He told him plainly and promptly of the Union lawyers' assessments.

Nor do allegations appear in the charge demonstrating that the Union had some ulterior motive that only came to light at the time of the hearing or within the six months preceding the filing of the charge. In short, the only event that occurred within this time frame was the hearing itself. Without more, the charge is untimely.

Contrary to our dissenting colleague, we are unconvinced that Reich lacked sufficient knowledge or ability to realistically assess his case. Reich was aware of Napier's optimistic view of his case in July 1984 and, for the reasons expressed in Vaca, supra, we are unwilling to rely solely on the eventual victorious hearing to supply the requisite evidence of a prima facie case.

ORDER

Based on the foregoing, we AFFIRM the regional attorney's dismissal.

Member Porter joined in this Decision. Chairperson Hesse's dissent begins on page 7.

Hesse, Chairperson, dissenting: I dissent on the limited grounds that the Charging Party's cause of action accrued when he had reason to believe that the Union's alleged refusal to represent him was made in bad faith, discriminatorily, or arbitrarily. While I would agree that a decision by the arbitrator in favor of a Charging Party does not necessarily evince such bad faith (see Vaca v. Sipes, supra), I am not willing to state that such a determination can never be evidence of bad faith.

In this case, the Charging Party was aware of the Union's opinion of his case in 1984, outside the six-month statute. But because of the Union's statement that "three Union lawyers . . . all said the case would lose in arbitration," I find it reasonable that he did not find the Union's reluctance to pursue his case to be arbitrary or in bad faith. That assessment could be made only when he won his arbitration without his new attorney even having to call any witnesses. Thus, in this factual situation, I would find the charge timely filed as his cause of action arose only when the decision was rendered.

As to the statement by the majority that the Union never refused to represent the Charging Party, I believe that to be a matter of fact to be decided at a hearing. Certainly the Union would raise such a defense, but the allegation as stated in the charge can be interpreted to mean that the Charging Party was discouraged from using Union counsel. I would remand the issue

of the Union's alleged breach of the duty of fair representation to the general counsel for issuance of a complaint so that these factual findings could be made at a hearing.