STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HOWARD S. MORROW, Charging Party, v. CALIFORNIA STATE EMPLOYEES' ASSOCIATION Respondent.	)	Case No. S-CO-54-S PERB Decision No. 614-S February 20, 1987

Appearances; Howard S. Morrow on his own behalf; Howard Schwartz, Attorney for the California State Employees' Association.

Before Hesse, Chairperson; Burt and Porter, Members.

DECISION

BURT, **Member:** This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by Howard S. Morrow (Morrow) to a proposed decision, attached hereto, issued by a PERB Administrative Law Judge (ALJ). In that decision, the ALJ dismissed charges that the California State Employees' Association (CSEA) violated section 3519.5(b) of the State Employer-Employee Relations Act (Govt. Code sec. 3512 et seq.) by its failure to pursue Morrow's pay inequity grievance.

The Board has reviewed the proposed decision in light of Morrow's exceptions and CSEA's response thereto, and the entire record in the case, and hereby adopts the proposed decision as the Decision of the Board itself.

In his exceptions, Morrow does not generally dispute the facts found by the ALJ, but he reiterates his claim that CSEA failed in it duty to represent him fairly. While we join with the ALJ in finding that CSEA was less than straightforward in its dealings with Morrow, for the reasons cited by the ALJ, we cannot find that CSEA's conduct in failing to pursue his grievance amounted to a breach of its duty of fair representation.

ORDER

The unfair practice charge in Case No. S-CO-54-S is DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Porter joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

HOWARD S. MORROW, Charging Party,	)	Unfair Practice Case No. S-CO-54-S
v.	)	PROPOSED DECISION (11/4/86)
CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Respondent.	)	

Appearances; Howard S. Morrow on his own behalf; Howard Schwartz, Attorney for the California State Employees' Association.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A union member alleges here that his union breached its duty of fair representation when it failed to pursue his complaint about a pay inequity. The union replies that there was no meritorious action which could have been taken on behalf of its member.

The charge which commenced this action was filed by Howard S. Morrow on November 21, 1985. It was dismissed on February 28, 1986, by the office of the General Counsel of the Public Employment Relations Board (PERB or Board). Subsequently, at the request of the General Counsel, the PERB

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

remanded the case back to the General Counsel for further investigation.[1]

On May 23, 1986, the office of the General Counsel issued a complaint alleging that the California State Employees' Association (CSEA) had breached its duty of fair representation toward Mr. Morrow. The union's action was alleged to have been in violation of State Employer-Employee Relations Act section 3519.5 (b).[2] CSEA answered the charge on June 6, 1986, specifically denying the various allegations in the complaint.

On July 17, 1986, CSEA filed a motion to dismiss the complaint on the grounds that Mr. Morrow, as a retired person,

[1]The grounds for the remand are set out in California State Employees' Association (1986) PERB Decision No. 568-S.

[2]Unless otherwise indicated, all references are to the Government Code. The State Employer-Employee Relations Act (SEERA or Act) is found at section 3512 et seq. In relevant part, section 3519.5 provides as follows:

> 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.

was no longer a state employee[3] and thus lacked standing to file the charge. The motion was denied by the undersigned on July 31, 1986.

A hearing was held in Sacramento on September 3 and 4, 1986. The parties made oral argument at the completion of the presentation of evidence. Upon the preparation of a transcript, the case was submitted for decision on September 25, 1986.

FINDINGS OF FACT

Mr. Morrow worked for more than 30 years in the State of California printing plant. During the relevant period, he was employed in state bargaining unit no. 14, printing trades.

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[3]The definition of "State employee" is set out in Government Code section 3513(c). It provides as follows:

> (c) "State employee" means any civil service employee of the state, and the teaching staff of schools under the jurisdiction of the Department of Education or the Superintendent of Public Instruction, except managerial employees, confidential employees, employees of the Department of Personnel Administration, professional employees of the Department of Finance engaged in technical or analytical state budget preparation other than the auditing staff, employees of the Legislative Counsel Bureau, employees of the board, conciliators employed by the State Conciliation Service within the Department of Industrial Relations, and intermittent athletic inspectors who are employees of the State Athletic Commission.

Since the commencement of collective bargaining in 1981, unit 14 employees have been represented by CSEA.

On February 22, 1982, a consent decree was filed in the United States District Court for the Eastern District of California in the case of Flemie Lubenko et al. v. Graphic Arts International Union et al. The case involved allegations of discriminatory hiring, promotion, and compensation practices toward women working in the bindery at the state printing plant. Under the decree, eight job classifications were to be condensed into a new four-level job series of bookbinder. The decree set out the pay relationship among the four levels of bookbinder and provided for a temporary "grandfather" clause that would prevent employees from incurring a pay cut as they were moved into the new classes. The consent decree was to last for three years. The decree provided a remedy for the plaintiffs to seek redress of any alleged violations.

At the time the decree went into effect, Mr. Morrow held the position of printing trades assistant II. Under the decree, the position was reclassified as a bookbinder II, range A. The salary for a bookbinder II, range A, was fixed under the decree at 75 percent of the salary for a bookbinder IV. The salary for a bookbinder II, range B, was fixed at 80 percent of the salary for a bookbinder IV.

The effect of the decree was to provide immediate pay increases for a number of women working in the bindery. The decree also provided affirmative action for the promotion of women to higher classes in the bookbinder series. The affirmative action provision was to remain in effect until the percentage of women in the bookbinder IV class matched the percentage of women employed as bookbinders.

Because of a history of job-aggravated back and hip injuries, Mr. Morrow had worked in an office job for a time prior to the consent decree. He took care of legislative journals and files. He did the filing in the office and sometimes answered the telephone. In May of 1982, Mr. Morrow was removed from his office job and assigned to work on a bundling machine. He soon reinjured his back and was off work for four days. When he returned, he was assigned to work on various machines in jobs which sometimes involved lifting paper. Although Mr. Morrow's pay class was that of a bookbinder II, range A, some employees performing the same duties as he were paid at the higher rates of bookbinder II, range B, and bookbinder III.

Shortly after receiving his new duties in May of 1982, Mr. Morrow complained to CSEA representative Richard Byfield about the 5-percent pay inequity which he believed he was suffering. Mr. Morrow asserted that if he was going to be

required to perform the same duties as persons in the bookbinder II, range B, classification he should receive the same pay. Mr. Byfield responded that CSEA could do nothing as long as the consent decree was still in effect.

In March of 1983, Virginia Guadiana replaced Mr. Byfield as the CSEA representative for unit 14. Promptly, Mr. Morrow renewed his complaint with her. Like Mr. Byfield, Ms. Guadiana told Mr. Morrow there was nothing she could do while the consent decree remained in effect. Ms. Guadiana testified that she believed there was no violation of the consent decree as to Mr. Morrow and there was, therefore, nothing that could be done for him.

In late 1984, with the expiration of the decree approaching, Ms. Guadiana met with Mr. Morrow to prepare a letter to the State Printer regarding Mr. Morrow's complaint. A draft of the letter was sent to Mr. Morrow in early 1985. Accompanying it was a note in which Ms. Guadiana notified Mr. Morrow that another CSEA representative, Bill Cook, would be reviewing the draft letter. Mr. Morrow telephoned Ms. Guadiana to advise her that he approved the letter and wanted it to be sent. He later made other telephone calls to her but was unable to reach her. Beginning in early 1985, Ms. Guadiana was busy in collective bargaining with the state on behalf of employees in unit no. 14.

On March 7, 1985, Ms. Guadiana attended a meeting of the Bindery Oversight Committee at the office of the State Printer. The committee was established under the consent decree to advise the State Printer regarding implementation of the terms of the decree. Among those present at the meeting were Don Male, the State Printer, and Bill Gregori, his deputy. Although the meeting had not been scheduled to discuss Mr. Morrow's complaint, Ms. Guadiana raised the issue. Mr. Gregori responded that there had been no violation of Mr. Morrow's rights and the state had accommodated him the best that it could. Subsequently, on March 22, Mr. Gregori sent Ms. Guadiana a note pointing out that under the consent decree a printing trades assistant II, which Mr. Morrow had been, was to become a bindery worker II, range A, as Mr. Morrow did. Mr. Gregori's note concluded with the observation: "Everything seems proper to me."

Mr. Morrow's return to physical labor in May of 1982 further aggravated the deterioration of his hip. At his doctor's insistence, he stopped working in August of 1983. Mr. Morrow filed a worker's compensation complaint in which he prevailed. Through a combination of worker's compensation and the use of sick leave, Mr. Morrow remained on the state payroll until June 30, 1985, even though he was no longer working. Beginning June 30th, Mr. Morrow commenced a disability retirement at age 57. His retirement pay rate was fixed

according to his final job classification of bookbinder II, range A. The amount is less than it would have been if he had succeeded with his complaint.

Ms. Guadiana was relieved of responsibility for unit 14 at the conclusion of negotiations in June of 1985. Prior to that date, she sent Mr. Morrow's case file to Mr. Cook.

In August of 1985, Mr. Cook consulted with Richard Weyuker, CSEA's lead labor relations representative for the Sacramento office. Mr. Weyuker, a lawyer, took over the Morrow case. Mr. Weyuker concluded there were four conceivable actions which might be attempted to assist Mr. Morrow. First, a grievance could be filed alleging that Mr. Morrow had performed the same work as persons in the bookbinder II, range B, classification but was paid less. However, he concluded, this option was impractical because the criteria for pay at range B required specific qualifications set out in the consent decree[4] and Mr. Morrow had possessed none of them.

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[4]In response to the consent decree, the State Personnel Board established the following criteria for bookbinder II, range B:

> Range B. This range shall apply:
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> 1. To those incumbents who on May 16, 1982, were placed in this class from the class of Bindery Worker II under the conditions of the February 19, 1982, Consent Decree; and
>
> 2. To those Bindery Worker II incumbents who

Next, an out-of-class claim could be filed contending that Mr. Morrow had worked in the wrong classification for the duties he performed. But Mr. Weyuker discarded that option because the duties performed by Mr. Morrow were within the job description of bookbinder II, range A. The next possibility was a grievance under the consent decree. But Mr. Weyuker found that option impossible for a number of reasons. For one thing, by the time the case came to Mr. Weyuker the consent decree had expired. For another, the decree limited the grievance procedure to plaintiffs and Mr. Morrow was not a plaintiff.

Finally, Mr. Weyuker discussed with CSEA attorneys the merits of going back into federal court to seek revision of the consent decree. But that option was rejected because CSEA had been a party to the original decree, was satisfied that the decree had remedied the effects of past discrimination, and did not want to disturb it.

Mr. Weyuker thereupon concluded that Mr. Morrow had been a victim of circumstances and there was nothing CSEA could do to help him. Mr. Weyuker decided not to send the letter which

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> on May 16, 1982, were placed in the class of Bookbinder III as a result of the February 19, 1982, Consent Decree and, who without a permanent break in service, and prior (emphasis in the original) to February 19, 1985, move to the class of Bookbinder II. Movement to this class may be by voluntary or mandatory action.

Ms. Guadiana had drafted because he believed it was pointless. He concluded that the only reasonable option was to inform Mr. Morrow that CSEA was unable to achieve his goal. On August 16, 1985, Mr. Weyuker sent Mr. Morrow a letter advising him that CSEA could not help him.[5] Mr. Morrow commenced the present action following his receipt of the letter.

LEGAL ISSUE

Did CSEA refuse to process the pay complaint of Mr. Morrow and thereby violate SEERA section 3519.5 (b)?

CONCLUSIONS OF LAW

The duty of fair representation requires an exclusive representative to fairly and impartially represent all employees in the bargaining unit. The duty is breached when the exclusive representative's conduct toward a unit member is arbitrary, discriminatory or in bad faith. Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

[5]The letter sent to Mr. Morrow by Mr. Weyuker was somewhat less than forthright. Rather than explaining the various roadblocks to the pursuit of any remedy as outlined at the hearing, Mr. Weyuker attributed CSEA's inability to help Mr. Morrow to the passage of time and to Mr. Morrow's recent retirement. When asked why he did not outline in more detail to Mr. Morrow the reasons for CSEA's action, Mr. Weyuker explained that it would have raised for the first time remedies never previously discussed with Mr. Morrow. It was simpler, Mr. Weyuker said, to explain CSEA's decision in terms of the passage of time and Mr. Morrow's retirement.

Unlike the other two statutes administered by the PERB,[6] SEERA contains no specific statutory provision setting out the duty. Nevertheless, PERB decisions have assumed the existence of a duty of fair representation under SEERA. See, for example, California State Employees' Association (Lemmons and Lund) (1985) PERB Decision No. 545-S and CSEA (Darzins) (1985) PERB Decision No. 546-S. A breach of the duty is an unlawful discrimination and a violation of SEERA section 3519.5 (b). See the rationale in Mt. Diablo Education Association (Quarrick and O'Brien) (1978) PERB Decision No. 68.

Existence of the duty does not mean, however, that an employee has "an absolute right to have a grievance taken to arbitration. . . . An exclusive representative's reasonable refusal to proceed with arbitration is essential to the operation of a grievance and arbitration system." Castro Valley Teachers Association (McElwain and Lyen) (1980) PERB Decision No. 149. An exclusive representative has no obligation to pursue a grievance where the "potential success at arbitration was doubtful." Sacramento City Teachers Association (Fanning et al.) (1984) PERB Decision No. 428.

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[6]In addition to SEERA, PERB administers the Educational Employment Relations Act, section 3540 et seq., and the Higher Education Employer-Employee Relations Act, section 3560 et seq. Duty of fair representation provisions are set out in EERA section 3544.9 and HEERA section 3578.

A breach of the duty will not be found where the exclusive representative refuses to pursue remedies which are outside the collective bargaining agreement. There is no duty, for example, to pursue a Board of Control claim, California State Employees' Association, supra, PERB Decision No. 545-S, or to file a lawsuit on behalf of a unit member, California State Employees' Association, supra. PERB Decision No. 546-S.

Nor will a breach of the duty be found where the exclusive representative is guilty of "mere negligence or poor judgment in handling a grievance." Los Angeles City and County School Employees Union (Scates and Pitts) (1983) PERB Decision No. 341. See also, California School Employees Association (Dyer) (1984) PERB Decision No. 342a.

In his charge, Mr. Morrow sets out four failings by CSEA which he believes constitute a breach of the duty of fair representation. These are: failure to meet with the State Printer on his complaints, failure to file a grievance on his behalf, failure to send the letter drafted by CSEA representative Guadiana, failure to return many of his telephone calls.

With respect to Mr. Morrow's first contention, it is clear that Ms. Guadiana did meet and discuss his grievances with the State Printer. This occurred at a meeting on March 7, 1985. Mr. Morrow's complaints were rejected by the state as being without merit.

Regarding the failure to file a grievance, CSEA initially was convinced that it was powerless to act during the term of the consent decree. Whether CSEA was correct in this evaluation is not crucial. What is important is that the evaluation was made in good faith and had a rational basis. There is no evidence to the contrary. Later, when the consent decree expired, CSEA again evaluated the possible success of pursuing a grievance on Mr. Morrow's behalf. It concluded that no remedy had been available at any time. The decision was rational, not arbitrary. There was no evidence of discrimination or bad faith toward Mr. Morrow.

Once CSEA determined that the filing of a grievance would be fruitless, it was under no obligation to send the letter drafted by Ms. Guadiana. She already had discussed the substance of her letter in a meeting with the State Printer. While Mr. Morrow doubtless would have felt better had the letter been sent, CSEA concluded that it had no prospect of achieving what he desired.

Finally, the duty of fair representation does not require an exclusive representative to return all telephone calls made by a unit member. Under some circumstances, the failure to return telephone calls might be evidence of arbitrary, discriminatory or bad faith conduct. But that was not the case here. The record is replete with evidence of meetings and conversations conducted by CSEA representatives with Mr. Morrow. If CSEA had a failing it was not for lack of good

faith concern about Mr. Morrow. It was for a lack of candor in not informing him at the outset about the unlikely prospect that he would be successful in his complaint. In any event, there is simply no evidence that CSEA breached its duty of fair representation toward Mr. Morrow.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge S-CO-54-S, Howard S. Morrow v. California State Employees' Association, and companion complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day for filing . . . ." See California Administrative Code,

title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: November 4, 1986

Ronald E. Blubaugh
Administrative Law Judge