STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMPTON COMMUNITY COLLEGE FEDERATION OF EMPLOYEES,	)	
Charging Party,	)	Case No. LA-CE-2393
v.	)	PERB Decision No. 649
COMPTON COMMUNITY COLLEGE DISTRICT,	)	December 21, 1987
Respondent.	)	

Appearance: Lawrence Rosenzweig, Attorney, for Compton Community College Federation of Employees.

Before Porter, Craib and Shank, Members.

DECISION

SHANK, Member: The Compton Community College Federation of Employees (hereafter CCCFE) appeals the partial dismissal of the third amended unfair practice charge filed against the Compton Community College District (hereafter District). The general counsel's office of the Public Employment Relations Board (hereafter PERB) concluded that CCCFE failed to state a prima facie violation of section 3543.5(d) of the Educational Employment Relations Act (EERA).[1]

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Government Code section 3543.5(d) provides as follows:

> It shall be unlawful for a public school employer to:
>
> . . . . . .

On May 27, 1986, CCCFE filed an unfair practice charge against the District which included, in pertinent part, the following allegation:

> On or about April 30, [1986] Mr. Ken Wibecan, a part time [sic] member of the bargaining unit, and others, circulated a petition on campus, apparently to create disunity in the bargaining unit, and to seek to change the internal union governance and management procedures . . . . On or about May 6, Mr. Wibecan mailed the same petition, along with a letter to the homes of the part time [sic] members of the bargaining unit . . . . On or about May 15, Mr. Wibecan or others related to the petitions, presented the latter or similar materials to the Long Beach Press Telegram . . . . And on May 12 and again on May 23, 1986, the Co-Presidents received letters from Mr. David Cobbs, apparently representing the same petition groups cited previously . . . .
>
> The Federation is in possession of evidence of a supporting nexus between the [District] and the attempts of Mr. Wibecan et. al. to interfere [sic] with and dominate formation and administration of the Federation. This evidence includes information submitted to the Chancellor of the California Community Colleges on May 10, 1986, urging an investigation into the financial relationship between the CCCD and Mr. Wibecan—Exhibit H; and the unauthorized appearance in the campus mail system of a photo-reduced copy of Exhibit F—see Exhibit I.[2]

> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

[2]Exhibit H references a letter from a CCCFE officer, written on CCCFE letterhead, to the personnel commission

On June 30, 1986, a first amended charge was filed which made no reference to the charge involving Kenneth Wibecan. This charge was defective in that it did not contain Charging Party's signature. A corrected, signed version of the charge was thereafter filed, which likewise contained no mention of the original allegation involving Wibecan.

On October 8, 1986, a second amended charge was filed which restated the charge regarding Kenneth Wibecan as follows:

> Mr. Kenneth Wibecan worked in the District's Public Information office as a public information assistant from November 1, 1985 through February 12, 1986. On February 12, 1986, Mr. Wibecan was hired by the District as a Public Relations Consultant. Acting as an agent of the District, Mr. Wibecan has interfered with the internal operations of the Charging Party. For example, attached hereto, marked Exhibit "B", is a memorandum dated April 30, 1986 from Mr. Wibecan to the part-time faculty members of the District. This memorandum attacks the union leadership. Mr. Wibecan was not acting as an individual faculty member in writing this document. Rather, he was following the directions of the District in attacking the Charging Party.

By letter dated November 13, 1986, the general counsel's office informed counsel for Charging Party of, among other

---

requesting the latter to investigate the position of "Professional Expert", which Ken Wibecan, as a Public Information Assistant, was designated as occupying. Exhibit I is a copy of an article appearing in the Press-Telegram on May 15, 1986, in which the leadership of CCCFE is criticized for its "hindering of open participation by the full membership" in a strike authorization vote. Ken Wibecan[1]s name appears in the article.

things, deficiencies in CCCFE's allegation concerning Wibecan. The portion of the letter addressing the subject of the District's alleged interference with the internal operations of CCCFE — vis-a-vis the activities of Wibecan — reads as follows:

> From November 1, 1985 through February 12, 1986, Kenneth Wibecan, a unit member, worked in the District's public information office as a public information assistant. On February 12, Wibecan was hired by the District to work part-time as a public relations consultant. On April 30, 1986, Wibecan distributed a memo (attached) to part-time faculty members challenging the union leadership and procedures at union meetings. In this memo, Wibecan protested the timing, lack of notice, the low number of participants and general conduct of a meeting at which a strike vote was held.
>
> You allege that the District interfered with the internal operations of CCCFE in violation of EERA section 3543.5(d) by directing, authorizing or ratifying Wibecan's distribution of the April 30 memo challenging CCCFE's procedures and leadership. Section 3543.5(d) seeks to protect the integrity of an employee organization from the domination or control of the employer so that it may make wholehearted efforts on behalf of the employees it represents. Santa Monica Unified School District (1978) PERB Decision No. 52; Antelope Valley Community College District (1979) PERB Decision No. 97; Clovis Unified School District (1984) PERB Decision No. 389. "Interference" constitutes a lesser degree of intrusion than domination but is equally unlawful. This term includes intruding into the internal functioning of an employee organization, setting up a rival organization, or engaging in a campaign to induce employees to support a particular organization. Antelope Valley, supra: Jack

> Smith Beverage Co., Inc. (1951) 94 NLRB 1401 [28 LRRM 1199]. Lending financial support or encouraging membership in a particular union has been found to constitute unlawful "assistance." Azusa Unified School District (1977) PERB Decision No. 38; State of California (Department of Corrections) (1980) PERB Decision No. 127-S; Sacramento City Unified School District (1982) PERB Decision No. 214.
>
> You do not allege facts which support a prima facie violation of section 3543.5(d). The only evidence which you have provided is the April 30 memo from Wibecan. Your bare assertion that Wibecan distributed the memo as an agent of the District, without more fails to demonstrate "interference" by the District. [Footnotes omitted.]

On November 24, 1986, CCCFE filed a third amended charge which reads as follows:

> Mr. Kenneth Wibecan worked in the District's Public Information office as a public information assistant from November 1, 1985 through February 12, 1986. On February 12, 1986, Mr. Wibecan was hired by the District as a Public Relations Consultant. Acting as an agent of the District, Mr. Wibecan has interfered with the internal operations of the Charging Party. For example, attached hereto, marked Exhibit "B", is a memorandum dated April 30, 1986 from Mr. Wibecan to the part-time faculty members of the District. This memorandum attacks the union leadership. Mr. Wibecan was not acting as an individual faculty member in writing this document. Rather, he was following the directions of the District in attacking the Charging Party.
>
> On or about May 6, 1986, Mr. Wibecan sent a letter to all part-time instructors in the District expressing his negative opinions about the union. These letters were sent to the home addresses of the part-time employees. Those addresses are only

> available from District records. A secretary employed by the District assisted Mr. Wibecan in addressing and stamping the envelopes.

On November 24, 1986, the general counsel's office acknowledged receipt and consideration of the third amended charge and advised CCCFE by letter that a complaint would be issued, but would not include the allegations concerning Wibecan's activities.[3] The general counsel's office explained that its determination was based on the grounds previously stated in its November 13 letter, i.e., that there were insufficient facts alleged indicating that Wibecan was acting as an agent for the District. The general counsel subsequently dismissed the charges involving Wibecan.

DISCUSSION

On appeal CCCFE contends that an agency relationship is established by the allegations that Wibecan was an employee of the District, that he was in possession of a list of names and addresses available only from District records, and that a secretary of the District assisted Wibecan in addressing and stamping the envelopes. The last two factual allegations were

---

[3]The allegations upon which a complaint issued were that the District: (1) unilaterally refused to permit a CCCFE officer to attend District Board meetings on District time; (2) delayed in providing names and addresses of part-time unit members to CCCFE in violation of the collective bargaining agreement; (3) refused to provide information regarding the amount of funds spent by the District on legal fees for collective bargaining; and (4) unilaterally distributed and implemented the 1986-87 instructional calendar.

made for the first time in CCCFE's third attempt at amending the charge.

Pursuant to PERB Regulation 32615(a)(5), the charging party must set forth a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice."[4] The purposes of PERB Regulation 32615(a)(5) are twofold: to facilitate the regional attorney's review and investigation of the charge and to give the respondent adequate notice of the conduct alleged to have been violative of EERA.

PERB's regulations delineate the responsibilities of the regional attorney as well. He or she must ascertain whether the factual allegations in support of an unfair practice charge are sufficient to establish a prima facie case. (PERB Regulations 32620(b)(5), 32630.) In connection therewith, the regional attorney performs an investigatory function involving the solicitation of facts from the parties for the limited purpose of determining whether a prima facie case has been alleged. State of California. Department of Developmental Services (1987) PERB Decision No. 551a-S. Regulation 32630 specifically commands the regional attorney to refuse to issue a complaint if he or she "concludes that the charge or the evidence is insufficient to establish a prima facie case . . . ." (Emphasis added.)

---

[4]PERB Regulations are codified at California Administrative Code, title 8, part III, section 31001, et seq.

Assuming, for purposes of this discussion only, that Wibecan's circulation on April 30 of the petition was sufficiently intrusive into the internal operations of CCCFE so as to constitute interference, the only issue remaining is whether Wibecan acted as an agent of the District in making the distribution. We agree with the regional attorney that there are insufficient facts alleged, even when considered in their totality, to establish an agency relationship between Wibecan and the District.

Wibecan is not alleged to have been a supervisory or managerial employee[5] and our precedent establishes that, in such a case, some factual demonstration of a relationship beyond employment alone is necessary to impute or infer an agency relationship. Moreland Elementary School District (1982) PERB Decision No. 227. For an agency relationship to exist, CCCFE must allege facts which show that Wibecan was acting with some direction, instigation, approval or ratification of the action by the District. (NLRB v. American Thread Co. (5th Cir. 1953) 32 LRRM 2094.)

Charging Party's original charge did not allege the existence of an agency relationship between Wibecan and the District. In fact, the first amended charge entirely omitted

---

[5]On the contrary, we note that the charges and exhibits indicate that Wibecan is a part-time journalism instructor, a part-time Public Information Assistant/Consultant, and a member of CCCFE.

reference to the Wibecan matter. The allegation involving Wibecan was reactivated in the second amended charge wherein it is stated, "Acting as an agent of the District, Mr. Wibecan has interfered with the internal operations of Charging Party." No facts were offered, however, to support this allegation of agency relationship, other than the conclusionary statement that Wibecan "was following the directions of the District in attacking the Charging Party." Indeed, the only additional facts arguably relevant to this issue appeared for the first time in the third amended charge, wherein Charging Party states: (1) Wibecan sent a letter dated May 6, 1984 to all part-time instructors expressing his negative opinions about CCCFE; (2) the addresses used to mail the letters were available only from the District records; and (3) a secretary employed by the District assisted Wibecan in addressing and stamping the envelopes.

By the foregoing allegations, Charging Party attempted to amend a deficient charge. We agree with the regional attorney's conclusion that the new factual allegations stated in the third amended charge are of little assistance in curing the deficiencies in the previously filed charges. We initially note that the regional attorney was not even provided a copy of the May 6 letter. We do not consider CCCFE's bare factual allegation, that "the addresses used to mail the letters were available only from the District records," as sufficient to

establish a prima facie showing of an agency relationship between Wibecan and the District. The insufficiency is underscored by the fact that, by CCCFE's own admission, the list of names and addresses, at least those of part-time unit employees, was also in the possession of CCCFE on April 18, 1986, before Wibecan's circulation of the petition on April 30, and well before the letter of May 6, 1986.

The other allegation upon which CCCFE relies to establish an agency relationship is that Wibecan was assisted by a secretary of the District. CCCFE's allegation fails to set forth facts which indicate the nature of the secretary's or Wibecan's employment status that existed at the time the stamps were purported to have been affixed to the envelopes. The secretary may well have been a volunteer, and there are no facts indicating control, direction, ratification or approval by the District if a different status were occupied.

We conclude, therefore, that those facts which were furnished the regional attorney fall short of demonstrating a prima facie case of an agency relationship.[6]

---

[6]In response to our dissenting colleague, we disagree with his contention that CCCFE's conclusionary allegation of agency states a prima facie showing of an agency relationship between Wibecan and the District. We initially note that Charging Party never specifically alleged that the District provided Wibecan with part-time unit members' names and addresses. Nor do we agree that the regional attorney actually credited the District's assertions that Wibecan does not perform public relations work and that it was unaware of and

ORDER

We hereby AFFIRM the decision of the regional attorney and ORDER that portion of the unfair practice charge relating to the actions of Kenneth Wibecan in case No. LA-CE-2393 be DISMISSED.

Member Porter joined in this Decision.
Member Craib's dissent begins on page 12.

---

did not authorize Wibecan's April 30, 1986 memo. The regional attorney merely noted these contentions of the District, without comment as to their validity, in footnotes to her dismissal letter. One may surmise by her inclusion of the District's response that she was alerting Charging Party of the defects of the charge and enabling it one last opportunity to amend and cure such deficiencies. Clearly, the District's views were not integral to her legal conclusion that CCCFE's factual allegations, even when considered in their totality, did not state a prima facie case of agency. In this regard the regional attorney was correct in concluding that Charging Party's allegations of agency fail to meet the minimum threshold requirement of alleging facts or evidence sufficient to support a prima facie showing of any agency relationship.

Finally, as to our dissenting colleague's contention that a demurrer standard is an appropriate one for testing allegations stated in the charge, we would initially question the application of such a standard in light of the critical procedural differences between the filing of a civil lawsuit and PERB's issuance of a complaint. For example, while a plaintiff on his or her own initiative may file a complaint with the court, here, only the general counsel decides whether a complaint shall issue, and his authority to do so is limited to those instances where the charge and the evidence state a prima facie case. (PERB Regulations 32620(5), 32630, emphasis added; see Los Rio Community College District (1987) PERB Decision No. 638.) We would also note, even assuming arguendo that a demurrer standard is proper, a court is not bound under such a standard to accept plaintiff's conclusionary, ineffectual or improperly pleaded allegations. Moncur v. City of Los Angeles (1977) 68 Cal.App.3d 118, 121; 3 Witkin, Cal. Procedure (2d ed.) Pleading, p. 2413. Finally, as to the agency cases cited in the dissent, we have examined them and find them inapplicable to the facts at hand.

Member Craib, dissenting: I disagree with the position the majority has taken for the reasons that follow.

In this case, the question before the Board is whether the charging party has alleged sufficient facts to support the claim that Wibecan's conduct interfered with the Federation's internal operations. That allegation, in turn, rests on the theory that Wibecan acted as an agent for the District. In my view, rather than limiting her analysis to the assessment of the Federation's prima facie case, the Board agent resolved the ultimate factual issue and concluded that Wibecan was not the District's agent. The majority similarly reviews the factual allegations and finds them deficient and unable to support the finding that an agency exists. While I might well reach the same result if, after a hearing, the totality of evidence presented in support of the Federation's claim was outweighed by the District's evidence, the instant case does not present that question. Rather, I find that the pleadings are sufficient to constitute a prima facie showing of agency and I would delay the final weighing of evidence until the Federation has had an opportunity to make its presentation at hearing before a Board administrative law judge.

In the instant case, the Federation alleges that Wibecan was an agent of the District and was not acting as an individual faculty member. The Federation's charge also specifies the particular theory on which it bases its assertion of agency. It states that Wibecan was "following the

directions of the District in attacking the Charging Party." In support of the assertion that the District directed Wibecan's conduct, the Federation alleges that Wibecan was provided with part-time employees' home addresses and that the addresses were only available from District records.[1] It is noteworthy that a complaint issued based on the allegation that the District delayed in providing the names and addresses of part-time employees to the Federation. In addition, the charge also includes the allegation that a secretary assisted Wibecan in addressing and stamping the envelopes mailed to unit employees. Preferential access to employees' addresses plus use of support staff are two facts that, if true, lend support to the Federation's theory that the District directed Wibecan's conduct. Thus, I find sufficient factual allegations to satisfy the requirement that the charging party established a prima facie case of interference by the conduct of the District's agent. It is not necessary, at the pleading stage, for the Federation to delineate with great specificity the manner or circumstances in which the District allegedly directed Wibecan's actions.

[1]While the Federation apparently received a list of the addresses from the District before Wibecan sent his controversial memo, implicit in the Federation's allegation is that Wibecan did not receive the list from the Federation and, thus, the District was the only possible source.

In its appeal, the Federation raises arguments that bear repeating and that focus on the central issue raised by this case. The Federation takes issue with the Board agent's apparent acceptance of two critical assertions made by the District and her apparent willingness to credit the assertions that Wibecan does not perform public relations work and that the District was unaware of and did not authorize Wibecan's April 30, 1986 memo. These factual issues could have some bearing on the question of agency and should not be resolved in Respondent's favor, particularly when age-old Board precedent clearly instructs to the contrary; i.e., that factual allegations in an unfair practice charge are to be considered true for purposes of assessing the prima facie case. San Juan Unified School District (1977) EERB Decision No. 12.[2]

Related to this contention, the Federation argues that, at this juncture, it has provided as much information as it can reasonably be expected to assemble. I agree. Should the Federation hope to establish agency by demonstrating, for example, that the secretary was authorized by the District to assist Wibecan, it seems unlikely that that information would be forthcoming from that District official, from Wibecan, or from the secretary. However, through cross-examination, the Federation may be able to ask questions that will demonstrate

[2]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

that the District directed its employee to provide information, to work overtime, to use District facilities, etc. Indeed, since the question of agency here depends on whether Wibecan acted on behalf of or with the encouragement or aid of management, the charging party's access to all relevant facts is necessarily limited and it should be given the chance to cross-examine District witnesses under subpoena. Had the majority so directed, the Board would have continued to recognize that the question of agency is one for the trier of fact to determine after examining all relevant evidence, including testimony produced during the evidentiary hearing. See Antelope Valley Community College School District (1979) PERB Decision No. 97; Santa Clara Unified School District (1979) PERB Decision No. 104; San Diego Unified School District (1980) PERB Decision No. 137; Moreland Elementary School District (1982) PERB Decision No. 227.

The central issue raised by this case is not new. Rather, it is one that has plagued this Board in the past and concerns the application of the Board's regulation that a charge be dismissed if it or the evidence is insufficient to establish a prima facie case. See PERB Regulation 32620(b)(5). While it is perhaps difficult to resist assessing the merits of the case or judging the credibility of the facts as pled, it is my view, and the Board has so held in the past, that the Board agent errs when he/she weighs the evidence presented, rather than examining the factual allegations as if true and measuring them

up against the necessary elements of an alleged violation of the Act. See Modesto City Schools and High School District (1985) PERB Decision No. 552; Riverside Unified School District (1986) PERB Decision No. 571; Cupertino Union Elementary School District (1986) PERB Decision No. 572. The Board agent in this case so erred and so has the majority.

In my view, a challenge to the sufficiency of the pleadings of an unfair practice charge should be considered a challenge in the nature of a demurrer and should raise only an issue of law regarding the sufficiency of the allegations set out in the pleadings. See California Code of Civil Procedure, section 589; James v. Superior Court (1968) 261 Cal.App.2d 415. A demurrer tests the pleadings alone, not the evidence, and lies only where defects appear on the face of the pleadings. See Witkin, California Procedure (3rd), Pleading, section 894 et seq. For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts; no matter how unlikely or improbable, plaintiff's allegations must be accepted as true for the purpose of ruling on a demurrer. Erevan v. Title Insurance and Trust Co. (1983) 147 Cal.App.3d 225. Furthermore, plaintiff's possible inability or difficulty in proving the allegations of the complaint is of no concern. Gutenberg v. Aetna Insurance Co. (1973) 9 Cal.3d 566. Since the existence of agency is a factual question (Anthony v. Angler (1976) 61 Cal.App.3d 872; Witkin, Summary of California Law (8th), Agency, section 80), the only question

before the Board is whether, as a matter of law, the Federation's claim that Wibecan acted under the District's direction is sufficient. I believe it is and would reverse the Board agent's dismissal.

California case law sustains this conclusion. In Meyer v. Graphic Arts International Union (1979) 88 Cal.App.3d 176, the Court expressly held that the plaintiff's allegation that individuals "were agents and employees of their codefendants, and, in doing the things herein mentioned, were acting within the scope of such agency and employment" was "sufficient to withstand a general demurrer." Id. at p. 178. "Under the facts here alleged, namely, that the employees acted as the agent of the employer within the scope of their agency, an employer may be held liable in a civil action." Id. at pp. 178-79. In accord, see Iverson v. Atlas Pacific Engineering (1983) 143 Cal.App. 3d 219; Halliman v. Los Angeles Unified School District (1984) 163 Cal.App.3d 46; Lagies v. Copley (1980) 110 Cal.App.3d 970 and cases cited therein; Kerivan v. Title Insurance and Trust Co., supra; Roberts v. Pup 'N' Taco Driveup (1984) 160 Cal.App.3d 283.

Thus, it appears that the Board is applying something other than a demurrer standard. If this is so, the Board must articulate just what that standard is in order to provide guidance to the parties practicing before the Board. The parties have should not be subject to having the sufficiency of their charges evaluated based upon an inconsistent and amorphous standard.