STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JO ANN HENKEL, et al., Charging Parties, v. NATIONAL EDUCATION ASSOCIATION, Respondent.	)	Case No. LA-CO-402 PERB Decision No. 656 December 31, 1987

Appearances: David T. Bryant, National Right to Work Legal Defense Foundation, Inc., for Jo Ann Henkel, et al.; Diane Ross, Attorney, for National Education Association.

Before Hesse, Chairperson, Shank and Craib, Members

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Jo Ann Henkel, et al. (Charging Parties), of the General Counsel's dismissal of its charge that the National Education Association (NEA) violated sections 3543.6(b), 3544.9 and 3543 of the Educational Employment Relations Act (EERA),[1] by using unconstitutional

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3543.6 provides, in pertinent part, 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

procedures in the deduction of fees from Charging Parties' salaries, pursuant to the organizational security provision. Charging Parties' appeal from the dismissal is based on the assertion that the Associated Chaffey Teachers (the exclusive representative), the California Teachers Association, and the National Education Association, collectively, constitute the "union." The regional attorney in the attached letter dismissed the charges because the exclusive representative, not the affiliate, is the proper respondent.[2]

We concur in the regional attorney's analysis. In King City High School District Association, et al. (1982) PERB Decision No. 197, the Board ruled that the proper respondent for an agency fee challenge is the exclusive representative. The Board reiterated this principle in Police Officers Research Association of California and California Association of Food and Drug Officials (1987) PERB Decision No. 644-S, dismissing the charges against the affiliate organizations and holding that the exclusive representative is the proper respondent in an agency fee challenge. Affiliation with the exclusive representative is insufficient to make the statewide organization the exclusive representative and "[h]ence, it was

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> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

[2]The General Counsel issued a complaint filed by Charging Parties against Associated Chaffey Teachers on March 2, 1987, containing charges identical to the charges against NEA. Associated Chaffey Teachers, LA-CO-397.

not liable for a violation of EERA." Fresno Unified School District (1982) PERB Decision No. 208; Washington Unified School District (1985) PERB Decision No. 549. Therefore, we dismiss this case for failure to state a prima facie violation of EERA.

ORDER

The unfair practice charge in Case No. LA-CO-402 is hereby DISMISSED.

Chairperson Hesse and Member Craib joined in this Decision.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, Suite 900
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(415)557-1350

March 19, 1987

David T. Bryant
National Right to Work Legal
Defense Foundation, Inc
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Diane Boss
California Teachers Assn.
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Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
JoAnn Henkel, et al. v. National Education Association
Charge No. LA-CO-402

Dear Parties; -

Pursuant to Public Employment Relations Board (PERB) Regulation section 32730, 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 Educational Employment Relations Act (EERA).[1] The reasoning which underlies this decision follows.

On February 5, 1987 JoAnn Henkel, et al. filed an unfair practice charge against the National Education Association alleging violation of EERA section 3543.6 (b). More specifically, charging parties alleged that the California Teachers Association (CTA) is jointly liable for alleged defects in the demand-and-return scheme provided by the Associated Chaffey Teachers, the local chapter. These alleged defects are described as follows.

1. Mb information has been provided to the objecting fee payors concerning the local Association's financial affairs.

2. There has been no independent audit of the expenses that are deemed "chargeable."

3. No financial information has been provided which concerns actual verifiable expenditures.

[1]References to the EERA are to Government Code sections 3540 et seq. PERB Regulations are codified at California Administrative Code, Title 8.

4. The categories of expenditures are too general to be constitutionally meaningful.

5. The appointment of an arbitrator by the American Arbitration Association does not meet the Hudson standard.

6. The charging parties did not receive information demonstrating "Why certain amounts are chargeable."

7. Information provided by CTA and the National Education Association (NEA) fails to demonstrate how much of the money was spent in support of the local chapter.

8. Charging parties did not receive information sufficient to enable them to determine the pro rata share of chargeable expenses.

9. "All of the expenses for management, occupancy and capital expenditures/ depreciation should be categorized as administrative expenses except for specific items spent far non-chargeable activities."

Charging parties also allege that the agency fee charged the objecting fee payors was excessive, to wit: "FACT and the Crisis Assistance Fund costs are not collective bargaining expenses." Charging parties appear also to object to two other aspects of the fee. First, they allege "none of the 'political affairs' expenses are chargeable to non-members"; and, second, "none of the expenses for higher education are chargeable to units of secondary teachers and vice versa."

On March 2, 1987 the regional attorney wrote to Mr. David T. Bryant, attorney for charging parties, and pointed out the deficiencies in the charge. The letter, attached and incorporated by reference, warned that unless withdrawn or amended, the allegations would be dismissed on March 13, 1987. On March 12, 1987 PERB received a letter from attorney Bryant, dated March 11, 1987, Which declined to amend or withdraw the charge. The letter, however, contains arguments seeking to justify naming CTA and NEA as respondents.

Mr. Bryant's position can be reduced essentially to four propositions. They are discussed separately below.

First, in Cumero v. Public Employment Relations Board (1985) 167 Cal.App.3d 137, the Court of Appeal affirmed PERB's ruling that EERA section 3541.1(i).

> requires nonmembers, like the charging parties in these cases, to pay fees to affiliated organizations as well as the exclusive representative.

Charging parties concede that the Court of Appeals' decision is currently being reviewed by the California Supreme Court.

Charging parties incorrectly interpret the decision by the Court of Appeals.[2] The Court did not view PERB's Cumero decision as requiring nonmembers to pay fees to affiliated organizations. Rather, it held, consistent with PERB's decision, that an exclusive representative can pass on to objectors the portion of the costs that it has incurred affiliating with the statewide organization. The agency fee payors are bound to accept the determination by the majority that the representational function the exclusive representative is obligated by statute to perform can best be carried out by affiliation with CIA.

Second, charging parties claim that PERB and the Court of Appeals held that it has jurisdiction over the affiliate concerning the amount of the fees and/or the procedures by which they are taken. This assertion incorrectly states the law. Under Cumero, it is the exclusive representative, not the affiliate, which is liable to the objecting fee payer. It, not CTA, is legally required to refund the portion of the fee which is not spent on activities Which are "germane to representational functions," and, provide a demand-and-return procedure which protects the objector's constitutional rights.[3]

Third, charging parties insist that PERB has jurisdiction over the affiliate by virtue of its statutory authority to do more than investigate unfair practice charges. It is true that PERB has the authority to broaden investigation beyond the exclusive representative. However, it may choose not to exercise this authority.

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[2]It should be noted that the Court of Appeal's decision in Cumero, under California law, is nullified once the Supreme Court accepts jurisdiction to review it, and it therefore cannot be cited as binding precedent. See California Rules of Court 976(d) and 977(a).

[3]The Board's Order is particularly revealing in this regard. It is directed to the exclusive representative, not the affiliate. That the affiliates filed appearances in the Cumero matter and thereby submitted to PERB's jurisdiction should not be confused with PERB's authority to find them liable for the activities of the local chapter.

Fourth, charging parties claim that as a practical matter it does not make any sense for PERB to accept jurisdiction over one level of the organization and decline to exercise jurisdiction over the other levels. However, charging parties offer no facts to support their claim of impracticality.

No practical difficulty is apparent. The exclusive representative is legally obligated both to account for all the money it has collected from objecting fee payors and refund all monies it cannot justify as retainable. No distinction is made between monies which are spent locally and those which are paid to affiliates for services rendered by those entities to the local chapter. Here, the exclusive representative has not claimed that it is unable or unwilling to obtain the information or refund the amount owing to objecting fee payers.

For the reasons set forth above as well as those contained in the warning letter of March 2, 1987, the allegations of the charge are dismissed. No complaint will issue thereon.

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 Notice (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.) or sent by telegraph or certified or Express United States mail postmarked not later than the last date set for filing. Code of Civil Procedure section 1013 shall apply. 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 each copy of a document served upon a party or 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 sail 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 specific time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

JEFFREY SLOAN
General Counsel

By _____
PETER HABERFELD
Regional Attorney

cc: General Counsel

STATE Of CALIFORNIA GEORGE DEUKMEJIAN, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
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March 2, 1987

David T. Bryant
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Ret JoAnn Henkel, et al. v. National Education Association
Charge No. LArCO-402

Dear Mr- Bryant:

On February 5, 1987 JoAnn Henkel, et al. filed an unfair practice charge against the National Education Association (NEA) alleging violation of EEEA, section 3543.6(b). More specifically, charging parties alleged that the NEA is jointly liable far alleged defects in the demand-and-return scheme provided by the Associated Chaffey Teachers, the local chapter. These alleged defects are described as follows.

1. No information has been provided to the objecting fee payors concerning the local Association's financial affairs.

2. There has been no independent audit of the expenses that are deemed chargeable."

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Charging parties also allege that the agency fee charged the objecting fee payors was excessive, to wit: "FACT and the Crisis Assistance Fund costs are not collective bargaining expenses." Charging parties appear also to object to two other aspects of the fee. First, they allege "none of the 'political affairs' expenses are chargeable to non-members"; and, second, "none of the expenses for higher education are chargeable to units of secondary teachers and vice versa."

Investigation of the charge revealed the following. The collective bargainings agreement between the Chaffey School District and the Association contains an organizational security provision Which requires that members are to have their dues deducted by the District for the duration of the agreement. Further, any member of the unit Who is not a member of the Association must authorize payroll deduction or make payment to the Association of a service fee equivalent to unified membership dues, initiation fees and general assessments. If such individual does not authorize payroll deduction of the service fee or make payment directly to the Association, the District, upon written request from the Association, shall begin payroll deduction of the service fee.

PERB records show that the NEA is a national organization with which the Associated Chaffey Teachers (ACT) is affiliated, and only ACT is the exclusive representative of District certificated employees. ACT pays NEA a portion of its dues in return far services.

In Link v. Antioch Unified School District, et al. (1985) PERB Order No. IR-47, the Board examined the exclusive representative's demand-and-return system, and determined that the procedural protections made available to objecting fee-payors were sufficient to meet EEEA standards, even though they did not require that the entire amount of the agency fee be escrowed pending the exclusive representative's determination and reimbursement of the amount attributable to political/ideological expenses.[1] Subsequent to PERB's decision in Link, the U.S. Supreme Court issued its decision in Chicago Teachers Union v. Hudson (1986) 106 S.Ct. 1066 [121 LRRM 2793]. Hudson held that the exclusive representative is constitutionally required to provider an

[1]There, as here, the exclusive representative was affiliated with statewide California Teachers Association (CTA) and National Education Association (NEA). Many aspects of the demand-and-return system were provided by statewide CTA to the local chapter and to CTA chapters throughout the state. The escrow account, for example, was administered at the state level and contained a sum intended to protect all objectors in the state.

adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

In Fresno Unified School District (1982) PERB Decision No. 208, and Washington Unified School District (1985) PERB Decision No. 549, PERB held that mere affiliation by the exclusive representative with the statewide organization (such as CTA) is insufficient to make the statewide organization *the* exclusive representative and "hence, it was not liable for a violation of EERA." Also see Link v. California Teachers Association and National Education Association (1981) PERB Order No. Ad-123. Similarly, the exclusive representative's affiliation with the NEA did not render NEA the exclusive representative.

The charge, as written, fails to state a prima facie violation of EEEA. Only the exclusive representative is required to provide the procedural protections discussed above. NEA is not the exclusive representative, and therefore is not obliged to provide the Hudson-type procedural requirements. Having no such obligation under EERA, NEA is not an appropriate a party to this action.

If 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. (1) The amended charge should be prepared on a standard PERB unfair practice charge farm clearly labeled First Amended Charge, (2) contain all the facts and allegations you wish to sake, (3) indicate the case number where indicated an the form (even though you are not to write in the box when originally filing a charge), (4) and be signed under penalty of perjury by the charging party. The amended charge East be served an the respondent, and proof of service must be attached to tie original as well as to all copies of the amended charge.

If I do not receive an amended charge or withdrawal from you on or before March 13, 1987, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (415) 557-1350.

Sincerely yours.

Peter Haberfield
Regional Attorney