

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



EDWARD H. LOPEZ,)
)
 Charging Party,) Case No. S-CO-92-S
)
 v.) PERB Decision No. 760-S
)
 PROFESSIONAL ENGINEERS IN)
 CALIFORNIA GOVERNMENT,)
)
 Respondent.)
)
 _____)

Appearances: Edward H. Lopez, on his own behalf; Ernest F. Schulzke, Attorney, for Professional Engineers in California Government.

Before Hesse, Chairperson; Porter, Craib, Shank and Camilli, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by the charging party of a Board agent's dismissal (attached hereto) of his charge that the respondent violated section 3915.5 of the Ralph C. Dills Act (Gov. Code sec. 3512 et seq.). We have reviewed the dismissal and, finding it free of prejudicial error, adopt it as the Decision of the Board itself.

The unfair practice charge in Case No. S-CO-92-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



April 20, 1989

Edward H. Lopez

Dennis Alexander
Professional Engineers in California Government
660 J Street, Suite 445
Sacramento, California 95814

Re: Edward H. Lopez v. Professional Engineers in California
Government (PECG)
Unfair Practice Charge No. S-CO-92-S
DISMISSAL LETTER

Dear Mr. Lopez:

In the above-referenced charge filed on December 22, 1988, you allege that the Professional Engineers in California Government (PECG) violated section 3519.5 of the Dills Act. Specifically, you allege that PECG representative Dennis Alexander failed to satisfy the duty of fair representation by turning over evidence to the State at a Skelly hearing which was subsequently used against you. In addition, you allege that PECG breached its duty of fair representation by not discussing with you certain provisions contained in the collective bargaining agreement governing subjects such as "Unfair Practices" and union "Access."

I indicated to you in my attached letter dated March 27, 1989, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to April 10, 1989, the charge would be dismissed.

In a telephone call on April 4, 1989, you requested and I granted an extension of the dismissal deadline to April 17, 1989. On April 17 you again requested an extension of the deadline so that you could obtain for my review a copy of legal authority you believed to be relevant to your case. I explained to you that I would either have to have a copy of the authority, or you could telephone me its correct legal citation by Wednesday, April 19, 1989. On April 19, 1989, I did not receive a copy of the case, nor did you telephone me. Thus, I am dismissing the charge based upon the facts and reasons contained in my March 27, 1989 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five 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, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). 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 copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Administrative Code, title 8, 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 California Administrative Code, title 8, 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 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 (California Administrative Code, title 8, section 32132).

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



March 27, 1989

Edward H. Lopez

Re: Edward H. Lopez v. Professional Engineers in California
Government (PECG)
Case No. S-CO-92-S

Dear Mr. Lopez:

On December 22, 1988, you filed a charge in which you allege that the Professional Engineers in California Government (PECG) violated section 3519.5 of the Dills Act. Specifically, you allege that PECG representative Dennis Alexander failed to satisfy the duty of fair representation by turning over evidence to the State at a Skelly hearing which was subsequently used against you. In addition, you allege that PECG breached its duty of fair representation by not discussing with you certain provisions contained in the collective bargaining agreement governing subjects such as "Unfair Practices" and union "Access".

My investigation revealed the following facts.

In 1986 you were hired by the Office of the State Architect as a Construction Project Inspector, and on December 2, 1987, you were appointed by the State to the classification of Construction Supervisor I. Your job required frequent travel throughout the state in order to conduct on-site inspections of construction projects. Your employer has a procedure by which it grants you per diem advances for your out of area travel expenses. The amounts requested in advance, however, must be substantiated by receipts before new travel advances will be issued.

On March 18, 1988, you were assigned to the Los Angeles area to inspect projects. Before you left you received a travel advance of two checks totalling \$1800. Approximately a month later, you turned in a travel expense claim which was approved by your supervisor. Then, you applied for and received a new advance for the sum of \$1200.

On April 29, 1988, a State policeman served you with a notice of suspension. In it, you were placed on leave of absence without pay while your employer investigated an alleged misappropriation of state funds. When you received the notice of suspension, you contacted your PECG representative, Dennis Alexander, who advised you to wait until you heard further word from the State.

On May 11, 1988, you were served by the State with a Notice of

Advance Action, and dismissed effective April 29, 1988. The

State alleged that you had misappropriated State property by altering credit card receipts in order to claim greater expenses than were actually incurred. When you were served this Notice, you requested Mr. Alexander to inspect all documents in the State's possession relevant to your adverse action, which you allege, he failed to do.

On May 13, 1988, Mr. Alexander represented you at a Skelly hearing in Sacramento. At this hearing, Mr. Alexander argued that you did not alter the receipts, and that you had receipts to substantiate that you were, at all times, at the location your employer intended for you to be. Most of these receipts were located at your home in Madera, and were not turned over to the employer representative on this date.

At the beginning of June, 1988, you gave Mr. Alexander your entire collection of receipts. Although you gave him permission to show them to the State, you allege that you specifically requested that he not turn them over. However, on June 9, 1988, Mr. Alexander met with employer representative Einer Christensen, and turned over copies of the receipts. These were then used against you at a subsequent State Personnel Board (SPB) hearing in support of the State's case to uphold your termination.

On June 15, 1988, you requested Mr. Alexander to no longer represent you. You desired his withdrawal from the case because you learned that he was attempting to obtain for you part of the monies owed to you by the State. When the State dismissed you, it owed you part of one month's pay. Mr. Alexander attempted to get from the State the difference between the amount of your outstanding pay and those monies alleged by the State to have been misappropriated. You felt that Mr. Alexander was not properly representing you because, in your view, you were entitled to the entire amount of your pay warrant until the State sustained its case against you at the SPB proceeding.

You also allege that Mr. Alexander failed to satisfy the duty of representation by not explaining to you certain provisions of the collective bargaining agreement. Some time in May or June 1988, you telephoned Mr. Alexander and requested that a PECG representative go to Avenal, a small community southwest of Fresno, California, to explain the following contractual provisions: Section 12B (Unfair Practices), Section 18A, 18B, 18C, 18D, 18E (Representation) and Section 22 (Training). Mr. Alexander told you that Avenal was too "out of the way" to send anyone for the purpose of explaining these provisions, and that these provisions did not apply to you, in any event.

Based on the allegations set forth above, I do not find that you have established a prima facie violation of Dills. Under Dills, a breach of the duty of fair representation occurs if the employee organization's conduct is arbitrary, discriminatory or

in bad faith. California State Employees' Association (Lemmons). (1985) PERB Decision No. 545-S.) PERB has determined, however, that the scope of the duty is limited to contractually-based remedies under the union's exclusive control. (San Francisco Classroom Teachers' Association (Chestangue) (1985) PERB Decision No. 544; California State Employees Association (Lemmons), *supra*; California State Employees' Association (Darzins) (1985) PERB Decision No. 546-S; California Faculty Association (Pomerantsev) (1988) PERB Decision No. 698-H.) In these decisions, the Board has dismissed charges based on alleged union failures to pursue non-contractual administrative or judicial relief such as an out-of-class, claim before the SPB, or an appeal of an adverse SPB ruling. In other words, there is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such employee can obtain a particular remedy. The exclusive representative possesses the sole means by which a unit member has access to the negotiating process, as well as to the grievance and arbitration procedure. This is not the case with regard to representation in a Skelly proceeding.

PERB's legal conclusions are consistent with those established under the National Labor Relations Act. In Hawkins v. Babbock and Wilcox Co. (1980) (U.S.D.C., N. Ohio) [105 LRRM 3458], the District court ruled:

The National Labor Relations Act, authorizing unions to represent employees in the creation and administration of collective bargaining agreements with employers, together with the correlative duty of fair representation, however, is limited to the collective bargaining agreement process . . . The union's duty of fair representation is restricted to the context of the collective bargaining agreement and does not extend to legal remedies available outside of the employment contract.

(See also Archer v. Airline Pilot's Association (9th Cir. 1979) 609 F2d; Freeman v. Teamsters Local 135 (7th Cir. 1984) 746 F2d 1316, cert. den'd. (1980) 446 US 953.)

Even assuming that Skelly proceedings are covered by the duty of fair representation, it should further be noted that it is unclear how Mr. Alexander, by giving the State copies of motel receipts, jeopardized your case, or incriminated you, or violated the duty of fair representation. In any event, your charge has alleged no facts demonstrating that Mr. Alexander's representation was arbitrary, discriminatory, or in bad faith. At most, Mr. Alexander's relinquishment of the receipts was an

act of negligence, which is an insufficient basis for finding a breach of the duty of fair representation. Los Angeles City and County School Employees Union (1983) PERB Decision 341.

Your charge, as currently alleged, further fails to show that PEGC treated you in an arbitrary, discriminatory or bad faith fashion by failing to adequately explain to you certain contractual provisions. The majority of the items you cite refer to the exclusive representative's rights vis-a-vis the employer. For example, in your charge you cite sections of the collective bargaining agreement pertaining to the State's obligation to: deal with PEGC-designated representatives (Section 18A), provide PEGC with a printout of the names of persons in the unit (Section 18B), and to provide access to bargaining unit employees and State-furnished bulletin boards. These provisions inure to PEGC's direct benefit and were negotiated to enhance its ability to represent the unit. Mr. Alexander's statement that these provisions did not apply directly to you did not evince arbitrary, discriminatory or bad faith treatment. You also cite Section 22 of the contract, which delineates the State's obligation to reimburse unit employees for expenses incurred as a result of attending job-required courses. While this provision was negotiated for the unit employees' direct benefit, as opposed to PEGC's, you still have not alleged sufficient facts to show how Mr. Alexander's failure have a PEGC representative go to Avenal to explain this provision, or to explain it more adequately to you on the telephone, evidenced discriminatory, arbitrary or bad faith conduct.

If you feel that there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge accordingly. This 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 April 17, 1989, I shall dismiss your charge without leave to amend. If you have any questions on how to proceed, please call me at (916) 322-3198.

Sincerely,

Jennifer Chambers
Regional Attorney

JAC:djt