

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STANLEY "S" MALIN,)
)
Charging Party,) Case No. LA-CO-545
)
v.) PERB Decision No. 870
)
UNITED TEACHERS LOS ANGELES,) March 1, 1991
)
Respondent.)
_____)

Appearance: Stanley "S" Malin, on his own behalf.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION AND ORDER

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Stanley "S" Malin (Malin) of the Board agent's dismissal, attached hereto, of his charge that United Teachers Los Angeles (UTLA) violated section 3543.6(b) of the Educational Employment Relations Act (EERA).¹ We have reviewed the dismissal, and finding it to be free of prejudicial error, adopt it as the decision of the Board itself.

In his appeal, Malin, for the first time, raised facts indicating that the actions taken against him occurred as a result of his serving a subpoena in a related case and filing the

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

charge in this case. PERB Regulation 32635² states, in pertinent part:

(b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

In accordance with this regulation, the Board will not consider those facts raised for the first time on appeal. The unfair practice charge in case no. LA-CO-545 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shank and Camilli join in this decision.

²PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



September 25, 1990

Stanley "S" Malin
8658 Nagle Avenue
Panorama City, CA 91402

RE: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice
Charge No. LA-CO-545, Stanley "S" Malin v. United Teachers
Los Angeles

Dear Mr. Malin:

I indicated to you in my attached letter dated September 19, 1990, 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 September 27, 1990, the charge would be dismissed.

In a telephone conversation on September 25, 1990, you informed me that you did not intend to amend or withdraw the charge. I am therefore dismissing the charge based on the facts and reasons contained in my September 19 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

Dismissal and Refusal
to Issue Complaint
LA-CO-545
September 25, 1990
Page 2

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).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

JOHN W. SPITTLER
General Counsel

By
Thomas J. Allen
Regional Attorney

Attachment

cc: Leo Geffner

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



September 19, 1990

Stanley "S" Malin
8658 Nagle Avenue
Panorama City, CA 91402

RE: WARNING LETTER, Unfair Practice Charge No. LA-CO-545,
Stanley "S" Malin v. United Teachers Los Angeles

Dear Mr. Malin:

In the above-referenced charge, it is alleged that United Teachers Los Angeles (UTLA) interfered with the right of Stanley "S" Malin (Malin) to run for office within UTLA. This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

My investigation of this charge revealed the following facts.

UTLA is the exclusive representative of a bargaining unit of certificated employees of the Los Angeles Unified School District. Malin is an employee in the bargaining unit and a member of UTLA. In or around March, 1990, Malin was one of four members elected to UTLA's Valley East Area Board of Directors. Three of the four filed to run for Valley East Area Chairperson (Area Chairperson) in an election scheduled for April 16, 1990: Malin, Lila Dawson-Weber (Dawson-Weber) and Loretta Toggenburger (Toggenburger). Dawson-Weber was the incumbent Area Chairperson.

UTLA's Election rules for 1990 provide in relevant portions as follows:

Section 3. COUNTING

(c.) CONTESTED ELECTIONS:

Contested elections shall be decided by a simple majority of 50% + 1 ballots cast, except for the election of Area Chairperson; in which case, if more than two Board of Directors-elect run for position of Area Chairperson, only a plurality shall be necessary for election.

Section 6. CAMPAIGN RULES

- (f.) UTLA Committees shall not endorse or discuss any candidacy during the election process.
.....
- (h.) Candidate literature shall not appear to be an official UTLA publication.
.....
- (j.) The logo of UTLA or any UTLA affiliate shall not be used on/with any campaign materials.
.....
- (o.) Candidate Statements shall be published in the United Teacher at least two (2) weeks prior to the appropriate election. Candidates who wish to submit articles for the election supplement of the United Teacher must submit articles to the Election Committee in duplicate on specified forms, retaining a third copy for personal files.

Galleys will be proofread by the candidate and signed off to make sure that the article agrees verbatim with the original submitted by each candidate. A specific time will be set for candidates to check the galley sheets of their election statements for the United Teacher.

Section 7. CHALLENGE PROCEDURE

- (a.) The Election Committee will not consider appeals filed with it more than five working days after each round of the election in question is terminated. Subsequent levels for appeal must be filed in the appropriate fashion within

five working days of a decision being made at the preceding level.

- (b.) If a candidate charges that another candidate has violated these election rules, the following procedure shall be followed:

Step 1. Election Committee Hearing

Both parties and/or representative of each shall appear before meeting of the Election Committee.

The Committee may:

1. Refuse to hear the challenge on the grounds that the challenge as presented does not involve the violation of any election rule.
2. Uphold the challenge and disqualify the challenged party on the grounds that there has been a violation of an election rule by the challenged party.
3. Deny the challenge on the grounds that there has not been a violation of any election rule by the challenged party.

The decision of the Election Committee may be appealed to a qualified independent arbitrator hired by UTLA. Such an appeal should be submitted in writing to the election Committee which shall facilitate the appeal. In any case where a candidate asks for arbitration, the candidate asking for arbitration shall pay a fee of \$150.00 to UTLA which will be refunded if the arbitrator finds in the candidate's favor. Arbitrators shall be selected from a list as submitted by the Federal Mediation Service with the ability of striking alternate names.

The same Arbitrator if possible is to preside for all challenges.

The decision of the independent arbitrator shall be final in all cases.

(c) Procedural Stipulations:

2. Candidates involved in any challenge shall be provided 5 working days advance notice of proceedings and procedures.

4. Any challenger or challengee will be invited to be present at any hearing before the Election Committee, or Arbiter with 5 working days advance notice.

Malin filed to run for Area Chairperson under the name "Stanley 'S' Malin," which he uses formally. Informally, he uses "Stan." Before the election on April 16, 1990, candidate statements appeared in United Teacher, a UTLA publication. Malin's statement was headed "Statement of Stan Malin." Malin did not write this heading, and he did not proofread it, because he was out of town. The statement, which he did write, began, "My name is Stanley 'S' Malin," and ended, "Thanks for your support. Stan." Dawson-Weber's statement identified her, in both the heading and the text, as "Lila Dawson-Weber."

On the ballot, Malin was listed as "Stan Malin" and Dawson-Weber was listed as "Lila Weber." Malin distributed copies of the ballot with his suggestions marked, including a suggested vote for "Stan Malin." The ballots were counted on or about April 17, 1990. Malin got 638 votes; Dawson-Weber (on the ballot as "Lila Weber") got 583 votes; and Toggenburger got 200 votes.

The UTLA Election Committee informed Malin that Toggenburger had withdrawn from the election before the votes had been counted. The Committee also told Malin that there would be a runoff election, because no one received a majority. Malin pointed out that under Section 3.(c.) of the Election Rules only a plurality is necessary if there are more than two candidates. Malin also pointed out that if the votes for Toggenburger were invalidated by her withdrawal he had received a majority of the valid votes. The Election Committee promised to get back to him.

The Election Committee later informed Malin that Dawson-Weber had challenged the election because she had been listed on the ballot merely as "Lila Dawson." The Committee upheld the challenge and

Warning Letter
LA-CO-545
September 19, 1990
Page 5

scheduled a new election. Two members of the Committee told Malin that there had not been a formal hearing on the challenge. Malin was not given advance notice of any proceeding or invited to attend.

The Election Committee informed Malin that ballots for the second election would be sent out on April 30, 1990. Malin sent out campaign materials on April 27, 1990, to arrive just before the ballots. The ballots were not sent out, however, until May 3, 1990. Dawson-Weber sent out her campaign materials on May 2, 1990. The Election Committee later admitted that it had told Dawson-Weber about the delay in sending out ballots because she had called the Committee. Malin felt he had no reason to call, and he was unaware of the delay. Dawson-Weber's campaign materials included endorsements from UTLA President Wayne Johnson and President-Elect Helen Bernstein, who were identified as such in the materials.

The return date printed on the ballots was May 4, 1990, but the Election Committee extended the deadline three days, without telling Malin. The Committee later admitted that it had told Dawson-Weber about the extension because she had called. Malin felt he had no reason to call, and he was unaware of the extension. Malin says that if he had known about the extension he would have made additional phone calls and gathered more votes. Declarant Steve Gregory Fox says he would have cast his vote had he known about the extension. Declarant Roberta Fine says she knows some (unidentified) people who did not vote because they were unaware of the extension. In the second election, Dawson-Weber got approximately 520 votes, and Malin got approximately 460 votes.

On May 21, 1990, Malin sent the following letter to the Election Committee:

1. I won the first election. My opponent challenged [sic] the results, I am told, on the grounds that her name wasn't on the ballot correctly. I was informed by two members of the election committee that a formal hearing was never held, but a second election was ordered anyway. This is, I believe illegal and the results of the first election must stand. How can a second election take place if no challenge has been heard?

Warning Letter
LA-CO-545
September 19, 1990
Page 6

2. The ballots were to be mailed on the 30th. of April. I mailed my material on Friday April 27 so that it would arrive a day before or with the ballots. The election ballots didn't arrive until May 5, post marked May 3. I was never informed of the delay in mailing the ballots. If I had been, I would have waited to send out my material. My opponent's materials were post marked May 2, mine April 27. Did she know of the delay?

3. Several people came to me at the area meeting, May 6, 1990, and asked me about the results of the election, as the ballots were to be counted on Monday May 4, and I told them that there had been a delay. Another person asked why they hadn't been informed of the delay, stating that by the time he had gotten his ballot, and gotten around to mailing it back he noticed that the return date on the ballot was passed so he didn't bother to send it in. He said that if he had known of the three day extension he could have mailed it in on time. He, and who knows how many others, had been disenfranchised [sic] by the delay. (Name on request)

4. My forth [sic] and final reason for challenging the election is the same as my opponent's. My name on the intent to run form is Stanley "S" Malin. The ballot said Stan Malin. If her challenge was upheld for this reason, without a hearing, I should be given the same consideration.

The Committee met with Malin, and on June 5, 1990, it responded to him by letter as follows:

The Election Committee met in Executive Session after you left and carefully reviewed all the facts concerning your challenge. As you recall, during the meeting it was agreed to divide your challenge into four (4) different issues. Each was then presented and discussed separately. They were as follows:

- 1) Issue - You stated the Election Committee did not have a hearing to hear Lila Dawson-Weber's challenge and therefore, we acted illegally and the results of the first election should stand.

Decision: It was agreed that indeed the Election Committee did meet and decided that Lila Dawson-Weber had a legitimate challenge to the Election Committee. We failed to print her name on the ballot as it was both listed on her Intent To Run Form and as she has been commonly known in UTLA.

- 2) Issue: Not everyone was aware of the "Delay of Ballots.

Decision: The Committee unanimously agreed that we did not have any control over the mailing of the ballots. Those receiving ballots early had three extra days in which to submit their ballots. The Election Company told us that the ballots were all mailed on the same day. Some went out on Wednesday, some on Thursday and some on Friday. The three day delay we felt was the fairest way to be sure everyone had the same number of days to return their ballots.

- 3) Issue: Candidate not being informed about the delay in the mailing of ballots.

Decision: The Committee decided that the majority of candidates were informed and that it is the responsibility of each candidate to keep abreast of all changes. Further, we have reason to believe that you were aware of the delay.

- 4) Issue: Your name was incorrect on the Ballot

Decision: We unanimously agreed that your name recognition within UTLA is "Stan Malin" and not "Stanley S. Malin" as you claim on your challenge. On the first round of

Warning Letter
LA-CO-545
September 19, 1990
Page 8

ballots your name was listed as "Stan Malin" and you did not challenge at that time. This indicated that the spelling of your name was not an important issue to you.

Conclusion: In summary, the Election Committee unanimously agreed to dismiss your challenge.

Malin requested arbitration of his challenge. On June 21, 1990, he also requested from the Election Committee copies of Dawson-Weber's "Intent To Run Form," her challenge to the first election, the Committee's findings on that challenge, and Dawson-Weber's financial reports to the Committee. He further requested a statement of the reason he was not invited to the proceeding on Dawson-Weber's challenge. Malin did not receive a response to his request for information.

On July 1, 1990, Dawson-Weber began her new two-year term as Area Chairperson. On August 31, 1990, Malin and Dawson-Weber selected Walter Kaufman as arbitrator of Malin's challenge, and an arbitration hearing was held on September 18, 1990. A decision is expected in about two and a half months.

Malin does not know why the Election Committee may have disfavored him and favored Dawson-Weber. His guess would be that it is because Dawson-Weber's husband has been a close friend and advisor of Wayne Johnson, who was UTLA President at the time of the election.

Based on the facts stated above, the charge does not state a prima facie violation of the EERA within the jurisdiction of the Public Employment Relations Board (PERB), for the reasons that follow.

The present charge essentially challenges UTLA's internal election procedures. Generally, PERB has not read the EERA as authorizing PERB to intervene in internal union affairs. In Service Employees International Union, Local 99 (Kimmitt) (1979) PERB Decision No. 106, at pp. 15-17, PERB explained as follows:

The EERA gives employees the right to "join and participate in the activities of employee organizations" (sec. 3543) and employee organizations are prevented from interfering with employees because of the exercise of their rights (sec. 3543.6(b)). Read broadly,

Warning Letter
LA-CO-545
September 19, 1990
Page 9

these sections could be construed as prohibiting any employee organization conduct which would prevent or limit employee's participation in any of its activities. The internal organization structure could be scrutinized as could the conduct of elections for union officers to ensure conformance with an idealized participatory standard. However laudable such a result might be, the Board finds such intervention in union affairs to be beyond the legislative intent in enacting the EERA. There is nothing in the EERA comparable to the Labor-Management Reporting and Disclosure Act of 1959, which regulates certain internal conduct of unions operating in the private sector. The EERA does not describe the internal workings or structure of employee organizations nor does it define the internal rights of organization members. We cannot believe that by the use of the phrase "participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations" in section 3543, the Legislature intended this Board to create a regulatory set of standards governing the solely internal relationship between a union and its members. Rather, we believe that the Legislature intended in the EERA to grant and protect employees' rights to be represented in their employment relations by freely chosen employee organizations. [Footnotes omitted.]

At the same time, PERB recognized an exception to the general principle of non-intervention, where the internal activities of an employee organization have such a substantial impact on employees' relationship with their employer as to give rise to the duty of fair representation.

PERB has since recognized two other exceptions to the principle of non-intervention. In California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280, at p. 11, PERB recognized its "jurisdictional power to determine whether an employee organization has exceeded its authority under subsection 3543.1(a) to dismiss or otherwise

Warning Letter
LA-CO-545
September 19, 1990
Page 10

discipline its members." That subsection of the EERA provides in relevant part as follows:

Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

Thus, in questions of membership, PERB will examine the reasonableness of restrictions or dismissals. See also Union of American Physicians and Dentists (Stewart) (1985) PERB Decision No. 539-S and California Correctional Peace Officers Association (Colman) (1989) PERB Decision No. 755-S.

Similarly, in California State Employees' Association (O'Connell) (1989) PERB Decision No. 753-H, at p. 9, PERB explicitly recognized its statutory authority to inquire into the internal activities of an employee organization when it is alleged that the organization has imposed reprisals on employees because of their exercise of protected rights. This decision was based on the statutory authority of Government Code section 3571.1(b) of the Higher Education Employer-Employee Act; the same statutory language appears in Government Code section 3543.6(b) of the EERA. See also California Association of Psychiatric Technicians (Long) (1989) PERB Decision No. 745-S and California School Employees Association (Petrich) (1989) PERB Decision No. 767.

The present charge does not fit into any of these three recognized exceptions to the principle of non-intervention. There is no alleged or apparent impact on Malin's (or any employee's) relationship with the employer so as to give rise to the duty of fair representation. (In Kimmett, supra, PERB specifically held that an election to select a representative to a negotiating team was not subject to the duty.) Nor does the charge involve a question about Malin's membership in UTLA; apparently, he remains a member in good standing. Finally, the charge does not allege that Malin is suffering any reprisal because of any exercise of protected rights; on the contrary, his best guess is that he has been disfavored only because of his opponent's husband's relationship with the UTLA President.

For these reasons, the charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended

Warning Letter
LA-CO-545
September 19, 1990
Page 11

Charge, contain all the facts and allegations you wish to make, and must 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 September 27, 1990, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

U
Thomas J. Allen
Regional Attorney

TJA:rdw