

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MARILYN KESKEY,)
)
 Charging Party,) Case No. LA-CO-547
)
 v.) PERB Decision No. 914
)
 UNITED TEACHERS OF LOS ANGELES,) December 13, 1991
)
 Respondent.)
 _____)

Appearances: Marilyn Keskey, on her own behalf; Taylor, Roth, Bush & Geffner by Catherine M. Loya, Attorney, for United Teachers of Los Angeles.

Before: Hesse, Chairperson; Shank and Camilli, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Marilyn Keskey (Keskey) to a PERB administrative law judge's (ALJ) proposed decision (attached) dismissing the unfair practice charge and complaint. The unfair practice charge and complaint allege that United Teachers of Los Angeles (UTLA) violated section 3543.6(b) of the Educational Employment Relations Act (EERA or Act)¹ by failing to satisfy its duty of fair

¹EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.6(b) states in pertinent part:

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

representation at a Step 2 grievance hearing.

The Board has reviewed the entire record in this case, including the hearing transcript and exhibits, proposed decision, Keskey's exceptions, and UTLA's response thereto, and finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and therefore adopts them as the decision of the Board itself consistent with the following discussion.

KESKEY'S EXCEPTIONS

Keskey appeals the proposed decision on the basis that her testimony was truthful. Keskey disagrees with the ALJ's credibility determinations, wherein the ALJ did not credit Keskey's testimony. Where conflict existed in the testimony, the ALJ credited the testimony of UTLA area representative Tom Kerr (Kerr), as corroborated by Jessie G. Franco (Franco), Superintendent of Elementary District No. 3. Keskey's exceptions can be summarized as follows: (1) Keskey contends there is no evidence that Kerr prepared a document/chart noting the consistencies and inconsistencies of the students' complaints against her; (2) Keskey contends she was forced to say that she had three discussions with Kerr between the Step 1 and Step 2 meetings; (3) Keskey claims the ALJ should not have credited Kerr's testimony in which Kerr denied telling Keskey prior to the Step 2 meetings that, "The District will be angry with me if I

employees because of their exercise of rights guaranteed by this chapter.

fight too hard;" (4) Keskey disputes the ALJ's reliance on the testimony of Kerr and Franco in which they denied that Kerr stated at the Step 2 meeting that there had been no violation of the collective bargaining agreement; and (5) Keskey excepts to the ALJ's finding that Kerr spent a considerable amount of time preparing for the Step 2 meeting. In sum, Keskey argues that Kerr and Franco provided the ALJ with false evidence. Further, at the Step 2 meeting, Keskey claims Kerr did not argue the case to the best of his ability.

UTLA'S RESPONSE TO EXCEPTIONS

UTLA responds that the ALJ's credibility determinations are supported by the record as a whole. As Keskey's exceptions to the proposed decision involve only issues of credibility, UTLA argues that deference to the ALJ's credibility determinations must result in the Board's rejection of Keskey's exceptions. UTLA argues that deference is appropriate where credibility determinations play a vital role in the consideration of the complaint. UTLA cites Los Angeles Unified School District (1988) PERB Decision No. 659 to support its position. In that case, the Board found it appropriate to adopt the ALJ's credibility determinations based upon the ALJ's observation of the witnesses' demeanor and appearances. Further, as the ALJ provided a detailed rationale for his credibility determinations, deference must be accorded to the ALJ's determinations. After addressing Keskey's specific credibility exceptions, UTLA concludes that the exceptions must be rejected. UTLA states that, "In light of

these undisputed facts, along with the ALJ's credibility determinations, the clear preponderance of the relevant evidence supports the ALJ's decision."

DISCUSSION

The proposed decision in this case is based upon the ALJ's credibility determinations. With regard to cases of this nature, the Board has stated:

[W]e must emphasize that credibility determinations play a vital role in the consideration of this allegation. While we are free to consider the entire record and draw our own conclusions from the evidence presented, we will afford deference to an ALJ's findings of fact which incorporate credibility determinations. Santa Clara Unified School District (1979) PERB Decision No. 104. This appears to us to be a classic instance where deference is appropriate.

(Los Angeles Unified School District, supra,
PERB Decision No. 659, p. 8.)

The Board, in Los Angeles Unified School District, supra, found that the testimony in that case presented two dramatically different versions of an incident. Because the ALJ credited one version, and there was no basis in the transcript for overturning that determination, the ALJ's credibility determination was adopted by the Board. In the case before us, there is no basis in the record for overturning the ALJ's credibility determinations. Accordingly, the Board must defer to the ALJ's findings which incorporate such determinations.

Further, the Board generally gives deference to the credibility determinations of its ALJ's, in recognition of the fact that, by virtue of witnessing the live testimony, they are

in a much better position to accurately make such determinations than the Board, which reviews only the cold transcript of the hearing. (Santa Clara Unified School District (1979) PERB Decision No. 104, pp. 12-13; Beverly Hills Unified School District (1990) PERB Decision No. 789, pp. 8-9.) Based upon a review of the entire record, the Board rejects Keskey's exceptions to the ALJ's credibility determinations.

Given the ALJ's credibility determinations and the undisputed evidence, the Board affirms the ALJ's dismissal of the unfair practice charge and complaint.

ORDER

The unfair practice charge and complaint in Case No. LA-CO-547 is hereby DISMISSED.

Member Shank and Camilli joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



MARILYN KESKEY,)
)
 Charging Party,) Unfair Practice
) Case No. LA-CO-547
 v.)
) PROPOSED DECISION
 UNITED TEACHERS OF LOS ANGELES,) (8/7/91)
)
 Respondent.)
)
 _____)

Appearances: Marilyn Keskey, on her own behalf; Taylor, Roth, Bush & Geffner by Jesus E. Quinonez and Catherine M. Loya, Attorneys, for United Teachers of Los Angeles.

Before Douglas Gallop, Administrative Law Judge.

PROCEDURAL HISTORY

On October 15, 1990, Marilyn Keskey filed an unfair practice charge alleging that United Teachers of Los Angeles (hereinafter Respondent) violated section 3543.6(b) of the Educational Employment Relations Act (hereinafter EERA)¹ by failing to satisfy its duty of fair representation at a Step 2 grievance hearing, and by refusing to submit the grievance to arbitration. On April 16, 1991, the General Counsel of the Public Employment Relations Board (PERB) issued a letter dismissing the allegation concerning Respondent's refusal to take the grievance to arbitration.

Also on April 16, 1991, a complaint issued alleging that Respondent's former area representative, Tom A. Kerr, made certain comments during the processing of Keskey's grievance at

¹The EERA is codified at Government Code section 3540, et seq. All citations herein are to the Government Code unless otherwise indicated.

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.

Step 2 which were inconsistent with Respondent's duty, under section 3543.1(a) and 3544.9, to represent employees in good faith, and thus, violated section 3543.6(b). Respondent filed an answer to complaint and motion to dismiss denying the commission of unfair practices, and alleging various affirmative defenses. The motion to dismiss was denied, and after an informal settlement conference failed to resolve the dispute, a formal hearing was conducted on July 23, 1991. The parties waived the receipt of transcripts and the filing of written briefs, and with oral argument at the hearing, the case was submitted for proposed decision.²

FINDINGS OF FACT

Background:

Respondent, an "employee organization" within the meaning of section 3540.1(d), is the exclusive representative for a unit of certificated employees of the Los Angeles Unified School District (hereinafter District). Respondent and the District were parties to a collective bargaining agreement effective July 1, 1988 through June 30, 1991 (hereinafter Agreement). The Agreement contained a three-step grievance procedure culminating in binding arbitration.

²Keskey also filed a charge against Los Angeles Unified School District, alleging that she was discharged from her employment in retaliation for engaging in protected activities. The General Counsel dismissed the charge as untimely, and the PERB affirmed the dismissal on appeal. Los Angeles Unified School District (1991) PERB Decision No. 887.

During the time period relevant herein, Respondent maintained a policy whereby its representatives had no authority to settle grievances at Step 1 or Step 2 without the consent of the unit member. Decisions to arbitrate grievances were made by a grievance review committee, whose voting members are teachers for the District. A unit member wishing to have a grievance taken to arbitration was afforded the opportunity to be heard and to present documentary evidence before the grievance review panel.

Keskey began her employment for the District in 1975, and worked as a substitute teacher in the elementary division commencing in 1982. She taught at about 250 elementary schools. Keskey became a member of Respondent in about 1980, and attended about eight meetings conducted for substitute teachers. She had not sought or occupied any position with Respondent.

Prior to the events described below, Keskey had generally maintained a harmonious relationship with Respondent's representatives. The one possible exception to this involved a grievance she filed, with Respondent's assistance, when she received an inadequate service report dated May 2, 1988. The District rejected that grievance for failure to follow the timelines established by the Agreement, and Keskey feels that Respondent should have advised unit members of the contractual time requirements. It is unclear whether Keskey actually complained about this to any of Respondent's representatives.

Kerr was employed by Respondent as an area representative from February 1989 to June 1990. Prior to the events leading to the charge in this case, Kerr and Keskey had met only once, and the encounter had been amicable. One of Kerr's duties for Respondent was to represent substitute teachers in grievance matters. During the course of his employment he filed, processed and resolved about 150 grievances. Previously, Kerr had been employed as a teacher by the District, and had been active in Respondent's organization, serving as an officer in various capacities.

Credibility:

Keskey, Kerr and Jessie G. Franco, who is employed by the District as superintendent of elementary district #3, testified at the hearing. Kerr was an impressive witness from the standpoint of his demeanor, which showed a relaxed confidence, and his detailed recall of the events.³ Franco, although less impressive from the standpoint of recall, also exhibited a forthright, confident demeanor which inspired confidence.

Keskey, on the other hand, was not a reliable witness. With respect to demeanor, she tended to be argumentative, hostile, defensive and non-responsive when confronted with questions she

³For example, Kerr, unassisted by reference to a student's letter concerning Keskey's actions in a classroom, was able to recall that the student had stated she did not hear certain statements attributed to Keskey, rather than stating that Keskey did not make the statements. Said testimony was later corroborated when the letter was introduced into evidence. In spite of the passage of time and the many grievances he handled, Kerr was also able to recall that Keskey's initial inadequate service report in 1990 was completed on the wrong form.

felt sought to elicit information damaging to her case. In addition, she testified in a rambling manner, repeatedly infusing her opinions into recitations of the events as they actually took place. She also demonstrated that listening to questions and instructions is not her forte, which is probably why she apparently misunderstood or misinterpreted many of the statements made during the course of the 1990 grievance. While she did testify in a consistent manner concerning the three statements attributed to Kerr in the complaint, her testimony was inconsistent on many other matters. Finally, her testimony showed a poor recall for the details of critical conversations. Therefore, Kerr's testimony, as corroborated by Franco, is credited where conflicts exist.

The February 1990 inadequate service report:

Keskey received an inadequate service report arising from her performance as a substitute teacher on February 6, 1990. The report alleged that a group of students complained to the school principal concerning statements made to them by Keskey, and that she tore up some their work.⁴ After a verbal conference with the principal, Keskey immediately proceeded to Respondent's office and met with Kerr. Kerr discussed the incident with Keskey and prepared a grievance for her, which was timely filed with the District on February 21, 1990.

⁴As noted above, the original report was completed on the wrong form. Similar allegations were made on the correct form shortly thereafter.

After the grievance was filed, a Step 1 grievance meeting was scheduled to take place within 15 days from the filing date. Either by telephone, or before they entered the Step 1 meeting, Kerr instructed Keskey to let him do the talking. Kerr advised all grievants of this because he did not want them to inadvertently make damaging statements to District representatives. Kerr also advised Keskey not to expect a favorable resolution at Step 1.

The Step 1 meeting lasted 15 to 20 minutes. Prior to the meeting, Keskey had been provided with written statements obtained by the District from students concerning the allegations against her. At the Step 1 meeting, the District cited the letters as grounds for the inadequate service report. Kerr requested copies of the letters, which were turned over to him. After briefly reviewing some of the letters, Kerr commented that they appeared to be too consistent. Kerr gave Keskey's version of the facts, and demanded that the report be rescinded. The District refused to settle at Step 1.

Keskey admitted that she was favorably impressed by Kerr's handling of her grievance at Step 1. She testified that he gave a strong presentation,⁵ and appeared to be a "fighter." After the Step 1 meeting, Kerr said he would take her grievance to

⁵On cross-examination, she changed this to a "strong, medium" presentation.

Step 2. Keskey said she had substantial documentary evidence to provide, and Kerr said "fine," she would probably win the grievance.

After the Step 1 grievance meeting, Kerr spent several hours analyzing the students' letters and drafting a chart noting their consistencies and inconsistencies. He also reviewed a chart and letter from Keskey analyzing the students' charges, and the District's allegations against her. In addition, Kerr discussed the grievance with Keskey by telephone on at least three occasions prior to the Step 2 meeting.⁶

The Step 2 meeting, as originally scheduled, was postponed at the District's request. Kerr left a note for Keskey at work informing her of the postponement on the morning of the scheduled meeting. Keskey was not given the note until that afternoon, about one hour before the meeting had been scheduled to commence.

⁶Keskey testified that she attempted to telephone Kerr on many occasions, but was repeatedly told he was not in, or was placed on hold indefinitely. Nevertheless, she admitted discussing her case with Kerr by telephone on three occasions between the Step 1 and Step 2 meetings. Keskey also testified that when she offered to provide Kerr with her documents, he snapped at her, "Just put it in the mail." Later in her testimony, Keskey changed this by adding that Kerr said, "I don't want to hear about it. Put it in the mail." On further questioning, Keskey again changed her testimony by claiming that Kerr said, "I'm very busy. Put it in the mail." Kerr credibly testified that he was, in fact, very busy and might have said this to Keskey, but never avoided discussing the grievance with her. Kerr recalled many telephone conversations with Keskey concerning the grievance, but could not pinpoint the number at each step in the process.

Keskey blames Kerr for the delay, because he purportedly did not inform the person he gave the note to that it was important.⁷

The Step 2 meeting was rescheduled for April 27, 1990. By prior arrangement, Keskey and Kerr were to meet 15 minutes prior to the start of the meeting. Kerr arrived on time, but Keskey was about five minutes late. Kerr reviewed the mechanics of the Step 2 grievance process with Keskey. He said he thought the strongest argument for her case would be to point out that the students' letters were so consistent that they must have been coached by the District. Keskey showed Kerr some favorable notes she had received in the past from students and principals. Kerr told her that he did not believe the letters would be very productive, because the District generally does not attach much weight to a substitute teacher's prior performance in considering discipline for subsequent conduct.⁸

⁷Keskey was both defensive and non-responsive when asked whether she complained to Kerr about his handling of the postponement.

⁸Keskey testified that Kerr's eyes were half closed during this conversation, and that he appeared "totally out of it." As alleged in the complaint, Keskey testified that Kerr told her, "If I try to fight too hard, the District will be mad at me." Keskey was far from precise, however, as to what she said to Kerr prior to his statement. Keskey testified that in response, she said, "That's ridiculous." Keskey claims that she told Kerr she had received a termination notice, and Kerr said nothing in response. In addition, Keskey testified that Kerr stated he should do all the talking at the meeting. Kerr denied saying that the District would be angry with him if he fought hard for Keskey, and further testified that it was his understanding, from the Step 1 meeting, that he would be the spokesperson in the grievance meetings. For the reasons set forth in the credibility analysis above, Kerr's testimony is credited.

After waiting about one-half hour for a District representative to arrive, the Step 2 meeting took place. Kerr outlined the history of the grievance and again stated the facts of the incident as had been related to him by Keskey. He argued that the students might have misconstrued what she had said, and that their statements appeared more damaging than what had actually taken place. He attributed the latter assertion to his belief that the students had been coached when writing the statements. He pointed out, inter alia, that all but one student had misspelled Keskey's name, and in the same way. Kerr concluded that the allegations in the report were unsubstantiated, and even if accurate to a degree, the District had not followed its progressive disciplinary policy. Therefore, the incident warranted no discipline or lesser discipline, such as a warning. Kerr offered that in the future, Keskey not be assigned to the school in question.

After Kerr concluded, Keskey spoke on her own behalf, presenting earlier testimonials to her work performance from students. Kerr requested a break to speak with her. During the break, Kerr told Keskey that he did not think it would be in Keskey's best interest to present that type of information, because the District would consider it irrelevant. Keskey disagreed, whereupon Kerr said "fine," but it would be over his objection and against his advice.⁹

⁹According to Keskey, Kerr simply said, "The people in the meeting aren't listening to you, so don't talk." She testified that in reply, she said, "Well, I have to talk. Somebody's got

When Kerr and Keskey returned to the Step 2 meeting, Keskey continued her presentation for about ten minutes, at which point, the District's representatives brought the meeting to a close. According to Keskey, after the meeting, she asked Kerr when she would receive a decision. Kerr allegedly replied that it would not be in five days as set forth in the Agreement, because he was going on a fishing trip. When Keskey disputed this, Kerr purportedly responded that Franco, who had attended the meeting, could respond whenever she wanted, or could not respond at all. Keskey claims she told Kerr she was shocked at his lack of support.¹⁰

In a letter to Kerr dated May 10, 1990, Franco denied the grievance at Step 2. Keskey was formally discharged from her

to represent me." Keskey recalled nothing further of this conversation. Kerr's version is credited, since his recall is clearly superior, and Keskey's testimony appears to constitute a shorthand summary of the incident.

¹⁰Kerr did not testify concerning this post-meeting conversation. As alleged in the complaint, Keskey testified that Franco, during the meeting, asked Kerr if this Agreement had been violated, and Kerr simply responded, "No." Both Kerr and Franco denied that the question or the answer were stated at the meeting. Franco further generally corroborated Kerr's version of the meeting, and testified that based on her experience with Kerr and other representatives of Respondent at Step 2 meetings, he performed in an above-average manner. As noted above, Kerr and Franco were generally more credible as witnesses than was Keskey, and her initial testimony concerning these statements was vague and confusing as to when and how often they were made. Furthermore, Keskey admitted that Kerr disputed the validity of the students' letters, and in light of this, it is unlikely he would have admitted that there was no violation of the Agreement. Therefore, the statements attributed to Franco and Kerr are not credited.

position as a substitute teacher.¹¹ Keskey requested a meeting with Respondent's grievance review committee which Kerr arranged, but did not attend. At the grievance review meeting, which took place on July 5, Keskey argued that her grievance should be taken to arbitration and submitted a 25-page report, including exhibits. The review panel voted not to take her grievance to arbitration.¹²

CONCLUSIONS OF LAW

An exclusive representative is obligated to process a unit member's grievance in good faith. A violation of that duty takes place when the representative's action is arbitrary, discriminatory or in bad faith. United Teachers of Los Angeles (Buller) (1984) PERB Decision No. 438; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258. Mere negligence or poor judgment in the handling of a grievance does not establish a violation of the duty, nor do differences in grievance-handling tactics, or differing interpretations of the collective bargaining agreement. United Teachers of Los Angeles (Buller). supra.

The complaint alleges that three statements by Kerr during the processing of Keskey's grievance at Step 2 were inconsistent

¹¹Keskey did not grieve her discharge, but filed a charge against the District with PERB, alleging unlawful retaliation. As noted above, the dismissal of that charge as untimely was upheld by PERB in Los Angeles Unified School District, supra.

¹²It has been noted that the General Counsel dismissed Keskey's allegation herein that the refusal to arbitrate her grievance violated the EERA.

with Respondent's duty of fair representation. It is alleged that before the Step 2 meeting, Kerr told Keskey, "If I fight hard for you, the District will get mad at me." The evidence supporting that allegation has not been credited. The complaint also cites Kerr's alleged denial, at the Step 2 meeting, that there had been a violation of the Agreement. The evidence presented to establish that statement has also not been credited. The third statement attributed to Kerr in the complaint is that Kerr told Keskey, "Don't speak any more." While the credited evidence does not establish a flat prohibition by Kerr against Keskey speaking at the Step 2 meeting, he admittedly attempted to dissuade her from doing so. Said action merely constituted a grievance-handling tactic, which Keskey, at any rate, ignored, and Kerr's statements did not violate any statutory duty owed to her.

If the complaint may be construed to generally allege a failure to represent Keskey in good faith at the Step 2 grievance level, the evidence fails in that respect as well. It is undisputed that Kerr promptly met with Keskey to discuss the inadequate service report, and promptly prepared and filed a grievance for her. It is also undisputed that Kerr vigorously advocated Keskey's grievance at the Step 1 level.

While Keskey is dissatisfied with the level of communication by Kerr prior to the Step 2 meeting, it is undisputed that they discussed the grievance by telephone at least three times before the meeting, and the evidence establishes that Kerr, given his

caseload, spent a considerable amount of time preparing for the Step 2 meeting. It is also undisputed that, alleged improper statements aside, Kerr did dispute the validity of the students' letters and Keskey was permitted to speak, at length, on her own behalf at the Step 2 meeting. Although disputed by Keskey, it is further concluded that Kerr argued her case to the best of his ability, given the evidence against her.

Accordingly, it is concluded that the evidence fails to establish that Respondent violated the EERA, and it will be recommended that the charge and complaint be dismissed.

PROPOSED ORDER

Based on the findings of fact, conclusions of law and the entire record in this case, and no violations of the Educational Employment Relations Act having been found:

IT IS HEREBY ORDERED that the unfair practice charge and complaint herein are DISMISSED.

Pursuant to California Code of Regulations, title 8, 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 Cal. Code of Regs., tit. 8, sec. 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 set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 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 Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: August 7, 1991

,
Douglas Gallop
Administrative Law Judge