STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TERRI PATRICIA LaFOUNTAIN, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Respondent.	)	Case No. LA-CO-565 PERB Decision No. 925 March 10, 1992

Appearances: Terri Patricia LaFountain, on her own behalf; Madalyn J. Frazzini, Attorney, for California School Employees Association.

Before Camilli, Carlyle and Caffrey, Members.

DECISION AND ORDER

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Terri Patricia LaFountain (LaFountain) of a Board agent's dismissal (attached hereto) of her charge that the California School Employees Association (CSEA) failed to adequately represent her in violation of section 3543.6(b) 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. Section 3543.6(b) provides, 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 employees because of their exercise of rights

The Board has reviewed the Board agent's warning and dismissal letters, and, finding them to be free of prejudicial error, adopts them as the decision of the Board itself.

In her appeal, LaFountain states, for the first time, that she explained to the Board agent investigating her charge that she had contacted PERB within six months of the incident at issue, and was told by a secretary that she could file a claim when she had a written answer from CSEA, and not before.[2]

PERB Regulation section 32635(b)[3] states:

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

There is no mention of such contact with PERB in LaFountain's original charge, nor is it mentioned in the Board agent's warning letter. On page 6 of the warning letter, LaFountain is told that if there are any factual inaccuracies in the warning letter or any additional facts which would correct the deficiencies explained therein, she should amend the charge accordingly. LaFountain's amended charge contains no mention of any contact with PERB within the six-month time period at issue.

As neither the original charge nor the amended charge in this matter allege contact with PERB within the relevant

---

guaranteed by this chapter.

[2]The warning and dismissal letters adequately address the remaining issues raised in LaFountain's appeal.

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

six-month time period, these facts alleged on appeal constitute new supporting evidence or factual allegations within the meaning of PERB Regulation section 32635, supra. No good cause having been shown, the Board finds that such new factual allegation or supporting evidence may not be considered herein.

The original and amended unfair practice charge in Case No. LA-CO-565 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Carlyle and Caffrey joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

December 30, 1991

Terri Patricia LaFountain
22321 Espuella Drive
Saugus, CA 913 50

Re: Terri Patricia LaFountain v. California School Employees Association, Unfair Practice Charge No. LA-CO-565, First Amendment, DISMISSAL OF CHARGE AND REFUSAL TO ISSUE COMPLAINT

Dear Ms. LaFountain:

The above-referenced charge was filed on August 1, 1991. It alleges that the California School Employees Association (CSEA) did not uphold your rights and thereby committed an unfair practice. I am treating this matter as a case alleging a violation of the duty of fair representation in violation of the Educational Employment Relations Act (EERA), Government Code section 3543.6(b).

I indicated to you in my attached letter dated December 12, 1991, 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 December 19, 1991, the charge would be dismissed. Prior to the deadline, I granted you an extension until December 24, 1991, for my receipt of a First Amended Charge.

On December 24, 1991, I received your letter (U.S. Express Mail) entitled "First Amended Charge" with five attachments, copies of various pages from the 1989/90 collective bargaining agreement (Agreement) between the District and CSEA, and a Proof of Service by Mail. You also enclosed a cassette tape labelled "July 16, 1990 L.A. County Hearing."[1] Your letter (with its yellow highlighting) appears to add some additional information or facts (with argument) to your initial Unfair Practice Charge. Although you have not used a correct PERB Unfair Practice Charge Form, I am treating this as a First Amendment to your original charge.

[1]*See* Footnotes 2 and 3 on pages 2 and 3 of my letter dated December 12, 1991.

Your First Amendment generally contends that the union violated the duty of fair representation (DFR). During in or about March 1990, you were advised by union representatives, in part, that you had no rights as you were a probationary employee, that one employee could not grieve against another employee, and that there was no help available for you through the union. See Page 2 of Exhibit 2 dated September 12, 1990 attached to your First Amendment. In No. 7, page 1 of the First Amendment, you contend, in part, that the union ignored your grievance and failed to speak with you in order to decide if the changes for success were minimal or not. You further indicate that "The grievance form was denied to (you)." When you filed a grievance (on May 28, 1990), "(you were) denied a hearing from someone who was not involved in any union dealings." (emphasis in original.) As you followed the procedure on the form, you believe this fact alone shows CSEA's inaction without a rational basis. You point to possible violations of several Articles (Article V - Grievance, Article VI - Evaluation, Article XXIII - Support of Agreement) of the Agreement between the District and CSEA, and, in general, blame CSEA for not protecting your rights. You believe you should have received union help. You argue, in part, on page 2 of the First Amendment that you have not received any written notification (or answer) from CSEA.[2]

Next, you appear to question when the six-months statute of limitations begins to run. You contend that "The occurrence is still in process until it is investigated or heard."[3] (emphasis in original.) You believe that "without any written form of an answer from CSEA that is appropriate by the rulings in the Agreement, the time frame has not began (sic)." Furthermore, you believe that since you followed the Agreement and have not received "any appropriate answer," the six month statute has not begun to run. You contend that you contacted appropriate people by September 1990.

Your original Charge and the First Amendment do not state a prima facie case for several reasons. First, as I indicated to you on

---

[2]It is unclear whether you are referring to notice of corrective action on the union's part, or notice that they would or would not assist you. You do allege that you were employed by the District, spoke to a CSEA Field Rep., and were given incorrect information. Thus, you contend that it was the union's responsibility to correct the situation.

[3]You indicate, in part, that the State of California advised you to file with PERB in July 1991.

pages 4-5 of my letter dated December 12, 1991, as your charge was filed on August 1, 1991, we may only consider alleged unlawful conduct of the union occurring after on or about February 1, 1991. You have still not alleged any unlawful conduct by CSEA occurring on or after February 1, 1991. Thus the charge and First Amendment are untimely and will be dismissed. Contrary to your assertions regarding the statute of limitations, as I indicated on December 12, 1991, in a case involving the duty of fair representation, a claim accrues on the date when the employee, in the exercise of reasonable diligence, knew, or should have known that further assistance from the union was unlikely. See International Union of Operating Engineers, Local 501 (Reich) (1986) PERB Decision No. 591-H. You knew in or about March 1990 that CSEA would not be assisting you further.[4] Thus, you had until the end of September 1990 to file a charge based upon the union's conduct. You proceeded to file your own grievance on May 28, 1990. Also, during 1990, you filed other claims or appeals with other agencies.[5]

Second, even assuming your allegations are timely, you have still not alleged sufficient facts indicating that the union's conduct was arbitrary, discriminatory or in bad faith. It appears that at most, the union's actions or inaction may constitute negligence or poor judgment, which will not constitute a breach of the duty of fair representation. See pages 5 and 6 of my letter dated December 12, 1991.

Third, as I indicated on December 12, 1991, at page 6 of my letter, regarding your subsequent appeals to the County of Los Angeles, and thereafter, it is very unlikely that CSEA's duty of

---

[4]The union indicates that you wanted CSEA, in part, to bring charges against another classified employee, Shirley Owen. You were advised by CSEA that it would not assist in filing a grievance against another employee.

[5]See Compton Community College District (1991) PERB Decision No. 915 at pages 4-6 for the law on "continuing violations." "Generally, a violation is a continuing one if the violation has been revived by subsequent unlawful conduct within the six-month statute of limitations." (citations omitted.) In this case, there are no facts of unlawful conduct within the six month period, prior to the filing of your charge. Also see Oakland Education Association, CTA/NEA (Mingo) (1984) PERB Decision No. 447 where subsequent requests that the union file grievances, and the union's refusal to file a grievance, did not constitute a continuing violation.

fair representation applies. CSEA does not control the exclusive means to obtain a remedy in such matters. See San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 544 and California Faculty Association (1988) PERB Decision No. 698-H.

I am therefore dismissing the Charge and First Amendment without leave to amend based on the facts and reasons contained in this letter and my December 12, 1991 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 Code of Regs., tit. 8, sec. 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 Code of Regs., tit. 8, sec. 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 Code of Regs., tit. 8, sec. 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 Code of Regs., tit. 8, sec. 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 Code of Regs., tit. 8, sec. 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 .
Marc S. Hurwitz
Regional Attorney

Attachment

cc: Maureen C. Whelan, Esq.
CSEA

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

December 12, 1991

Terri Patricia LaFountain
22321 Espuella Drive
Saugus, CA 91350

Re: Terri Patricia LaFountain v. California School Employees Association. Unfair Practice Charge No. LA-CO-565
WARNING LETTER

Dear Ms. LaFountain:

The above-referenced charge was filed on August 1, 1991. It alleges that the California School Employees Association (CSEA) did not uphold your rights and thereby committed an unfair practice. I am treating this matter as a case alleging a violation of the duty of fair representation in violation of the Educational Employment Relations Act (EERA), Government Code section 3543.6(b).

My investigation and the charge revealed the following facts. You were employed by the William S. Hart Union High School District (District)[1] from October 1988 through March 30, 1990. You were an interpreter, as well as a part-time job developer on the Job Training Partnership Act (JTPA) Program. You later became a full-time job developer. Your job was to complete documentation which allowed participants in the JTPA Program to be paid for services. You were asked to forge documents in order to insure that payments were made. You complained to management but nothing was done. During the week of March 19, 1990, you spoke with Margie Lombardi, the District's Personnel Director regarding filing a grievance. She told you to speak to Marlene Bost, past President of CSEA and Marilou Brolin, past field representative of CSEA. Ms. Lombardi advised you that you had "no rights under her supervision of the Personnel Commission." These two union people indicated that you had no grievance rights under the Agreement since you were a probationary employee. After stating that you paid union dues each month, they directed you to speak with Margaret Shelley, a CSEA Field Representative. She confirmed the prior information and advised you to hold onto your job until your probation period was completed. At that point, she would help you.

[1]The District and the union are parties to a collective bargaining agreement (Agreement) effective July 1, 1990 through June 30, 1991.

In or about March 1990, you reported possible violations of the JTPA contract (regarding JTPA procedures and personnel) to Dan Hanigan, Asst. Superintendent, indicating a number of areas needing investigation. On March 30, 1990, you resigned your position as a job developer. You indicated, in part, that due to continued stress and harassment of co-workers, you were left in the position of leaving. You did not wish to participate in unlawful practices contrary to your moral standards. You allege in the unfair practice charge that you resigned "after being set up on a fraud situation which later proved to be not of (your) doing but of a co-worker who then threatened (you) to either quit or be fired." You earlier spoke to "administrative personnel about (an) alcoholic co-worker and fraudulent behavior in (your) office."

After resigning, you provided evidence of fraud to Los Angeles County, the County's Department of Community and Senior Citizens Services (CSCS). On or about May 14, 1990, you were advised by the County of the procedures for filing a complaint and the appeal process. Based upon this advice, on May 28, 1990, you filed a grievance with the District alleging violations of the Agreement, at Article VI, section 6.2. Section 6.2 provides that "Probationary unit members shall be evaluated at least twice during the probationary period. These evaluations shall occur at approximately the seventh (7th and twenty-fourth (24th) workweeks subsequent to probationary employment." You also alleged a violation of Article V, section 5.2.1 which provides, "Within ten (10) days after the occurrence of the act or omission giving rise to the grievance or within ten (10) days after the grievant should have known or have been reasonably expected to have known of the act or omission, the grievant should attempt to resolve the grievance by an informal conference with the immediate supervisor." On June 1, 1990, the District responded by indicating that since you previously resigned, you were no longer a member of the bargaining unit and did not have standing to file a grievance pursuant to the Agreement between the District and the union.

You allege that Los Angeles County (no date provided in the charge) called a hearing for the purpose of hearing your alleged facts.[2] You indicate that at this meeting (no date provided in

[2]At this point you refer to an enclosed tape. This will confirm that no tape was received here with your unfair practice charge. Furthermore, generally we review the facts alleged to

the charge), you learned that you had never been given any information legally due you from Los Angeles County concerning grievance rights.[3]

You further allege that Jean Sisson, the CSEA local President, then telephoned you to offer a hearing, but then cancelled the meeting. On December 10, 1991 you advised me, in part, this occurred around the summer of 1990. Furthermore, you were advised that the union would stand behind you if criminal charges were brought against one of your prior co-workers, Shirley Owen. You allege that you later learned the Personnel Commissioner for the District is the roommate of the co-worker you were attempting to grieve against. Furthermore, Ms. Shelley, Field Representative, told you (no date is provided in the charge) that Steven Balentine, CSEA Field Director, instructed Ms. Shelley not to assist you. You allege that this matter has gone to hearing in Sacramento and the information has gone to the Labor Department in Washington D.C. In 1991, you were advised that Sacramento would assist you "in hearing and audit findings and ruling on attached wrongful discharge clause."[4] Finally, you

---

determine if a prima facie case has been alleged. We do not need or request charging parties to provide this type of physical evidence at this stage.

[3]I note that on July 16, 1990, the CSCS heard your appeal of a negative decision by the school district concerning your claims involving issues of your alleged dismissal and program mismanagement. By letter dated August 23, 1990, CSCS advised you of the hearing officer's decision and recommendations and affirmed them. It was found, in part, that the termination occurred as a result of your action of resignation. A hearing on your "dismissal" was correctly denied by the school district. Also, a referral was to be made for a more formal investigation and report involving program mismanagement issues involving the JTPA program. Thereafter, you appealed to the Chief Administrative Office (CAO) and Board of Supervisors of the County of Los Angeles. Thereafter, you appealed to the State of California, Equal Employment Opportunity Office, Employment Development Department (EDD).

[4]I am assuming you are referring to documents attached to your unfair practice charge which you believe contain or describe a wrongful discharge claim by you against the District. This includes a letter dated May 9, 1991 from EDD to you regarding your allegations of program abuse in the Los Angeles County

allege that your rights through this union were not upheld, and were denied you because of whom you were grieving against "and the reasons around the issues involved not being discussed."

The allegations in your charge do not state a prima facie case for several reasons. First, as I indicated to you on December 10, 1991, EERA does not allow a complaint to issue regarding a charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. It is the charging party's burden, as part of the prima facie case, to prove the charge was timely filed. Furthermore, there is no longer any equitable tolling of the six month limitations period. The Regents of the University of California (1990) PERB Decision No. 826-H. This charge was filed on August 1, 1991 (cert. mail). Therefore, we may only consider alleged unlawful conduct of the union occurring after on or about February 1, 1991. Since you have alleged no allegations of unlawful conduct by CSEA occurring on or after February 1, 1991, the charge is untimely.

Also, one of your allegations is that around March 1990, representatives of CSEA indicated to you that you had no grievance rights since you were a probationary employee. Viewing this case as involving the duty of fair representation (DFR), a claim accrues on the date when the employee, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. You received the union's assessment in or about March 1990. Therefore, you had until the end of September 1990, to file a charge based upon this specific conduct. Therefore, this allegation is untimely. See

---

service delivery area. It indicates that on April 4, 1991 you indicated your concerns with an audit performed in this matter. You appealed your "dismissal" through formal grievance procedures. Your case was reviewed by the State Review Panel on November 26, 1990. Said Panel requested further review by the Secretary of the Department of Labor. The case was returned for final disposition by EDD. You were advised that EDD was reviewing the prior audit to decide what action, if any, was warranted. You sent me a letter dated August 27, 1991 from EDD to you which indicated that on May 23, 1991, the Secretary of Labor, U.S. Department of Labor, returned an appeal of your case to EDD for further review and final disposition. Review of your case, at that time, was still ongoing.

International Union of Operating Engineers, Local 501 (Reich) (1986) PERB Decision No. 591-H. A number of allegations do not specify the date of occurrence. Without said dates, we must assume the allegations are outside the statutory period, and therefore, dismiss them as untimely.

Second, assuming your allegations are timely, there is no evidence indicating violations of the union's duty of fair representation (DFR). The following information describes what is needed to allege a prima facie case involving the DFR guaranteed under EERA. The duty of fair representation imposed on the exclusive representative extends to negotiating and grievance handling. Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258. In order to state a prima facie violation of section 3543.6(b)of EERA, the Charging Party must show that the Association's conduct was arbitrary, discriminatory, or in bad faith. In United Teachers of Los Angeles (Collins). Id.. the Public Employment Relations Board (PERB) stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty.
>
> . . . . . .
>
> A union may exercise its discretion to determine how far to pursue a grievance on the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> . . . must, at a minimum, include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB

Decision No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

As I indicated to you on December 10, 1991, the present charge fails to state a prima case as it does not allege facts or show that the union's conduct was arbitrary, discriminatory or in bad faith. As seen above, mere negligence or poor judgment does not constitute a breach of the union's duty. Pleading or raising a bare allegation without sufficient supporting facts is insufficient for purposes of alleging a prima facie case. California State University (Pomona) (1988) PERB Decision No. 710-H. Furthermore, PERB regulation 32615 (California Code of Regulations, title 8, section 32615) requires that a charge contain "a clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (Emphasis added.) Charging Party must allege with specificity who, what, when, where and how the union's activities were arbitrary, discriminatory, or in bad faith. Mere speculation, conjecture or legal conclusions are insufficient.

Third, it is likely that CSEA in fact owes you no duty of fair representation as to your subsequent appeals to the County, and thereafter. This is because CSEA does not control the exclusive means to obtain a remedy in such matters. See San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 544 and California Faculty Association (1988) PERB Decision No. 698-H. It appears that the procedures you followed in complaining or appealing to the County, the U.S. Department of Labor, EDD, or others, are independent of, and wholly outside the grievance procedure in the Agreement between CSEA and the District. Thus, no duty of fair representation was owed to you by CSEA.

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 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[5] and

[5]Maureen C. Whelan, Esq., California School Employees Association, P.O. Box 640, San Jose, CA 95106-9986.

the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before December 19, 1991, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Marc S. Hurwitz
Regional Attorney