

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CELIA D. BENNETT,)
)
 Charging Party,) Case No. SF-CO-465
)
 v.) PERB Decision No. 1128
)
 OAKLAND EDUCATION ASSOCIATION,) December 8, 1995
)
 Respondent.)
 _____)

Appearances: Celia D. Bennett, on her own behalf; California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for Oakland Education Association.

Before Caffrey, Chairman; Garcia and Dyer, Members.

DECISION AND ORDER

CAFFREY, Chairman: This case is before the Public Employment Relations Board (Board) on appeal of a Board agent's dismissal (attached hereto) of an unfair practice charge filed by Celia D. Bennett (Bennett). In her charge, Bennett alleged that the Oakland Education Association (Association) breached its duty of fair representation guaranteed by section 3544.9 of the Educational Employment Relations Act (EERA), thereby violating EERA section 3543.6(b),¹ when it refused to file two grievances

¹EERA is codified at Government Code section 3540 et seq. Section 3544.9 states:

The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

EERA section 3543.6(b) states, in pertinent part:

It shall be unlawful for an employee

on her behalf.

The Board has reviewed the entire record in this case, including the warning and dismissal letters, Bennett's original and amended charge, her appeal and the Association's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SF-CO-465 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Garcia and Dyer joined in this Decision.

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 guaranteed by this chapter.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350



January 30, 1995

Celia Bennett

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**

Celia D. Bennett v. Oakland Education Association
Unfair Practice Charge No. SF-CO-465

Dear Ms. Bennett:

The above-referenced unfair practice charge, filed on June 30, 1994 and amended on August 9, 1994, alleges that the Oakland Education Association (Association) breached its duty of fair representation to Celia D. Bennett. This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated December 27, 1994, 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 which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to January 9, 1995, the charge would be dismissed. You were granted an extension of time to file an amended charge.

On January 20, 1995, an amended charge was filed. The amended charge contained new allegations concerning the Association's refusal to file a grievance regarding Celia Bennett's work assignments during the fall of 1993. However, as noted in the December 27, 1994 letter, these events occurred outside of the statute of limitations period and therefore no complaint can issue based on these allegations.

The amended charge also contains additional allegations regarding the Association's failure to file a grievance on Bennett's behalf during the spring of 1994. The undersigned has reviewed these allegations but concludes that there is insufficient evidence to demonstrate that the Association refused to file a grievance for arbitrary, discriminatory, or bad faith reasons.

Therefore, I am dismissing the charge based on the facts and reasons contained in my December 27, 1994 letter, as well as those set forth above.

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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. (Cal. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. 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 (20) calendar days following the date of service of the appeal. (Cal. 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 Cal. 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 (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code of Regs., tit. 8, sec. 32132.)

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Final Date

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

DONN GINOZA
Regional Attorney

Attachment

cc: A. Eugene Huguenin, Jr.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)557-1350



December 27, 1994

Celia Bennett

Re: **WARNING LETTER**

Celia D. Bennett v. Oakland Education Association
Unfair Practice Charge No. SF-CO-465

Dear Ms. Bennett:

The above-referenced unfair practice charge, filed on June 30, 1994 and amended on August 9, 1994, alleges that the Oakland Education Association (Association) breached its duty of fair representation to Celia D. Bennett. This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. Celia D. Bennett was employed by the Oakland Unified School District (District) during the 1992-93 and 1993-94 school years as a Teacher on Special Assignment (TSA) for the Youth Employment Program. Her duties included serving as a Work Experience Education (WEE) Teacher Coordinator/Team Leader and Project Manager for the Summer Youth Employment and Training Program (SYETP). Her duties as a WEE teacher included coverage of seven schools in the District. The assignment to seven schools constituted a change from her previous assignment. The District informed Bennett of this change in a letter dated August 30, 1993." The letter indicated that the change was required due to the District's reduction of WEE teachers. Her duties as Project Manager for SYETP typically required her to work on that program from February through October.

Bennett was instructed to "close out" the SYETP by October 15, 1993. Bennett objected to this directive believing that the deadline would make it impossible for her to fulfill her responsibilities as a WEE teacher.

Following receipt of the August 30 letter from the District, Bennett contacted Ward Roundtree, Executive Director of the Association, to request his assistance in protesting the District's assignment of duties. She contended that her rights under Article XII, "Transfer/Consolidation Policy," section 10 (A), 10 (B), and 10 (C) were violated. These provisions state as follows:

- A. Teachers on Special Assignment shall be given notice, in writing, of their tentative assignments when the school program is completed in June for the ensuing school year.
- B. TSAs shall be consulted individually regarding any change in their assignment due to unanticipated circumstances after the initial assignment, and shall be informed of any changes in writing. The appropriate administrator shall hold a conference with said teachers, to discuss any change of assignment.
- C. Schedules of TSA who are assigned to more than one school shall be arranged so that no TSA shall be required to engage in an unreasonable amount of inter-school travel. Such teachers shall be notified of any changes in their schedule by October 1, of each school year, except in cases of emergency.

Regarding Bennett's claim that the Article XII had been violated, Roundtree told Bennett that they should wait to hear the District's position. During a meeting on September 7, attended by Bennett and Roundtree, Barbara Daniels, District Assistant Superintendent, Adult and Vocational Education, stated that Bennett's "top priority" should be to close out the SYETP. Daniels wrote Bennett a letter dated September 14 confirming the "agreement" that closing out the SYETP was a priority. Daniels also indicated that she was still in the process of clarifying issues related to Bennett's "future responsibility" to SYETP.

On September 8, Bennett reported to two of her WEE sites because students, parents and counselors were requesting her services.

By letter dated September 14, Daniels wrote to Bennett informing her that Bennett was authorized to remove certain computer equipment from a building in which it was located. This equipment was being used by Bennett in connection with the SYETP.

On September 17, Bennett, accompanied by Roundtree, again met with Daniels and two other District administrators, to discuss the lack of space, clerical support, and a transportation allowance as well as other issues regarding the WEE assignment. Bennett complained that two other male WEE teachers had only been

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assigned two high schools each, while she had two high schools and five alternative schools. Daniels responded that the assignment of one of those teachers, Michael Gordon, would be altered so that he would cover two days at one of the high schools and Bennett would cover one day at the same school. Bennett believed that this change did not help her, because "in fact, more work had been added." Roundtree pursued the issue of the change in Gordon's schedule during the meeting. Bennett believed that Roundtree was dodging the alleged contract violation. Bennett asserts that at this point she began to believe that Roundtree's "personal friendship was overshadowing his professional judgment and that he was only acting in a perfunctory capacity" on her behalf. Daniels promised more clerical support, which never materialized. Around this time, Bennett began to suffer from work-related stress and her health deteriorated.

By letter dated September 20, Bennett wrote a letter to Fred Turner, Director of Student Services, complaining about his harassment of her with regard to removal of the computer equipment. Bennett complained about pressure from Turner not to return the equipment that had been replaced through insurance, but which exceeded the number of pieces actually lost in the theft, unbeknownst to the administration. Turner had told Daniels that the equipment belonged to his Vocational Educational program. Bennett told Daniels in the September 17 meeting that this was incorrect. In her letter to Turner, Bennett also described a heated encounter the two had and demanded that Turner treat her courteously in the future.

On September 27, after reporting to work, Bennett called Roundtree to again complain about the poor working conditions that were aggravating her health problems. These conditions included the number of schools assigned, the amount of travel required, inadequate work space, and lack of administrative support. Bennett requested that Roundtree file a grievance alleging a violation of Article XII, sections 10(A), (B), (C), and (D). She also cited Article 4 ("Non-Discrimination") and Article 7 ("Employee Rights"), sections 3 and 4 regarding Turner's conduct towards her. The latter provisions prohibit disciplinary action in the absence of just cause. Roundtree declined to file a grievance, stating that she should not worry about the WEE

assignment since her "top priority" was closing out the SYETP program. Roundtree stated that Bennett should not be objecting because she had "agreed to the assignment" and should not be worried about her WEE assignment because her priority was the SYETP work. He also stated, "You are retiring in June, what more do you want?" Bennett now believed that Roundtree was more

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interested in appeasing the administration than in clarifying and submitting a grievance on her behalf.

By letter dated September 28, Bennett complained to Daniels that even with the adjustments to her work schedule, the WEE assignment involving seven schools was too burdensome. On September 29, Bennett was advised by her doctor not to return to work due to her arthritic condition, and she took an extended medical leave thereafter.

On March 3, 1994, Bennett called the Association and spoke to Ben Visnick, President. She requested an appointment to discuss a letter from Daniels regarding her job assignment, which apparently had been given to Beverlee Williams during Bennett's absence. Bennett objected because Williams had received the position without a posting of the vacancy by the District, and, that in doing so, the District had increased her level of stress and exacerbated her arthritic condition. She met with Visnick that afternoon. Visnick suggested that Roundtree join the meeting. Bennett objected because she believed that Roundtree did not have her best interests at heart. Visnick responded that perhaps Roundtree would not be interested in representing her either. Bennett believed that Visnick had received negative input from Roundtree regarding her disputes with the District.

On the same day, Bennett sent a letter of protest to Daniels complaining about the situation and specifically about the assignment of Williams to the same job site from which she had been ordered by Daniels to vacate. Daniels responded in a letter to Bennett dated March 9, stating that Williams had not been hired to fill her position and that if Williams had been assigned to her job site, it was not a decision Daniels had made. A copy of the letter was sent to Visnick.

On March 31, Bennett met with Visnick and insisted that a grievance be filed. Visnick responded that she "should come back to work and then they would have some reason to fight." Bennett dismissed this as being irrelevant. Visnick then stated that she was not being taken seriously by the District because she was about to retire. Bennett stated that she would be changing her retirement date so that that issue could not be used against her.

By letter dated April 4, Visnick wrote to Daniels attempting to clarify the status of the position held by Williams and stating Bennett's complaints regarding the Williams assignment. He asked for confirmation of the configuration of employees being used to cover Bennett's duties. Visnick also made reference to certain objectionable conduct by Turner. Bennett called Visnick on April 15 to ask if he had received a response to this letter. He

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answered that he had not but had been contacted by Turner. Visnick offered to mediate an informal meeting between Turner and Bennett. Bennett declined the offer.

Bennett called Visnick several times between April 19 and 21. Visnick responded on April 22 stating that he was still awaiting an answer from Daniels. He also told her that a grievance had not been filed because there was no basis for one.

In a letter to Visnick dated April 18, Turner complained about Visnick's reference to objectionable conduct on his part but thanked Visnick for clarifying the basis for his remark and for acknowledging communication problems that Bennett was having with the Association. Turner stated his approval of Visnick's offer to mediate the dispute between Bennett and himself.

On May 10, Bennett expressed to Visnick her dismay over the Association's refusal to process a grievance regarding the inequitable WEE assignment. She contended that the the District's use of three certificated staff to cover her duties in her absence proved that her original assignment was too burdensome.

Bennett contends that the District's unreasonable WEE assignment and lack of support, as well as the harassment of Turner, led to her medical condition and her leave of absence. The leave of absence resulted in her loss of approximately one year of retirement service credit.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the EERA for the reasons that follow.

Government Code section 3541.5(a) states that the Public Employment Relations Board (PERB) "shall not . . . issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge."

PERB has held that the six month period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Dec. No. 359-H.) Since the charge was filed on June 30, 1994, the statute of limitations period began to run on December 30, 1993.

The charge alleges essentially that the Association refused to file a grievance for her on two occasions. The first occasion occurred at the beginning of the 1993-94 school year, when the

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District notified her of the inequitable WEE assignment. Bennett raised this issue with Roundtree, as well as related issues involving Turner. At least two meetings were held with Daniels over these issues. During her September 27, 1993 meeting with Roundtree, Bennett was informed by Roundtree that he would not file a grievance over these issues. Therefore, Bennett knew of Association's alleged failure to file a grievance on this date. Since this date is more than six months prior to the filing of the charge, PERB lacks authority to issue a complaint with respect to this alleged violation.

With respect to Visnick's refusal to file a grievance over the reassignment of Bennett's work during her medical leave, an analysis of the elements of a prima facie case is required. In order to state a prima facie violation regarding lack of grievance representation, the Charging Party must show that her union refused to process a meritorious grievance for arbitrary, discriminatory, or bad faith reasons. In United Teachers of Los Angeles (Collins) (1983) PERB Dec. No. 258), 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.
[Citations.]

A union may exercise its discretion to determine how far to pursue a grievance in 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.

It has also been stated that 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. (Emphasis added.)" (Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Dec. No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Dec. No. 124.)

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With respect to Visnick's refusal to file a grievance over the reassignment of Bennett's work during her medical leave, the charge fails to allege sufficient facts from which it can be concluded that a prima facie violation occurred under the standards articulated above. There is insufficient evidence to demonstrate that the Association failed to pursue a meritorious grievance, or if it did, that it did so for arbitrary, discriminatory, or bad faith reasons.

The Association is not required to file a grievance upon request of an employee but is permitted discretion in whether to process a potential grievance based on the strength of the case. Here, it is not clearly established that the Association's reasons for rejecting the grievance were arbitrary, discriminatory or in bad faith. The charge does not establish that the Association failed to base its decision on a rational assessment of the merits of the potential grievance. Visnick listened to Bennett's complaints and made several attempts to investigate them in communications with District representatives. While Bennett suggests that Visnick received "negative input" from Roundtree, there is no concrete evidence that such was received, or if received, that it played a determinative role in Visnick's handling of her case.¹

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 additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair

¹ This conclusion is further bolstered by the questionable basis for a meritorious grievance. The crux of the grievance is that the manner in which the District reassigned Bennett's work caused her emotional distress. However, because she was on leave, the reassignment did not change Bennett's working conditions, a basic element for a grievance of this kind. In this context, Visnick's statement that the District would take Bennett more seriously if she returned to work can be interpreted as reflecting the reasonable proposition that no change in "working conditions" could be claimed in a grievance while Bennett was on leave. Alternatively, viewed solely as a grievance based on the effect on an employee on leave, Bennett's complaint lacks merit because the collective bargaining agreement does not make the District responsible for this type of emotional injury. Such injury, if compensable, is redressable in a private lawsuit, to which the duty of fair representation does not attach. (California Faculty Association (Pomerantsev) (1988) PERB Dec. No. 698-H.)

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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 **January 9, 1995**. I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

DONN GINOZA
Regional Attorney