

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MICHAEL LOWMAN,)
)
 Charging Party,) Case No. S-CO-347
)
 v.) PERB Decision No. 1142
)
 LOS RIOS COLLEGE FEDERATION OF) February 29, 1996
 TEACHERS,)
)
 Respondent.)
 _____)

Appearances; Michael Lowman, on his own behalf; Law Offices of Robert J. Bezemek by Adam H. Birnhak, Attorney, for Los Rios College Federation of Teachers.

Before Garcia, Johnson and Dyer, Members.

DECISION AND ORDER

DYER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's dismissal (attached) of an unfair practice charge filed by Michael Lowman (Lowman). In his charge, Lowman alleged that the Los Rios College Federation of Teachers (Federation) breached its duty of fair representation guaranteed by section 3544.9 of the Educational Employment Relations Act (EERA),¹ thereby violating

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 states, in pertinent part:

It shall be unlawful for an employee organization to:

EERA section 3543.6(b), when it failed to adequately represent him in two grievances filed against his employer and when it published a union newspaper article which discussed one of his grievances.

The Board has reviewed the entire record in this case, including Lowman's unfair practice charge and amended charge, the warning and dismissal letters, Lowman's appeal and the Federation's response thereto.² 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. S-CO-347 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Garcia and Johnson joined in this Decision.

(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.

²The declaration filed by Annette M. Deglow in support of Lowman's charge was not considered by the Board for failure to comply with PERB Regulation 32210. (PERB regulations are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

PUBLIC EMPLOYMENT RELATIONS BOARD



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



December 19, 1995

Michael Lowman, Ph.D.

Re: Michael Lowman v. Los Rios College Federation of Teachers
Unfair Practice Charge No.S-CO-347

DISMISSAL LETTER

Dear Mr. Lowman:

I indicated to you, in my attached letter dated August 1, 1995, 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 August 8, 1995, the charge would be dismissed.

On August 14, 1995, this office received your amended charge. In that amended charge, you continue to allege that the union improperly published a summary of a grievance that you had filed and adversely impacted your opportunity to resolve the grievance. Because you have not demonstrated how the Los Rios College Federation of Teachers (LRCFT or union) violated its duty of fair representation or interfered with your rights by publication, this allegation will be dismissed for the reasons given in my prior letter.

In your amended charge you also make a new allegation, that the union improperly represented you in two grievances. One was the grievance which was referred to in the February 1995 publication.

In January of 1994, you asked the LRCFT to investigate and file a grievance on your behalf with the District. You had been informed by your immediate supervisor, that she wished to place you on a special evaluation schedule for the Spring 1994 semester because of a letter which you had written which she found to be "profane and disparaging". The grievance alleged that you had been improperly scheduled to be the subject of a special review. The LRCFT processed your grievance and a subsequent grievance which reflected a special performance evaluation that contained unsatisfactory and "needs improvement" ratings. This evaluation resulted in your not being reemployed for Fall 1994.

You contend that the LRCFT did not represent you properly with regard to the grievances by not keeping you adequately informed, not adequately seeking your input, and not providing your attorney with a copy of a time sequence. You further allege that the improper representation was motivated by your participation in an unfair practice hearing for a charge which Annette Deglow had filed against the LRCFT.

Investigation reveals that the LRCFT did represent you in the grievance matters, including discussions with the employer of a possible settlement. You hired another attorney to assist you in these matters and in dealing with the LRCFT. Letters to your attorney from the attorney for the LRCFT written in February and March of 1995, reflect the chronology of events concerning the grievances, lengthy discussions of the merits of the cases and the reasoning behind the LRCFT decision not to take the grievance to a board of review. One letter was written prior to your February 22, 1995 appearance before the LRCFT Executive Board appealing the determination not to seek a board of review.

As stated in my letter of August 1, 1995, PERB has held that the duty of fair representation attaches during grievance handling. (Rocklin Teachers Professional Association) (1980) PERB Dec. No. 124. Also, as you correctly state in your amended charge, a breach of that duty will be found when the union's conduct is "arbitrary, discriminatory or in bad faith". (Rocklin, supra) Further, a union's decision not to pursue a matter to arbitration, or a board of review, is not a violation where a rational basis existed. (Castro Valley Unified School District) (1980) PERB Dec. No. 149. In fact, a union is not required to process a grievance to any level if it has a reasonable belief that the claim is meritless: (Los Angeles Unified School District) (1985) PERB Dec. No. 526. From the letters sent to your attorney, it appears that the LRCFT investigated the grievances, attempted to settle the matters, and concluded that the grievances lacked sufficient merit to pursue to a board of review. More importantly, you have not alleged facts which would lead to the conclusion that LRCFT's conduct was arbitrary, discriminatory or in bad faith. Accordingly, the conduct does not appear to violate the duty of fair representation. For these reasons, and the reasons given in my letter of August 1, 1995, this charge must be dismissed.

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.)

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

By

BERNARD MCMONIGLE
Regional Attorney

Attachment

cc: Adam H. Birnhak
Betty Lawrence

PUBLIC EMPLOYMENT RELATIONS BOARD



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



August 1, 1995

Michael Lowman, Ph.D.

Re: Michael Lowman v. Los Rios College Federation of Teachers,
CFT/AFT Local 2279
Unfair Practice Charge No. S-CO-347
WARNING LETTER

Dear Dr. Lowman:

On May 24, you filed the above-referenced charge alleging that the Los Rios College Federation of Teachers (LRCFT) violated its duty to fair representation. I called you on July 27 and on August 1 to discuss the charge, however, there was no answer. I left a message on your machine.

The February 1995 edition of the LRCFT Union News published a summary of a grievance that you had filed. You contend that while the article does not reference you by name, the article sufficiently described you. You contend that the Federation was aware that making your grievance public "had an instant diminishing effect on any possibility for resolve (sic)" the grievance in your favor. However, you supply no facts to support this conclusion. You state that the publication of your grievance was in direct conflict with the Federation's advertised policy of discussing grievances in the publication only with permission of the grievant. The publication was without your permission and resulted from your past support of Annette Deglow, including testimony in a PERB proceeding.

Government Code section 3544.9 requires that an exclusive representative "for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit." Accordingly, PERB has held that the duty of fair representation attaches during contract negotiations (Los Angeles Unified School District (1986) PERB Dec. No. 599) and during grievance handling and contract administration. (Rocklin Teachers Professional Association (1980) PERB Dec. No. 124.) However, internal union affairs are largely immune from scrutiny under the duty of fair representation analysis. In SEIU, Local 99 (Kimmatt) (1979) PERB Dec. No. 106 the Board determined that the fair representation duty found in Government Code section 3544.9 "contains no language indicating that the legislature intended that section to apply to internal union activities that did not have a substantial impact on the relationships of unit members to

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their employers." Because you have not demonstrated how these statements have a substantial impact on your relationship to your employer (grievance resolution), these allegations do not state a prima facie violation of EERA section 3544.9.

Speech activity by the Union "is accorded generous protection" so long as it is related to matters of legitimate concern. (California Faculty Association (Hale, et al.) (1988) PERB Dec. No. 693-H.) Such free speech rights are similar to those accorded an employer. (California Faculty Association (Hale). supra.) The expression of views or opinion does not evidence an unfair practice unless there is a threat of reprisal or promise of benefit. (Rio Hondo Community College District (1980) PERB Dec. No. 128). Your allegations demonstrate no such threat or promise by the LRCFT.

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 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 **August 8, 1995**, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, extension 355.

Sincerely,

Bernard McMonigle
Regional Attorney

BMC:mmh