

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PEGGY J. McCLURE,)
)
 Charging Party,) Case No. SF-CO-506
)
 v.) PERB Decision No. 1165
)
 VALLEY OF THE MOON TEACHERS)
 ASSOCIATION, CTA/NEA,) August 13, 1996
)
 Respondent.)
 _____)

Appearances: Hugh N. Helm III, Attorney, for Peggy J. McClure; California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for Valley of the Moon Teachers Association, CTA/NEA. Before Garcia, Johnson and Dyer, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of Peggy J. McClure's (McClure) unfair practice charge. As amended, the charge alleged that the Valley of the Moon Teachers Association, CTA/NEA (Association) breached the duty of fair representation mandated by section 3544.9 of the Educational Employment Relations Act (EERA), and thereby violated section 3543.6 (a) and (b) of the EERA,¹ when it failed to

¹EERA is codified at Government Code section 3540 et seq. EERA section 3543.6 provides, in pertinent part:

It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause a public school employer to violate Section 3543.5.

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

adequately pursue grievances against the Sonoma Valley Unified School District.

The Board has reviewed the entire record in this case, including McClure's original and amended unfair practice charge, the warning and dismissal letters, McClure's appeal, and the Association's response thereto. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself as modified by the following discussion.

DISCUSSION

We take this opportunity to clarify two points in the Board agent's warning letter.

First, despite the contrary inference one may draw from the warning letter, the Board has never held that the EERA entitles an exclusive representative to interfere with a member's selection of private counsel. In fact, every public school employee has the right to present grievances to the public school employer without the intervention of the exclusive representative. (EERA section 3543.) Nonetheless, the Association's alleged criticism of McClure's attorney was not of such a nature that it violated the duty of fair representation.

Second, as the Board agent noted, so long as a union reasonably determines that a grievance has no merit, that union

to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

is under no obligation to investigate or to arbitrate that grievance. (Los Angeles Unified School District (1985) PERB Decision No. 526, proposed decision at 34, citing Washington-Baltimore Newspaper Guild, Local 35 Communication Workers of America (1979) 239 NLRB 1321.) The key inquiry in this situation is whether the union's interpretation of the collective bargaining agreement is reasonable. (Id.) McClure has failed to allege facts showing that the Association's interpretation of the collective bargaining agreement was not reasonable. Accordingly, McClure's allegations fail to state a prima facie case of violation of the EERA.

ORDER

The unfair practice charge in Case No. SF-CO-506 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Garcia and Johnson joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



April 3, 1996

Hugh N. Helm III

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

Peggy J. McClure v. Valley of the Moon Teachers Association
Unfair Practice Charge No. SF-CO-506

Dear Mr. Helm:

The above-referenced unfair practice charge, filed February 21, 1996, alleges that the Valley of the Moon Teachers Association (Association) failed to fairly represent Peggy J. McClure with regard to several disputes she had with her employer, the Sonoma Valley Unified School District (District). This conduct is alleged to violate Government Code 3543.6(a) and (b) of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated March 18, 1996, 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 March 26, 1996, the charge would be dismissed. I further extended this deadline to April 1, 1996.

An amended charge was filed on April 1, 1996. The amended charge reiterates the original claims and adds the following.¹

On or about August 24, 1995, Ms. McClure contacted Sandra Lowe regarding the placement of the full inclusion student into Ms. McClure's classroom for the school year. Ms. Lowe stated she

¹ The amended charge addresses only Ms. McClure's duty of ~~fair representation~~ allegations and does not address the deficiencies in her right to counsel or refusal to arbitrate claims. Thus, as those allegations fail to state a prima facie case and have not been amended, they are hereby dismissed for the reasons stated in my March 18, 1996 letter.

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would look into the matter and respond to Ms. McClure by August 28. Ms. McClure did not hear from Ms. Lowe and telephoned her on August 29. Ms. Lowe responded that she had discussed the matter with District officials on August 25, and asked if Ms. McClure had heard from Director of Human Resources Cindy Walker or Principal Rosemary Haver. Ms. Lowe also asked whether Ms. McClure was familiar with the Americans With Disabilities Act, which protects disabled employees. Ms. McClure alleges that Ms. Lowe's conduct in failing to return her phone call by August 28 demonstrates a failure of the Association to act in good faith and evidences the Association collusion with the District in this matter.

On or about August 29, 1995, Ms. McClure contacted CTA representative Sharon Berry and informed her that Ms. Lowe had been delinquent in contacting her. Ms. McClure also addressed with Ms. Berry, the placement of the full inclusion student in her classroom. Ms. Berry responded that there was nothing the Association could do to stop the District from placing the child in her classroom, and noted that Ms. McClure had rejected a reasonable accommodation of a transfer to another school or another grade level. Ms. McClure alleges that Ms. Lowe's and Ms. Berry's failure to address a potential Article 3.7² violation demonstrates the Association was acting in bad faith and devoid of honest judgment.

Ms. McClure also provides evidence which she states demonstrates that the Association and the District have a practice of promoting to supervisory positions, those "good" Association representatives. Ms. McClure notes that Association representative Micaela Philpot was promoted this year to a Principal position and Association representative Bob Gossett was promoted to a Principal's assistant position. Ms. McClure alleges that these promotions demonstrate a pattern of collusion. She further alleges that the Association's contract negotiating team failed to vigorously represent bargaining unit members, resulting in unusually low salaries.

Finally, Ms. McClure asserts that Ms. Lowe's failure to inform Ms. McClure of her rights is part of an ongoing pattern of bad faith and poor representation. As evidence of this pattern, Ms. McClure refers to an incident in January of 1995, where the

² Article 3.7 of the collective bargaining agreement states, "[t]he employer agrees not to discriminate against any employee in any article specified in this Agreement because of race, color, national origin, religion, creed, age, sex, marital status, sexual orientation or disability.

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District was considering having Ms. McClure team teach a class. Ms. McClure alleges that she had to pressure Ms. Lowe into addressing the issue with the District, and although the issue was resolved in Ms. McClure's favor, Ms. McClure is certain the issue would not have been so resolved were it not for her persistence that Ms. Lowe file a grievance.

As noted in the March 18, 1996, letter, in order to state a prima facie violation of EERA section 3543.6(b), a Charging Party must show that the exclusive representative's conduct was arbitrary, discriminatory, or in bad faith. (United Teachers of Los Angeles (Collins) (1983) PERB Dec. No. 258.) At a minimum, Charging Party must demonstrate 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. (Id.)

Ms. McClure asserts that Ms. Lowe's failure to return her phone call, and her failure to inform Ms. McClure of her Article 3.7 rights amounts to bad faith and arbitrary conduct on the Association's part. However, as stated in the attached letter, 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) (1984) PERB Dec. No. 438.) The amended charge fails to state any specific facts which demonstrate that Ms. Lowe acted without a rational basis or devoid of honest judgment. The failure to return a phone call or the reluctance to file a grievance where the Association honestly determines the case is without merit, is insufficient to establish arbitrary, discriminatory or bad faith conduct.

Therefore, I am dismissing the charge based on the facts and reasons set forth above and contained in my March 18, 1996, 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. (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

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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

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By
 Kristin L. Rosi
 Regional Attorney-
Attachment
cc:

PUBLIC EMPLOYMENT RELATIONS BOARD



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



March 18, 1996

Hugh N. Helm III

Re: **WARNING LETTER**

Peggy J. McClure v. Valley of the Moon Teachers Association
Unfair Practice Charge No. SF-CO-506

Dear Mr. Helm:

The above-referenced unfair practice charge, filed February 21, 1996, alleges that the Valley of the Moon Teachers Association (Association) failed to fairly represent Peggy J. McClure with regard to several disputes she had with her employer, the Sonoma Valley Unified School District (District). This conduct is alleged to violate Government Code 3543.6(a) and (b) of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. Peggy J. McClure is a public school teacher within the meaning of the EERA section 3540.1(j), and a member of the Valley of the Moon Teachers Association. The Association is the exclusive representative of the bargaining unit.

Prior to May 1995, Ms. McClure was diagnosed with reflex sympathetic dystrophy, a condition which limits the strength and mobility in her right arm, and which is susceptible to aggravation when subjected to unusual stress.

In or about May 1995, Ms. McClure's then principal, Sandy Zimmerman, mentioned to Ms. McClure and her fellow second grade teachers that a full-inclusion student would be joining the second grade the following school year. Ultimately, this student was assigned to Ms. McClure's classroom.

On or about May 31, 1995, Ms. McClure advised Ms. Zimmerman of her medical condition and provided her with a letter from Ms. McClure's physician that it would not be advisable for the full inclusion student to be placed in her class. Ms. McClure alleges the District responded by ordering Ms. McClure to retract the medical letter and threatening her with termination.

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On or about August 21, 1995, Rosemary Haver, Ms. Zimmerman's replacement, notified Ms. McClure that the full inclusion student would be placed in her classroom for the upcoming school year.

On or about August 24, 1995, Ms. McClure contacted Association representative Sandra Lowe to seek advice about the placement. It is alleged that Ms. Lowe supported the District's placement and urged Ms. McClure to transfer to another school. Ms. McClure then contacted James Bertolli, the Association's Group Legal Service attorney and Sharon Berry, a California Teachers Association (CTA) representative, and requested representation on this matter.

Ms. Berry advised Ms. McClure that there were no remedies under the CBA for the District's placement. Ms. Berry further advised that Ms. McClure had to accept the full inclusion student, accept a transfer to another school, or risk facing disciplinary action by the District. Mr. Bertolli advised Ms. McClure on her rights under the Americans With Disabilities Act (ADA), and referred her back to Ms. Lowe for all other CBA matters.

In or about September 1995, Ms. McClure accepted the full inclusion student into her classroom. The student remained in her class for only three days, during which it is alleged that the student hit a classmate. It is also alleged that the student's aide mishandled another student. As a result of these events, the student's parents requested their son be transferred to another teacher.

On or about October 2, 1995, Cindy Walker, Director of Human Resources, sent Ms. McClure a warning letter, which stated that Ms. McClure had refused to collaborate, accommodate or modify her curriculum and classroom to adequately meet the needs of the full inclusion student. Ms. McClure was also reprimanded for an alleged comment regarding the gender of the full inclusion student's aide.

On or about October 6, 1995, Ms. McClure retained attorney Hugh Helm as private counsel to assist her in problems with the District. Mr. Helm contacted the District regarding the warning letter and urged Ms. McClure to seek representation from the Association for potential CBA violations.

On or about November 5, 1995, the parents of the full inclusion student filed a "public charge" against Ms. McClure, requesting her transfer or discharge. Ms. McClure contacted Ms. Lowe, and requested assistance from the Association. Ms. Lowe agreed to assist Ms. McClure on the matter, but informed her that she believed it was a mistake to retain outside counsel. Ms. Lowe

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also stated that the Association could not file a grievance on Ms. McClure's behalf unless she gave them written permission and waived her rights to a CTA appointed Group Legal Services attorney.

On December 5, 1995, the Association ceased all communications with Mr. Helm, stating that it was CTA policy not to communicate with outside counsel retained by a bargaining unit member. On or about December 20, 1995, Mr. Helm contacted Ms. Berry seeking clarification regarding this policy.

On or about December 21, 1995, the District, the Association, Ms. McClure, and the full inclusion student's parents met to discuss what action would be taken against Ms. McClure.

On or about December 22, 1995, Mr. Helm received a response from Mr. Bertolli, which states in pertinent part that the CTA Group Legal Services manual requires that in order to have legal services through the CTA, she must chose a Group Legal Services attorney. Mr. Bertolli also notes that the Association is representing Ms. McClure's interests for matters concerning wages, hours and terms of employment. Finally, Mr. Bertolli notes that the Association is not obligated to work with legal counsel that is independently retained by a unit member to represent them in the grievance process or with regard to contractual issues.

On or about January 2, 1996, the District notified Ms. McClure that it was placing the public charge in her personnel file. Ms. McClure requested that the Association file a grievance on her behalf over the placement of the public charge. Ms. Lowe responded that she did not believe the placement violated the CBA.

On or about January 16, 1996, Ms. McClure notified Ms. Lowe of ten potential CBA violations with regard to the placement of the public charge in her personnel file. This resulted in the January 17, 1996, filing of a grievance on Ms. McClure's behalf by the Association. Included as part of the grievance was the District's recognition of Mr. Helm as Ms. McClure's representative.

On or about January 26, 1996, Ms. McClure requested that she not be named as the "grievant" by the Association. After this notification, the Association amended to name itself as the "grievant."

Ms. McClure alleges that the Association failed to fairly represent heir rights, attempted to undermine her right to

independent counsel, threatened not to take her grievance to arbitration and intentionally withheld its services. Ms. McClure also alleges that the Association discriminated against her for retaining independent counsel and has arbitrarily retaliated against her.

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.

Duty of Fair Representation

Ms. McClure alleges that the Association denied her the right to fair representation guaranteed by EERA section 3544.9 and thereby violated EERA section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Dec. No. 125; United Teachers of Los Angeles (Collins) (1983) PERB Dec. No. 258.) In order to state a prima facie violation of this section the EERA, a Charging Party must show that the exclusive representative's conduct was arbitrary, discriminatory, or in bad faith. In United Teachers of Los Angeles (Collins), id., 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.

Ms. McClure alleges that the Association failed to fairly represent her during the grievance procedure. As she fails to highlight an incident of this failure, it is assumed that Ms. McClure believes the totality of the Association's conduct to be a violation of the duty of fair representation. However, Ms. McClure has failed to demonstrate that the Association's conduct was without honest judgment or devoid of rational basis. Mere negligence by a union in handling a grievance does not constitute a breach of the duty of fair representation. (California School Employees Association (1984) PERB Dec. No. 427). Without specific allegations as to arbitrary or discriminatory conduct on the Association's part, a complaint cannot issue.

Right to Independent Counsel

A. Non-Contract Litigation

Ms. McClure alleges that a contractual provision in the CTA Group Legal Services manual violates the duty of fair representation. The CTA Group Legal Services manual requires that a unit member either chose an attorney affiliated with that program or waive his or her right to an attorney from the CTA. However, this waiver applies only to claims that fall outside the collective bargaining agreement, such as Ms. McClure's potential Americans With Disabilities claims. There is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such an employee can obtain a particular remedy. (San Francisco Classroom Teachers Association. CTA/NEA (Chestangue) (1985) PERB Dec. No. 544.) Thus, an exclusive representative does not owe a unit member a duty of representation in matters that do not implicate the collective bargaining agreement. As such, the Association's Group Legal Services manual does not violate the duty of fair representation.

B. Contractual Grievances

Ms. McClure alleges that the Association failed to fairly represent her by refusing to share information regarding her

contractual grievances with Mr. Helm.¹ Article 5.4.2 of the collective bargaining agreement states that a unit member may be represented in all stages of the grievance procedure by him or herself or by a representative of the Association. It seems Ms. McClure became dissatisfied with the Association's response to her problems and sought the representation of Mr. Helm in the grievance process, although the contract does not provide that outside counsel may provide her representation.

Consistent with the prerogatives of an exclusive bargaining representative, a union may object to an employee selecting outside counsel or an agent of the employee's choice for grievance representation. (United Teachers of Los Angeles (Bracey) (1987) PERB Dec. No. 616.) Further, an employee organization's denial of a member's request for a particular representative, without more, does not establish arbitrary, discriminatory or bad faith conduct on the organization's part. (Id.) Similarly, where an employee chooses self representation or representation by an outside agent, the Association has no obligation to provide representation or assistance. By retaining Mr. Helm and having him participate in the grievance process and by having him designated as her representative, Ms. McClure chose to forego Association representation.² As such, the Association, by refusing to provide information regarding her grievance, has not violated its duty of representation to Ms. McClure.

Failure to take grievance to arbitration

Ms. McClure's allegation that the Association threatened not to take her grievance to arbitration is without merit. If an Association determines that a grievance is not meritorious, there is no duty to take the allegations to arbitration. (United Teachers of Los Angeles (Glass) (1985) PERB Dec. No. 526). The contractual arbitration procedure belongs exclusively to the contracting union, thus the decision to permit arbitration is a decision uniquely within the province of the union. (Id.) Ms. McClure does not allege any facts demonstrating why the Association's conduct in refusing to utilize arbitration

¹ Ms. McClure fails to specify what information the Association refused to provide to her or to Mr. Helm, nor does it provide the import of such information. Without such facts it is difficult to ascertain the impact of the Association's conduct on the pursuit of her grievance.

² The Association is currently grieving the District's recognition of Mr. Helm as Ms. McClure's representative for contractual issues as a violation of Article 5.4.2.

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provisions is arbitrary, discriminatory or in bad faith.³
Without such facts, this allegation fails to state a prima facie violation.

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 March 26, 1996, I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

Kristin L. Rosi
Regional Attorney

³ Ms. McClure does not state what form the alleged threat took. 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 Dec. No. 710-H.)