

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ELAINE LAVAN,)
)
 Charging Party,) Case No. SF-CO-510
)
 v.) PERB Decision No. 1193
)
 BERKELEY FEDERATION OF TEACHERS,) April 29, 1997
)
 Respondent.)
 _____)

Appearances: Elaine Lavan, on her own behalf; Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Berkeley Federation of Teachers.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION AND ORDER

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by Elaine Lavan (Lavan) to a Board agent's dismissal (attached) of the unfair practice charge and refusal to issue a complaint. Lavan alleged that the Berkeley Federation of Teachers (Federation) denied her the right to fair and impartial representation guaranteed by section 3544.9 of the Educational Employment Relations Act (EERA), in violation of EERA section 3543.6(b),¹ by failing to assist her in

¹EERA is codified at Government Code section 3540 et seq. Section 3543.6 states:

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

investigating why she was not selected for certain positions with the Berkeley Unified School District.

The Board has reviewed the entire record in this case, including the Board agent's warning and dismissal letters, the original and amended unfair practice charge, Lavan's appeal, and the Federation's response. The Board finds the warning and dismissal letters to be free of prejudicial error and therefore adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SF-CO-510 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

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

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940



December 4, 1996

Elaine Lavan

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Elaine Lavan v. Berkeley Federation of Teachers
Unfair Practice Charge No. SF-CO-510

Dear Ms. Lavan:

The above-referenced unfair practice charge alleges the Berkeley-Federation of Teachers (Federation) failed to fairly represent you concerning a dispute with the Berkeley Unified School District (District). This conduct is alleged to violate Government Code section 3543.6(b) of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated August 1, 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 12, 1996, the charge would be dismissed.

On August 12, 1996, I received a First Amended Charge. The amended charge reiterates the initial allegations and adds the following.

On April 8, 1996, you contacted Federation Vice-President Doug Abadie regarding your unfair practice charge. Mr. Abadie informed you that the District was entitled to hire anyone it chose for the Computer Literacy Instructor position, and that the District was not required to provide you with an explanation as to why you were not selected. Mr. Abadie also informed you bargaining unit members do not receive preferential hiring status when a position within the unit opens up.

Shortly after this conversation, you contacted Frank Brunetti, Assistant Superintendent of Personnel to inquire as to why you were not selected for the open position. Mr. Brunetti stated he would speak to Principal Poe regarding the matter. After speaking with Mr. Poe, Mr. Brunetti stated you were not selected

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because the hiring committee felt the other applicant was more qualified for the position.

On September 25, 1996, you met with Joan Anderson, a Consultant with the Department of Fair Employment and Housing (DFEH) regarding your discrimination complaint. During that meeting, you discovered the District submitted a performance evaluation to the DFEH which you had never seen. You do not state whether you contacted the Federation regarding this discovery.

You further allege the District violated the following contractual provisions: (1) Section 6.2 regarding discrimination in the workplace; (2) Section 7.2.1 regarding your right to representation during the grievance procedure; (3) Section 9.6.1 governing rehire rights; (4) Section 21.7 regarding preferential consideration; and (5) Section 21.8 regarding the posting of open positions.

Based on the above stated facts, the charge fails to state a prima facie violation of the duty of fair representation.

The charge does not indicate you contacted the Federation regarding a discrimination violation. Thus, it is unclear how the Federation failed to fairly represent you regarding this issue. Moreover, the duty of fair representation is limited to contractually based remedies under the Federation's exclusive control. (California Union of Safety Engineers (John) (1995) PERB Decision No. 1064-S.) Thus, as to a violation of Section 6.2, the Federation is not obligated to assist you in presenting your case to the DFEH or any other administrative agency.

Section 7.2 of the Agreement provides representation for bargaining unit members during the grievance process. The charge does not indicate you filed a grievance against the District, and as such it is unclear how the Federation failed to fairly represent you with regard to this section of the Agreement.

With regard to Section 9.6.1, you allege the District violated this provision of the Agreement when it hired another teacher for the position. Section 9.6.1 of the Agreement states in pertinent part:

A teacher who has taught a class the previous four (4) semesters to the satisfaction of the District, shall have priority in teaching the class (subject, time and location) the next time it is offered.

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You allege the Federation allowed the District to violate this provision of the Agreement in hiring another teacher. However, this provision is not applicable in your situation as you had not taught this class the previous four (4) semesters. Thus, the Federation did not violate its duty of fair representation in failing to file a grievance over the violation of this section.

Section 21.7 states bargaining unit teachers shall receive preferential consideration for hourly assignments for which they are credentialed. The charge fails to demonstrate, however, that the District violated this provision of the Agreement and that the Federation failed to make an honest and reasonable determination regarding your complaint. Moreover, the charge does not provide sufficient facts to determine whether this provision of the Agreement applies in your situation.

Finally, you allege the Federation ignored the District's violation of Section 21.8 which requires the District to post notices of open positions. It is unclear, however, from the charge how the District violated this provision and how the Federation failed in its duty to represent you with regard to your employment. In my August 1, 1996 letter, I indicated that you must, at minimum, present facts demonstrating how the Federation's inaction was without rational basis or devoid of honest judgement. The charge, as amended, fails to demonstrate any of these facts, and as such must be dismissed.

Therefore, I am dismissing the charge based on the facts and reasons contained herein and in my August 1, 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 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

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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
Kristin L. Rosi
Regional Attorney

Attachment

cc: Stewart Weinberg

PUBLIC EMPLOYMENT RELATIONS BOARD



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



August 1, 1996

Elaine Lavan

Re: **WARNING LETTER**

Elaine Lavan v. Berkeley Federation of Teachers
Unfair Practice Charge No. SF-CO-510

Dear Ms. Lavan:

The above-referenced unfair practice charge alleges the Berkeley-Federation of Teachers (Federation) failed to fairly represent you concerning a dispute with the Berkeley Unified School District (District). This conduct is alleged to violate Government Code section 3543.6(b) of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. Ms. Lavan was employed as a Computer Application Teacher for the District. During 1994-95, Ms. Lavan was off of work for six months due to a physical attack that rendered her disabled.

On February 2, 1996, Ms. Lavan attempted to return to work, but was denied access to her class by Mr. Poe, the school's principal, as a substitute was already in place. Ms. Lavan contacted Shirley VanBorg, Federation Vice President, and discussed the problem. Ms. VanBorg allegedly contacted Mr. Poe, and Ms. Lavan was reinstated in her classroom.

During late March 1996, Ms. Lavan applied for the position of Computer Literacy Instructor. During the April 2, 1996, interview for this position, Susan Krammer, Program Director for Career Development, stated that Ms. Lavan had an absence problem which might hinder her application for the position. Ms. Lavan states she has never been warned or reprimanded regarding an absence problem.

On April 4, 1996, the District denied Ms. Lavan the Instructor position, and allegedly offered her another Computer Literacy Instructor position at the West Berkeley Senior Center. The District allegedly retracted this offer two weeks later.

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On July 30, 1996, I telephoned you regarding additional information needed to process your charge. During our conversation, you stated that after being denied the Computer Literacy Instructor position, you contacted Doug Abadie, Federation Vice President. You informed Mr. Abadie you were concerned that the District had hired an outside teacher for the position, as this outside teacher would be receiving additional hours, making him eligible for contract status. Mr. Abadie acknowledged your concerns and promised to speak with the Federation President regarding this issue. After discussing the matter with the Federation President, Mr. Abadie telephoned you and informed you that it was unlikely the District would contract another teacher, as there was no room in the District's budget for this position. Feeling unsatisfied with Mr. Abadie's response, you contacted District Superintendent, Frank Bernetti, who responded similarly to Mr. Abadie.

Ms. Lavan states she was denied the new positions based on her physical disabilities, and feels the Federation should have investigated the hiring of the Computer Literacy Instructor.

Based on the above stated facts, the charge fails to state a prima facie violation of the duty of fair representation, for the reasons that follow.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). In order to state a prima facie violation of this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith.

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 Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

In the instant charge, it is not clear how the Federation's handling of her situation with the District is contrary to its duty. Ms. Lavan does not allege the Federation failed to assist

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her in resolving these matters. Thus, the charge fails to state a prima facie case.

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 12, 1996, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Kristin L. Rosi
Regional Attorney