

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



NOEL LANCE BERNATH,)
)
 Charging Party,) Case No. SA-CO-384
)
 v.) PERB Decision No. 1208
)
 LOS RIOS COLLEGE FEDERATION OF)
 TEACHERS, CFT/AFT, LOCAL 2279,) June 23, 1997
)
 Respondent.)
)

Appearances: Noel Lance Bernath, on his own behalf; Law Offices of Robert J. Bezemek by Adam H. Birnhak, Attorney, for Los Rios College Federation of Teachers, CFT/AFT, Local 2279.

Before Caffrey, Chairman; 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 Noel Lance Bernath's (Bernath) unfair practice charge. As amended, Bernath's charge alleges that the Los Rios College Federation of Teachers, CFT/AFT, Local 2279 (Federation) breached its duty of fair representation in violation of sections 3544.9 and 3543.6(a) of the Educational Employment Relations Act (EERA)¹ and discriminated against him in violation of EERA

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

section 3543.6(b) when it failed to adequately represent him in processing a grievance against the Los Rios Community College District.

The Board has reviewed the entire record in this case, including Bernath's original and amended unfair practice charge, the warning and dismissal letters, Bernath's appeal and the Federation'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.

ORDER

The unfair practice charge in Case No. SA-CO-384 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member 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.

EERA section 3544.9 provides:

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.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



April 22, 1997

Noel Lance Bernath

Re: NOTICE OF DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
DENIAL OF REQUEST FOR SANCTIONS
Noel Lance Bernath v. Los Rios College Federation of
Teachers/CFT/AFT/Local 2279
Unfair Practice Charge No. SA-CO-384

Dear Mr. Bernath:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 27, 1997. Your charge alleges that the Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Federation or Respondent) breached its duty of fair representation (DFR) in violation of Government Code sections 3544.9 and 3543.6(a) and discriminated against you in violation of Government Code section 3543.6(a).

I indicated to you, in my attached letter dated March 28, 1997, 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 April 7, 1997, the charge would be dismissed.

Your subsequent request for additional time was granted, and a First Amended Charge was filed on April 21, 1997.

Discussion

As discussed more fully in my March 28, 1997 letter, this charge addresses a dispute of long-standing over the application of contract language concerning eligibility for step increases and how service credits are calculated for the period prior to the 1980-81 school year, and the refusal of the Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Federation) to carry your recent grievance to arbitration.

The First Amended Charge and a letter which accompanies it contain numerous factually specific allegations in support of the merit of the grievance.. The question before PERB, however, is whether the Federation's decision declining to advance your grievance lacks a rational basis or evidences conduct which was

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arbitrary, capricious or discriminatory, or, in other words, "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. See also Los Rios College Federation of Teachers (Baker et. al.) (1991) PERB Decision No. 877, Los Rios College Federation of Teachers (Violett) (1991) PERB Decision No. 889, and San Diego Teachers Association (1991) PERB Decision No. 902.) Where a grievance on its face lacks arguable merit, the "rational basis" question must necessarily be resolved in favor of the exclusive representative. (Los Angeles Unified School District/United Teachers-Los Angeles (Glass) (1985) PERB Decision No. 526; Los Rios College Federation of Teachers (Lowman) PERB Decision No. 1142.) On the other hand, the "considerable discretion" accorded an exclusive representative "includes the exclusive representative's ability to decide in good faith that even a meritorious employee grievance should not be pursued." (Los Rios College Federation of Teachers (Deglow) (1996) PERB Decision No. 1133, citing United Teachers of Los Angeles (Clark) (1990) PERB Decision No. 796.) Even assuming that the underlying grievance here was meritorious, the instant charge fails to allege prima facie evidence of a violation.

The amended charge alleges in conclusory fashion that the Federation's conduct breached the duty of fair representation; was arbitrary, capricious and discriminatory; and was motivated by an animus because of your history of protected activity. You also allege that the Federation "has a history of collaborating with [your employer] to circumvent . . . and to diminish, dominate or interfere with" your rights. However, none of these legal conclusions are supported by specific factual allegations which establish a prima facie case of a breach of the duty of fair representation or discrimination under the applicable standards described in my March 28, 1997 letter. Legal conclusions are insufficient to state a prima facie case. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S.)

Finally, the amended charge both responds to the Federation's request that PERB order sanctions in this case and contends that the request for sanctions is itself evidence of unlawful retaliation because of your protected activity in filing the charge. Though the Board has infrequently granted motions seeking attorneys' fees or other sanctions, I am unaware of any cases which hold that a request for sanctions by a party is itself an unlawful act.

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Therefore, I am dismissing the charge based on the facts and reasons set forth above as well as those contained in my March 28, 1997 letter.

Request for Sanctions

As noted above, the Federation argues that sanctions against the Charging Party are appropriate in this case, citing Los Rios College Federation of Teachers (Deglow) (1996) PERB Decision No. 1133 (Deglow). The Federation bases its request on Charging Party's unsuccessful filing of three previous unfair practice charges (Los Rios Community College District (1991) PERB Decision No. 875; Los Rios College Federation of Teachers, CFT/AFT (Baker et al.) (1991) PERB Decision No. 877; Los Rios College Federation of Teachers (Sander et al.) (1995) PERB Decision No. 1111) and the contention that the instant charge is "without arguable merit."

The Board described the standard for sanctions in Los Angeles Unified School District/California School Employees Association (Watts) (1982) PERB Decision No. 181a (LAUSD) as follows:

The Board notes that Mr. Watts has repeatedly filed complaints which are virtually identical in content to this despite the Board's patient and adverse rulings.
[Citations omitted.]

Mr. Watts' repeated raising of such nonmeritorious complaints abuse Board processes and wastes State resources. Further, respondents must necessarily incur expenses in time, effort and money in continually defending against the same charges. Accordingly, the Board sees fit to order that Mr. Watts cease and desist from filing complaints which merely raise facts and questions of law which the Board has already fully considered. Further, if such complaints are filed in the future, the Board will consider the possibility of assessing Mr. Watts any litigation expenses incurred by a respondent while trying to defend against such actions.

In Deglow, the Board emphasized that it is the "repeated presentation of charges based on circumstances which have been considered by the Board in related cases previously [which

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suggest] an abuse of that process." Likewise, in Los Angeles Unified School District (Watts) (1993) PERB Decision No. 1013 the Board reversed a Board agent's award of attorney's fees, ruling that the issues in the case were "properly before the Board" and had "not been the subject of Board decisions in the past." (See also Los Angeles Community College District (Watts) (1984) PERB Decision No. 411 and United Teachers of Los Angeles (Watts) (1993) PERB Decision No. 1018.)

Here, Charging Party previously filed two charges alleging the Federation breached the duty of fair representation regarding longevity pay (PERB Decision No. 877) and seniority, longevity pay, sick leave credits and retirement credits (PERB Decision No. 1111) and one charge against his employer concerning longevity pay (PERB Decision No. 875). Charging Party notes that the issue of his proper step placement was not addressed by these earlier charges.

The request for sanctions in this case is denied. While there are certainly similarities and overlap involved in the instant charge and the earlier charges filed by Charging Party, the facts do not warrant a finding that Charging Party has engaged in the kind of "repeated presentation of charges" (Deglow) which are "virtually identical in content" to issues previously considered by the Board. (LAUSD.) Thus, the record does not support a finding that Charging Party has engaged in conduct which is "without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith or otherwise an abuse of process." (State of California (Office of the Lieutenant Governor) (1992) PERB Decision No. 920-S. See also Chula Vista City School District (1990) PERB Decision No. 834.)

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
Les Chisholm
Regional Director

Attachment

cc: Adam H. Birnhak

PUBLIC EMPLOYMENT RELATIONS BOARD



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



March 28, 1997

Noel Lance Bernath

Re: WARNING LETTER
Noel Lance Bernath v. Los Rios College Federation of
Teachers/CFT/AFT/Local 2279
Unfair Practice Charge No. SA-CO-384

Dear Mr. Bernath:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 27, 1997. Your charge alleges that the Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Federation or Respondent) breached its duty of fair representation (DFR) in violation of Government Code sections 3544.9 and 3543.6(a) and discriminated against you in violation of Government Code section 3543.6(a).

Investigation of this charge revealed the following pertinent information. You are employed by the Los Rios Community College District (District) as a tenured, "less than 100%" instructor,¹ and your position is included in the bargaining unit exclusively represented by the Federation. You have been employed by the District since September 1966.

At the heart of the current charge is a dispute of long-standing over the application of contract language in the District and Federation's written agreement concerning eligibility for step increases and how service credits are calculated for the period prior to the 1980-81 school year. You contend that various court decisions entitle you to year-for-year credit for service prior to 1980-81.

PERB considered an earlier DFR charge filed by you and other District employees concerning salary step and service credits issues in Los Rios College Federation of Teachers. CFT/AFT (Baker et al.) (1991) PERB Decision No. 877, and dismissed the charge as untimely and because the Federation's conduct "had a rational basis." Similar issues were addressed and dismissed in Los Rios College Federation of Teachers (Sander et al.) (1995) PERB Decision No. 1111. In December 1994, a publication of the Federation included an article which referenced the earlier

¹The Federation's response to the charge indicates you are currently employed at

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grievances and unfair practice charges filed by you and other employees.

On October 9, 1996, you submitted a letter and completed grievance form to the Federation, and requested that the Federation file the grievance and represent you. The grievance was assigned number 2F96 and filed by the Federation on October 16, 1996.

Grievance 2F96, as drafted by you, cites various provisions of the collective bargaining agreement and court decisions, and asks that you be placed at the maximum step (step 14) of the salary schedule, with appropriate retroactive adjustment of salary and benefits.

On November 21, 1996, a meeting was held on the grievance at the District level. The meeting was attended by yourself, District employee Bill Monroe, and the Federation's Executive Director, Robert Perrone.

The District's response to the grievance, dated December 10, 1996, indicated the grievance was being denied as you had agreed your salary placement was appropriate pursuant to a 1981 arbitration ruling.

On December 11, 1996, the Federation's executive board voted not to pursue your grievance to the next level (a board of review hearing).

By letter dated December 15, 1996, you informed the Federation that the District's response misstated the facts of the meeting, and renewed your request that the Federation pursue your grievance.

By letter dated December 16, 1996, Perrone wrote notifying you of the decision not to pursue your grievance to a board of review hearing. Perrone's letter explained the rationale for the decision, including a review of the history of relevant contract language and the fact that court decisions cannot be enforced through the grievance procedure, and advised you of your appeal rights with the Federation's executive board.

Duty of Fair Representation

In order to state a prima facie case involving a breach of the duty of fair representation, facts must be alleged in the charge indicating how and in what manner the Federation refused to process a meritorious grievance or otherwise fulfill its duty for arbitrary, discriminatory or bad faith reasons. In United

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Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258, the Board 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.

In order to state a prima facie case of arbitrary conduct violative of 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. See also Los Rios College Federation of Teachers (Baker et. al.) (1991) PERB Decision No. 877, Los Rios College Federation of Teachers (Violett) (1991) PERB Decision No. 889, and San Diego Teachers Association (1991) PERB Decision No. 902.)

It is, further, the charging party's burden to show how an exclusive representative has abused its discretion. (United Teachers of Los Angeles (Vigil) (1992) PERB Decision No. 934.) The "considerable discretion" accorded an exclusive representative "includes the exclusive representative's ability to decide in good faith that even a meritorious employee grievance should not be pursued." (Los Rios College Federation of Teachers (Deglow) (1996) PERB Decision No. 1133, citing United Teachers of Los Angeles (Clark) (1990) PERB Decision No. 796.)

The only factual allegation made which appears to address any discriminatory motive on the part of the Federation concerns the Federation's publication, in 1994, of an article which reviews the history of earlier grievances and unfair practice charges filed by you and other employees. The article references an unfair practice charge filed against the Federation due to its refusal to process a grievance similar to 2F96 to a board of review hearing. This allegation is not sufficient to establish that the more recent decision of the Federation, again declining

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to advance a grievance over salary placement and service credits, was unlawfully motivated.

You also cite the Federation's earlier filing of a grievance on your behalf as evidence that their recent conduct is without a rational basis. This argument is unpersuasive. The Federation agreed to file your recent grievance, just as they determined to file a similar grievance in 1989. But the Federation also declined to carry your most recent grievance to a board of review, just as they did with earlier, like grievances.

Your charge fails to allege sufficient facts to establish that the Union abused its discretion or otherwise breached the duty of fair representation under the standards described above. The analysis required here is not whether your grievance has merit. The issue raised by your charge is whether the Federation's decision declining to advance your grievance lacks a rational basis. (See Reed District Teachers Association, CTA/NEA (Reyes), supra, and like cases cited above.) The facts summarized above do not establish prima facie evidence that the Federation's conduct was arbitrary, capricious or discriminatory, or, in other words, "without a rational basis or devoid of honest judgment." (Ibid.)

Discrimination

The second question posed by the instant charge is whether the facts alleged support a finding that the Federation has discriminated or taken reprisals against you in violation of section 3543.6(b).

To demonstrate a violation, you must show that you engaged in protected activity, that the Federation had knowledge of such activity, and the Federation imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced you because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad); Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106 (Kimmett).)

The instant charge does establish that you have engaged in protected activity and that the Federation had knowledge of such activity. For the reasons set forth in the above analysis of whether the Federation acted out of a discriminatory motive, however, the charge fails to allege prima facie evidence that the Federation's conduct was unlawfully motivated.

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For these reasons the charge, as presently written, does not state a prima facie case.² 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

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 April 7, 1997, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, extension 359.

Request for Sanctions

In its response to the instant charge, dated March 17, 1997, the Federation requests that sanctions be imposed against you in this case. Your response to this motion must also be filed not later than April 7, 1997.

Sincerely,

Les Chisholm
Regional Director

²The instant charge would also be subject to dismissal under the doctrine of collateral estoppel, as it appears to raise the same issue involving the same parties as Los Rios College Federation of Teachers. CFT/AFT (Baker et al.) (1991) PERB Decision No. 877, and Los Rios College Federation of Teachers (Sander et al.) (1995) PERB Decision No. 1111. . (See Los Rios College Federation of Teachers (Deglow) (1996) PERB Decision No. 1133.)