STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN ROSSMANN, ET AL.,	)	
Charging Parties,	)	Case No. LA-CO-780
v.	)	PERB Decision No. 1307
ORANGE UNIFIED EDUCATION ASSOCIATION, CTA,	)	January 14, 1999
Respondent.	)	

Appearances; John Rossmann for John Rossmann, et al.; Geffner & Bush by Nathan Kowalski, Attorney, for Orange Unified Education Association, CTA.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by John Rossmann, et al. (Rossmann, et al.) of a Board agent's dismissal (attached) of their unfair practice charge. In the charge, Rossmann, et al. alleged that the Orange Unified Education Association, CTA (Association) violated the Educational Employment Relations Act (EERA) section 3543.6(b)[1] by negotiating an agreement with the

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee 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.

Orange Unified School District and intimidating bargaining unit members.

The Board has reviewed the entire record in this case, including Rossmann, et al.'s original and amended unfair practice charge, the Board agent's warning and dismissal letters, Rossmann, et al.'s appeal and the Association's response. 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. LA-CO-780 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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

October 7, 1998

John Rossman

Re: John Rossman. et. al. v. Orange Unified Education Association, CTA
Unfair Practice Charge No. LA-CO-780
DISMISSAL/REFUSAL TO ISSUE A COMPLAINT

Dear Mr. Rossman:

I indicated to you, in my attached letter dated September 28, 1998, 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 October 5, 199 8, the charge would be dismissed. On October 5, 1998, you filed a first amended charge.[1]

The original charge alleged the Orange Unified Education Association (0UEA) violated its duty of fair representation. The Warning Letter indicated the charge was untimely and failed to factually demonstrate a prima facie violation. The Charging Parties' first amended charge alleges PERB failed to include CTA as a party to this charge. However, as indicated in both the caption of this letter and the caption of the Warning Letter, the Respondent is the Orange Unified Education Association, CTA.

The first amended charge alleges the charge is timely filed. The first amended charge states in pertinent part:

[1]In the first amended charge, the Charging Parties complain that they did not have enough time to address the September 28, 1998, Warning Letter. Although the Warning Letter includes my telephone number, the Charging Parties did not call me to request an extension of time. The Charging Parties also complain that the Warning Letter issued before the September 22, 1998, Initial Letter's deadline for the Respondent to file a position statement, and that they did not receive a copy of the position statement. However, as noted in the September 22, 1998 Initial Letter, PERB Regulations do not require the Respondent to file a position statement.

> it was only on April 27, 1998, that the Charging Parties first **knew of** the existence of a statutory union obligation under EERA to fulfill the Duty of Fair Representation toward members. Furthermore, in May, 1998, after the Charging Parties first learned of this Duty and queried the Respondent Unions about fulfillment of said Duty, the Unions responded with deceptive answers which delayed and diverted the Charging Parties from immediate pursuance of an Unfair Practice Charge, [emphasis in original.]

As previously indicated in the Warning Letter, the statute of limitations is jurisdictional and the Charging Parties' lack of knowledge regarding PERB, the Educational Employment Relations Act (EERA or Act) or their rights does not give PERB jurisdiction over an otherwise untimely filed charge. (See Mt. San Jacinto College Faculty Association, CTA/NEA (1996) PERB Decision No. 1147; California State University, San Diego (1989) PERB Decision No. 718-H; Calexico Unified School District (1989) PERB Decision No. 754.) The Charging Parties' belated discovery of the legal significance of the underlying conduct does not excuse an otherwise untimely filing. (UCLA Labor Relations Division (1989) PERB Decision No. 735-H.) It is not the Charging Parties' knowledge of the law which starts the statute of limitations running. Rather it starts to run when the Charging Party knew or should have known of the activities allegedly violating the EERA, Therefore, in the instant charge, the statute of limitations period began running when the Charging Parties knew or should have known OUEA allegedly failed to fairly represent its bargaining unit employees. The Charging Parties knew on June 23, 1997, that OUEA had negotiated an agreement which the Charging Parties disliked. The Charging Parties also knew in September 1997, that the OUEA conducted a ratification vote which the Charging Parties similarly disliked. Thus, the statute of limitations period began to run on these allegations on June 23, 1997, and in September 1997. The Charging Parties did not file their unfair practice charge until September 19, 1998, and thus acted outside the six-month statute of limitations period. Therefore, these allegations are not within the jurisdiction of PERB. Even if timely filed, the amended charge does not correct the deficiencies noted in the Warning Letter. The first amended charge fails to present facts demonstrating the Respondent acted in an arbitrary, discriminatory, or bad faith manner. Thus, these allegations are dismissed.

The first amended charge also alleges that OUEA violated its duty of fair representation in May 1998. The amended charge alleges:

> Among the Charging Parties are bargaining unit members who were present at the May 1998, meeting during which a high-ranking member of the California Teachers Association legal department told members that they had no basis for filing a grievance alleging that the Unions failed to fulfill their Duty of Fair Representation. We therefore further amend our charge, still well within the six month filing period, to include that the Respondent Unions also violated their Duty of Fair Representation by deceiving their members about the obligations owed to members under the precepts of the Duty of Fair Representation. [emphasis in original.]

Although timely filed, this allegation fails to state a prima facie violation of the EERA for the reasons that follow. As stated in the Warning Letter, in order to state a prima facie violation of this section of EERA, Charging Parties 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, the Charging Parties:

> " . . . 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.]

The charge does not provide facts demonstrating the union's statements in May 1998 violated the EERA. The charge does not demonstrate that .the Respondent deceived the Charging Parties by indicating the Charging Parties did not have the right to file a "grievance" regarding the union's duty of fair representation. A grievance would necessarily stem from the collective bargaining agreement (CBA) between the District and OUEA. The charge does not provide facts indicating the CBA contained a duty of fair representation provision under which the employees could file a grievance against the union. Therefore, the union's statements as described in the first amended charge appear to be accurate.

Even if CTA told the Charging Parties' that they did not have the basis for an "unfair practice charge" alleging a violation of the duty of fair representation, the charge fails to state a prima facie violation. The exclusive representative does not owe a duty of fair representation in regard to avenues of relief other than the grievance procedure. (University Council - American Federation of Teachers (1994) PERB Decision No. 1062-H.) Moreover, CTA's assessment of the Charging Parties' allegations appears correct. By May 1998, when CTA spoke to the Charging Parties, more than six months had elapsed from the time when OUEA negotiated the agreement, and conducted the ratification vote. An unfair practice charge alleging a duty of fair representation violation filed in May 1998 would have been time-barred. Thus, this allegation is dismissed.

For the foregoing reasons, as well as those stated in the Warning Letter, the charge is 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
Tammy L. Samsel
Regional Director

Attachment

cc: Nathan Kowalski
Jesus Quinonez

STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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

September 28, 1998

John Rossman

Re: John Rossman. et. al. v. Orange Unified Education Association. CTA
Unfair Practice Charge No. LA-CO-780
WARNING LETTER

Dear Mr. Rossman:

The above-referenced charge alleges the Orange Unified Education Association (0UEA) violated the Educational Employment Relations Act (EERA or Act) § 3543.6(b) by negotiating an agreement with the Orange Unified School District (District) and intimidating bargaining unit members. My investigation revealed the following information.

Charging Parties are members of the certificated bargaining unit at the District and are exclusively represented by 0UEA. In 1997 the District and OUEA were negotiating for a collective bargaining agreement. During the negotiations, the District proposed that new hires and unit members with less than eight years of experience would receive double-digit salary increases, while unit members with greater experience would receive a lesser salary increase. The salary increases for the more experienced unit members would also be dependent upon veteran teachers selling out their retirement benefits for payments below the value of the benefits. From March 1997 through June 1997, OUEA assured unit members it would not agree to such a proposal. However, on June 23, 1997, OUEA notified unit members it had reached a tentative agreement (TA) with just such a provision.

Bargaining unit members protested this provision of the TA, and OUEA responded by indicating the TA was legal and fair. OUEA held an election to ratify the TA which included two options for unit members to choose between: -The first option was to vote to ratify the TA. The second option was as follows:

> NO-I REJECT THE TENTATIVE AGREEMENT AND AUTHORIZE THE ASSOCIATION TO CALL A STRIKE.

The voters ratified the TA. The Charging Parties allege that in the past OUEA has held ratification elections and strike elections separately. The charge also alleges OUEA failed to

provide the members with full and complete editions of the TA prior to the vote.

The Charging Parties indicate they did not file a charge against OUEA in September of 1997 because OUEA told the unit members that the TA was neither illegal nor unfair. The Charging Parties allege that on April 27, 1998, they learned that unions owe employees a duty of fair representation. In May 1998, unit members told OUEA that OUEA owed them a duty of fair representation, and OUEA responded by indicating the employees did not have grounds for filing an unfair practice charge. The Charging Parties relied on this statement and did not file a charge for that reason.

The above-stated information fails to state a prima facie violation for the reasons that follow.

EERA § 3541.5(a)(1) provides the Public Employment Relations Board 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." It is your burden as the charging party to demonstrate the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.)

The Charging Parties filed the instant unfair practice charge on September 19, 1998. The alleged unfair practices occurred on June 23, 1997, when OUEA negotiated an agreement which the charge characterizes as unfair, and in September 1997 when OUEA conducted a ratification vote. More than six months has elapsed since the Charging Parties knew of the alleged unfair practices. Thus, these allegations are untimely filed and outside the jurisdiction of PERB.

The Charging Parties allege they did not know that OUEA owed the bargaining unit members a duty of fair representation until April 27, 1998. However, PERB has consistently held the statute of limitations is jurisdictional and the Charging Parties' lack of knowledge regarding PERB, the EERA or their rights does not give PERB jurisdiction over an otherwise untimely filed charge. (See Mt. San Jacinto College Faculty Association. CTA/NEA (1996) PERB Decision No. 1147; California State University. San Diego (1989) PERB Decision No. 718-H; Calexico Unified School District (1989) PERB Decision No. 754.) Thus, the charge must be dismissed.

Further, even if considered timely filed, the charge fails to state a prima facie violation of the duty of fair representation.

Charging Parties have alleged that the exclusive representative denied Charging Parties 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 Parties 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, the Charging Parties:

> " . . . 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.]

A union's duty to fairly represent employees during negotiations does not encompass an obligation to negotiate any particular item. (Rocklin Teachers Professional Association (1980) PERB Decision No. 124.) Although the Board recognizes it may be difficult, in order to ensure that the bargaining agent is afforded a broad range of discretion and latitude, it is necessary for the Charging Party to set forth with exactitude the irrational or arbitrary nature of the union's conduct toward the unit membership. (Id.) An exclusive representative is not expected or required to satisfy all members of the unit it represents, and the duty of fair representation does not mean that an exclusive representative is barred from making contracts which may have unfavorable effects on some members. (California School Employees Association and its Chapter 107 (Chacon) (1995) PERB Decision No. 1108.) The instant charge fails to provide facts demonstrating OUEA acted in an arbitrary, discriminatory or bad faith manner. Thus, the charge does not 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before October 5. 1998. I

shall dismiss your charge. If you have any questions, please call me at (213) 736-3008.

Sincerely,

Tammy L. Samsel
Regional Director