STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PAUL AKERS, ET AL.,	)	
	)	
Charging Parties,	)	Case No. LA-CO-510
	)	
v.	)	PERB Decision No. 1310
	)	
TEACHERS ASSOCIATION OF LONG BEACH,	)	January 27, 1999
	)	
Respondent.	)	
	)	

Appearances; National Right to Work Legal Defense Foundation, Inc. by John C. Scully for Paul Akers, et al.; California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for Teachers Association of Long Beach.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of Paul Akers, et al.'s (Charging Parties) unfair practice charge. The charge alleged that the Teachers Association of Long Beach (Association) breached the duty of fair representation set forth in section 3544.9 of the Educational Employment Relations Act (EERA) and thereby violated EERA section 3543.6(b) when it used a portion of the agency fee paid by non-members to support activities not related to collective bargaining or contract administration.[1]

[1]EERA 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:

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters, Charging Parties' 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.

ORDER

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

Chairman Caffrey and Member Amador 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.

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.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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

October 5, 1998

John C. Scully, Staff Attorney
National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road
Springfield, Virginia 22160

Re: T.A.U.S. - Teachers Against Unfair Share, Paul Akers et al. v. Teachers Association of Long Beach
Unfair Practice Charge No. LA-CO-510
DISMISSAL LETTER

Dear Mr. Scully:

The above-referenced charge alleges that the Teachers Association of Long Beach (Association) collected from the individually named Charging Parties an agency fee for the 1989-90 school year in violation of the Educational Employment Relations Act (EERA). More specifically, the alleged violation is that the fee was collected and used to reimburse the Association for costs other than collective bargaining and contract administration. This conduct is alleged to violate sections 3543.6(b) and 3544.9 of the EERA.

I indicated to you, in my attached letter dated September 18, 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 September 28, 1998, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my September 18, 1998 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

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

Attachment

cc: A. Eugene Huguenin, Jr.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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

September 18, 1998

John C. Scully, Staff Attorney-
National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road
Springfield, Virginia 22160

Re: T.A.U.S. - Teachers Against Unfair Share, Paul Akers et al. v. Teachers Association of Long Beach
Unfair Practice Charge No. LA-CO-510
WARNING LETTER

Dear Mr. Scully:

The above-referenced charge alleges that the Teachers Association of Long Beach (Association) collected from the individually named Charging Parties an agency fee for the 1989-90 school year in violation of the Educational Employment Relations Act (EERA). More specifically, the alleged violation is that the fee was collected and used to reimburse the Association for costs other than collective bargaining and contract administration. This conduct is alleged to violate sections 3543.6(b) and 3544.9 of the EERA.

My investigation revealed the following information. The eighty three individual Charging Parties were members of the bargaining unit exclusively represented by the Association during the 1989-90 school year. During this period, the Association and the Long Beach Unified High School District (District) had a collective bargaining agreement which became effective on September 1, 1989. The organizational security clause of the agreement provided that a unit member who is not a member of the Association shall pay an agency fee to the Association. On October 1, 1989, the District deducted an agency fee from each of the individual Charging Party's pay warrants.

On October 13, 1989, the Association provided all agency fee payers with a notification regarding the collection of agency fee. The notice provided that the chargeable fee for the 1989-90 school year for the California Teachers Association was 75.3 percent of union dues and the chargeable fee for the National Education Association for the same year was 75.66 percent. The notice also provided for an agency fee payer to challenge the calculations and that arbitration would be provided for a review of that challenge. More specifically, the notice states:

> In addition, if you wish to challenge the calculation for CTA's, NEA's or your local

chapter's chargeable expenditures in an arbitration hearing, you must also make this request in writing to Mary Trevithick, postmarked on or before November 15, 1989. Please indicate your name, home address, social security number, the name of your school district and the name of your local chapter in any request for agency fee reduction and/or arbitration.

. . . . . .

If you do request an arbitration hearing to challenge the calculations of the chargeable amount, we will promptly inform you of the arbitration hearing procedure. Note that the estimate of chargeable expenditures for CTA, NEA and locals contained in this notice is based on percentages derived from audited financial statements for the 1987-88 fiscal year, the most recent fiscal year for which final figures are available. Final figures for actual expenditures for the 1988-89 year will not be available until approximately December 15. Since these figures will be available in time for the arbitration hearing, the evidence presented at that hearing will be based on percentages derived from actual expenditures for the 1988-89 year.

Following the arbitration decision, CTA will immediately send arbitration requestors a check representing the non-chargeable amount for CTA, NEA and the local chapter as determined by the arbitrator for the 1989-90 year, together with interest on that portion of the amount collected to date. (If your local chapter is not adopting the presumption, they will send the check representing the local non-chargeable expenses.) Note that the arbitrator will have the authority to order a larger or smaller rebate as he or she deems appropriate under prevailing case precedent.

Charging Party Greg Pappas participated in the arbitration procedure described by the Association for the school year 1988-89.

Based on the information contained above, the allegation that the Association collected agency fees and spent those fees for

activities not related to collective bargaining and contract administration must be dismissed.

There are no facts alleged that Charging Party, T.A.U.S. - Teachers Against Unfair Share,(T.A.U.S.) is an employee organization within the meaning of EERA section 3540.1(d). Unless T.A.U.S. is an employee organization it does not have standing to file an unfair practice charge. EERA section 3541.5(a); see also Sierra Sands Unified School District (1993) PERB Decision No. 977. Therefore, T.A.U.S. will be dismissed as a Charging Party.

PERB Regulation 32994 (a)[1] requires that an agency fee payer who wishes to challenge the amount of the fee by filing an unfair practice charge with PERB must first exhaust the agency fee appeal procedure unless the procedure is insufficient on its face. In this case, there is evidence that only one of the Charging Parties, Greg Pappas participated in an agency fee arbitration. However, he was involved in the arbitration for the 1988-89 school year rather than the 1989-90 school year which is being challenged in this unfair practice charge. Because the specifics of the arbitration change from year to year, his earlier participation does not satisfy the exhaustion requirement of the regulation.

Finally, there is no evidence that the appeal procedure is insufficient on its face. Accordingly, the allegation that the Association improperly collected and spent agency fee monies must be dismissed as to all individual Charging Parties.

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[1]Public Employment Relations Board (PERB) Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32994(a) reads:

> (a) If an agency fee payer disagrees with the exclusive representative's determination of the agency fee amount, that employee (hereinafter known as an "agency fee objector") may file an agency fee objection. Such agency fee objection shall be filed with the exclusive representative. An agency fee objector may file an unfair practice charge that challenges the amount of the agency fee; however, no complaint shall issue until the agency fee objector has first exhausted the exclusive representative's Agency Fee Appeal Procedure. No objector shall be required to exhaust the Agency Fee Appeal Procedure where it is insufficient on its face.

Charging Parties assert that exhaustion of the appeal process is irrelevant or unconstitutional as contrary to Air Line Pilots Ass'n. v. Miller 118 S.Ct. 1761 (1998). That case found that plaintiffs challenging the amount of an agency fee collected pursuant to a collective bargaining agreement under the Railway Labor Act (44 Stat. 577 (1926), 45 USC sections 151-63 (1988)) may not be required to exhaust an arbitration procedure, unless they agree to the process, before bringing their claims to federal court. The case does not hold that challengers can avoid arbitration before filing with a state administrative agency such as PERB.

The Supreme Court supports its finding in Air Line Pilots, in part, by minimizing the value of an arbitration prior to a federal court case. The Court notes that in federal court, agency fee challengers, like other civil litigants would not be allowed to "file a generally phrased complaint, then sit back and require the union to prove the 'germaneness' of its expenditures without a clue as to 'which of its thousands of expenditures' the objectors oppose." Air Line Pilots Ass'n. v. Miller 118 S.Ct. 1761, 1768. The Court states that such challengers would be required to make their objections known with a degree of specificity and be subject to pretrial attack through a motion to dismiss, motion for summary judgement, etc.

Air Line Pilots is distinguishable from the instant case because PERB is not a federal court. In the PERB forum, Charging Parties are alleging a violation of State law before a State administrative agency. In addition, at PERB the burden of persuasion is on the union. Cumero v. Public Employment Relations Bd. (1989) 49 Cal. 3d 575, 605; 8 Cal. Code Regulation section 32994(b)(6). And there is no prehearing discovery in unfair practice charges. King City High School District (1982) PERB Decision No. 197. These factors strongly support the need for an arbitration, prior to a PERB hearing, to define the scope of the challengers' concerns.

At the time PERB Regulation 32994 was being considered, the National Right to Work Legal Defense Fund, Inc. opposed the provision requiring exhaustion of the agency fee arbitration procedure. The Board rejected the argument based on three reasons. First, exhaustion was not specifically rejected by the majority in Chicago Teachers Union v. Hudson 475 U.S. 292 (1986). Second, the Board has long adhered to a policy favoring the resolution of disputes through the grievance/arbitration forum prior to charges being filed with PERB. Lake Elsinore School District (1987) PERB Decision No. 646, Government Code sections 3514.5(a), 3541.5(a), PERB Regulation 32620. Third, a similar procedure was being used by the National Labor Relations Board.

Based on the differences between federal court and PERB as well as the reasons posited for the adoption of PERB Regulation section 32994, I find Air Line Pilots to be not controlling.

If Mr. Pappas' participation in the previous school year's agency fee arbitration satisfies the exhaustion requirement, then this charge presents a novel issue. PERB has only recently considered the applicable standard of review in post-arbitration cases involving agency fee objections. (Steve Murray, Richard Neville, Rod Ziolkowski v. ABC Federation of Teachers, AFT Local 2317. Unfair Practice Charge No. LA-CO-747) Because there is no final decision in the Murray case, there is no case law directly on point, and it is appropriate to seek guidance from case law addressing arbitration.

In unfair practice cases, PERB has adopted the National Labor Relations Board's (NLRB) standard of deferral to an arbitrator's award. (Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a; San Diego County Office of Education (1991) PERB Decision No. 880; Yuba City Unified School District (1995) PERB Decision No. 1095.) In determining whether to defer to an arbitrator's award, the NLRB's post-arbitration review standard considers whether: (1) the arbitration proceedings were fair and regular; (2) all parties agreed to be bound; (3) the decision of the arbitrator is not clearly repugnant to the purposes of the Act; and (4) the arbitrator considered the unfair labor practice issue. (Spielberg Manufacturing Company (1955) 112 NLRB 1080 [36 LRRM 1152]; Olin Corporation (1984) 268 NLRB 573 [115 LRRM 1056].) If these standards are met, PERB will defer to the arbitrator's award and dismiss the unfair practice charge.

A slightly modified version of this standard appears appropriate to review allegations concerning agency fee objections where the agency fee arbitration has already concluded. From the guidance provided by the cases noted above, PERB will defer to an arbitrator's award in an agency fee case and refuse to issue a complaint where: (1) the arbitration proceedings were fair and regular; and (2) the arbitrator's award is not clearly repugnant to the purposes of the Act.

In applying this standard of review, there are no facts alleged in the charge which demonstrate that the arbitral proceedings were unfair or procedurally defective. Nor are there any allegations that the arbitrator's award is clearly repugnant to the purposes of the Act. Accordingly, the allegations regarding Mr. Pappas will be dismissed.

For these reasons, the allegation that the Association collected and spent agency fee monies for subjects not related to collective bargaining or contract administration, 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 September 28, 1998, I shall dismiss the above-described charge. If you have any questions, please call me at (916) 322-3198, extension 361.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel