STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KEN L. FILINUK, ET AL.,	)	
	)	
Charging Parties,	)	Case No. LA-CO-536
	)	
v.	)	PERB Decision No. 1312
	)	
TEACHERS ASSOCIATION OF LONG BEACH,	)	January 27, 1999
	)	
Respondent.	)	
	)	

Appearances: National Right to Work Legal Defense Foundation, Inc. by John C. Scully for Ken L. Filinuk, 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 Ken L. Filinuk, 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-536 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.

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, Ken Filinuk, Kathleen Gross. James P. Kelly, Rosemary J. Porter, and Robert Wallace v. Teachers Association of Long Beach
Unfair Practice Charge No. LA-CO-536
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 3443.6 (b) and 3544.9 of the EERA.

I indicated to you, in my attached letter dated September 16, 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 16, 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,

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ROBERT THOMPSON
Deputy General Counsel

Attachment

cc: A. Eugene Huguenin, Jr.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

September 16, 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, Ken Filinuk, Kathleen Gross, James P. Kelly, Rosemary J. Porter, and Robert Wallace v. Teachers Association of Long Beach
Unfair Practice Charge No. LA-CO-536
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 3443.6 (b) and 3544.9 of the EERA.

My investigation revealed the following information. The five 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.

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 for the following reasons.

EERA section 3541.5 states:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
>
> (1) 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.

This charge was filed on May 17, 1990. The alleged violation of unlawfully deducting and spending the money occurred on October 1, 1989, more than six months prior to the filing of the charge. The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. Gavilan Joint Community College District (1996) PERB Decision No. 1177. A charging party's belated discovery of the legal significance of the underlying conduct does not excuse an otherwise untimely filing. California State Employees Association (Darzins) (1985) PERB Decision No. 546-S. Thus the charge is untimely and will be dismissed.

Even if the charge was timely filed, 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 a standing to file an unfair practice charge. EERA section 3541.5(a); see also Sierra Sands Unified School District (1993) PERB Decision No. 977.

Finally, PERB Regulation 32994(a)[1] requires that an agency fee

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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

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 no evidence any of the Charging Parties requested arbitration. Nor is there any 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.

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.

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exhaust the Agency Fee Appeal Procedure where it is insufficient on its face.

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 the reasoning of Air Line Pilots to be not controlling.

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