STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VALERIE HIMES, ET AL., Charging Parties,	)	Case No. SA-CO-410
v.	)	PERB Decision No. 1322
SAN JUAN TEACHERS ASSOCIATION, CTA/NEA, Respondent.	)	April 8, 1999

Appearances: Valerie Himes for Valerie Himes, et al.; California Teachers Association by Ramon E. Romero, Attorney, for San Juan Teachers Association, CTA/NEA.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION AND ORDER

AMADOR, Member: This case is before the Public Employment Relations Board (Board) on appeal by Valerie Himes, et al. (Charging Parties), to a Board agent's dismissal (attached) of the unfair practice charge. Charging Parties alleged that the San Juan Teachers Association, CTA/NEA (Association) denied them 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 negotiating

[1]EERA is codified at Government Code section 3540 et seq. Section 3544.9 provides that:

> 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.

Section 3543.6 states, in pertinent part:

provisions contrary to the interests of resource teachers and by failing to communicate with and seek input from resource teachers prior to negotiating new contract provisions affecting them.

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, Charging Parties' appeal and the Association'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. SA-CO-410 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

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.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

November 16, 1998

Valerie Himes

Re: Valerie Himes. et al. v. San Juan Teachers Association
Unfair Practice Charge No. SA-CO-410
DISMISSAL LETTER

Dear Ms. Himes:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 20, 1998. The charge alleges that the San Juan Teachers Association (Association) denied the Charging Parties fair representation, guaranteed by the Educational Employment Relations Act (EERA), Government Code section 3544.9, and thereby violated section 3543.6(b), by negotiating provisions contrary to the interests of resource teachers and by failing to communicate with and seek input from resource teachers prior to negotiating new contract provisions which adversely affect them.

I indicated in my attached letter dated August 6, 1998, that the above-referenced charge did not state a prima facie case. Charging Parties were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, the charge should be amended. Charging Parties were further advised that unless they amended the charge to state a prima facie case or withdrew it prior to August 24, 1998, the charge would be dismissed.

Charging Parties requested and were granted an extension of time to file an amended charge. An amended charge was filed on September 24, 1998.

The information provided in the amended charge does not address the first allegation in the charge, that the Association violated its duty of fair representation when it negotiated provisions which were adverse to the interests of resource teachers. When we discussed the charge by phone, you clarified that the Charging Parties are not challenging the Association's right to negotiate contract provisions which may have unfavorable effects on some members. Instead, Charging Parties assert that the Association violated its duty of fair representation by acting in bad faith when it deliberately and willfully concealed the nature of their contract proposals regarding resource teachers and failed to seek input from or communicate with resource teachers concerning these

proposals during the bargaining process. Since you do not challenge the first allegation, that allegation is dismissed in accordance with the discussion in the attached letter.

In the amended charge you provide information regarding the Association's bargaining conduct concerning the proposals affecting resource teachers. The Association ultimately reached agreement with the District on a contract for the 1997-98 school year which included provisions which specifically affect resource teachers. These included provisions which limit resource teachers to a four year term and redefine the length of the resource teachers' work day.

In January 1997, the Association conducted a meeting of its bargaining unit members to develop its bargaining proposals for the 1997-98 successor contract. Charging Parties contend that proposals concerning resource teachers were not proposed or discussed at this meeting. Charging Parties further allege that the resource teacher proposals were not discussed at the Association's monthly representative's meetings which were held throughout the bargaining process.

On February 21, 1997, Association President Steve Duditch sent a letter to the District school board in which the Association presented its "bargaining interests for the 1997/98 successor agreement." The Association's proposal concerning resource teachers, placed under Article 4, Transfers, stated, "Provide language re: limited term assignments of bargaining unit members." The District was then required to "sunshine" the Association's proposals by making them available for public review.

Charging Parties contend that this proposal was not sufficiently clear to put resource teachers on notice that the Association proposed to limit resource teachers to a specified term in the position. Charging Parties assert that elsewhere in its bargaining proposals the Association identified which groups of employees would be affected by its proposals. However, Charging Parties contend that the Association deliberately refrained from specifying that the "bargaining unit members" in this proposal refers only to resource teachers.

The District's summary minutes of the bargaining sessions between the Association and the District indicate that the resource teacher issue was first discussed at the bargaining table on June 26, 1997. Charging Parties assert that the minutes show that the Association wanted to eliminate the resource teacher positions, but, failing that, make assignment to these positions undesirable. The June 26, 1997 minutes state, in part:

> The next item was the resource teachers and the five issues . . . selection process, extra pay, identification of hours worked, return rights, evaluation instrument, terms of assignment....
>
> SJTA feels the DRT [district resource teachers] is not cost effective, and the site is better able to determine and provide the kind of service the current DRT are performing. District resource teachers are not needed.

The August 13, 1997 summary minutes state:

> * SJTA negotiators presented an extensive draft for the conditions under which the district resource teachers would work. The draft eliminated extra-pay and continued with term limits.

Finally, the September 19, 1997 minutes list the following "key points" concerning resource teachers:

> * Position advertised
> * Term limits
> * No consecutive terms
> * No extra pay
> * No responsibility dollars. SJTA believes going to the district has perks; i.e. flexibility in work day. This last point is most confusing as the association knew our hours were from 8:00 to 5:00 and there is little flexibility in these hours.

During the period of October 1-10, 1997, the Association and the District reached tentative agreement on the terms of the 1997-98 collective bargaining agreement (CBA). Thereafter, Charging Parties learned that the CBA contained provisions affecting resource teachers. Charging Parties sought meetings with Mr. Duditch and Tom Alves, the Association's Executive Director, which were held on October 13 and 15, 1997, and resource teachers met with the Association's executive board on November 4, 1997. In response to the resource teachers' questions, Association representatives denied that it sought to eliminate the resource teacher positions. The resource teachers were also told that negotiations were complete, the Association and the District were merely finalizing the contract language, and that further input was not permitted.

On October 21, 1997, the Association sent a letter to the union membership outlining the terms of the tentative agreement and recommending that the members ratify the proposed contract. The Association held informational meetings on October 27 and 28, 1997. The contract ratification vote was conducted on November 4, 5 and 6, 1997, wherein the contract was ratified.

As I previously discussed in the attached letter, the Board has held that the duty of fair representation requires an exclusive representative, when conducting contract negotiations, to consider the views of employees and provide "some access for communication of those views." (El Centro Elementary Teachers Association (1982) PERB Decision No. 232. In Oxnard Educators Association (1988) PERB Decision No. 681 (Oxnard), however, the Board determined that it was sufficient for a union to inform union members of the terms of the negotiated tentative agreement at a ratification meeting. By providing union members with an opportunity to be heard during a ratification meeting, the Board concluded that a union has met its duty of fair representation obligation.

In California Sate Employees Association (Hackett) (1993) PERB Decision No. 1012-S, the Board rejected an allegation that the union failed to provide the union membership with adequate information to make an informed vote on the proposed agreement. The Board ruled that a failure to provide adequate information concerning the terms of the proposed agreement does not violate the duty of fair representation. However, an intentional misrepresentation of a fact or term of the contract in order to secure member votes for ratification would violate the duty of fair representation. (California State Employees Association (O'Connell) (1986) PERB Decision No. 596-S.)

As previously noted, Charging Parties learned of the negotiated changes affecting resource teachers in October, prior to contract ratification. Several resource teachers met with Association representatives in October and expressed their concerns with the proposed contract terms. However, the Association responded that negotiations were complete and that further input was not permitted. The Association also held two informational meetings on October 27 and 28, 1997 prior to the ratification vote. Under the rule in Oxnard, the opportunity to comment at the informational meetings and vote against ratification of the contract is sufficient to meet the duty of fair representation.

Furthermore, a union's failure to provide adequate information concerning a tentative agreement during ratification proceedings is not deemed a violation of the duty of fair representation. Therefore, although the Association may not have been forthcoming

with information concerning the resource teacher provisions, this does not violate the duty of fair representation.

Finally, while a union's intentional misrepresentation of fact in order to ensure contract ratification would demonstrate bad faith, the charge alleges only that the Association intentionally concealed its proposals concerning resource teachers. The charge does not allege facts which evidence the Association's intentional misrepresentation of fact concerning the resource teacher proposals. Accordingly, under PERB case law, the charge fails to state a prima facie violation of the duty of fair representation and must be 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

Robin Wright Wesley
Regional Attorney

Attachment

cc: Ramon Romero

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

August 6, 1998

Valerie Himes

Re: Valerie Himes, et al. v. San Juan Teachers Association
Unfair Practice Charge No. SA-CO-410
WARNING LETTER

Dear Ms. Himes:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 20, 1998. The charge alleges that the San Juan Teachers Association (Association) denied the charging parties fair representation, guaranteed by the Educational Employment Relations Act (EERA), Government Code section 3544.9, and thereby violated section 3543.6(b), by negotiating provisions contrary to the interests of the resource teachers and by failing to communicate with and seek input from resource teachers prior to negotiating new contract provisions affecting resource teachers.

Investigation of the charge revealed the following pertinent information. The eleven charging parties in this case are employed as resource teachers by the San Juan Unified School District (District). During the period of October 1-10, 1997, the bargaining teams for the Association and the District reached tentative agreement on the terms of the 1997-98 collective bargaining agreement.

On October 10, 1997, several resource teachers learned via the grapevine that contract negotiations had been completed and that the Association and the District had negotiated provisions which affected resource teachers. Several resource teachers sent a fax to the Association requesting a meeting to discuss the bargaining process and the new contract provisions.

The president and the executive director of the Association met with seven resource teachers on October 13, 1997 and held a second meeting with six additional resource teachers on October 15, 1997. The Association representatives informed the resource teachers that several provisions had been negotiated concerning resource teachers, including provisions which would limit resource teachers to a four year term and which redefined a resource teacher's hours as working a professional day. When the resource teachers expressed concerns at not being informed of or

consulted about the changed working conditions, the Association representatives responded that the union was entitled to propose contract terms without first seeking input from its members. The resource teachers asked whether there was any opportunity to modify the provisions at this point in the process. The executive director informed the resource teachers that negotiations were complete, the Association and the District were merely drafting the language of the proposed agreement.

On October 21, 1997, the Association sent a letter to the union membership outlining the terms of the tentative agreement and recommending that the members ratify the proposed contract.

On November 4, 1997, eight resource teachers met with the Association's executive board to express their concerns with the new contract provisions and about the lack of input from resource teachers in the bargaining process. The Association's executive board refused to respond to the teachers' questions during the meeting, but indicated that it would provide a written response at a later date.

On November 4, 5 and 6, 1997, the union membership voted to ratify the new contract.

On December 11, 1997, the Association's executive board issued a written response to the questions submitted by the resource teachers at the November 4 meeting.

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

Initially, the charge alleges that the Association breached its duty of fair representation by negotiating provisions contrary to the interests of resource teachers. Under EERA, the duty of fair representation imposed on the exclusive representative extends to grievance handling, administration of the contract and contract negotiations. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation of the duty of fair representation, a charging party must show that the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. (United Teachers of Los Angeles (Collins), supra. PERB Decision No. 258.)

To demonstrate a prima facie case of arbitrary conduct, the Board has held that 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. [citation omitted.] While the Board recognizes that it may be difficult to set forth with exactitude the irrational or arbitrary nature of the union's conduct toward unit membership, this requirement is necessary in order to insure that the bargaining agent, faced with the impossible task of pleasing all of the people all of the time, is afforded a broad range of discretion and latitude. [Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

An exclusive representative is not 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. (Redlands Teachers Association (1978) PERB Decision No. 72, citing Steele v. Louisville & N.R.R. (1944) 323 U.S. 192 [15 LRRM 708].) As the U.S. Supreme Court explained in Ford Motor Co. v. Huffman (1953) 345 U.S. 330 [31 LRRM 2548]:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant consideration, they believe will best serve the interests of the parties represented. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The Board considered circumstances similar to the present charge in Mount Diablo Education Association (1984) PERB Decision No. 422. In Mount Diablo, the union negotiated a provision which altered the seniority rankings of teachers for purposes of involuntary transfers. The effect of the contract change was to lower the seniority rankings of a small number of unit members

and, consequently, to advance the rankings of a different and larger group of teachers. The charging party, a member of the smaller group, was involuntarily transferred as a result of her lowered seniority ranking. The charge included facts from which it appeared that in negotiating the new provision, the union was attempting to remedy an inconsistent practice which it deemed to be unfair. The Board dismissed the duty of fair representation charge, finding there was a rational basis for the union's action.

In the present charge, the Association provided an explanation for its position on the new contract provisions in a letter responding to the resource teachers' questions dated December 11, 1997. For example, the Association claimed that it agreed to language which would end pay disparities between resource teachers and the remaining members of the bargaining unit; negotiated a professional day for resource teachers which is comparable to other unit members; and relied on a national survey which recommended that teachers in resource roles would benefit from periodic and regular classroom experience. These statements by the Association evidence a rational basis for the Association's support for these provisions. Accordingly, absent additional specific factual allegations which demonstrate the Association acted in an arbitrary, discriminatory or bad faith manner when it negotiated provisions contrary to the interests of resource teachers, this allegation fails to state a prima facie violation of the duty of fair representation. Therefore, this allegation must be dismissed.

The charging parties also assert that the Association breached its duty of fair representation by failing to communicate with and seek input from resource teachers before reaching agreement on the provisions affecting resource teachers.

The Board has held that the duty of fair representation concerning contract negotiations requires an exclusive representative to provide "some consideration of the views of various groups of employees and some access for communication of those views." (El Centro Elementary Teachers Association (1982) PERB Decision No. 232.) However, in Oxnard Educators Association (1988) PERB Decision No. 681 (Oxnard), the Board, while acknowledging that an employee's opinions might "carry greater weight and influence if heard before the close of negotiations," held that notice of the terms of the proposed tentative agreement and an opportunity to provide input during a ratification meeting is sufficient to meet a union's duty of fair representation.

In Oxnard, late in the bargaining process the union and district discussed a new proposal involving changes to the salary schedule. The parties agreed that the details of the modified

salary schedule would not be revealed to bargaining unit members until the salary proposal was presented to and approved by the school board. After learning of the school board's approval of the salary proposal, the union and district reached tentative agreement. Five days later the union held a ratification meeting where unit members first learned of the details of the modified salary schedule.

Based on these facts, the Board concluded that the charging parties failed to show that the exclusive representative "acted arbitrarily, discriminatorily or in bad faith" in failing to inform unit members of the proposal or seek input prior to the ratification meeting. The Board stated:

> Constituent ratification serves as a check to errant provisions with which the majority does not agree. The essential ingredient to this process is the provision of notice and an opportunity for members to be heard before the collective bargaining agreement becomes final and binding. Here, there was a ratification process. The record establishes that Charging Parties received notice, attended the ratification meeting, and knew what the salary schedule provided for. Charging Parties exercised their rights as members and voted against ratification because of the salary provision. There, quite simply, were not enough members who shared Charging Parties' concern. [Emphasis added.]

In the present case, the charging parties similarly allege that the Association failed to communicate with and seek input from resource teachers before reaching agreement on the provisions affecting resource teachers. The charging parties did learn of the proposed changes and met with Association officials to express their concerns prior to the ratification vote. As discussed above, the Board's holding in Oxnard is directly on point to the issue raised in the present charge and requires a finding here that the charge fails to establish that the Association's conduct was arbitrary, discriminatory or in bad faith. Accordingly, this allegation must also be dismissed.

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 August 24, 1998, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, ext. 305.

Sincerely,

Robin E. Wright
Regional Attorney