STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LILLIAN H. BURTON, Charging Party, v. LOS ANGELES COUNTY EDUCATION ASSOCIATION, CTA/NEA, Respondent.	Case No. LA-CO-793 PERB Decision No. 1358 October 27, 1999

Appearance: Lillian H. Burton, on her own behalf.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Lillian H. Burton (Burton) from a Board agent's dismissal (attached) of her unfair practice charge.

On March 20, 1999,[1] Burton filed a charge alleging that the Los Angeles County Education Association, CTA/NEA violated her rights by not representing her when she was ordered to leave campus on September 22, 1998.

Following a March 26 warning letter from the Board agent, which indicated that the charge did not state a prima facie case, Burton filed an amended charge on April 6. In both the original and amended charges, Burton failed to allege that any specific section of the Educational Employment Relations Act (EERA)[2] had

[1]All dates refer to 1999 unless otherwise noted.

[2]EERA is codified at Government Code section 3540 et seq.

been violated. A review of the charges by the Board agent demonstrated that they should be analyzed as an alleged violation of EERA section 3543.6(b).[3]

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters and Burton's appeal. 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-793 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Amador joined in this Decision.

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[3]Section 3543.6 provides, in relevant 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.

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

June 9, 1999

Lillian H. Burton

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Lillian H. Burton v. Los Angeles County Education Association, CTA/NEA
Unfair Practice Charge No. LA-CO-793

Dear Ms. Burton:

The above-referenced unfair practice charge, filed March 20, 1999, alleges the Los Angeles County Education Association (LACEA or Association) violated your due process rights by ordering you to leave campus on September 22, 1998.[1] Charging Party does not allege any specific section of the Educational Employment Relations Act (EERA or Act) has been violated. A review of the charge demonstrates, however, the charge should be analyzed as a violation of Government Code section 3543.6 (b).

I indicated to you, in my attached letter dated March 26, 1999, 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 5, 1999, the charge would be dismissed.

On April 6, 1999, Charging Party filed a first amended charge. The first amended charge contains a six (6) page hand-written narrative, and included a binder of attachments totaling nearly 100 pages. A summary of those documents and Charging Party's allegations follow.

[1] Specifically, Charging Party alleges in Section 6(b) of the unfair practice charge form: "Suspension-Censorship-Expulsion-Coercion to engage in child endangerment activities and other illegal activities. Harassment, invalid grievance procedure-Criminal Activity, Discrimination, etc."

Charging Party provides numerous documents regarding a 1996 incident involving student Ruben Martinez. Apparently Charging Party provided such information to demonstrate the District's treatment of her. Such information also included police reports filed against Charging Party. Additionally, Charging Party provided several documents regarding her 1997 grievances against the District over her disciplinary suspension. Included in this information are letters between Charging Party and the Association which date back to 1997. It appears Charging Party was not satisfied with the representation she received in 1997.

Charging Party also includes a section entitled "Child Endangerment" in which she includes more information regarding what she believes are unsafe conditions at the District dating back to 1997. It is unclear how such information relates to her removal from the classroom in September 1998 or the Association's involvement.

In the only section devoted to the Association, Charging Party presents documentation and a narrative regarding the Association's failure to handle a 1996 grievance to her satisfaction. Over the next two years, Charging Party contacted several Association representatives on both a local and national level to resolve her concerns. In essence, Charging Party believed false criminal complaints had been filed against her in 1996, and wanted the Association to look into the matter and into her subsequent suspension, which had been grieved and settled.

On November 7, 1996, the Association filed a grievance on Charging Party's behalf. On January 7, 1997, the District denied the grievance at Level I. On January 17, 1997, the Association appealed the decision to Level II. On February 24, 1997, the Association represented Charging Party in a Level II hearing. On March 3, 1997, the District issued its Level II response, sustaining in part, and denying in part, Charging Party's grievance. On March 14, 1997, Charging Party wrote to her Association representative seeking a clarification of the remedy provided by the District. On March 17, 1997, the Association provided Charging Party with the clarification she sought and further informed her that it would not be appealing the grievance to Level III as Charging Party "prevailed on the issues that were grieved."

On March 26, 1997, Charging Party requested the Association take her grievance to Level III, as she did not prevail on the issue of "disciplinary suspension." On March 27, 1997, then-Association President, Kathleen O'Neil, informed Charging Party that the Association would not be taking the grievance to Level III, as it believed it had prevailed on the issues. Further, the Association informed Charging Party that it did not believe she

had been suspended in violation of the contract, as Charging Party remained on pay status. Additionally, Ms. O'Neil informed Charging Party of her right to see an attorney. On April 7, 1997, Charging Party responded to Ms. O'Neil's letter by requesting that the Association's Executive Board hear her concerns and reconsider the Association's decision not to pursue the grievance to Level III. On May 9, 1997, Charging Party sent another letter to Ms. O'Neil, as she had not received any return communication from the Association. On May 13, 1997, Ms. O'Neil sent Charging Party another letter, again reiterating the Association's position that it would not take her sustained grievance to Level III. Charging Party was further informed that Charging Party's legal concerns regarding the Child Endangerment allegations needed to be pursued outside the contract's grievance procedure.

Charging Party wrote letters to the Association in 1996, 1997 and early 1998 requesting further assistance regarding her grievance. After several meetings with Charging Party, the Association provided Charging Party with a one-hour meeting with a CTA attorney in approximately April 1998. Charging Party was provided with legal assistance and was told by the attorney to file a report with the police if she believed a criminal law had been violated. It is unclear whether Charging Party followed this advice. It also appears the Association did not pursue the matter any further, nor does Charging Party note any contact with the Association after April 1998. In January 1999, Charging Party "ran into" Association representative Kathleen O'Neil, who again refused to consider Charging Party's grievance issues.

Although not fully discussed in the amended charge, Charging Party also contends the Association failed to represent her on September 22, 1998, when she was asked to leave her classroom.

Based on the facts provided in the original and first amended charges, the charge fails to state a prima facie case under the EERA, and thus is dismissed for the reasons provided below.

With regard to the allegations concerning the 1996 grievance, the allegation is untimely. Government Code section 3541.5(a)(1) prohibits the Board from issuing 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. The statute of limitations begins to run on the date the employee, acting with reasonable diligence, knew or should have known that further assistance from the union was unlikely. (Los Rios Federation of Teachers (1991) PERB Decision No. 889.) Repeated refusals to process a grievance over a recurring issue do not start the limitations period anew. (California State Employees' Association (Calloway) (1985) PERB Decision No. 497-S.)

Facts presented herein demonstrate that Charging Party spent nearly two years attempting to get the Association to review her settled grievance and the issues underlying the grievance. During 1997 and early 1998, the Association provided her with, some assistance, but ultimately informed her that she needed to file a police report. The Association unequivocally stated in April and May of 1997, that it would not pursue the grievance further. Thus, Charging Party knew in May 1997, that the Association would not provide her further assistance in this matter. As the charge was filed on March 19, 1999, the allegation is untimely.

Charging Party also alleges that the Association owed her a duty of representation when she was asked to leave her classroom in September 1998.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (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 this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations 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. [Citations.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating 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. (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.]

Charging Party alleges the Association violated the EERA by failing to inform her the District would be asking her to leave the classroom. As noted in my March 26, 1999, letter, Charging Party presents no case law to support the assertion that a union has a duty to notify its members of impending visits by school officials or impending bad news. Moreover, Association representative Wakefield provided Charging Party with assistance during and after the meeting. As such, facts presented fail to demonstrate the Association acted arbitrarily or in bad faith.

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 Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board

Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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 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 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

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 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
Kristin L. Rosi
Regional Attorney

Attachment

cc:

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

March 26, 1999

Lillian H. Burton

Re: **WARNING LETTER**
Lillian H. Burton v. Los Angeles County Education Association, CTA/NEA
Unfair Practice Charge No. LA-CO-793

Dear Ms. Burton:

The above-referenced unfair practice charge, filed March 20, 1999, alleges the Los Angeles County Education Association (LACEA or Association) violated your due process rights by ordering you to leave campus on September 22, 1998.[1] Charging Party does not allege any specific section of the Educational Employment Relations Act (EERA or Act) has been violated. A review of the charge demonstrates, however, the charge should be analyzed as a violation of Government Code section 3543.6 (b).

Investigation of the charge revealed the following. Charging Party is a Special Education teacher with the Los Angeles County Office of Education (LACOE) at La Merced Intermediate School (LMI). As a certificated employee, Charging Party is represented by the Association. Prior to September 1998, Charging Party apparently filed a Worker's Compensation claim against the LACOE as the facts described herein, reference a worker's compensation claim.

On September 22, 1998, Charging Party was met in her classroom by Buena Vista Principal Ms. Hopko and LACOE's Worker's Compensation coordinator, Janice Whittle. Ms. Hopko informed Charging Party that because Charging Party had not provided a doctor's release for her to return to work, she would have to leave campus immediately. As there was only 3 0 minutes left in the school day, Charging Party asked to stay until the end of the day. Charging Party also requested written confirmation from Ms. Hopko

[1]. Specifically, Charging Party alleges in Section 6(b) of the unfair practice charge form: "Suspension-Censorship-Expulsion-Coercion to engage in child endangerment activities and other illegal activities. Harassment, invalid grievance procedure-Criminal Activity, Discrimination, etc."

that she was being told to leave the campus prior to the end of the school day.

Ms. Hopko refused to allow Charging Party to stay until the end of the school day and refused to provide written documentation. As Charging Party walked towards the classroom telephone to contact her union representatives, Ms. Hopko stated she had already spoken with LACEA President, John Kohn. Charging Party then telephoned LACEA site representative Doug Jockinson, seeking his advice. Mr. Jockinson then attempted to contact another LACEA representative. During this time, Ms. Hopko and Ms. Whittle stationed themselves outside Charging Party's classroom door.

After several minutes had passed, Ms. Hopko telephoned campus security who refused to remove Charging Party from the school grounds. Eventually, the school day ended and Charging Party gathered her things to leave the classroom. Before she could leave, however, Charging Party and Ms. Hopko engaged in a verbal confrontation. Charging Party ended the conversation stating she would return the following day to receive written confirmation of her removal from the classroom.

After leaving school grounds, Charging Party met with Association representative Andrea Wakefield. Ms. Wakefield telephoned Mr. Kohn and confirmed that Mr. Kohn had been informed of Charging Party's situation prior to her removal from the classroom. Charging Party voiced her anger over Mr. Kohn's failure to inform her of the impending events. Ms. Wakefield then telephoned the District's Labor Relations Officer and secured his word that Charging Party would receive written confirmation of the days events the next day.

Charging Party and Ms. Wakefield returned to school grounds on the following day. Ms. Hopko was not present at the time, thus Charging Party waited outside. When Ms. Hopko finally arrived, 30 minutes late, Charging Party secured her letter and left the campus.

Based on the above stated facts, the charge as presently written, fails to state a prima facie violation of the duty of fair representation, for the reasons provided below.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (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 this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations 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. [Citations.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating 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. (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.]

Charging Party alleges the Association engaged in arbitrary acts when its President, Mr. Kohn, failed to contact Charging Party prior to Ms. Hopko's entry into the classroom. However, Charging Party presents no case law to support the assertion that a union has a duty to notify its members of impending visits by school officials or impending bad news. Moreover, Association representatives Wakefield and Jockinson provided Charging Party with assistance during and after the crisis. As such, facts provided fail to demonstrate the Association acted arbitrarily or in bad faith.

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 April 5, 1999. I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

Kristin L. Rosi
Regional Attorney