STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANTHONY McKEEL,	)	
	)	
Charging Party,	)	Case No. SF-CO-565
	)	
v.	)	PERB Decision No. 1383
	)	
OAKLAND EDUCATION ASSOCIATION,	)	May 11, 2000
	)	
Respondent.	)	
	)	

Appearances: King, King & Fishleder by George King, Attorney, for Anthony McKeel; California Teachers Association by Priscilla Winslow, Attorney, for Oakland Education Association.

Before Dyer, Amador and Baker, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Anthony McKeel (McKeel) from the Board agent's dismissal (attached) of his unfair practice charge.

On December 13, 1999, McKeel filed an unfair practice charge alleging that the Oakland Education Association (Association) failed to represent McKeel in his appeal of a dismissal action by the Oakland Unified School District. This conduct is alleged to violate section 3543.6 of the Educational Employment Relations Act (EERA).[1] A warning letter issued on January 24, 2000,[2]

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[1]**EERA** is codified in Government Code section 3540 et seq. EERA 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

indicating that the charge did not state a prima facie case. McKeel filed an amended charge on February 4 and a dismissal of the unfair practice charge was issued on February 9.

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge, the warning and dismissal letters, McKeel's appeal and the Association's response. The Board finds the dismissal and warning 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. SF-CO-565 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Baker joined in this Decision.

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discriminate against employees, or otherwise to interfere with, restrain or coerce employees because of their exercise of rights guaranteed by this chapter.

[2]A11 dates refer to 2000.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

February 9, 2000

George King
King, King & Fishleder
1999 Harrison Street, Suite 810
Oakland, California 94612

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Anthony McKeel v. Oakland Education Association
Unfair Practice Charge No. SF-CO-565

Dear Mr. King:

The above-referenced unfair practice charge, filed on December 13, 1999, alleges that the Oakland Education Association (Association) failed to represent Anthony McKeel in the appeal of a dismissal action by the Oakland Unified School District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated January 24, 2000, 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 February 3, 2000, the charge would be dismissed.

By letter dated February 4, 2000, Charging Party submitted a letter attaching a copy of the decision by the Commission on Professional Competence (Commission) upholding the District's dismissal based on his conviction of an offense under Health and Safety Code, section 11550, subdivision (a). In addition, Charging Party contends that the undersigned has failed to address the theory that the Association has treated its members in a different manner from those non-member bargaining unit employees who are paying agency fees but are not being provided representation before the Commission. While acknowledging the precedent of the Public. Employment Relations Board (PERB) that has declined to adopt the theory of Lane v. I.U.O.E. Stationary Engineers, Local 39 (1989) 212 Cal.App.3d 164, Charging Party asserts that PERB has not rejected that theory in the context defining this case. In essence, he argues that where the exclusive representative has voluntarily undertaken to represent members in extra-contractual proceedings, it is obligated to extend the same privilege to non-members.

Notwithstanding Charging Party's novel theory, the undersigned concludes that Charging Party has failed to assert a cognizable legal theory under existing PERB precedent. While discriminatory treatment is condemned in the application of the duty of fair representation (see, e.g., San Francisco Federation of Teachers (Hagopian) (1982) PERB Decision No. 222), such precedent is in apposite here because the underlying premise of an existing duty of fair representation is not present in extra-contractual proceedings such as the one involved here.

Charging Party's theory more closely approaches that identified in California Union of Safety Engineers (John) (1994) PERB Decision No. 1064-S, where PERB found a prima facie violation of discrimination based on the withholding of representation to a member because of particular protected activity to which the exclusive representative objected. Although exercising non-membership is a protected right (Gov. Code, sec. 3543), the charge fails to allege sufficient facts to demonstrate that the Association's decision to extend representation only to members would not have been made but for the non-members' choice to refrain from joining the Association. (See Novato Unified School District (1982) PERB Decision No. 210; California State Employees Association (O'Connell) (1989) PERB Decision No. 753-H.)

Therefore, I am dismissing the charge based on the facts and reasons set forth above as well as those contained in my January 24, 2000 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 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

DONN GINOZA
Regional Attorney

Attachment

cc: Priscilla Winslow

PUBLIC EMPLOYMENT RELATIONS BOARD

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

January 24, 2000

George King
King, King & Fishleder
1999 Harrison Street, Suite 810
Oakland, California 94612

Re: **WARNING LETTER**
Anthony McKeel v. Oakland Education Association
Unfair Practice Charge No. SF-CO-565

Dear Mr. King:

The above-referenced unfair practice charge, filed on December 13, 1999, alleges that the Oakland Education Association (Association) failed to represent Anthony McKeel in the appeal of a dismissal action by the Oakland Unified School District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. Anthony McKeel was employed by the District as a teacher. The Association is the exclusive representative of the certificated bargaining unit in the District. McKeel has been a dues paying member of the Association.

Sometime in 1999, the District dismissed McKeel from employment because he had been convicted of driving a motor vehicle under the influence of a controlled substance. McKeel appealed the dismissal.

McKeel contacted the Association to request representation in the matter. He spoke with John Grace, a staff member who had represented him previously in a grievance against the District. Grace referred him to another Association representative, Bruce Cowell.

Cowell had McKeel sign a California Teachers Association (CTA) agreement entitled "Individual Referral to Group Legal Services Attorney." The agreement indicates that eligibility for the referral is based on membership in CTA both at the time of the request for representation and during the course of representation. It also indicates that the group legal services attorney is paid according to rates outlined in CTA's group legal services manual, with the employee responsible for any additional amounts. The manual sets ceilings on the amounts paid in for-cause dismissal proceedings. McKeel alleges that he was "under

the impression" that the dismissal would be handled like his previous grievance under the collective bargaining agreement.

Cowell then referred McKeel to panel attorney Dorothy Guillory. Guillory proceeded to represent McKeel in the appeal before the Commission on Professional Competence. However, the Association notified McKeel that he was no longer eligible for free representation under the CTA contract because he was no longer a member of CTA. McKeel alleges that he continues to pay union dues. A letter from Guillory to McKeel indicates that she terminated representation after giving him the opportunity to retain her privately.

McKeel alleges that Guillory's withdrawal occurred just days before his dismissal hearing was to occur. He does not allege that he was unable to reschedule the hearing.

McKeel contends that an unfair practice has been stated based on the authority of Lane v. I.U.O.E. Stationary Engineers, Local 39 (1989) 212 Cal.App.3d 164.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the EERA for the reasons that follow.

McKeel does not contend that the Association breached its duty of fair representation by failing to process a grievance through the grievance procedure of the collective bargaining agreement.[1] 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.) It does not extend to rights or remedies that may be enforced outside of the grievance procedure. (Los Angeles City and County School Employees Union (Morgan) (1987) PERB Decision No. 645 [dismissal of claim that an employee was poorly represented at a personnel commission dismissal hearing]; California Union of Safety Engineers (John) (1994) PERB Decision No. 1064-S [same, re disciplinary matter before State Personnel Board].)

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[1]There is an allegation that McKeel believed he would be represented as he had previously been represented in the grievance procedure. However, whether this assumption was valid rests in part on the threshold legal question of whether the matter he sought to challenge was covered by the collective bargaining agreement. He has provided no facts to demonstrate that it was.

Notwithstanding the latter principle, McKeel claims that the Association undertook to represent him and then arbitrarily withdrew from his case at a critical time. He asserts that this constitutes an unfair practice under Lane v. I.U.O.E. Stationary Engineers, Local 39, supra. In Lane, a union member sued his union in Superior Court alleging that his union hired an attorney to represent him in appealing a dismissal for being under the influence at the time he was involved in an accident. The attorney performed negligently. After acknowledging that the duty of fair representation arises from a union's status as an exclusive representative, but then noting that "it is not the case that the only duty ever imposed on labor organizations arises out of its exclusive representation," the court held that the employee stated a cause of action based either on his contract with the union and an attendant duty of care associated with that contract, or the fact that a duty of care was assumed by the union once it voluntarily undertook representation. (Id. at pp. 170-171.)

PERB has never adopted the Lane theory as a basis for an unfair practice charge. PERB has viewed such a theory as implicating a cause of action in state court rather than a matter within its jurisdiction. (California State Employees Association (Cohen) (1993) PERB Decision No. 980-S.) This follows logically from the notion that such a breach of duty does not arise out of the union's status as an exclusive representative, as noted in Lane. (See California State Employees Association (Darzin) (21985) PERB Decision No. 546-S [union's refusal to represent in non-contractual proceeding does not bar individual from seeking redress on his own].)[2]

Since there appears to be no other theory on which to base an unfair practice, the charge fails to state a prima facie violation of the EERA.

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

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[2]In other contexts implicating Lane, PERB has declined to follow its reasoning. (See California Union of Safety Engineers (Coelho) (1994) PERB Decision No. 1032-S; Los Angeles Unified School District (1994) PERB Decision No. 1061; California Union of Safety Engineers (John), supra, PERB Decision No. 1064-S [no representation actually undertaken; declining to address applicability of Lane to extra-contractual proceedings].)

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 **February 3, 2000,** I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

DONN GINOZA
Regional Attorney