STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MAURA HOGAN LARKINS, Charging Party, v. CHULA VISTA ELEMENTARY EDUCATORS ASSOCIATION, Respondent.	Case No. LA-CO-1091-E PERB Decision No. 1575 December 30, 2003

Appearance: Maura Hogan Larkins, on her own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case comes before the Public Employment Relations (PERB or Board) on appeal by Maura Hogan Larkins (Larkins) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Chula Vista Elementary Educators Association (Association) breached its duty of fair representation codified at Educational Employment Relations Act (EERA) section 3544.9[1], thereby violating EERA section

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3544.9 states:

> 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.

3543.6(b)[2], by failing to pursue her grievances and by informing her employer that her pay could be suspended because she had not reported to work.

LARKINS' APPEAL

Larkins argues on appeal that the Board agent failed to properly consider many of the factual allegations in her charge. Larkins also submits that the Board agent failed to treat factual allegations in the charge as true for purposes of determining whether the charge stated a prima facie case under EERA. In addition, Larkins argues that the Board agent improperly accepted as true factual assertions contained in a letter to the Board agent from California Teachers Association President, Wayne Johnson (Johnson), describing the Association's efforts to assist her and Larkins' alleged refusal of such assistance. Larkins argues that the Board agent improperly relied on those factual assertions when dismissing the charge. Larkins also provides detailed arguments regarding her factual allegations and her view of their proper interpretation. Larkins also asserts that the Association violated its duty of fair representation by failing to "notify her of the existence of PERB".

DISCUSSION

As requested by Larkins, the Board has thoroughly and carefully reviewed the detailed factual allegations from the unfair practice charge and first amended charge in this case. After considering Larkins' allegations, correspondence to the Board agent, the Association's

---

[2]EERA section 3543.6 provides, in 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.

response to the charge, and Larkins' arguments on appeal, the Board finds that the warning and dismissal letters are free from prejudicial error and adopts them as the decision of the Board itself, subject to the following discussion.

DISCUSSION

The Board agrees with Larkins that any material factual allegations contained in correspondence submitted by the Association should not have been accepted as true where disputed by Larkins. (See San Juan Unified School District (1977) EERB[3] Decision No. 12.) The Board, therefore, does not adopt the Board agent's discussion of Johnson's letter. In reviewing the dismissal of Larkins' charge, the Board has not relied on facts contained in communications from the Association, other than letters from the Association to Larkins which Larkins placed at issue through attachment to the charge and discussion in her allegations.

With the exception of the Board agent's brief discussion of material facts derived from Johnson's letter, the Board's review of Larkins' allegations indicates that the Board agent accepted as true Larkins' material allegations. The Board agent correctly set forth the legal standards governing an alleged violation of an employee organization's duty of fair representation and correctly applied those standards to Larkins' factual allegations. The Board agrees that Larkins alleged no specific facts demonstrating that the Association's actions were arbitrary, discriminatory, undertaken in bad faith, lacked a rational basis, or were devoid of honest judgment.

Larkins contends on appeal that she should have been allowed to engage in discovery to ascertain a detailed factual basis for her charge allegations before a determination was made as

[3]Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

to whether she had established a prima facie case. However, as charging party, Larkins bore the burden of alleging facts which, taken as true, stated a violation of the Association's duty of fair representation. (See PERB Reg. 32615(a)(5)[4]; Los Angeles Unified School District (1984) PERB Decision No. 473.) Where, as here, the charging party fails to set forth facts constituting a prima facia violation of EERA, dismissal is required and no evidentiary proceedings are initiated. (See PERB Reg. 32630[5].) There is no legal basis for Larkins to obtain discovery through PERB by asserting generalized conclusions relative to which she provided no detailed factual allegations. (See generally, King City High School District Association, CTA/NEA; King City Joint Union High School District; et al. (Cumero) (1982) PERB Decision No. 197, at p. 26.)

Larkins' claim that Association representatives failed to notify her of the existence of PERB does not provide a basis for a duty of fair representation (DFR) charge because the

---

[4]PERB's regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32615 provides, in relevant part:

> (a) ...The charge shall be in writing, signed under penalty of perjury by the party or its agent with the declaration that the charge is true, and complete to the best of the charging party's knowledge and belief, and contain the following information:
>
> (5) A clear and concise statement of the facts and conduct alleged to constitute an unfair practice.

[5]PERB Regulation 32630 provides:

> If the Board agent concludes that the charge or the evidence is insufficient to establish a prima facie case, the Board agent shall refuse to issue complaint, in whole or in part. The refusal shall constitute a dismissal of the charge. The refusal, including a statement of the grounds for refusal, shall be in writing and shall be served on the charging party and respondent.

Association owed her no duty to provide such notice. (See California School Employees Association and its Chapter 77 (Vincelet) (2002) PERB Decision No. 1487.)

Larkins has recently submitted to the Board excerpts from a hearing before the Commission on Professional Competence (CPC), a decision rendered by the CPC as well as, her Petition for Writ of Mandate and supporting papers challenging the CPC decision. She asserts that the transcript testimony undercuts the credibility of individuals named in her charge before PERB. Larkins also states that the CPC transcripts support her contention that the District's assistant superintendent was aware the Association was acting on behalf of an individual who had accused Larkins of misconduct which resulted in her removal from the classroom in February 2001.

PERB Regulation 32635 provides, in part: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." Larkins submits these late-filed documents as evidence in support of factual assertion that already were considered and assumed to be true by the Board agent and have been taken as true by the Board itself. As noted, those allegations, taken as true, were insufficient to state a prima facie case of a DFR violation by the Association. New documentation directed to the veracity of those allegations is unnecessary and does not cure the defects in the charge. Therefore, Larkins has not shown good cause for the Board to accept her late-filed documents on appeal. Moreover, even if good cause were found, the documents would not change the outcome in this case because the allegations they relate to already have been presumed true and found inadequate. Therefore, the Board did not consider those documents in rendering this decision.

ORDER

The unfair practice charge filed by Maura Hogan Larkins in Case No. LA-CO-1091-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 322-3198
Fax: (916) 327-6377

June 7, 2002

Maura Hogan Larkins

Re: Maura Hogan Larkins v. Chula Vista Elementary EA
Unfair Practice Charge No. LA-CO-1091-E
DISMISSAL LETTER

Dear Ms. Larkins:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 1, 2002. Your charge alleges that the Chula Vista Elementary Educators Association breached its duty of fair representation guaranteed by the Educational Employment Relations Act (EERA),[1] Government Code section 3544.9, and thus violated section 3543.6(b), by failing to fairly represent you in your grievances against your employer.

I indicated to you in the attached letter dated March 29, 2002, 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 16, 2002, the charge would be dismissed. Your requests for extensions of time to file an amended charge were granted. Your amended charge was filed on May 28, 2002.

Your charge alleges that the Association failed to fairly represent you in your grievances against your employer involving employment matters dating back to at least February 12, 2001. Your amended charge provides further clarification and argument in support of your claim that the Association breached its duty of fair representation.

As discussed in the attached letter, to demonstrate that an exclusive representative breached its duty of fair representation, a charging party must show that the respondent's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Board stated:

> 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

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

> 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.]

Your amended charge alleges that on February 12, 2001, Association President Gina Boyd agreed to your removal from the classroom. Your charge does not provide any facts in support of this assertion.

You also allege that the Association refused to allow California Teachers Association representatives to represent you. Again, your charge does not provide facts in support of this allegation. Rather, in a letter dated December 13, 2001, CTA President Wayne Johnson responded to your complaints about the Association's failure to represent you. Mr. Johnson stated that, "The local Association president and grievance chairperson, as well as the local CTA staff person have spent significant time representing you in meetings with district representatives to resolve work related issues and process grievances on your behalf, even when you have chosen not to attend meetings scheduled for these purposes."

On August 6, 2001, the Association's Board of Directors conducted a meeting to determine whether to advance your grievance to arbitration. You were offered the opportunity to make a presentation and provide evidence to the Association Board concerning the merits of your grievance, rather than relying on Ms. Boyd to advocate on your behalf. You declined that opportunity. The fact that you disagree with the Association's conclusions as to the merits of your grievances does not demonstrate arbitrary, discriminatory or bad faith conduct.

Concerning the remaining grievances you filed yourself, the amended charge indicates that Association representatives attended at least some of the grievance meetings with the District. The Association's decision not to pursue arbitration of your remaining grievances because the arbitration provisions had expired with the contract, does not demonstrate arbitrary, discriminatory or bad faith conduct. The charge does not demonstrate a prima facie violation of the duty of fair representation and is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,[2] 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. (Regulation 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. (Regulations 32135(a) and 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 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. (Regulation 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 Regulation 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. (Regulation 32135(c).)

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (Regulation 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
General Counsel

By _____
Robin W. Wesley
Regional Attorney

Attachment

cc: Michael D. Hersh

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8385
Fax: (916) 327-6377

March 29, 2002

Maura Hogan Larkins

Re: Maura Hogan Larkins v. Chula Vista Elementary Educators Association
Unfair Practice Charge No. LA-CO-1091-E
WARNING LETTER

Dear Ms. Larkins:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 1, 2002. Your charge alleges that the Chula Vista Elementary Educators Association breached its duty of fair representation guaranteed by the Educational Employment Relations Act (EERA),[1] Government Code section 3544.9, and thus violated section 3543.6(b), by failing to fairly represent you in your grievances against your employer.

Your charge makes the following factual allegations. You are employed by the Chula Vista Elementary School District as a third grade teacher at Castle Park Elementary School. On February 12, 2001, you attended a meeting with Assistant Superintendent Richard Werlin. Association President Gina Boyd attended the meeting as your union representative. At the meeting, Mr. Werlin informed you that two teachers had filed a complaint alleging that you had behaved as if you were going to kill someone and they feared for their safety. Mr. Werlin informed you that you were being removed from your classroom.

During this time, Ms. Boyd was running for reelection as union president. One of the teachers who filed the accusation against you was a close friend of Ms. Boyd. You contend that Ms. Boyd was afraid that your two accusers might be held liable for slander and she sought to cover up the incident by telling you to "be quiet."

In March 2001, Mr. Werlin informed you that you had been cleared to return to school. On March 27, 2001, while visiting your classroom you spoke with Mr. Werlin. Following the meeting, Mr. Werlin accused you of irrational behavior and throwing pens at him.

You returned to your teaching assignment on April 16, 2001. On April 20, 2001, Mr. Werlin telephoned you and told you that you were being removed from the classroom and placed on paid administrative leave.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

In May 2001, the Association filed a grievance in your behalf concerning Mr. Werlin's accusation in March 2001 that you were irrational.

A meeting of the Association's Board of Directors was scheduled for August 6, 2001 to determine whether to advance your grievance to arbitration. Ms. Boyd invited you to make a presentation to the Board. Ms. Boyd refused to tell you what she intended to say at the meeting and refused to allow you to listen to her presentation in executive session. As result, you did not attend the meeting. However, you asked Ms. Boyd to provide the Board with a copy of a letter written by Association Executive Director Tim O'Neill. In his letter, Mr. O'Neill stated that it was unfair for Mr. Werlin to consider grievances that involved him. Mr. O'Neill was absent from the meeting and Ms. Boyd did not share his letter with the Board. The Board declined to take your grievance to arbitration.

In a letter to you dated August 23, 2001, Mr. O'Neill explained why the Board of Directors decided not to arbitrate your grievance.

In August 2001 you were cleared to return to work. In September 2001, Mr. Werlin directed you to attend a meeting scheduled for September 12, 2001 to discuss your teaching assignment for the new school year. Mr. O'Neill attended the meeting as your union representative. You did not attend the meeting.

Following the meeting, Mr. O'Neill wrote you a letter dated September 12, 2001, summarizing the subjects he discussed with Mr. Werlin. Mr. O'Neill asked Mr. Werlin how the District would ensure your ability to earn a full year's salary if you were assigned to a year-round school at which the school year had already started. Mr. Werlin indicated that you could use sick or personal leave or make up workdays during off-track time.

On September 26, 2001, the District notified you that you were being placed on unpaid status. You contend that Mr. O'Neill suggested to the District that you did not need to be paid because you were not working.

Your charge alleges that the Association failed to support seven grievances which you filed on your own behalf and that the Union refused to advance these grievances to arbitration.

Based on the facts stated above, the charge fails to state a prima facie case.

The duty of fair representation imposed on an 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, a charging party must show that the respondent's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the 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 omitted.]
>
> 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.]

Your charge alleges that the Association refused to arbitrate your May 2001 grievance. You were provided the reasons for the Association's decision in an August 23, 2001 letter. As stated above, absent evidence of arbitrary conduct, a union may exercise its discretion to decline to take a grievance or arbitration. Your charge does not demonstrate that the Association's decision was arbitrary, discriminatory or bad faith.

Your charge also alleges that the Association failed to support seven grievances you filed on your own behalf. Your charge does not identify the seven grievances, including when they were filed, the subject of the grievances, when you requested union assistance and the Association's response to your requests. Thus, there is insufficient evidence to demonstrate a violation of the duty of fair representation.

Finally, your charge alleges that Mr. O'Neill suggested to the District that your pay be stopped. The facts alleged in your charge do not support this contention. There is no evidence that Mr. O'Neill's conduct at a meeting with Mr. Werlin to discuss your return to work, was arbitrary, discriminatory or bad faith. Thus, 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 that 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 16, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney