

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ROBERT J. O'MALLEY,

Charging Party,

v.

CALIFORNIA NURSES ASSOCIATION,

Respondent.

Case No. SF-CO-72-H

PERB Decision No. 1578-H

December 31, 2003

Appearance: Robert J. O'Malley on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Robert J. O'Malley (O'Malley) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the California Nurses Association (CNA) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to provide financial reports at O'Malley's request. O'Malley alleged that this conduct constituted a violation of HEERA sections 3584(b) and 3587 and PERB Regulations² 32125, 32993, and 32997.

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

²PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Upon review of the entire record, including the unfair practice charge, the amended charge, the Board agent's warning and dismissal letters, and O'Malley's appeal, the Board adopts the Board agent's dismissal as a decision of the Board itself.

BACKGROUND

In his charge as amended, O'Malley alleges that he is a nurse practitioner II with the University of California Davis Health Systems. CNA is the exclusive representative but O'Malley is not a member. CNA collected agency fees from unit members. By telephone on January 27, 2003, confirmed in writing January 28, 2003, O'Malley requested copies of financial reports from CNA for fiscal years 1999-2000 and 2001-2002. He did not receive a response and again faxed a request to CNA regarding the status of his January request on March 2, 2003. O'Malley filed the original charge on March 27, 2003.

On April 14, 2003, the Board agent sent O'Malley copies of CNA financial reports filed with the Board for fiscal years ending June 30, 2000, 2001 and 2002. The Board agent also enclosed a form requesting that O'Malley withdraw the charge. On May 5, 2003, O'Malley filed an amended charge alleging that CNA unlawfully collected agency fees while the required financial filings were delinquent, in violation of PERB regulations. O'Malley asserts that delinquent compliance does not render the violation moot.

In the warning and dismissal letters, the Board agent observed that CNA filed copies of reports for fiscal year 2001-2002 as well as for the two previous fiscal years.³ She dismissed the charge because under Section 3587 and Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106 (Kimmett), the appropriate remedy for failure to

³The Board agent noted that since PERB Regulation 32125(f) (now section 32125(b)) requires filing a petition to compel within 12 months following the end of the exclusive representative's preceding year, the request for the 1999-2000 fiscal year financial report is untimely.

file financial reports is a petition to compel compliance and not an unfair practice charge. The Board agent further disagreed with O'Malley's contention, conveyed by telephone, that HEERA section 3583.5 and PERB Regulation 32993 supersede Kimmett by making CNA's violation of agency fee regulations an unfair practice. According to the Board agent, Section 3583.5 and Section 32993 instead address the required contents of financial reports, not the requirement to make them available to the Board and to members of the employee organization. In addition, the Board agent opined, new regulations adopted by the Board are assumed to incorporate precedent, not to overturn it. Furthermore, PERB Regulation 32125 is not included in the agency fee regulations, so that noncompliance with Regulation 32125 is not an unfair practice charge. Most importantly, the remedy sought under the charge is the same remedy available under Section 3587, to compel CNA to file the requested financial reports. This remedy was achieved when CNA filed the requested reports and copies were sent to O'Malley on April 14, 2003. Therefore, the issues raised in the charge are moot. Although O'Malley disputed the mootness of the charge, the remedy is to compel compliance, and CNA complied. The Board agent found that the charge therefore did not state a prima facie case and dismissed it.

DISCUSSION

On appeal, O'Malley claims that the delinquent financial reports are equivalent to reports that lack the required information pursuant to PERB Regulation 32993⁴ and, therefore,

⁴PERB Regulation 32993 provides:

Each exclusive representative that has agreed to or has had implemented an agency fee provision shall, as part of the financial report required by Government Code Sections 3502.5(f), 3515.7(e), 3546.5, 3584(b), and 3587, also include (a) the amount of membership dues and agency fees paid by employees in the affected bargaining unit, and (b) identify the expenditure(s) that constitute(s) the basis for the amount of the agency fee.

constitute an unfair practice charge under PERB Regulation 32997.⁵ In his amended charge, O'Malley cited Hudson v. Chicago Teachers Union Local No. 1 (7th Cir. 1984) 743 F.2d 1187 (Hudson) for the principle that voluntary cessation of unlawful conduct does not moot the case.⁶ In that case, non-union dissenters challenged the amount of fees deducted pursuant to a union security clause. The union placed the disputed fees in an escrow account pending resolution of the dispute over the legitimacy of the use of the funds. However, the union controlled the escrow account. Under those circumstances, the court held that the union's placement of the funds in an account it controlled, as opposed to an account with a neutral third party trustee, does not render the issue moot.

In this case, unlike Hudson, O'Malley's claim is not that CNA is inappropriately using the collected agency fees, but rather that CNA did not make available the financial reports.

⁵PERB Regulation 32997 provides:

It shall be an unfair practice for an exclusive representative to collect agency fees in violation of these regulations.

⁶O'Malley also cites other cases to support the same principle: United States v. Concentrated Export Assn., Inc. (1968) 393 U.S. 199, 203 (anti-trust action requiring a stringent test for mootness, stating that mere voluntary cessation of the illegal act would allow the wrongdoer to return to its old ways); City of Mesquite v. Aladdin's Castle, Inc. (1982) 455 U.S. 283, 289 (case not moot because City repeal of unlawful ordinance would not preclude City from later reenacting similar provisions); United States v. W.T. Grant Co. (1953) 345 U.S. 629, 632 (anti-trust case in which the Court found mootness because defendant demonstrated no reasonable expectation that the wrong would be repeated.) These cases are not on point. Unlike these cases, in the case before us, any failure to comply with Section 3587 has been cured through a statutory remedy. In addition, CNA cannot take back its financial reports from the Board. There is no further wrong to remedy.

HEERA section 3587,⁷ as implemented by PERB Regulation 32125,⁸ provides the appropriate and only remedy for failure to make available the financial records, a petition to compel

⁷HEERA section 3587 provides:

Every recognized or certified employee organization shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by the president and treasurer or comparable officers. In the event of failure of compliance with this section, any employee within the organization may petition the board for an order compelling such compliance, or the board may issue such compliance order on its motion.

⁸PERB Regulation 32125 was amended effective December 13, 2003 but retains the provisions pertinent to the issue before the Board. Section 32125 provides:

(a) A petition to compel compliance with Government Code Section 3546.5 or 3587 may be filed by any employee belonging to the organization. A petition to compel compliance with Government Code Section 3515.7(e) may be filed by any employee in the unit. Such petition shall be filed in the regional office and shall include the names, addresses and telephone numbers of the exclusive representative, the employer, and the petitioning party.

(b) The petition to compel compliance shall be filed not later than 12 months following the end of the exclusive representative's preceding fiscal year.

(c) Board Action.

(1) Upon the valid filing of a petition to compel compliance, the Board agent shall determine whether or not the exclusive representative has complied with the applicable Government Code section. In the event of a determination of noncompliance, the Board agent shall so notify the exclusive representative, requiring it to comply within 30 days of the notification.

(2) Any determination made by the Board agent pursuant to this section may be appealed to the Board itself in accordance with the provisions of Chapter 1, Subchapter 4, Article 2 or 3 of these regulations, as appropriate. The Board itself may issue a compliance order or take other appropriate action.

compliance. (See Kimmett, pp. 18-19.) CNA provided the requested financial records to the Board, and in turn, the Board agent forwarded them to O'Malley. That is all that is required by HEERA section 3587 and PERB Regulation 32125.⁹

Since CNA has complied with the request for financial records, the issue is now moot. However, whether or not CNA has complied with the request, O'Malley has failed to state a prima facie violation of HEERA.

ORDER

The unfair practice charge in Case No. SF-CO-72-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

(d) The Board may require an exclusive representative to submit a copy of its most recent financial report.

⁹It should be noted that PERB Regulation 32125(a), previously section 32125(e), only permits an employee belonging to the organization to file a petition to compel compliance under Section 3587. Therefore, O'Malley has no remedy under this section.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027



May 13, 2003

Robert J. O'Malley

Re: Robert J. O'Malley v. California Nurses Association
Unfair Practice Charge No. SF-CO-72-H
DISMISSAL LETTER

Dear Mr. O'Malley:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 27, 2003. The charge alleges that the California Nurses Association violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to file financial reports with PERB as required by Government Code section 3587² and PERB Regulation 32125.³

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

²Government Code section 3587 provides:

Every recognized or certified employee organization shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by the president and treasurer or comparable officers. In the event of failure of compliance with this section, any employee within the organization may petition the board for an order compelling such compliance, or the board may issue such compliance order on its motion.

³PERB Regulation 32125(b) provides:

(b) Under HEERA, pursuant to Government Code Section 3587, every recognized or certified employee organization shall keep an adequate itemized record of its financial transactions. Within 60 days after the end of its fiscal year, every recognized or certified employee organization shall file with the regional office a detailed written report thereof, certified as to accuracy by its president and treasurer or comparable officers.

I indicated to you in my attached letter dated April 28, 2003, 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.

On May 5, 2003, you filed an amended unfair practice charge. Your amended charge alleges that the Association committed an unfair practice because it collected agency fees while delinquent in filing financial reports with PERB. You base this allegation on PERB Regulation 32997, which states that it "shall be an unfair practice for an exclusive representative to collect agency fees in violation of these regulations." The words "these regulations" refer to the Agency Fee Regulations contained in Subchapter 8 of PERB Regulations. However, PERB Regulation 32125, which requires the filing of financial reports, is not included with the Agency Fee Regulations, and noncompliance with this regulation is not an unfair practice.⁴

Your amended charge also asserts that the Association's compliance with PERB Regulation 32125 on April 14, 2003, pursuant to your petition for compliance does not render moot the allegations in your unfair practice charge. As discussed in the my April 23, 2003, letter, the remedy for noncompliance with PERB Regulation 32125 is to compel compliance. This remedy was achieved when the Association filed the delinquent report. PERB has no authority to seek additional remedies for a violation of PERB Regulation 32125.

For the reasons stated above and in the attached warning letter, this unfair practice charge is dismissed.

Right to Appeal

Pursuant to PERB Regulations,⁵ 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.)

⁴ It should be noted that the financial report required by PERB regulation 32125 is not the written notice which PERB regulation 32992 requires exclusive representatives to provide to nonmembers.

⁵ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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).)

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

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time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By
Jerilyn Gelt
Labor Relations Specialist

Attachment

cc: Robert F. Henderson



PUBLIC EMPLOYMENT RELATIONS BOARD

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April 28, 2003

Robert J. O'Malley

Re: Robert J. O'Malley v. California Nurses Association
Unfair Practice Charge No. SF-CO-72-H
WARNING LETTER

Dear Mr. O'Malley:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 27, 2003. The charge alleges that the California Nurses Association violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to file financial reports with PERB as required by Government Code section 3587.²

The charge states that you telephoned this office on January 27, 2003, to request copies of the Association's financial reports for 1999-2000 and 2001-2002. You formalized your request in writing on January 28, 2003, citing PERB regulation 32125(e).³

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

²Government Code section 3587 provides:

Every recognized or certified employee organization shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by the president and treasurer or comparable officers. In the event of failure of compliance with this section, any employee within the organization may petition the board for an order compelling such compliance, or the board may issue such compliance order on its motion. (Emphasis added.)

³PERB Regulation 32125(e) provides:

A petition to compel compliance with Government Code Section 3546.5 or 3587 may be filed by any employee belonging to the organization. A petition to compel compliance with Government Code Section 3515.7(e) may be filed by any employee in the unit. Such petition

Since no current financial report from the Association was on file, the Association was contacted and notified that it must comply by filing the financial report for 2001-2002 as soon as possible.⁴ On April 14, 2003, the Association filed copies of its financial reports for 2001-2002 as well as for the two previous years. Copies of all three financial reports were mailed to you that same day.

In Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106, the Board noted that section 3546.5 of the Educational Employment Relations Act (EERA)⁵, which is identical to Government Code section 3787, clearly indicates that the appropriate procedure for remedying a violation of the financial report filing requirement is not by filing an unfair practice charge but by filing a petition to compel compliance with PERB. The unfair practice charge in Kimmett was filed prior to the Board's adoption of PERB regulation 32125, which provided a mechanism for compelling compliance with the financial report filing requirements in both HEERA and EERA.

In a conversation with the undersigned on April 17, 2003, you asserted that Kimmett was outdated because it preceded the enactment of Government Code section 3583.5⁶ in January, 2000. You also note that PERB Agency Fee Regulation 32993 provides:

shall be filed in the regional office and shall include the names, addresses and telephone numbers of the exclusive representative, the employer, and the petitioning party.

⁴ PERB Regulation 32125(f) provides that "the petition to compel compliance [with financial report filing requirements] shall be filed not later than 12 months following the end of the exclusive representative's preceding year." Thus, the request for a copy of the 1999-2000 financial report was untimely.

⁵ EERA is codified at Government Code section 3540 et seq.

⁶ Government Code section 3583.5 provides, in pertinent part:

(a)(1) Notwithstanding any other provision of law, any employee of the California State University or the University of California, other than a faculty member of the University of California who is eligible for membership in the Academic Senate, who is in a unit for which an exclusive representative has been selected pursuant to this chapter, shall be required, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of the employee organization, and shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Upon notification to the employer by the exclusive representative, the amount of the fee shall be deducted by the employer from the wages or salary of the employee and paid to the employee organization.

Each exclusive representative that has agreed to or has had implemented an agency fee provision shall, as part of the financial report required by Government Code Sections 3502.5(f), 3515.7(e), 3546.5, 3584(b), and 3587, also include (a) the amount of membership dues and agency fees paid by employees in the affected bargaining unit, and (b) identify the expenditure(s) that constitute(s) the basis for the amount of the agency fee.

You assert that since PERB Regulation 32997 makes it “an unfair practice for an exclusive representative to collect agency fees in violation of [agency fee] regulations,” it supersedes Kimmett and makes a violation of PERB Regulation 32993 an unfair practice.

First, the regulation you reference, PERB Regulation 32993, does not require the filing of financial reports, but simply requires the inclusion of certain information in those reports. The requirement for filing financial reports is contained in Government Code section 3587 and PERB Regulation 32125.

Secondly, when regulations are adopted by the Board, it is with the presumption that they incorporate previous decisional law, such as Kimmett, and do not overturn it.⁷

Finally, the remedy sought by the unfair practice charge is to compel the Association to file the requested financial reports, which is also the remedy available under section 3587. This remedy was achieved when the Association filed the 2001-2002 financial report (as well as those for the two prior years) with PERB, and copies were sent to you on April 14, 2003. Therefore, the issue raised in the charge and in your January 28, 2003, letter has been rendered moot.

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

(2) The costs covered by the fee under this section may include, but shall not necessarily be limited to, the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the higher education employer.

⁷ See Government Code section 11349(d), which requires that any regulation approved by the Office of Administrative Law be “in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”

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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 May 5, 2003, I shall dismiss your charge.

If you have any questions, please call me at the above telephone number.

Sincerely,

Jerilyn/Gelt
Labor Relations Specialist