

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

DANIEL WAYNE SLOAN,

Charging Party,

v.

SHASTA COLLEGE FACULTY ASSOCIATION,

Respondent.

Case No. SA-CO-455-E

PERB Decision No. 1603

February 25, 2004

Appearance: Daniel Wayne Sloan, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Daniel Wayne Sloan (Sloan) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Shasta College Faculty Association violated its duty of fair representation under the Educational Employment Relations Act (EERA)¹ by failing to represent Sloan in a dispute over a teaching assignment and in employment matters related to his position as a pollution prevention coordinator.

The Board has reviewed the entire record in this matter, including the original and amended charge, the warning and dismissal letters and Sloan'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, subject to the discussion below.

¹EERA is codified at Government Code section 3540 et seq.

DISCUSSION

Sloan argues on appeal that the Board agent improperly found his amended charge late-filed. Sloan has submitted documents indicating that he filed his amended charge via facsimile at 4:59 p.m. on the day it was due. Obviously, by waiting until the last minute – literally – Sloan took the risk that his amended charge would not be received by PERB until after the close of business at 5:00 p.m.

Fortunately for Sloan, the Board agent accepted the amended charge even though it was late. The Board agent's dismissal letter thoroughly analyzes the additional information provided by Sloan. Accordingly, Sloan's contention that the Board agent refused to consider his amended charge is without merit.

Sloan also argues on appeal that he was not provided enough time to prepare an amended charge. According to the warning letter, an amended charge was originally due on October 31, 2002. Sloan then requested and received an extension until November 14, 2002. Sloan does not allege in his appeal that he requested an additional extension. Having not requested additional time, Sloan's contention on appeal that he needed more time must be rejected.

ORDER

The unfair practice charge in Case No. SA-CO-455-E is hereby **DISMISSED**
WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

Dismissal Letter

November 26, 2002

Daniel Wayne Sloan

Re: Daniel Wayne Sloan v. Shasta College Faculty Association
Unfair Practice Charge No. SA-CO-455-E
DISMISSAL LETTER

Dear Mr. Sloan:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on . It was amended on April 22 and June 2. Daniel Wayne Sloan alleges that the Shasta College Faculty Association violated its duty of fair representation under the Educational Employment Relations Act (EERA)¹ when he was terminated as the Pollution Prevention Coordinator. The amended charge includes an allegation that the union did not properly represent him when he was denied summer and fall 2002 employment as an instructor.

I indicated to you in my attached letter dated October 24, 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 October 31 the charge would be dismissed. You requested and received an extension of time to November 14.

I have not received either another amended charge or a request for withdrawal. I have received several facsimile letters which contain additional facts and argument that the Association failed to properly represent you with respect to your loss of the Pollution Prevention Coordinator (PPC) position.

In your fax of November 15, you provided additional information regarding your activities in the PPC position. You were asked to assist in developing curriculum for the training of 500 instructors as part of the "Flex Day" educational activities. You state that you were "asked to be the instructor" on the Flex Day planning committee.

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.

You note that the EnVac Committee wrote a proposed job description for the PPC in October 2000 which was originally to be supervised by the director of physical plant. The job description had major educational components added to it and was changed to report to the Dean for the Center of Science, Industry and Natural Resources. You point out that at least until May 2001, you “never stopped teaching your students nor working on programs that you were involved in.” You provide other information regarding your curriculum and educational endeavors.

As in your original charge, you assert that the Association officers failed to assist you with the PPC position and were actually in collusion with the college to eliminate you from that position.

On November 18, you faxed a copy of a letter to you from Association Vice President Christine Flowers. You supplied this letter again (it is part of the amended charge) to demonstrate that Flowers and the union wanted another individual in the PPC position.

On November 21 you faxed a letter which describes efforts by Flowers and other Association officers to undermine your efforts in the PPC position, including a letter to the college president criticizing the manner in which you were hired into that position. In that document, you reaffirm your belief that the union and the college have discriminated against you.

In your fax of November 15, you note that in my letter of October 24 I stated that the PPC position could only be added to the faculty bargaining unit by agreement of the Association and the employer or through a petition filed with PERB. You state that “The facts I have presented do support the hiring of my position as one that SHOULD have been petitioned by one or both, the college and union for the purpose of formally adding my position” to the faculty bargaining unit. However, as discussed in my letter of October 24, the PPC position in which you were employed is outside the bargaining unit represented by the Shasta College Faculty Association.

As explained in my October 24 letter, the Association owes a duty of fair representation only with regard to bargaining unit positions. In reviewing your unfair practice charge, PERB is limited to a determination as to whether there has been a violation of a union’s duty of fair representation. Because the PPC position was not covered by the Association’s duty of fair representation, a prima facie violation has not been demonstrated.

Therefore, I am dismissing the charge based on this discussion and the facts and reasons contained in my October 24 letter.

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).)

Extension of Time

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

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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 _____
Bernard McMonigle
Regional Attorney

Attachment

cc: Alan Frey

Warning Letter

October 24, 2002

Daniel Wayne Sloan

Re: Daniel Wayne Sloan v. Shasta College Faculty Association
Unfair Practice Charge No. SA-CO-455-E
WARNING LETTER

Dear Mr. Sloan:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on . It was amended on April 22 and June 2. Daniel Wayne Sloan alleges that the Shasta College Faculty Association violated its duty of fair representation under the Educational Employment Relations Act (EERA)¹ when he was terminated as the Pollution Prevention Coordinator. The amended charge includes an allegation that the union did not properly represent him when he was denied summer and fall 2002 employment as an instructor. Investigation reveals the following.

FACTUAL BACKGROUND

You have worked for the Shasta- Tehama-Trinity Joint Community College District for several years as a part-time instructor. In May 2001, at the request of another instructor and Dean Ross Tomlin, you began working on a job description for a classification title Pollution Prevention Coordinator (PPC). It was envisioned that this would be a full-time position assigned to develop recycling and polluting control activities.

You began working in the PPC position in July 2001. Dean Tomlin told you that the District Board had approved your hiring. On August 29, 2001, you were introduced at a meeting of the District's Environmental Advisory Committee by Dean Tomlin as the new Pollution Control Coordinator.

Christine Flowers is a full-time faculty member at the District. She serves as chair of the Environmental Advisory Committee. She is also the Vice-President of the Shasta College Faculty Association. On October 18, 2001, Ms. Flowers sent you an e-mail requesting a summary of the grant proposals you were working on as the PPC. Sharon Lowry is the District's Dean of the School of Business. On October 19, she informed you that you would no longer be the Worksite Learning Coordinator. You believe that Ms. Flowers and Ms.

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.

Lowry were upset because a grant from the California Integrated Waste Management Board had been approved for a project of yours and not for a proposal of theirs.

The minutes of a union executive board meeting of August 21, 2001, states that Ms. Flowers “expressed her concern about the procedure implemented in the recent hiring of Dan Sloan for PPC. She stated that faculty hiring procedures were not followed as agreed upon in “shared-governance policies”. A motion passed to send a letter to the college president expressing concerns that your hiring as PPC was in violation of shared-governance policies and that an unfair practice had occurred.

In November 2001, you were asked by College President Doug Treadway to provide Ms. Flowers with copies of your grant proposals prior to their submission. On November 30 you e-mailed copies to her. Ms. Flowers responded with an e-mail that was sent to you and others, which contained several criticisms of your efforts as PPC. You contend that the e-mail was designed to harm you professionally. There were several more e-mail exchanges that day and the next between you and Ms. Flowers with copies to others.

On December 2, Dean Tomlin sent you an e-mail stating that he was very concerned about Ms. Flowers’ e-mail and its impact. In part, he stated, “I am VERY concerned with the direction this is heading. I thought it was clear to you that you were not to communicate with the other faculty on these issues without going through me.” You met with him the next day.

On December 17, you met with Dean Tomlin and Personnel Director Pat Demo. You were told that on September 12, 2001, the District Board had approved pay for the PPC position that was a lower rate of pay than had been stated in the PPC job description. You informed them that you would be seeking union assistance. Ms. Demo stated that the PPC position was not covered by union representation and thus you could not file a grievance.

Included with your charge is a copy of an e-mail to you from Dean Tomlin of December 29, 2001. He states that he needed to assign your office to another person. You state that this event marked the loss of your PPC position.

In December you contacted Association President Nick Rogers and asked to meet with him, you also asked for minutes of union representative meetings. On December 20, Rogers responded by e-mail and stated

I am not sure what you are appealing or dealing with. You are a part-time instructor. Your duties as the Pollution Control Coordinator are not of such a nature that the union represents you. If you have an issue with your teaching assignment we can represent you.

In December and January you continued to seek union assistance regarding issues with the PPC position. The union, through Nick Rogers took the position that the PPC position was not a faculty issue in which it could represent you.

In its response to your unfair practice charge, filed April 12, 2002, Association representative Alan Frey stated that the PPC position is not a position in the academic bargaining unit that the Faculty Association represents². Attached to that response was a memo from District Personnel Director Patricia Demo that states that the PPC position is a classified administrative position and is not an academic classification. With that memo was a copy of the authorization to hire you in a temporary PPC position effective July 16, 2001 to January 16, 2002.

On January 23, you received an e-mail from Sandra Lowry informing you that you were no longer scheduled to teach a summer course. She stated that she had overlooked a prior request by a permanent instructor, Bob Goggins. In late March, you contacted Goggins and he informed you that you had the "first right of refusal to teach this class". You forwarded this information to Ms. Lowry. On April 9, she sent you an e-mail that stated

In response to your e-mail on March 27 about BUAD 45, I talked to Bob Goggins. He indicated that he will not be teaching Buad 45 the summer. Since this class had been offered to you previously in December, I am again offering that class to you for summer 2002.

Ms. Lowry's e-mail stated that you would need to respond to her within 48 hours to confirm that you would be available to teach the class. She also stated that all classes in your discipline had been assigned for fall 2002. Ms. Lowry then discussed several "performance issues" which would result in you being evaluated for spring 2002.

Your amended charge of June 10, states that you filed two grievances against the college. You state that CTA representative Alan Frey and other union representatives initially offered assistance in completing the forms that were delayed by the union and the college. You also state that later "Alan Frey refused to help complete the forms after receiving a draft of them".

You also attached several memorandums between yourself and Alan Frey. On May 7, 2002, you sent Mr. Frey a "recap" of a conversation concerning two grievances. You stated that he told you that you could be fired for any reason including hair color, that he gave you the names and phone numbers for his supervisors, and that there was no protection in the union contract that would protect your right to teach in summer and fall 2002.

Mr. Frey responded on May 9 and stated that you had mischaracterized the conversation. Regarding your grievances, he stated that the District need not give you a reason for non-renewal and that part-time faculty have no right to a teaching assignment. He pointed out that there were no contractual protections for either the summer school position or the fall 2002 position. Mr. Frey stated that he had reviewed your two grievances, however, a "grievance" is an alleged violation of the collective bargaining agreement. He concluded that, with the grievances, you had not stated a contractual violation; he could find none.

²You were served a copy of the letter.

On May 13, you responded to Mr. Frey. You disagreed with several of the statements he had made in his letter of May 9. You stated that you had been requesting union assistance since December 3. You also informed him that in the future he should contact you only through your attorney.

With your charge, you have provided copies of two grievances, which you signed and dated May 7, 2002. In one, you state that the contract was violated when Sharon Lowry misled you and did not schedule you for summer school. The other grievance alleges that you were improperly terminated from teaching fall 2002. The section of the grievance forms which asks "Specific contract violation alleged (cite article and section)" is left blank on each.³

You have also supplied a copy of the grievance cover letter to Personnel Director Pat Demo stating that you are represented by a local attorney. It also states that Association representative Alan Frey had refused to find a contract section that had been violated and would allow the union to represent you in the matters.

DISCUSSION

You have alleged that by the actions of Association Vice President Flowers and the Association's refusal to represent you regarding your PPC issues, the union has violated its duty of fair representation.

The duty of fair representation is derived from and limited to the union's exclusive representation in bargaining and grievance handling for positions in the bargaining unit which it represents. Accordingly, PERB has held that the duty of fair representation under EERA is limited to contractually based remedies within the union's exclusive control. CSEA (Garcia) (2001) PERB Decision No. 1444 The duty does not extend to matters outside the contract; matters not covered by the bargaining relationship. Oakland Educators Association (McKeel) (2000) PERB Decision No. 1383.

As stated, the collective bargaining relationship extends only to those positions exclusively represented by a union. Therefore, for the Association's duty of fair representation to apply to the PPC position it must be established that the position is in the bargaining unit represented by the Shasta College Faculty Association.

Initially, it must be considered that both the Association and your employer assert that the PPC position is a classified administrative position that is not in the bargaining unit represented by the Association.

The collective bargaining agreement between the Association and the employer states in Article I that the bargaining unit consists of "all full-time and part-time regular or contract

³Specific contract sections that were violated are also not identified in this unfair practice charge.

academic employees”. Accordingly, the union represents only employees working in academic positions. You have established that in your position as a part-time instructor, you are in the bargaining unit represented by the Shasta College Faculty Association. Its duty of fair representation applies to that position.

With your original charge you submitted early drafts of the job description for the PPC position along with a District job bulletin giving an application deadline of December 10, 2001. That bulletin describes the job and states that the classification is “S-11 (Research Analyst)”. The classification of research analyst, which includes the PPC position, is not in the academic bargaining unit⁴. Because the PPC position is outside the bargaining unit represented by the Faculty Association, the duty of fair representation does not apply to that position.

You contend that your position as PPC was detrimentally affected by the actions of the Association. Association Vice-President Flowers distributed e-mails that damaged your chances of remaining in the PPC position. The Association Board sent a letter to the college president expressing concerns about the manner in which you were hired and your qualifications. The union did not represent you on PPC issues.

You allege that these actions were damaging and unfair to you as a member of the Faculty Association. However, the unfair practice charge before PERB is limited to a determination as to whether there has been a violation of the Association’s duty of fair representation⁵. For the reasons discussed, that duty does not apply to the PPC position and that allegation must be dismissed.

You have also alleged that the union failed to properly represent you with regard to summer and fall teaching positions. The Association did not pursue grievances on your behalf.

You have provided information that you told union representative Alan Frey that you had been fired from the summer position. You had additional discussions with him on the loss of the

⁴ You have also supplied a job description for the PPC position that you describe as the final job description. That document states that the position is in the classification “Range S-17 Project Coordinator” another classification which is not included in the academic bargaining unit represented by the Association.

You note that the job description contains references to interacting with students “thru academic and applied means”, assisting in developing curriculum and conducting “outreach and education”. However, such duties alone do not move a position in to the bargaining unit. That is accomplished by the agreement of a union and an employer or a petition by one of them to PERB. Such a determination by PERB would depend on whether the job primarily involved classroom instruction.

⁵ PERB has also held that a union may not discriminate against a member because of internal union activities such as running for union office. California State Employees Assn. (1999) PERB Decision No. 1368-S. However, this allegation provides no facts to support that theory.

teaching positions and he informed you that part-time instructors have no enforceable right to a teaching assignment. Such assignments are within the employer's discretion.

In the union's response to this unfair practice charge, Mr. Frey states that he has been informed that the position was made available to you. He also stated that there is no contractual right to a teaching position for part-time instructors. For this reason, the Association did not pursue a grievance on your behalf. As discussed earlier, he stated to you the same reasons for the Association not pursuing a grievance over the employer's failure to give you a teaching assignment.

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 Respondent's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations 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 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.]

In sum, PERB will not find that the duty of fair representation has been breached where a union has made an honest, non-arbitrary determination that a grievance lacks merit. United Teachers Los Angeles (2001) PERB Decision No. 1453.

Here, the Association determined that there was no contractual basis on which to pursue your non-appointment to teaching positions. Your charge does not provide facts that establish that this determination was without a rational basis or was not based on honest judgement. Nor do the facts demonstrate that the Association's position was discriminatory, motivated over the filing of an unfair practice charge regarding the PPC position. Accordingly, the allegation that

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the Association violated its duty by not pursuing grievances regarding the employer's failure to appoint you to teaching positions in summer and fall 2002 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 October 31, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernard McMonigle
Regional Attorney

BMC