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

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| ROBERT J. O'MALLEY,<br><br>Charging Party,<br><br>v.<br><br>CALIFORNIA NURSES ASSOCIATION,<br><br>Respondent. | Case No. SA-CO-20-H<br><br>PERB Decision No. 1607-H<br><br>March 18, 2004 |

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

Before Duncan, Chairman; 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 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 unilaterally returning agency fees collected from O'Malley and failing to follow the agency fee appeal procedure. O'Malley alleged that this conduct constituted a violation of HEERA section 3583.5 and PERB Regulations 32994(a), (b), 32995(b), and 32997.[2]

Based upon review of the record, including the unfair practice charge, the amended charge, the warning and dismissal letters, and O'Malley's appeal, the Board affirms the Board agent's dismissal consistent with the discussion below.

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

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

## BACKGROUND

O'Malley alleges that CNA sent him a Hudson[3] agency fee notice in May 2002. He sent a protest letter dated June 6, 2002 to CNA. O'Malley filed an unfair practice charge in Case No. SA-CO-15-H, alleging that CNA did not permit O'Malley to challenge CNA's agency fee calculations. O'Malley later withdrew the charge when CNA agreed to proceed to arbitration on the challenge. In July 2003, CNA returned in full the agency fees collected from him for fiscal year 2002-2003. During the August 29, 2003 arbitration hearing, CNA challenged O'Malley's standing to participate in the arbitration, citing Los Rios College Federation of Teachers, Local 2279, CFT/AFT (Deglow) (1992) PERB Decision No. 950 (Los Rios). As a result, according to O'Malley, the arbitrator excluded him from the arbitration hearing. O'Malley contends that even though CNA returned the fees, he still has standing to challenge the calculations. This is because CNA collected the fees for the entire year in question and refunded them only after the year ended. O'Malley further alleges that amendments to HEERA and the Educational Employment Relations Act (EERA),[4] in SB 645 and SB 1960, respectively, enacted during the 1999-2000 legislative session, require either membership in a recognized employee organization or payment of fair share service fees as a condition of employment; and, he is concerned that these amendments require his termination from employment with the University of California, Davis Medical Center (University). In the warning letter, the Board agent relied upon Los Rios to conclude that where the exclusive representative refunds in full the agency fees, the objecting nonmember lacks standing to challenge the fees. O'Malley states that because of the amendments to HEERA and EERA, he

[3]The reference to "Hudson" pertains to the U.S. Supreme Court's decision in Chicago Teachers Association v. Hudson (1986) 475 U.S. 292 [106 S. Ct. 1066].

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

lacks any option to pay agency fees and must pay them to retain his employment with the University. Therefore, CNA violated HEERA section 3583.5 by returning his agency fees and not proceeding with the agency fee appeal procedure.

The Board agent dismissed the charge for failure to state a prima facie case.

O'MALLEY'S APPEAL

O'Malley filed a timely appeal on September 27, 2003. He reiterates his argument that HEERA section 3583.5(a)(1) requires that he either join CNA or pay fair share fees as a condition of employment. O'Malley disputes the Board agent's interpretation that nothing precludes CNA from refunding agency fees collected from nonmembers. Even if the Board agrees with the Board agent, O'Malley asserts that once agency fees are collected, he should be allowed to challenge the amount of agency fees.

O'Malley further contends that Los Rios does not apply to his charge. In Los Rios, the union refunded agency fees deducted on certain dates and then did not collect any more fees. In contrast, in O'Malley's case, CNA collected agency fees for all of fiscal year 2002-2003 and did not refund the fees until July following the end of that fiscal year. He again states that once fees are collected, he should have the right to challenge them. O'Malley argues that the dismissal letter did not rebut any of these facts.

O'Malley next asserts that there are no facts indicating CNA's improper expenditure of his agency fees. He states that no documentation was provided indicating that CNA in fact put his agency fees in an escrow account.

O'Malley finally argues that regardless of whether CNA failed to place the fees in escrow or instead, placed the fees in escrow and refunded them, CNA violated PERB Regulation 32995.

On January 21, 2004, O'Malley filed a supplement to his appeal. This document was received three months after the appeal was due and provided new information regarding CNA's escrow account and corroboration for the refund of O'Malley's agency fees. (PERB Reg. 32635.)

## DISCUSSION

O'Malley untimely filed a supplement to his appeal on January 21, 2004. Under PERB Regulation 32136, a late filing may only be excused for good cause. O'Malley has not provided any facts that would excuse the late filing. In addition, new supporting evidence may not be raised absent good cause. (PERB Reg. 32635(b).) O'Malley has failed to allege any facts showing good cause to raise new supporting evidence on appeal and therefore, the supplement will not be considered.

With regard to the original appeal, we find that O'Malley has failed to state a prima facie violation of HEERA section 3583.5 or the agency fee regulations. HEERA 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.
> (Emphasis added.)

O'Malley is concerned that since CNA refunded his agency fees, the underlined provision would require termination of his employment with the University. O'Malley has not cited any legislative history that would support such an interpretation of this section. However, the parallel provision under EERA section 3540.1(i)(2),[5] has been interpreted by the California Supreme Court not to require the termination of nonmembers for failing to pay agency fees as required by a collective bargaining agreement. (San Lorenzo Education Assn. v. Wilson (1982) 32 Cal. 3d 841, 847 [187 Cal. Rptr. 432].) Instead, the court opined that a civil action is the appropriate mechanism for enforcing an agency shop obligation, and the union and the employer should otherwise be allowed to choose an appropriate remedy. (Id.) Indeed, in the instant case, CNA voluntarily refunded O'Malley's fees and there is no indication in the charge that either CNA or the University have any interest in terminating O'Malley's employment.

Next, O'Malley contends that although CNA has refunded his agency fees, he should still have the right to challenge the amount of the fees to ensure that they were not spent on nonchargeable expenditures while still held by CNA. PERB Regulation 32992 requires that O'Malley exhaust the Agency Fee Appeal Procedure in objecting to collected fees. O'Malley's objections were submitted to arbitration under CNA's agency fee appeal

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[5]EERA section 3540.1(i)(2) provides, in part:

> As used in this chapter:
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> (i) 'Organizational security' is within the scope of representation, and means either of the following:
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> (2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first.

procedure. According to O'Malley, the arbitrator ruled that O'Malley lacked standing to participate in the arbitration proceeding because CNA refunded all the collected fees.

Generally, the Board will defer to an arbitrator's award so long as: (1) the arbitration proceedings were fair and regular, and (2) the decision of the arbitrator is not clearly repugnant to the purposes of the Act. (California Faculty Association (Malamud) (2002) PERB Decision No. 1482-H, citing standard set forth in ABC Federation of Teachers, AFT Local 2317 (Murray, et al.) (1998) PERB Decision No. 1295.)

O'Malley has not alleged sufficient facts showing that the arbitration proceedings were unfair and procedurally defective.

We further find that O'Malley has not provided sufficient information to prove the arbitrator's decision repugnant to HEERA. The test for repugnancy was ultimately decided by the National Labor Relations Board in Inland Steel Company (1982) 263 NLRB 1091 [111 LRRM 1193]:

> The test of repugnancy under Spielberg[6] is not whether the Board would have reached the same result as an arbitrator, but whether the arbitrator's award is palpably wrong as a matter of law.

This test was affirmed in Olin Corp. (1984) 268 NLRB 573 [115 LRRM 1056], which defined "palpably wrong" as "not susceptible to an interpretation consistent with the Act." This standard was adopted by the Board in Yuba City Unified School District (1995) PERB Decision No. 1095.

O'Malley asserts that after CNA refunded the collected agency fees, at CNA's motion, the arbitrator excluded him from the arbitration proceeding. O'Malley did not provide a copy of the arbitrator's decision for review, only a sentence summarizing the ruling. O'Malley then cites and distinguishes Los Rios in support of his claim that despite CNA's full refund of the

[6]Spielberg Mfg. Co. (1955) 112 NLRB 1080 [36 LRRM 1152].

collected fees, O'Malley is entitled to have his challenge heard. According to O'Malley, in Los Rios, the union quickly refunded the challenged fees; whereas, in the instant matter, CNA waited until one month before the arbitration proceeding to refund the fees. We find that the principles of Los Rios apply. Citing with approval a non-precedential Board decision, the Board in Los Rios reasoned that:

> [B]ecause the fees had been returned, there was no real remedy that PERB could afford the charging parties that they had not already received. As the ALJ stated, 'since the charging parties in this case have suffered no harm, nor do they have any potential for any harm, they have no standing to challenge the union's refusal to provide them with arbitration.'
> (Warning letter pp. 2-3, emphasis added.)

Once CNA refunded the collected fees in full to O'Malley, CNA could not use the fees in any way, let alone wrongfully use them.[7] There is no possibility for harm to O'Malley that the Board could remedy. To hold otherwise would lead to an absurd result: that individuals may challenge the use of funds no longer in the possession of the exclusive representative or of funds held by the exclusive representative but collected from other employees.[8] Similarly, O'Malley claims that CNA violated PERB's agency fee regulations (PERB Regs. 32990 – 32997) when it refunded in full the collected agency fees. Those regulations presume possession of the collected fees by either the exclusive representative or deposit in an escrow

[7]O'Malley has not alleged that he did not receive interest with the full refund of agency fees.

[8]O'Malley may not assert agency fee objections on behalf of other unit employees. The courts have historically held that the individual agency fee payer has the burden to challenge the use of funds collected from him/her and held by the exclusive representative. (International Assn. of Machinists v. Street (1961) 361 U.S. 740, 774 [81 S. Ct. 1784]; Railway Clerks v. Allen (1963) 373 U.S. 113, 119; Cumero v. Public Employment Relations Bd. (1989) 49 Cal. 3d 575, 590 [262 Cal.Rptr. 46].) O'Malley cannot and does not claim to object to CNA's use of funds collected from other nonmembers who may believe the expenditures to be a valid use of those funds by CNA. (Id.)

account pursuant to PERB Regulation 32995. Any other interpretation of those regulations would be unreasonable as described above.

We therefore find that the arbitrator's award is not "palpably wrong," i.e., not repugnant to HEERA. In light of the above discussion, we conclude that the charge does not state a prima facie case and affirm the Board agent's dismissal.

ORDER

The unfair practice charge in Case No. SA-CO-20-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.