

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PETER HEIN,

Charging Party,

v.

SEIU LOCAL 790,

August

Respondent.

Case No. SF-CO-642-E

PERB Decision No. 1677

20, 2004

Appearance: Peter Hein, on his own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Peter Hein (Hein) from a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged a violation of the duty of fair representation by SEIU Local 790 (Local 790). The Board agent dismissed the charge for timeliness as to the conduct alleged in May 2003 and for failure to state a prima facie case as to the other charges under Educational Employment Relations Act (EERA)¹ section 3544.9.

The Board has reviewed the entire record in this matter including the unfair practice charge, warning and dismissal letters, and Hein's appeal. The Board finds the warning and dismissal letters to be without prejudicial error and adopts them as the decision of the Board itself.

¹EERA is codified at Government Code section 3540, et seq. Unless otherwise noted, all statutory references herein are to the Government Code.

DISCUSSION

Hein has alleged a violation of the duty of fair representation by the exclusive representative. He cites incidents of being questioned by his representative at a disciplinary meeting, lack of proper notification of a promotional exam, allegedly violating the collective bargaining agreement and civil service rules, and an e-mail about him. There was also an allegation related to a newly instituted sign-in policy at one campus library.

None of the allegations, individually or in totality, rise to the level of a breach of the duty of fair representation.

Hein has alleged that the exclusive representative denied him the right to fair representation guaranteed by EERA section 3544.9 and thereby violated Section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Unified District Teachers Association. CTA/NEA (Xing) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258 (UTLA (Collins))). 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 UTLA (Collins), PERB 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.]

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. (Dism. letter, p. 5.)

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 rationale basis or devoid of honest judgment. (Emphasis added.)' Reed District Teachers Association, CTA/NEA (Reves) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

There are no cases indicating it was arbitrary or unlawful for the union representative to ask questions of a union member in a disciplinary meeting. No facts were presented that indicated Local 790 caused Hein to be reprimanded. An exclusive representative does not owe a duty to members in a forum over which the union does not control the means to a particular remedy (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S). Local 790 was not required to represent Hein at the Civil Service Commission or in an Americans with Disabilities Act action.

The e-mail inadvertently sent to Hein may have been insensitive but Hein does not include any facts to indicate that he was treated differently by Local 790 because he filed a complaint against the president of Local 790.

Further, there is no authority that requires a union to inform an employee of a promotional exam and therefore this allegation is also dismissed.

One allegation is not timely filed under EERA. The alleged incident occurred in May 2003 and the charge was filed on March 15, 2004, and so the merits were not reached.

ORDER

The unfair practice charge filed in Case No. SF-CO-642-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



May 20, 2004

Peter Hein

Re: Peter Hein v. SEIU Local 790
Unfair Practice Charge No. SF-CO-642-E
DISMISSAL LETTER

Dear Mr. Hein:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 15, 2004. Peter Hein alleges that the SEIU Local 790 violated the Educational Employment Relations Act (EERA)¹ by failing to file a complaint with the Civil Service Commission and failing to file a grievance over a contract violation.

I indicated to you in my attached letter dated May 3, 2004, 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 May 10, 2004, the charge would be dismissed. On May 6, 2004,¹ extended this deadline to May 19, 2004.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my May 3, 2004 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.

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.

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on 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

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.

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May 20, 2004
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Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: SEIU Local 790

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



May 3, 2004

Peter Hein

Re: Peter Hein v. SEIU Local 790
Unfair Practice Charge No. SF-CO-642-E
WARNING LETTER

Dear Mr. Hein:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 15, 2004. Peter Hein alleges that the SEIU Local 790 violated the Educational Employment Relations Act (EERA)¹ by failing to file a complaint with the Civil Service Commission and failing to file a grievance over a contract violation.

Charging Party is a Library Assistant II and is employed by the San Francisco Community College District. As such, Charging Party is exclusively represented by SEIU Local 790. Local 790 and the District are parties to a collective bargaining agreement that expired on June 30, 2003. With regard to Job Postings and Transfers, Article 16 of the Agreement provides as follows:

A. The District shall post at its Gough Street facility and on a main bulletin board at the Phelan campus and each campus to which the District has assigned a Campus Dean examination announcements for full-time permanent positions.... The Union acknowledges that the District's only obligation under this section is to make a good faith effort to secure and post such information, and that the District cannot be held legally responsible for inadvertent errors by either the Civil Service Commission, or District employees who are responsible for processing the information or posting

* * * * *

D. Notice of Locations of Bulletin Boards:

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.

Within 120 days of the ratification date of this Agreement, the District will mail, via campus mail, to each classified employee a notice detailing the bulletin boards on which classified job announcements are posted. The Union acknowledges that the District's only obligation under this section is to make a good faith effort to mail such information, and that the District cannot be held legally responsible for inadvertent errors by District employees who are responsible for mailing.

Additionally, the San Francisco Civil Service Commission has specific rules and procedures for promotional examinations. These provisions are found at Rule 110 of the Commission's rules and regulations.

On October 20, 2003, Charging Party was called into a disciplinary meeting with Library Administrator Rita Jones. During this meeting, Charging Party was represented by two Local 790 representatives. Charging Party asserts that during the meeting, his union representative asked him questions about the incident, which ultimately led to a disciplinary letter.

In February 2004, Charging Party complained to Local 790 representatives that he was not notified of a promotional examination in violation of Civil Service Rules and Article 16.D of the parties' agreement. Charging Party contends Local 790 President, David Gallerani, was obligated to provide him this information and failed to do so. Additionally, Charging Party requested Local 790 file a grievance over this issue.

Also in February 2004, Charging Party contends he requested Local 790 file a grievance over an alleged Americans with Disabilities Act violation. Additionally, Charging Party requested the union file a grievance over a sign-in policy at one campus library. Further, Charging Party asserts the union failed to file a grievance over a reprimand Charging Party received in May 2003.

Lastly, Charging Party contends the union discriminated against him by noting in an electronic mail message that Charging Party had filed a complaint against the union President. The mail message instructs Charging Party's union steward to proceed with caution in handling this matter and suggests Charging Party's complaint be assigned to another union representative. It is unclear how Charging Party was adversely affected by such statements. Moreover, Local 790's statements merely indicate they were aware of Charging Party's complaint and noted the sensitive nature thereof.

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

I. Statute of Limitations

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing

of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed, (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

Charging Party asserts the union failed to represent him when he received a reprimand in May 2003. As this refusal took place more than six months prior to the filing of the charge, the allegation must be dismissed as untimely.

II. Duty of Fair Representation

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). 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:

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 (Reves) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

First, Charging Party contends the union breached its duty of fair representation by asking him questions during a disciplinary meeting. It is unclear why such an action is considered arbitrary and it is unclear why Charging Party believes this action to be unlawful. My research failed to uncover any cases where a union representative was found to have violated the Act by asking questions of an employee. Moreover, as two union representatives were present at this meeting, the meeting was clearly investigatory and/or disciplinary in nature. Finally, there are no facts supporting the contention that the union caused Charging Party to be reprimanded. As such, this allegation fails to state a prima facie case.

Charging Party also contends the union failed to file a Civil Service complaint against the District for alleged violations of Rule 110 and failed to assist him with an ADA complaint. However, an exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) Accordingly, the duty of fair representation does not attach to an exclusive representative in extra-contractual proceedings before agencies such as Department of Fair Employment and Housing or the State Personnel Board. (California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S; California State Employees Association (Carrillo) (1997) PERB Decision No. 1199-S.) As such, Local 790 is not obligated to represent you in front of the Civil Service Commission and is not required to assist you with your ADA complaint. As they are not obligated to represent you, their failure to do so cannot violate the EERA.

With regard to the alleged contract violation, Charging Party contends he requested the union file a grievance over the District's failure to mail out the location of bulletin boards and their failure to post promotional opportunities. However, the parties' agreement clearly states the District cannot be held legally liable for such failures. Moreover, many of these alleged violations occurred well outside of the grievance timelines. As a union is not obligated to pursue a grievance with a slim chance of success, their failure to file is not unlawful. Finally, as the District cannot be held liable for violations of those provisions, the union's failure to file a grievance is not a violation of the EERA.

Lastly, Charging Party contends the union's mention of his complaint against the President violates the duty of fair representation. However, there are no facts to indicate that Charging Party is being denied representation because of his complaint. Moreover, there is no indication that Charging Party has been treated differently because of the complaint. As such, this allegation must 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

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May 3, 2004

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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 10, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR