

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ADRIAN MAASKANT,

Charging Party,

v.

KERN HIGH FACULTY ASSOCIATION,
CTA/NEA,

Respondent.

Case No. LA-CO-1168-E

PERB Decision No. 1834

April 10, 2006

Appearances: Adrian Maaskant, on his own behalf; California Teachers Association by Diane Ross, Attorney, for Kern High Faculty Association, CTA/NEA.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (Board) on appeal by Adrian Maaskant (Maaskant) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Kern High Faculty Association, CTA/NEA violated the Educational Employment Relations Act (EERA)¹ Sections 3543(a), 3543.2, 3543.6(b), 3544.9, 3546(a), 3545(f) and 3546.5 by: (1) withholding non-chargeable fees², (2) withholding information regarding collective bargaining, (3) excluding Maaskant from providing input and voting on the collective bargaining agreement, and (4) improperly categorizing non-chargeable expenditures³, thereby violating the duty of fair representation.

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

²Maaskant stipulated that his allegation regarding withholding of non-chargeable fees was time-barred. He did not appeal the subsequent dismissal of this allegation.

³The Board agent placed the allegation regarding improper categorization of non-chargeable expenses in abeyance pending the outcome of the arbitration procedure. On

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters and Maaskant's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-1168-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member McKeag joined in this Decision.

January 10, 2005, Maaskant submitted a letter withdrawing this allegation. The Board agent issued a notice of withdrawal of allegation without prejudice on January 14, 2005.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-3008
Fax: (213) 736-4901



November 2, 2004

Adrian Pieter Maaskant
21605 Belmont Drive
Tehachapi, CA 93561

Re: Adrian Maaskant v. Kern High Faculty Association, CTA/NEA
Unfair Practice Charge No. LA-CO-1168-E
DISMISSAL LETTER

Dear Mr. Maaskant:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 12, 2004. You allege that the Kern High Faculty Association, CTA/NEA (CTA) violated the Educational Employment Relations Act (EERA)¹ at Government Code sections 3543 (a), 3543.2, 3543.6(b), 3544.9, 3546(a), 3545 (f), and 3546.5 by (1) withholding non-chargeable fees, (2) withholding information regarding collective bargaining, (3) excluding you from voting and participating in the bargaining process, and (4) improperly categorizing non-chargeable expenditures, thereby violating the duty of fair representation.

Robert M. Hurwitz sent you two letters on August 2, 2004. The Abeyance Letter indicated that the allegation that CTA improperly categorized non-chargeable expenses was currently the subject of an arbitration between the you and CTA and would therefore be placed in abeyance. You informed me by email on October 7, 2004 that the arbitrators decision will be delayed until at least the end of October. Thus, the allegation regarding improper categorization of non-chargeable expenses will remain in abeyance while the arbitration proceeds.

The other letter sent by Mr. Hurwitz on August 2, 2004, was a Warning Letter (attached herein) and it indicated to you that the above-referenced allegations 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 August 11, 2004, the charge would be dismissed. The charge was transferred to me on August 9, 2004 and I extended the deadline to amend to August 30. You filed your First Amended Charge on August 30, 2004.

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.

Mr. Hurwitz indicated in his Warning Letter that the allegation that CTA improperly withheld fees was time barred. In your First Amended Charge you stipulated to that fact. Thus the allegation regarding withholding of fees will be dismissed. The two remaining allegations, CTA's alleged withholding of information and exclusion of you from voting and participating in the bargaining process are discussed below.

Withholding of Information

You stated that CTA did not place a notification of the ratification meeting in your school mail box and that their failure to do so demonstrates their conduct was arbitrary, discriminatory or in bad faith. In support of your allegation you stated that CTA representative Julie Gibson told you she had been instructed by CTA not to give you any information. You stated in your October 30, 2004 email to me that you were entitled to the notice of the ratification meeting because it pertains to negotiations which are chargeable. You stated that you should get the full benefit of what you pay for which includes the same information delivered to you in the same manner it is delivered to members.

Oxnard Educators Association (1988) PERB Decision No. 681, discussed in Mr. Hurwitz's Warning Letter, held that notice of the terms of a proposed tentative agreement and an opportunity to provide input during a ratification meeting was sufficient to meet a union's duty of fair representation. In San Juan Teachers Association (1999) PERB Decision No. 1322, the charging parties alleged the Association failed to communicate with and seek input from teachers before reaching agreement on the provisions affecting the teachers. However, the charging parties did learn of the proposed changes and met with Association officials to express their concerns prior to the ratification vote. Thus, the Board adopted the Board Agent's finding that the charging parties failed to establish the Association's conduct was arbitrary, discriminatory or in bad faith.

Here, similar to the facts in San Juan Teachers Association, you did learn of the ratification meeting and had the opportunity to provide input. Even though you stated you learned of the meeting by "surreptitious distribution" of the notification flyer by another staff member, you also acknowledged that CTA representative Julie Gibson offered you a copy of the notice at issue but you refused to accept it. Moreover, communications like those contained in the notification flyer are available to members and non-members alike through the internet.² Thus, you fail to show that you were denied notice or an opportunity to be heard.

Exclusion From Voting

You stated that you were not allowed to participate in the vote to ratify the collective bargaining agreement in October 2003. Mr. Hurwitz's Warning Letter informed you that a union may exclude non-members from voting as long as the union provides non-members with

² You state in your amended charge that, contrary to the CTA's assertion, there is not a CTA binder containing flyers in the staff lounge.

an opportunity to communicate their views. (El Centro Elementary Teachers Association (1982) PERB Decision No. 232.) In your amended charge you assert that such a practice is discriminatory and that PERB should "revisit" the issue. Regardless, there was a survey available to you and there were question and answer sessions open to you prior to voting. Thus, you were not denied notice or opportunity to express your viewpoints. And, since non-members are not entitled to vote, your charge fails to state facts sufficient to demonstrate a prima facie violation.

Therefore, I am dismissing the charge based on the facts and reasons contained in herein and in Mr. Hurwitz's August 2, 2004 letter.

Right to Appeal

Pursuant to PERB Regulations,³ 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. (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

³ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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.)

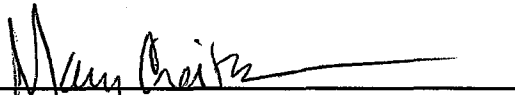
Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By


Mary Creith
Regional Attorney

Attachment

cc: Diane Ross, Staff Attorney, California Teachers Association

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
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August 2, 2004

Adrian Pieter Maaskant
21605 Belmont Drive
Tehachapi, CA 93561

Re: Adrian Maaskant v. Kern High Faculty Association, CTA/NEA
Unfair Practice Charge No. LA-CO-1168-E
PARTIAL WARNING LETTER

Dear Mr. Maaskant:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 12, 2004. Adrian Maaskant alleges that the Kern High Faculty Association, CTA/NEA (Association) violated the Educational Employment Relations Act (EERA)¹ by withholding non-chargeable fees, withholding information on collective bargaining, excluding non-members from providing input and voting on the collective bargaining agreement, and improperly categorizing non-chargeable expenditures, thereby violating the duty of fair representation.

Mr. Maaskant is an employee of the Kern High School District (District). The Association is the exclusive representative of the bargaining unit. Mr. Maaskant is a fee payer and is not a member of the Association.

On August 8, 2003, Mr. Maaskant received a letter from the Association that gave non-Association members the option of paying the agency fee either in full or through monthly paycheck deductions. Mr. Maaskant paid the fee in full on September 26, 2003.

On or about October 15, 2003, Mr. Maaskant realized that he was not receiving updates on collective bargaining. Ms. Julie Gibson, the Association's site representative, told Mr. Maaskant that she was instructed not to give him information. Mr. Maaskant sent Ms. Gibson an email requesting a list of the withheld documents, and she told him that they were about collective bargaining negotiations. On October 16, 2003, Mr. Maaskant sent a letter to the Association objecting to the withholding of information. The Association responded on October 22 and told Mr. Maaskant to "be assured that as a fee payer you are receiving all the services we are required to provide."

The Association notes that only one document was produced during the relevant period. Mr. Maaskant requested a copy from Ms. Gibson, and she gave him her personal copy.

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.

Additionally, the document was posted on the Association's website and it was placed in a binder in the staff lounge, both of which Mr. Maaskant had access to.

The Association surveyed the bargaining priorities of all bargaining unit members before submitting an initial proposed agreement to the District. At the time of the survey, Mr. Maaskant was a member of the Association.

The Association conducted voting to ratify the collective bargaining agreement on October 20 and October 22, 2003. The Association distributed a flyer to each bargaining unit member's mailbox that announced that the sessions would begin with "a summary of contract changes and question/answer session [sic]." The flyer also announced that "[v]oting is open to all members of the Kern High Faculty Association who are also members of the bargaining unit."

In October 2003, Mr. Maaskant received the Association's financial statements. The financial statements account for the Association's chargeable and non-chargeable expenditures. Mr. Maaskant contests the categorization of expenditures, including but not limited to the following line-items of the Association's financial statements: Governance, Training, Information and Development, Communications, Human Rights, Instruction and Professional Development, Research and Finance, Regional Services, Accounting, Central Services and Human Resources Management, Integrated Systems and Strategies, Management, Crisis Assistance Fund, Occupancy/Properties, Capital Expenditures/Depreciation, Debt Reduction and Service, Payroll, Staff Travel and Expenses and Office Expenses.

Mr. Maaskant alleges that the Association has committed four violations of the duty of fair representation by (1) withholding fees, (2) withholding information, (3) excluding Mr. Maaskant from voting and participating in the bargaining process, and (4) improperly categorizing non-chargeable expenditures.

In its letter dated April 16, 2004, the Association claims that the first allegation is time barred because Mr. Maaskant became aware of the situation on August 8, 2003, and he filed the claim on March 12, 2004, more than six months later. In a letter dated April 26, 2004, Mr. Maaskant writes, "CTA begins its discourse on my first allegation with the notation that this charge is time barred. I concur."

Also in its letter dated April 16, 2004, the Association notes that the fourth allegation is currently in arbitration in accordance with PERB Regulation 32994(a) and should be held in abeyance. In his letter dated April 26, 2004, Mr. Maaskant writes, "I concur with CTA's position that this portion of the Unfair Labor Practice Charge be held in abeyance until the arbitration procedure is exhausted."

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.)

For the first allegation, Mr. Maaskant charges that he either should have received an immediate rebate or had the option of only paying the amount charged to fee-payers. In other words, Mr. Maaskant objects to the Association's practice of initially charging fee-payers the full amount and later issuing a rebate.

Mr. Maaskant became aware of the conduct underlying the charge by the Association's letter dated August 8, 2003. The unfair practice charge was filed on March 12, 2004, more than seven months after Mr. Maaskant became aware of the conduct. In his letter dated April 26, 2004, Mr. Maaskant admits that he filed the charge after the statutory period expired. Therefore, Mr. Maaskant has not satisfied his burden of alleging that the charge was timely filed.

The second allegation charges that the Association violated the duty of fair representation by excluding non-members from receiving collective bargaining information. In order to state a prima facie violation of the duty of fair representation, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. It is not a violation for a union to withhold information as long as there is notice and an opportunity to be heard before a collective bargaining agreement becomes final and binding. (Oxnard Educators Association (Gorcey) (1988) PERB Decision No. 681.)

Mr. Maaskant had multiple opportunities to be heard before the collective bargaining agreement became final and binding. First, the Association distributed a survey to all bargaining unit members before submitting an initial proposal. Second, the Association held two ratification meetings that included question and answer sessions. Although voting was restricted to Association members, the question and answer sessions were open to all bargaining unit members. Moreover, the Association publicized the session by placing a flyer in each bargaining unit member's mailbox. Therefore, because the Association gave Mr. Maaskant notice and the opportunity to be heard at least three times, Mr. Maaskant has not sufficiently alleged that the Association improperly withheld information.

In his third allegation, Mr. Maaskant charges that the Association violated the duty of fair representation by excluding non-members from providing input and voting. In order to state a prima facie violation of the duty of fair representation, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. A union violates its duty if non-members are left completely uninformed about the status of negotiations or if they are not provided an opportunity to express their viewpoints. (Fontana Teachers Association (1984) PERB Decision No. 416.) A union may exclude non-members from voting as long as the union provides them with an opportunity to communicate their views. (El Centro Elementary Teachers Association (1982) PERB Decision No. 232.)

Mr. Maaskant has not properly alleged that he was completely uninformed about the status of negotiations or that he lacked an opportunity to express his viewpoints. The Association conducted a survey of all bargaining unit members before submitting an initial proposal. Additionally, Mr. Maaskant had access to information through the Association's website and through a binder that was kept in the staff lounge. He was also given one document by Ms. Gibson, the Association's site representative.

Similarly, Mr. Maaskant has not adequately alleged that he lacked an opportunity to communicate his views. Mr. Maaskant had the opportunity to communicate his views by completing and returning the Association's survey. He also had the opportunity to attend both ratification meetings and participate in the question and answer sessions. Therefore, because Mr. Maaskant was not completely uninformed and he had the opportunity to communicate his views, Mr. Maaskant has not properly alleged that the Association violated its duty of fair representation by restricting voting to members.

The fourth allegation relates to the categorization of chargeable expenditures. By his letter dated April 26, 2004, Mr. Maaskant agrees to place this allegation in abeyance because the parties are currently in arbitration over the matter. This allegation was placed in abeyance by a separate letter dated August 2, 2004.

For these reasons, the allegations that the Association violated the duty of fair representation by (1) withholding fees, (2) withholding information, and (3) excluding non-members from voting and participating in the bargaining process, as presently written, do 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 August 11, 2004, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,



Robert M. Hurwitz
Board Agent

RMH