STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ADRIAN PIETER MAASKANT, Charging Party, v. KERN HIGH FACULTY ASSOCIATION, CTA/NEA, Respondent.	Case No. LA-CO-1184-E PERB Decision No. 1844 May 19, 2006

Appearances: Adrian Pieter 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

McKEAG, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Adrian Pieter 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 (Association or CTA) violated the Educational Employment Relations Act (EERA)[1] by: (1) requiring Maaskant to pay a full lump-sum agency fee, rather than an amount that equaled the agency fee less the non-chargeable expenditures; and (2) engaging in unlawful discrimination against Maaskant by selectively offering to him alone, and not any other agency fee payers, the option of making a lump-sum agency fee payment. Maaskant alleged this conduct constituted violations of EERA sections 3546(a) and 3543.6(b).

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

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the Association's position statement, the warning and dismissal letters, Maaskant's appeal and the Association's response. We find that Maaskant, although he had standing, failed to state a prima facie case regarding the alleged violations of Section 3543.6(b). Further, with regard to the discrimination allegation, we find the Board agent's analysis to be free of prejudicial error, and adopt those portions of the warning and dismissal letters as a decision of the Board itself. Accordingly, we sustain the dismissal of the instant unfair practice charge.

BACKGROUND

Maaskant is a teacher employed by the Kern High School District (District). His exclusive representative is CTA. On August 9, 2004, CTA sent a letter to Maaskant that provided as follows:

> Although not required by law, we have decided to accommodate your complaint about paying nonchargeable fees in your lump sum agency fee payment. If you are going to pay your agency fee in a lump sum again this year, and if you indicate that you wish a refund of all fees that are not chargeable to objecting fee payers under State and Federal law, you may pay the lump sum minus the chargeable amount. Please let us know if this is how you wish to proceed and we will inform you of the chargeable amount as soon as we have that information.

Maaskant did not respond to this letter.

On August 12, 2004, the Association sent a letter to non-members, including Maaskant, stating that non-members could pay a fee equal to the unified dues of $770.00 within thirty (30) days, or, if the lump sum was not paid, the District would deduct $77.00 per month for ten (10) months. The letter also informed non-members that they had a right to rebate for non-chargeable fees and that such rebate would be mailed separately.

On August 25, 2004, Maaskant went to the CTA offices to pay his fees. The employees working in the office, however, did not know the amount of the chargeable fee. Consequently, Maaskant voluntarily provided the Association with a check for $770.00, the full amount of the dues. On the face of the check, Maaskant wrote: "[r]equest that undisputed Agency Fee rebate be deducted DENIED." The Association neither cashed nor returned the check. Additionally, the Association did not make monthly deductions from Maaskant's paycheck.

DISCUSSION

The Board agent determined Maaskant did not have standing to challenge the Association's practice of collecting agency fees and later rebating non-chargeable expenses because the Association did not cash Maaskant's agency fee check. The warning letter explained that "when a union has not collected fees from an agency fee payer, that nonmember has no standing to challenge the use or amount of fees."

In his appeal, Maaskant argued that the Association collected his fees when they accepted his check. According to Maaskant, since the Association failed to return his check, they accepted his payment, and, therefore, he has standing to pursue his charge regarding the Association's agency fee practices. For the reasons set forth below, we believe Maaskant had standing to pursue his claim.

Standing

The Board has ruled that exclusive representatives are under no obligation to accept agency fees. Indeed, in Los Rios College Federation of Teachers, Local 2279, CFT/AFT (Deglow) (1992) PERB Decision No. 950, the Board allowed a union to refund agency fees to an agency fee objector, and subsequently refuse to arbitrate an agency fee dispute based on lack of standing.

In California Nurses Association (O'Malley) (2004) PERB Decision No. 1673-H (CNA (O'Malley)), the union took active measures to refund the fees collected from an agency fee payer. Based on the actions by the union, the Board ruled that the employee did not have standing to assert his claim. In California State Employees Association (Sarca) (2006) PERB Decision No. 1813-H, the union refunded the employee's 2003/2004 fees and aggressively refused to accept the employee's 2004/2005 fees. Again, as in CNA (O'Malley), the Board ruled that the employee did not have standing to assert his claim.

In each of these cases, the union took an affirmative act to either refund the fees or refuse to collect the fees. Thus, the test for standing is whether the union accepted an employee's agency fee payment. In this case, there is nothing in the record to support the proposition that the Association did not intend to accept fees from Maaskant. Rather, the Association held, but did not cash, the check.

Once a union collects an agency fee payment, it is presumed that the union has accepted the payment and the employee has standing to challenge the fees. In order to dispossess an employee of standing, a union must take an affirmative act to completely relieve the employee of agency fee payer status. Said another way, this presumption may be defeated if the union takes such an affirmative act. Since no such act occurred in this case, Maaskant has standing.

Lump-Sum Payments of Fees

In his appeal, Maaskant argues that the Association is prohibited from collecting the entire amount of the union dues and then later rebate the non-chargeable fees. However, the Association's procedure of initially collecting the entire annual amount of dues and later rebating the non-chargeable expenses with interest approximately two (2) months later has been approved by both this Board and the Ninth Circuit Court of Appeals. (Grunwald v.

San Bernardino City Unified School Dist. (9th Cir. 1990) 994 F.2d 1370 [143 LRRM 2305]; San Ramon Valley Education Association, CTA/NEA (Abbot and Cameron) (1990) PERB Decision No. 802.) Accordingly, Maaskant's argument has no merit.

Here, Maaskant, although informed by the Association that they did not know the amount of the non-chargeable expenses, voluntarily paid the full union dues. In an apparent attempt to force an unfair practice, Maaskant wrote on the check, "[r]equest that undisputed Agency Fee rebate be deducted DENIED."

The Association did not violate the law by accepting the check. Under these circumstances, the Association would be required to rebate the non-chargeable expenses, with interest, after the amount is calculated. (See PERB Reg. 32995(c)[2].) Maaskant's failure to later avail himself to the Association's rebate procedures does not manufacture an unfair practice. Because Maaskant failed to state a prima facie case regarding the alleged violation of Section 3543.6(b), this allegation is properly dismissed.

ORDER

The unfair practice charge in Case No. LA-CO-1184-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan joined in this Decision.

Member Shek's concurrence begins on page 6.

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

SHEK, Member, concurring: I concur with the decision of the majority opinion subject to the following rationale. The Public Employment Relations Board (PERB or Board) agent determined that Adrian Pieter Maaskant (Maaskant) had no standing to challenge the use or amount of fees because Kern High Faculty Association, CTA/NEA (CTA) had not cashed his check or made any deductions from his paycheck. Her conclusion was based on California Nurses Association (O'Malley) (2004) PERB Decision No. 1673 (CNA (O'Malley)). In CNA (O'Malley), the California Nurses Association had exempted Robert J. O'Malley (O'Malley) from payment of any agency fees. Accordingly, O'Malley was determined not to be an agency fee payer and the agency fee regulations had no applicability to him.

In the present case, CTA had not exempted Maaskant from payment of any agency fees. In fact, CTA notified Maaskant by letters on August 9, 2004 and August 12, 2004, respectively, of the two optional methods for making an agency fee payment, either by a lump sum agency fee payment minus the non-chargeable amount after the non-chargeable expenditures had been determined, or by monthly deductions. I would therefore conclude Maaskant is an agency fee payer and has standing to assert his charge.

I believe the test for standing is whether or not the nonmember is "required to pay an agency fee," rather than whether or not the union has accepted the agency fee. In setting forth the union's obligation to issue written notices prior to collecting agency fees, PERB Regulation section 32992 is stated in the following language:

> (a) Each nonmember who will be required to pay an agency fee shall annually receive written notice from the exclusive representative...
> [Emphasis added.]

In CNA (O'Malley), it was stated that "O'Malley does not have standing because he has not been 'required to pay an agency fee' and thus there would be no useful purpose in

affording him the procedural guarantees designed to enable a nonmember to challenge the use or amount of his fee." (Adopting the administrative law judge's (ALJ) proposed dec. at p. 8.)

In California State Employees Association (Sarca) (2006) Decision No. 1813-H, the union stopped accepting Sarca's fees in fiscal year 2004-2005, thus he was not required to pay agency fees during that time. Sarca therefore did not have standing.

In Los Rios College Federation of Teachers, Local 2279, CFT/AFT (Deglow) (1992) PERB Decision No. 950, the Board adopted a Board agent's dismissal of Deglow's unfair practice charge on the ground that the union was not required to provide an arbitration hearing because as a nonmember, Deglow's right was protected by the placement of collected funds in escrow and/or immediate return of the funds. The Board also held that nonmembers had no "right to a hearing" because "they were relieved of any fair share assessment for the fee payer year." (Adopting the Board agent's warning letter at p. 3.) Being relieved of an obligation to pay is equivalent to not being required to make a payment.

Maaskant contends on appeal to the Board that CTA's acceptance of his check in the amount of $770 as an advance, full lump sum agency fee payment on August 25, 2004, constituted illegal activity because CTA had total control over the funds supporting that check. Maaskant's argument lacks merit because he did not offer any evidence to show that the check to CTA had been cancelled, or that money was paid to CTA from his bank account. Maaskant also failed to produce any evidence to demonstrate that he had exercised his legal right to stop

payment on the check to resolve his dispute[1] with the payee, CTA, over the amount of the agency fee. Thus, I would find this contention to have failed.

I would therefore conclude that Maaskant has standing, but based on a different rationale.

[1]California Civil Code, section 1719(a)(3) provides, inter alia, that "... a person shall not be liable for the service charge, costs to mail the written demand, or treble damages if he or she stops payment in order to resolve a good faith dispute with the payee." Maaskant's writing on the face of the check, "Request that undisputed agency fee rebate be deducted DENIED," showed that he had a dispute with the payee, CTA, concerning the amount of the agency fee.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

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 9, 2004

Adrian Pieter Maaskant
21605 Belmont Drive
Tehachapi, CA 93561

Re: Adrian Pieter Maaskant v. Kern High Faculty Association
Unfair Practice Charge No. LA-CO-1184-E
DISMISSAL LETTER

Dear Mr. Maaskant:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 30, 2004. You allege that the Kern High Faculty Association violated the Educational Employment Relations Act (EERA)[1] at sections 3546 and 3543.6 by failing to provide you with an advance reduction of your agency fee.

I indicated to you in my attached letter dated October 25, 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 November 1, 2004, the charge would be dismissed. You requested an extension to file a First Amended Charge by December 1, 2004. I granted you an extension to file an amended charge or withdrawal by close of business November 8.[2] You filed your First Amended Charge, by mail, on November 8, 2004.

In your First Amended Charge you state that you can demonstrate a case of discrimination in violation of EERA at section 3543.6, subdivision (b). You assert that adverse action is shown because "a reasonable person would regard the forced exaction of the employee's funds, funds normally derived from the employee's paycheck, followed by a rebate, [as] an adverse impact on the employee's employment." This argument fails to recognize the fact that CTA did not deduct any money from your paychecks. Moreover, CTA made you an offer to allow you to avoid paying the agency fee until after the chargeable/non-chargeable calculation was made. Instead of accepting this offer, you chose to go to CTA's offices on August 25, and write CTA a check for the full amount of the years agency fees. CTA has not cashed your check and CTA

[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] I explained that you could meet the deadline by faxing the document before 5pm on the due date with originals to follow immediately by regular mail.

indicated it will not cash the check you gave them. Since no adverse action is shown, I am dismissing the charge based on the facts and reasons contained herein and in my October 25, 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

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).)

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

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
Mary Creith
Regional Attorney

Attachment

cc: Diane Ross, Staff Attorney

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

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

October 25, 2004

Adrian Pieter Maaskant
21605 Belmont Drive
Tehachapi, CA 93561

Re: Adrian Pieter Maaskant v. Kern High Faculty Association
Unfair Practice Charge No. LA-CO-1184-E
WARNING LETTER

Dear Mr. Maaskant:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 30, 2004. You allege that the Kern High Faculty Association violated the Educational Employment Relations Act (EERA)[1] at sections 3546 and 3543.6 by failing to provide you with an advance reduction.

You are a teacher employed by the Kern High School District. Respondent Kern High Faculty Association, CTA/NEA (CTA) represents the bargaining unit of teachers in the District. You are an agency fee paying non-member of CTA.

CTA has a deduction-escrow-refund procedure wherein the union sends out, no later than October 15 of each year, a notice to all agency fee payers telling them how to obtain a rebate of funds not used for collective bargaining. These are referred to as non-chargeable expenses. Agency fee payers must submit, no later than November 15, a letter objecting to the union's discretionary use of their fees to obtain a rebate. Objectors may then accept the unions calculation of non-chargeable expenses and take the rebate or they may challenge the calculation and have the calculation determined anew by an arbitrator. If they opt for the rebate, the agency fee payer receives the rebate for the entire year by December 7. If they opt for arbitration, it begins no later than February 28. Since all fees collected from nonmembers are placed in an independently maintained interest bearing escrow account, the objector who obtains a rebate receives interest on the nonchargeable amount already paid. In addition to the deduction-escrow-refund procedure, CTA offers non-members the option of paying agency fees upfront in a lump sum so that nonmembers can avoid monthly payroll deductions if they so choose.

On August 9, 2004, CTA sent a letter to you stating that, although not required by law, CTA was willing to accommodate your ongoing objection regarding fee collection and rebate

[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.

payments. CTA proposed that you could pay a lump sum minus the non-chargeable amount at a date following the determination of the non-chargeable amount. That way, you would not have to pay and then wait for a rebate. CTA asked you to inform them if you wanted to take advantage of this offer so that they could tell you what the non-chargeable amount would be as soon as they knew the amount.

On August 12, 2004, the Kern High Faculty Association sent a letter to non-members, including you, that stated non-members could pay a fee equal to the unified dues of $770.00 within 30 days otherwise the District would deduct $77.00 each month for ten months from non-member salaries.

On August 25, 2004, you went to the union offices. You had not previously responded to CTA's offer to accommodate your situation. The people working in the office did not yet know what the non-chargeable amount would be and thus could not tell you how much you could deduct from the lump sum payment. You gave CTA a check for $770.00. You wrote on the face of the check: "Request that undisputed agency fee rebate be deducted DENIED." CTA did not cash the check.

You contend that CTA violated the law in two respects. First, you object to CTA's procedure for collecting agency fees and rebating non-chargeable expenses. Second, you claim that CTA's offer to accommodate your concerns over the procedures was discriminatory.

PERB has held that when a union has not taken fees from a nonmember, there is no need to afford the nonmember the procedural guarantees designed to allow a nonmember to challenge the use or amount of his fees. (O'Malley v. California Nurses Association (2004) PERB Decision No. 1673.) In other words, when a union has not collected fees from an agency fee payer, that nonmember has no standing to challenge the use or amount of fees. (Ibid.)

Although you gave CTA a lump sum payment on August 25, 2004 in the amount of $770.00 for agency fees, CTA has not cashed the check. Similarly, CTA has not made any deductions from your paycheck. Since CTA has not collected fees from you, you lack standing to assert this charge and fail to allege a prima facie violation.

PERB has long held that the standard applied in cases involving employer discrimination is appropriate in cases alleging discrimination by an employee organization. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S; California Faculty Association (Hale, et al.) (1988) PERB Decision No. 693-H; California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S.) To demonstrate a violation of EERA section 3543.6(b), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employee organization had knowledge of the exercise of those rights; and (3) the employee organization imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employee organization's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employee organization's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employee organization's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employee organization's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employee organization's cursory investigation of the employee's misconduct; (5) the employee organization's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

You allege that CTA's August 9, 2004 offer to accommodate your concerns comprises discrimination because CTA singled you out and only made the offer to you. To the contrary, the offer by CTA was not an adverse action under Palo Verde Unified School District, supra, or Newark Unified School District, supra, because a reasonable person under the same circumstances would not consider CTA's offer to make special arrangements to accommodate a person's concern regarding the rebate procedure to have an adverse impact on the person's employment. Without an adverse action, a prima facie case of discrimination or reprisal cannot be made.

CTA made an offer to you that would have enabled you to pay the lump sum minuse the non-chargeable amount but, instead of accepting the offer by letting them know how you wished to

proceed so they could inform you of the chargeable amount as soon as they had the information, you chose to go to the CTA offices on August 25 and give the union a check for the full amount. In an apparent attempt to force an unfair practice, you wrote on the check that your request that the agency fee rebate be deducted was "DENIED."

Also, since CTA has not taken any funds from you, they have not violated PERB Regulation Number 32992 which requires the union to provide you written notice of the amount of the chargeable expenditures 30 days prior to collection of the agency fee or concurrent with the initial agency fee collection.

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 November 1, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Creith
Regional Attorney

MC