

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SUSAN G. WYMAN,

Charging Party,

v.

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION & ITS CHAPTER 374,

Respondent.

Case No. LA-CO-1268-E

PERB Decision No. 1903

May 7, 2007

Appearances: Wyman & Wyman Representational Services by Frank E. Wyman, Representative for Susan G. Wyman; California School Employees Association by Sonja J. Woodward, Attorney, for California School Employees Association & its Chapter 374.

Before Duncan, Chairman; McKeag and Neuwald, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by Susan G. Wyman (Wyman) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the California School Employees Association & its Chapter 374 (CSEA) violated the Educational Employment Relations Act (EERA)¹ by failing to handle a grievance properly and thus breaching the duty of fair representation owed to her.²

The Board has reviewed the entire record in this matter, including the unfair practice charge, the amended charges, the Board agent's warning and dismissal letters, the appeal filed by Wyman and CSEA's opposition to Wyman's appeal. The Board finds the Board agent's

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

²In addition to alleging violations of EERA, Wyman also alleged that CSEA violated the Ralph C. Dills Act, the Meyers-Milias-Brown Act and the Higher Education Employer-Employee Relations Act. However, the charge establishes that Wyman is in fact a school district employee and the matter is appropriately governed by EERA.

warning and dismissal letters to be without prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-1268-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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January 11, 2007

Frank E. Wyman, CEO
Wyman & Wyman Representational Services
PMB 349, 909 Armory Road
Barstow, CA 92311

Re: Susan G. Wyman v. California School Employees Association & its Chapter 374
Unfair Practice Charge No. LA-CO-1268-E
DISMISSAL LETTER

Dear Mr. Wyman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 11, 2006. An amended charge was filed on October 13, 2006. Susan G. Wyman alleges that the California School Employees Association & its Chapter 374 (CSEA) violated the Educational Employment Relations Act (EERA)¹ by breaching the duty of fair representation owed to her by failing to handle a grievance properly.

I indicated to you in my attached letter dated December 8, 2006, that the above-referenced charge did not state a prima facie case. This letter was re-sent to you via U.S. mail on December 20, 2006, and the deadline for your response was extended. 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 January 2, 2007, the charge would be dismissed.

On December 27, 2006, you amended the charge. In the amended charge you state that the "record holds" that the grievance was denied due to untimely filing by CSEA and that this demonstrates CSEA's purposeful failure to act, as well as willful, wanton, and knowing bad faith and arbitrary conduct. However, as stated in my attached letter, CSEA admits that the Level II Grievance was filed late. The District chose to proceed with the Level II meeting despite the late request. This meeting occurred on November 11, 2006, without Mrs. Wyman in attendance. You do not allege in the amended charge that this meeting between CSEA and the District did not actually take place on November 11, 2006. Therefore, you do not allege sufficient facts that demonstrate the grievance was denied due to Untimeliness. Further, you do not allege any facts demonstrating how CSEA's conduct was willful, wanton, done in bad faith or arbitrary, but merely state such as a conclusion.

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.

PERB regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the Charging Party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California Dept. of Food and Agriculture (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) *Mere legal conclusions are not sufficient to state a prima facie case.* (*Ibid.*; Charter Oak Unified School District (1991) PERB Decision No. 873. Emphasis added.)

You allege that "[b]ut for Mrs. Wyman's physical handicap, CSEA would have filed a timely grievance." You do not provide any factual support for that statement.

You allege that the "record holds" that the instant grievance did not reach Level III, because Mrs. Wyman did not receive any letter informing her of CSEA's decision not to pursue arbitration. Counsel for CSEA, Sonia Woodward, maintained in a telephone conversation on December 6, 2006, that CSEA had made that decision and sent a letter to Mrs. Wyman informing her of such. In a telephone conversation on January 8, 2007, Ms. Woodward said she would look into obtaining a copy of the letter in order to re-send it to Mrs. Wyman.

You again allege that CSEA's failure to schedule an informal conference had a negative effect on Mrs. Wyman's right to pursue her grievance, "because the written grievance as presented failed to provide 'the decision rendered at the informal conference,'" as required by the collective bargaining agreement. As stated my attached letter, the union's failure to schedule the informal conference did not impact the grievance process because the District cooperated with CSEA and participated in a Level II meeting on November 11, 2006. Further, CSEA's failure to follow exactly the requirements of the grievance process outlined in the collective bargaining agreement does not, without more, demonstrate conduct that can be considered discriminatory, arbitrary, or in bad faith. (See San Francisco Classroom Teachers Association (Bramell) (1984) PERB Decision No. 430.)

You allege that CSEA "purposefully allowed the grievance time frames to expire and then vainly attempted to pursue Mrs. Wyman's concerns," but you do not provide any factual support for this allegation. Thus, your contention that this action by CSEA was arbitrary, discriminatory, and in bad faith is unsupported and merely conclusory.

You again allege that the Level I Grievance was not timely filed. However, as stated in my attached letter, the District's own documents note that the Level I grievance was filed on August 30, 2006. This was prior to the September 1, 2006 deadline, and therefore was timely filed. The grievance was not "null and void" as you claim, because the District participated in a Level II meeting on November 11, 2006, even after they denied the Level I Grievance for violating procedure outlined in the collective bargaining agreement. Therefore, the grievance did move forward past the first level.

You allege that the moves by CSEA in this case were without rational basis and devoid of honest judgment, but do not explain how and why you believe CSEA was acting in an irrational and dishonest manner. I left you a telephone message on January 4, 2007 to attempt

to discuss these deficiencies with you. You did not return my call. For all of the foregoing reasons, the charge does not state a prima facie case and is accordingly dismissed.

Right to Appeal

Pursuant to PERB Regulations,⁴ 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 during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business 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
(916)322-8231
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.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

² 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,

ROBIN WESLEY
Acting General Counsel

By.
Valerie Racho
Board Agent

Attachment: Warning Letter

PUBLIC EMPLOYMENT RELATIONS BOARD



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December 8, 2006

Frank E. Wyman, CEO
Wyman & Wyman Representational Services
PMB 349, 909 Armory Road
Barstow, CA 92311

Re: Susan G. Wyman v. California School Employees Association & its Chapter 374
Unfair Practice Charge No. LA-CO-1268-E
WARNING LETTER

Dear Mr. Wyman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 11, 2006. An amended charge was filed on October 13, 2006. Susan G. Wyman alleges that the California School Employees Association & its Chapter 374 (CSEA) violated the Educational Employment Relations Act (EERA)¹ by breaching the duty of fair representation owed to her by failing to handle a grievance properly.

CSEA is the exclusive representative of the classified bargaining unit at the Silver Lake Unified School District (District). Ms. Wyman is an employee of the District within the classified unit. My investigation revealed the following information.

On July 7, 2006, Ms. Wyman was interviewed for the position of Food Services Account Technician. That position was awarded to an outside candidate. Article 17 of the collective bargaining agreement (CBA) between the District and CSEA requires the District to provide justification when an outside candidate is selected for a position over an internal candidate. On August 11, 2006, Ms. Wyman made a written request to the District to provide such justification.

On August 18, 2006, District Human Resources Director, Steven Desist, sent a memorandum to Ms. Wyman providing the selection criteria for the Food Services Account Technician position. The purported criteria used was a combination of test scores, interview scores, and review of current job performance. The memo did not provide any justification for the specific reason that Ms. Wyman was not selected for the position.

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.

On August 21, 2006, Ms. Wyman made a written request for representation to CSEA to file a grievance on her behalf regarding the District's failure to provide justification for her non-selection for promotion.

On August 30, 2006, CSEA filed a Level I Grievance with the District, suggesting as possible remedies that: 1) the District resubmit a letter to Ms. Wyman containing "clear and unambiguous" justification for Ms. Wyman's non-selection; 2) that the parties' MOU be altered to reflect the "clear and unambiguous" standard for justification in non-selection of internal candidates; and 3) that Ms. Wyman be made whole in all matters related to the issue.

On September 8, 2006, a meeting was held between Linda Johnson, President of CSEA Chapter 374, Lacy Gillespie, CSEA Labor Relations Representative, Jill Kemock, Director of Business Services for the District, and Ms. Wyman. Ms. Kemock raised a concern that a Level I Grievance had been submitted before an informal conference was held with the grievant's immediate supervisor as is required by the CBA at Article 15.3.

On September 12, 2006, the District denied the Level I Grievance on the grounds that there was a failure to attempt resolution at an informal level with the grievant's immediate supervisor.

On September 13, 2006, Ms. Wyman sent a letter to Rob Feckner, President of CSEA, complaining that she had not been assigned a union steward, had not been consulted regarding possible remedies, and had not approved the language of the grievance before it was filed on her behalf.

On November 11, 2006, a Level II meeting was held with CSEA representatives and District personnel. Ms. Wyman was not in attendance. Counsel for CSEA admits that the Level II Grievance was filed late; however, the District cooperated in the meeting and the Grievance was processed. At that meeting the District shared with CSEA Ms. Wyman's test and interview scores for the Food Services Account Technician position.

On December 6, 2006, counsel for CSEA reported that the grievance in this matter is at Level III. CSEA has decided not to pursue arbitration in this matter, and Ms. Wyman has been sent written notification of this decision.

Discussion:

In addition to alleging a violation of the EERA at section 3543.6(b), Charging Party also alleges a violation of the Ralph C. Dills Act (Dills Act) at section 3519.5(b), the Meyers-Milias-Brown Act (MMBA), and the Higher Education Employer-Employee Relations Act (HEERA) at section 3571.1(e). The Dills Act concerns the relationship between employees of the state and employee organizations comprised of state employees. A state employee is defined by the Dills Act as, with certain exclusions, "any civil service employee of the state, and the teaching staff of schools under the jurisdiction of the Department of Education or the Superintendent of Public Instruction[.]"

The MMBA concerns the relationship between California's municipal, county, and local special district employers and employees and the employee organizations that represent such employees. The MMBA defines a "public employee" as "any person employed by any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state."

HEERA concerns the relationship between higher education employers and employees and the employee organizations that are comprised of higher education employees. A higher education employee is defined by HEERA as "any employee of the Regents of the University of California, the Directors of the Hastings College of Law, or the Trustees of the California State University." (HEERA, § 3562(e).)

The charge does not establish that Ms. Wyman is either an employee of the state, a public employee, or a higher education employee. The charge also does not establish that CSEA is comprised either of state employees, public employees, or higher education employees. Instead the charge indicates that Ms. Wyman is an employee of the District, a public school, which is governed by EERA. Accordingly, the allegations that CSEA violated section 3519.5(b) of the Dills Act, the MMBA, and section 3571.1(e) of HEERA do not state a prima facie case and are dismissed.

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

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270 [113 LRRM 3532], at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090].)

In this case, the charge alleges that CSEA mishandled the grievance procedure in two ways: first, by filing a Level I Grievance form before attempting an informal conference with Ms. Wyman's immediate supervisor, in contradiction to the procedure outlined in the CBA; and second, by filing the Level I Grievance after the ten-day deadline for doing so, in this case September 1, 2006. Charging Party alleges that the Level I Grievance was filed on September 5, 2006, because that is the date stamped as "received" by District human resources. For the reasons that follow, these allegations do not amount to a breach of the union's duty of fair representation.

With regard to CSEA filing the grievance before attempting to schedule an informal conference, this act did not have an effect on Ms. Wyman's right to pursue her claim, because the grievance proceeded to the second level with the meeting that occurred on November 11, 2006. The charge fails to set forth any facts that demonstrate that CSEA's decision to file the Level I Grievance before scheduling an informal conference was "without a rational basis or devoid of honest judgment." (See Reed, supra.) CSEA claims its reason for doing so was difficulty in scheduling time for the meeting while remaining within the required timeframe for filing the grievance. The charge fails to demonstrate that CSEA's conduct was arbitrary, discriminatory, or in bad faith.

Charging Party's assertion that the Level I Grievance was untimely filed is inaccurate. The letter from the District dated September 12, 2006 denying the Level I Grievance noted that the date the grievance was filed was August 30, 2006. Therefore, the grievance was filed before the September 1, 2006 deadline. Further, the Board has held that the duty of fair representation is not breached even if a union negligently forgets to file a timely grievance appeal. (Emphasis added. See San Francisco Classroom Teachers Association (Bramell) (1984) PERB Decision No. 430.)

In addition, the amended charge also alleges that Ms. Wyman has not been "properly represented" by CSEA because Ms. Wyman has not approved or signed the grievance. The Board has held that a union's failure to obtain a member's approval prior to settlement of a

grievance does not constitute a breach of the duty of fair representation because that factor alone does not amount to arbitrary conduct. (Hart District Teacher's Association (2001) PERB Decision No. 1456.) Here, Ms. Wyman requested that CSEA pursue a grievance on her behalf on August 21, 2006, and the union did so. Failure to obtain Ms. Wyman's approval of the language used in the grievance form does not amount to a breach of the union's duty of fair representation.

Charging Party also asserts that the union's second suggested remedy listed in the grievance is in "open violation" of the CBA. CSEA suggested that the parties' agreement be altered to add the words "clear and unambiguous" to the justification requirement when an internal candidate is denied promotion in favor of an external candidate. The charge fails to demonstrate how the union's inclusion of this bargaining language amounts to conduct that could be considered arbitrary, discriminatory, or in bad faith. There are no facts suggesting that the inclusion of such a proposal in Ms. Wyman's grievance had in any way interfered with her right to pursue her claim.

Lastly, the amended charge expresses doubt that Linda Johnson is Ms. Wyman's "assigned steward" and suggests that other stewards are available to provide representation, and that the assistance rendered thus far by Lacy Gillespie has been "flawed." The Board has held that "the duty of fair representation does not contemplate the complete satisfaction for all represented. A wide range of reasonableness must be allowed the representative, subject to good faith and honesty of purpose." (Hart, supra, citing Castro Valley Unified School District (1980) PERB Decision No. 149.) The charge does not allege any facts to suggest that the conduct of Johnson or Gillespie has been performed without good faith or honesty.

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 Second 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 December 18, 2006, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Valerie Racho
Board Agent

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