

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CHARLES E. ULMSCHNEIDER,

Charging Party,

v.

LOS BANOS TEACHERS ASSOCIATION,

Respondent.

Case No. SA-CO-529-E

PERB Decision No. 1922

September 11, 2007

Appearances: Charles E. Ulmschneider, on his own behalf; California Teachers Association by Ballinger G. Kemp, Attorney, for Los Banos Teachers Association.

Before Shek, McKeag and Wesley, Members.

DECISION

SHEK, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Charles E. Ulmschneider (Ulmschneider) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Los Banos Teachers Association (LBTA) breached its duty of fair representation under Educational Employment Relations Act (EERA)¹ section 3544.9² and thereby violated EERA section 3543.6(b) by failing to prevent the Los Banos Unified School District from violating the collective bargaining agreement and by declining to advance Ulmschneider's grievance to level three.

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

²The unfair practice charge alleges violations under the following sections of EERA, none of which apply to a claim by an employee against an employee organization: Section 3543.5 (unlawful acts of public school employer); Section 3543.6(c) (failure of employee organization to meet and negotiate in good faith); Section 3543.7 (duty to meet and negotiate in good faith); Section 3543.8 (employee organization's standing to sue); and Section 3543.2(a) and (b) (scope of representation). We construe this charge as alleging a breach of the duty of fair representation under EERA section 3544.9.

The Board has reviewed the entire record in this case, including but not limited to the unfair practice charge, LBTA's position statement, the amended unfair practice charge, the warning and dismissal letters, Ulmschneider's appeal of the dismissal and LBTA's response. Based upon this review, the Board affirms and adopts the Board agent's warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SA-CO-529-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8384
Fax: (916) 327-6377



March 13, 2007

Charles E. Ulmschneider
3102 W. Flagstaff Ave
Visalia, CA 93291

Re: Charles E Ulmschneider v. Los Banos Teachers Association
Unfair Practice Charge No. SA-CO-529-E
DISMISSAL LETTER

Dear Mr. Ulmschneider:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 16, 2007. Charles Ulmschneider alleges that the Los Banos Teachers Association (LBTA or Association) violated the Educational Employment Relations Act (EERA)¹ by violating its duty of fair representation.

I indicated to you in my attached letter dated February 21, 2007, 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 March 5, 2007, the charge would be dismissed. I granted your request to extend that deadline and you filed a First Amended Charge.

The Los Banos School District required Ulmschneider to participate in the Peer Assistance Review program for several years. The Warning Letter indicated that although Ulmschneider believes his participation in the PAR program is unnecessary, the charge did not demonstrate that the Association's refusal to pursue his grievance on that issue was a decision made in an arbitrary, discriminatory, or bad faith manner. Instead it appeared that the Association rationally determined not to pursue Ulmschneider's grievance to arbitration because the collective bargaining agreement allows the District to keep employees in the PAR program for more than one year. The Warning Letter concluded that the charge must be dismissed.

My review of the First Amended Charge revealed the following information.

The First Amended Charge indicates that the leaders of the PAR program are LBTA members, including the LBTA President.

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 January 30, 2007, Association Representative James Orr attended a meeting with Ulmschneider, Principal Dan Martin, and teacher Brett Lee. During the meeting Martin issued Ulmschneider a reprimand. Ulmschneider wanted a different representative to attend the meeting, but the District refused his request. During the meeting Ulmschneider complained that reading the reprimand to him constituted harassment. Martin asked Orr whether he agreed with Ulmschneider's characterization. Orr indicated that Martin was not harassing Ulmschneider.

On February 13, 2007, Director of Human Resources Shanna Spiva read Ulmschneider another reprimand. The District denied Ulmschneider's request for a specific Association representative, but Orr attended the meeting. Orr did not object to the accusations or statements. Following the meeting, Orr told Ulmschneider words to the effect of, "Charles, man, those are some serious charges."

On February 26, 2007, the District met with Ulmschneider to present him with another reprimand. After Ulmschneider complained to Orr about how the District officials read the reprimands to him, Orr requested that the reprimand not be read out loud. The District official agreed to simply present Ulmschneider with the document rather than reading it to him.

Orr mentioned to Ulmschneider that he had heard that the District had offered him a full year of paid administrative leave if he agreed to resign. Ulmschneider asked how Orr knew about that offer. Ulmschneider had not told Orr about the District's offer.

On March 1, 2007, PAR teacher Dave Waller and teacher Brett Lee entered Ulmschneider's classroom and observed his class. Lee left at the end of the class period, but Waller approached Ulmschneider to share his notes. Ulmschneider requested that he be allowed to read what Waller wrote. Waller asked, "so we are not going to discuss anything?" Ulmschneider indicated he would rather just read the comments.

The First Amended Charge also provides, in pertinent part:

I sincerely feel that some of the cooperation the LBTA has had with the district's aggressiveness has come from my decision to be a candidate for our NEA Representative Assembly and a past political campaign I had for our LBTA presidency.

The above-stated information fails to state a prima facie violation for the reasons that follow.

District's conduct

Although this charge is filed against the Association, the First Amended Charge includes information regarding the District's conduct. For example, the charge indicates that the District denied Ulmschneider's requests for a representative of his choice. Allegations regarding the District's conduct must be dismissed as the Association is not responsible for the District's conduct. Thus, these allegations must be dismissed.

PAR Program

The original charge alleged the Association violated its duty of fair representation by refusing to advance Ulmschneider's grievance regarding the PAR program. The First Amended Charge did not correct the deficiencies noted in the Warning Letter. The amended charge did not provide facts demonstrating that the Association's refusal to pursue Ulmschneider's grievance to arbitration was arbitrary, discriminatory or made in a bad faith manner. Nor does the charge provide facts indicating that the Association member's participation in the PAR Program violates the Association's duty of fair representation. Thus, this allegation must be dismissed.

Reprimand Meetings

The First Amended Charge provides facts indicating that Orr represented Ulmschneider in several meetings with District representatives. During these meetings, Ulmschneider received reprimands. Ulmschneider felt humiliated by the District's reading of the reprimands especially as they were read in front of his peers. Orr attended the meetings in question and the facts suggest that he provided Ulmschneider rational advice. For example, when Ulmschneider tried to leave the January 30, 2007 meeting, in direct conflict with the principal's directive, Orr advised Ulmschneider to stay. Orr listened to Ulmschneider's complaint that the reading of the reprimands was causing him psychological harm and told Martin that Ulmschneider did not need the reprimand read aloud to him. The charge does not provide any facts demonstrating a connection between Ulmschneider's NEA candidacy or his political campaign and the Association's participation in the PAR Program. (See United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) The PAR Program is a part of the parties' negotiated agreement. Thus, the charge does not provide facts indicating that the Association acted in an arbitrary, discriminatory or bad faith manner. As such, this allegation must be dismissed.

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.

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

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

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).)

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.)

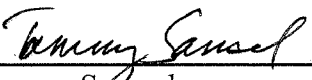
SA-CO-529-E
March 13, 2007
Page 5

Final Date

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

Sincerely,

TAMI R. BOGERT
General Counsel

By 
Tammy Samsel
Regional Attorney

Attachment

cc: Balinger Kemp

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8384
Fax: (916) 327-6377



February 21, 2007

Charles E. Ulmschneider
3102 W. Flagstaff Ave
Visalia, CA 93291

Re: Charles E Ulmschneider v. Los Banos Teachers Association
Unfair Practice Charge No. SA-CO-529-E
WARNING LETTER

Dear Mr. Ulmschneider:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 16, 2007.¹ Charles Ulmschneider alleges that the Los Banos Teachers Association (Association) violated the Educational Employment Relations Act (EERA)² by denying his request to advance his grievance to Level III. My investigation revealed the following information.

On November 14, 2006, Ulmschneider, a foreign language teacher, filed a grievance alleging his employer, the Los Banos Unified School District (District), violated the collective bargaining agreement between the District and the Association by misusing the Peer Assistance and Review (PAR) program. When the District denied Ulmschneider's grievance at Level I, Ulmschneider raised his grievance to Level II. When the District denied Ulmschneider's grievance at Level II, Ulmschneider requested that the Association appeal the grievance to Level III. On January 8, 2007, Ulmschneider attended the Association's Representative Council regarding his grievance. The Council voted 22 to 2, against taking the grievance to arbitration.

The collective bargaining agreement between the District and Association indicates that an employee in the PAR program shall be evaluated until the employee receives a satisfactory evaluation or leaves District employment.

On February 14, 2007, I spoke with Ulmschneider and discussed his attempt to obtain a restraining order from the superior court to enjoin the principal from entering his classroom. Ulmschneider indicated the District was going to try to terminate his employment and that he needed help. I explained that his charge was filed against his exclusive representative and that allegations of conduct by the employer would not be addressed therein. Ulmschneider

¹ Although the Charging Party's proof of service indicates that both the charge and attachments had been served on the Respondent, the Respondent's representative called PERB to obtain the attachments to the charge.

² 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.

indicated he would send me additional information regarding the PAR program and the District's actions. I indicated that only documents regarding the Association's conduct would be relevant to this charge and that any documents that he wanted me to review must be served on the Respondent. On February 16, 2007, I received additional documents. They did not include a proof of service indicating that they had been served on the Respondent. As such, they are not a part of the official file and were not considered in the investigation of this charge.³ (See Los Angeles Unified School District (2003) PERB Decision No. 1552.)

On February 20, 2007, Ulmschneider called to confirm that I had received the additional documents that he had sent. I confirmed receipt of these documents and again told him that I needed a proof of service indicating that the documents were served on the Respondent in order to consider the information provided.

The above-stated information does not state a prima facie violation for the reasons that follow.

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.)"

³ Although filing in pro per, Ulmschneider is familiar with PERB's process as he filed SA-CO-498-E on October 27, 2004, SA-CE-2280-E on December 6, 2004, SA-CE-2343-E on February 23, 2006.

[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.]

The charge does not provide facts indicating that the Association's refusal to appeal Ulmschneider's grievance to Level III was a decision made in an arbitrary, discriminatory or bad faith manner. The charge must present facts demonstrating the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S.)

The facts indicate that the District has been requiring Ulmschneider to participate in the PAR program for several years. Although Ulmschneider believes his participation in the PAR program is unnecessary, the charge does not demonstrate that the Association's refusal to pursue his grievance on that issue was a decision made in an arbitrary, discriminatory, or bad faith manner. Instead it appears that the Association rationally determined not to pursue Ulmschneider's grievance to arbitration because the collective bargaining agreement allows the District to keep employees in the PAR program for more than one year. Thus, the charge 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 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 March 5, 2007, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Tammy Samsel
Regional Attorney

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