

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SAMWEL OSEWE,

Charging Party,

v.

LONG BEACH COUNCIL OF CLASSIFIED
EMPLOYEES, AFT, AFL-CIO,¹

Respondent.

Case No. LA-CO-1291-E

PERB Decision No. 1934

December 21, 2007

Appearances: Samwel Osewe, on his own behalf; Law Offices of Jeffrey R. Boxer by Jeffrey R. Boxer, Attorney, for Long Beach Council of Classified Employees, AFT, AFL-CIO.

Before Shek, McKeag and Rystrom, Members.

DECISION

SHEK, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Samwel Osewe (Osewe) of a Board agent's dismissal of his unfair practice charge. The unfair practice charge alleged that the LBCCE, violated the Educational Employment Relations Act (EERA)² by insisting on an informal appeal regarding Osewe's annual job performance evaluation and then abandoning his appeal. Osewe asserted that this conduct violated the duty of fair representation guaranteed by EERA section 3544.9, and thereby violated EERA section 3543.6(b).

¹The unfair practice charge was filed against Alta Costa (Costa), president of the Long Beach Council of Classified Employees, AFT, AFL-CIO (LBCCE). PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq. PERB Regulation 32602(b) provides "that unfair practice charges may be filed by an employee, employee organization, or employer against an employee organization or employer [emphasis added]." Therefore, PERB will construe the charge as filed against the LBCCE and not Costa.

²EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

The Board has reviewed the entire record in this case, including but not limited to the unfair practice charge, LBCCE's position statement, the amended unfair practice charge, LBCCE's response to the amended charge, the Board agent's warning and dismissal letters, Osewe's appeal of the dismissal and LBCCE's response. The Board hereby affirms the dismissal of the unfair practice charge based on the following discussion.

BACKGROUND

The Unfair Practice Charge

The Board agent's investigation of Osewe's unfair practice charge filed on January 29, 2007, revealed the following facts.

Osewe was employed as a custodian at the Long Beach Community College District's (District) Pacific Coast campus. Osewe received a less than satisfactory annual evaluation from the District at a meeting on May 11, 2006. The District Plant Manager informed Osewe on May 10, 2006, that he had a right to union representation. Osewe notified LBCCE's President, Costa, who attended the evaluation meeting with him. After the meeting, Osewe and Costa discussed the filing of a grievance regarding the evaluation. Costa explained that the first step in the grievance procedure was an informal meeting pursuant of Article 18.2 of the collective bargaining agreement (CBA).³ The next step was the filing of a formal written

³The last CBA between the District and LBCCE had effective dates of June 26, 2002 through June 30, 2005. The parties apparently continue to be bound by the provisions in the Agreement during the period in question.

Article 18.2 of the CBA provides:

18.2 Informal Level

Within 15 days after the employee and/or LBCCE knew, or reasonably should have known, of the alleged violation, the grievant shall attempt to resolve the grievance by an informal conference with the immediate supervisor.

grievance pursuant to Article 18.3.1 of the CBA.⁴ However, Osewe asserted that pursuant to Article 18.4.3 of the CBA, a grievance can be filed at any level. Article 18.4.3 provides:

Whenever the District and LBCCE agree it is appropriate, they may permit a grievance to be initiated at any step in the grievance procedure.

In a telephone conversation on May 24, 2006, Costa insisted that the informal grievance process be initiated, and that Osewe would “be on [his] own” if he chose to file his own grievance. On or about June 2, 2006, against Costa’s advice given to him in the May 24th telephone conversation and in an electronic mail dated June 1, 2006, Osewe filed his own grievance via electronic mail against the District at the formal level.

Osewe sent an electronic mail to Costa on June 5, 2006, referencing an earlier e-mail from Costa stating that Osewe had refused union representation. Costa responded on the same date by electronic mail, stating:

When you filed your grievance and sent it (not on a grievance form, but in an email), you knowingly filed it against advice of the Union (which was to file at the informal level).

Since you chose to file your own grievance, you dismissed the Union from representing you, and now you have the

⁴Article 18.3.1 of the CBA provides, in part:

18.3 Formal Level

18.3.1 Level 1 (Dean/Director of Area Being Grieved)

Within 15 days after the informal conference, should the grievance not be resolved, the grievant must present his/her grievance in writing on the District Classified Grievance form to the Dean/Director of the area being grieved, with a copy to Human Resources. This statement shall be a clear, concise statement of the circumstances giving rise to the grievance, citation of the specific article, section and paragraph of this Agreement that is alleged to have been violated, the decision, if any, rendered at the informal conference, and the specific remedy sought. . . .

responsibility to represent yourself, and there will be no Union representative at any of your grievance meetings.

Osewe alleged that LBCCE had refused to represent him on June 19, 2006. The grievance was subsequently denied on August 11, 2006.

The unfair practice charge further alleged that Osewe sent Costa an e-mail on September 6, 2006, asking for copies of “union reports of all the disciplinary actions/hearings which have been taken against [him] and also an email or letter confirming the date/venue and participants in the mediation hearing [he] went through in the past year up to the last one.” Osewe alleged that Costa “simply ignored [him].”

Osewe filed an amended unfair practice charge on March 29, 2007, alleging that “it wasn’t until [August 11, 2006] when the vice president issued an arbitrary decision based on intimidations and threats from the acting facilities director that [he] became aware that [his] right to pursue [his] claim was foreclosed.”

LBCCE’s Response

LBCCE contended that Costa had informed Osewe in a conversation on May 24, 2006, that his grievance regarding the less than satisfactory evaluation should be filed pursuant to the informal grievance process under the applicable Article in the CBA. LBCCE asserted that Costa had informed Osewe on that date that LBCCE would not assist him if he chose to file his own grievance at another level. According to LBCCE, Costa confirmed this advice by electronic mail on June 1, 2006.

LBCCE also provided a copy of an electronic mail from Costa to Osewe, dated July 17, 2006, stating that LBCCE represented Osewe at a disciplinary meeting on June 27, 2006, regarding “safety rules in driving the carts.” The electronic mail stated that there was no contract violation based upon the “cart incidents,” and that although Osewe “tacked on” the

cart violation to the already-filed grievance, the union also could not represent Osewe in that portion of the grievance.

Board Agent's Dismissal

The Board agent stated in the warning letter dated March 19, 2007, that the charge was untimely filed. The Board agent found that Osewe was put on notice as early as May 24, 2006, or at the latest July 17, 2006, that Costa would not serve as his representative if he ignored their advice and filed his own grievance. Thus, the Board agent found that the statutory time period began to run on May 24, 2006, or at the latest, July 17, 2006, and that the charge, which was filed on January 29, 2007, was therefore outside the six-month statute of limitations period. The Board agent further found that even if the charge were timely, it failed to state a prima facie case of arbitrary conduct violating the duty of fair representation.

The Board agent dismissed the charge on July 25, 2007. The dismissal letter stated that the date of "August 11, 2006" mentioned in the amended charge "has no bearing on the date when LBCCE confirmed that it would cease representing Osewe if he chose to file a grievance on his own." The Board agent found that the amended charge presented no new facts to substantiate a prima facie case, and dismissed the charge for the reasons stated in the warning letter.

Osewe's Appeal

On appeal, Osewe contends that the unfair practice charge was timely and that it stated a prima facie case of a violation of the duty of fair representation.

DISCUSSION

The primary issue in this case is whether the unfair practice charge was timely filed. The Board's recent decision in Los Angeles Unified School District (2007) PERB Decision No. 1929 (Los Angeles USD) is on point. Los Angeles USD relied on Sacramento City

Unified School District (2001) PERB Decision No. 1461 (Sacramento City Unified School District), in which the Board adopted a warning letter that cited the following rule:

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 (Department 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.) [Sacramento City Unified School District, warning letter, at p. 8.]

Los Angeles USD further states that:

Additionally, the charging party has the burden of alleging facts showing that the unfair practice charge was timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; City of Santa Barbara (2004) PERB Decision No. 1628-M (City of Santa Barbara).) The Board held that by failing to allege the date of a meeting at which an alleged violation occurred, the charging party had failed to demonstrate that the charge was timely. (City of Santa Barbara, warning letter, at p. 4.) [Los Angeles USD, at p. 6.]

In this case, Osewe has failed to satisfy his burden of stating sufficient facts to establish that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (EERA sec. 3541.5(a)(1).) Based on Osewe's own allegations, he knew or should have known that Costa and LBCCE would not represent him in his grievance on or about June 5, 2006 (when Costa communicated this fact to him by electronic mail), or at the latest, July 17, 2006 (when Costa informed him that LBCCE would not represent him with regard to the alleged "cart incident"). All of these dates occurred more than six months prior to the filing of the unfair practice charge on January 29, 2007. Therefore, the allegation in the unfair practice charge that Costa and LBCCE failed to represent Osewe was untimely.

The original unfair practice charge also alleged that Osewe made a futile attempt to request information from Costa on September 6, 2006. Although this allegation was timely, we find that it fails to state a prima facie case of a violation.

The Board has held that where an employee chooses self-representation, the employee organization “has no obligation to provide representation or assistance.” (Valley of the Moon Teachers Association, CTA/NEA (McClure) (1996) PERB Decision No. 1165 (Valley of the Moon), warning letter, at p. 6.) In Valley of the Moon, the Board held that where an employee chooses to be represented by his own attorney, and chooses to forego union representation, “the Association, by refusing to provide information regarding her grievance, has not violated its duty of representation.” (Id., warning letter, at p. 6.) In this case, Osewe chose to file his own grievance after the union told him that he would not receive union assistance if he did so. Under Valley of the Moon, Costa and LBCCE did not violate the duty of fair representation even if they had failed to respond to Osewe’s information request.

Moreover, Osewe provided no further detail regarding why the requested information was necessary or relevant, and failed to mention this claim in his appeal of the dismissal. Therefore, although this allegation was timely, we find that it fails to state a prima facie case.

Based on the discussion above, the Board therefore finds that the unfair practice charge fails to state a prima facie case of a breach of the duty of fair representation.

ORDER

The unfair practice charge in Case No. LA-CO-1291-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Rystrom joined in this Decision.

