STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

NIMAL SUSANTHA DIUNUGALA, Charging Party, v. SEIU LOCAL 1000, Respondent.	Case No. LA-CO-127-S PERB Decision No. 2060-S September 8, 2009

Appearance: Nimal Susantha Diunugala, on his own behalf.

Before Dowdin Calvillo, Acting Chair; McKeag and Neuwald, Members.

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Nimal Susantha Diunugala (Diunugala) of a Board agent's dismissal of his unfair practice charge against Service Employees International Union Local 1000 (SEIU). The charge alleged that SEIU violated the Ralph C. Dills Act (Dills Act)[1] by breaching the duty of fair representation in failing to process a grievance on his behalf concerning the 2004 denial of a merit salary adjustment (MSA). The Board agent dismissed the charge on the ground that it failed to state a prima facie case of breach of the duty of fair representation.

The Board has reviewed the dismissal and the record in light of Diunugala's appeal and the relevant law.[2] Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

[1] The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2] SEIU did not file a response to the appeal.

BACKGROUND

At all relevant times to this proceeding, Diunugala was employed by the California Air Resources Board (ARB) as an Air Resources Field Representative II. On October 26, 2004, Diunugala's supervisor issued a memorandum denying his MSA effective November 1, 2004.[3] The memorandum stated that the denial was for reasons related to Diunugala's job performance and his confrontational behavior with management during the past 18 months. Diunugala filed a grievance on October 30, 2004, challenging the denial of his MSA. Although the record is unclear concerning the initial processing of this grievance, SEIU asserted that it assisted Diunugala in processing the grievance through Step 4 of the grievance procedure and requested arbitration in 2005. According to SEIU, the Department of Personnel Administration (DPA) did not respond to the request for arbitration.

By letter dated March 1, 2007, an attorney for DPA informed SEIU that he had been assigned to provide legal representation for ARB[4] with respect to Diunugala's grievance, and requested that SEIU provide him with the status of the case within the next 30 days. On July 18, 2007, Diunugala sent a letter to SEIU Labor Relations Representative Wendell Prude (Prude) stating that neither he nor DPA had received a response from SEIU to the DPA attorney's March 1, 2007, letter and asked Prude to let him know what action SEIU had taken or was planning to take.

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[3] State civil service employees are eligible to receive MSAs annually after the first year of employment, up to the maximum step of the salary range, if the appointing authority certifies that the employee has met the standards of efficiency required for the position. (Gov. Code, § 19832; 2 Cal. Code Reg., § 599.683.) When an employee has not met the standards of efficiency required for the position, the supervisor shall so certify and shall recommend that the MSA not be granted. (2 Cal. Code Reg., § 599.684.)

[4] The letter mistakenly referred to ARB as the Department of Health Services.

On September 21, 2007, Diunugala filed his original charge with the Board and alleged that SEIU had failed to respond to DPA's March 1, 2007 letter within 30 days (by March 31), as requested by DPA in the letter, and despite numerous written and telephone requests to do so.[5] After the charge was filed, SEIU sent letters dated October 30, 2007, January 10, 2008, and February 20, 2008, to the DPA attorney reiterating Diunugala's request for arbitration and asking the attorney to contact the SEIU attorney to select an arbitrator and possible arbitration dates.

On May 16, 2008, an SEIU Statewide Arbitration Coordinator sent Diunugala a letter stating that SEIU would not take Diunugala's grievance to arbitration. That letter noted that Diunugala's supervisor found serious deficiencies in his performance, citing both his most recent performance evaluation and language from Diunugala's written rebuttal that SEIU believed contained accusations that would make it difficult for an arbitrator to find that his relationships with his supervisors merited granting the MSA.

On November 12, 2008, the Board agent issued a warning letter indicating that the allegations of the charge failed to state a prima facie case of violation of the duty of fair representation. On December 4, 2008, Diunugala filed an amended charge, which alleged that SEIU and its representatives failed to provide adequate representation to challenge the denial of his MSA, despite making promises to do so.

The Board agent dismissed the charge on December 22, 2008, finding that the amended charge failed to state a prima facie case of breach of the duty of fair representation.

[5] Diunugala resubmitted the original charge on July 18, 2008, after being informed that PERB had no record of the charge having been filed. Upon confirmation that SEIU had received a copy of the September 21, 2007, charge, the Board agent analyzed the charge as though it had been properly filed with PERB on September 21, 2007.

DISCUSSION

On appeal, Diunugala asserts that SEIU violated its duty of fair representation toward him by neglecting his case for several years and then ultimately deciding not to pursue it to arbitration. State employees have the right to fair representation guaranteed by Dills Act section 3515.7, subdivision (g). (See *California State Employees' Association (Norgard)* (1984) PERB Decision No. 451-S.) The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified School District Teachers Association, CTA/NEA (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 the duty of fair representation, the charging party must show that the union's conduct was arbitrary, discriminatory or in bad faith. In *United Teachers of Los Angeles (Collins)*, *supra,* the 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.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

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, at p. 1274; see also *Robesky v. Qantas Empire Airways, Ltd.* (9th Cir. 1978) 573 F.2d 1082.)

In regards to grievance arbitration, the Board has held that a union's decision not to take a grievance to arbitration is lawful where a rational basis, for the decision exists. (*Castro Valley Unified School District* (1980) PERB Decision No. 149.) Accordingly, PERB will dismiss a charge alleging a violation of the duty of fair representation if it is shown that a union has made an honest, reasonable determination that the grievance lacks merit. (*Sacramento City Teachers Association (Fanning, et al.)* (1984) PERB Decision No. 428.) In determining whether that standard is met, PERB does not determine whether the union's decision was correct but whether it "had a rational basis, or was reached for reasons that were arbitrary or based upon invidious discrimination." (*Ibid.*; see *Vaca v. Sipes* (1967) 386 U.S. 171, 195 [holding that "a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious"].)

Diunugala argues that SEIU acted in bad faith in neglecting his case and, in particular, by failing to respond to DPA's March 1, 2007, letter requesting SEIU to provide DPA with the status of the case. A union's delay in responding to employees about grievance proceedings based on mere negligence or inadvertent omissions does not constitute a breach of the duty of fair representation. (See, e.g., *SEIU Local 1000, CSEA (Burnett)* (2007) PERB Decision No. 1914-S [union's failure to communicate with grievant about status of arbitration request

did not violate duty of fair representation]; *Service Employees International Union, Local 250 (Hessong)* (2004) PERB Decision No. 1693-M [union did not violate duty of fair representation despite taking over two years to process a member's grievance].) While both DPA and SEIU delayed the processing of Diunugala's request for arbitration, there is no indication that the delay was caused by anything other than mere negligence. Moreover, the facts alleged in the charge do not show that SEIU was under any obligation to respond to DPA's request for a status report or that the delay prejudiced Diunugala's ability to have his grievance arbitrated. Accordingly, the charge fails to state a prima facie violation of the duty of fair representation based upon the delay in processing the grievance.

Diunugala also argues that SEIU acted in bad faith when it decided in May 2008 to reject his request for arbitration. The May 16, 2008, letter, however, clearly sets forth a rational basis for SEIU's decision based upon its determination that it was unlikely to prevail at arbitration. SEIU concluded that Diunugala's contentions concerning the timeliness of the denial of the MSA by ARB and his allegations of reprisal and discrimination lacked merit. In addition, the letter noted that Diunugala's most recent performance evaluation indicated serious performance deficiencies and that his written rebuttal to that evaluation contained language which would make it difficult for an arbitrator to find that his relationship with his supervisors merited granting the MSA, since he received an "Improvement Needed" in "Relationships with People" and other comments concerning his attitude with management staff. SEIU's rejection of Diunugala's request to arbitrate his grievance was based on a reasonable determination that his grievance lacked merit and thus, did not breach its duty of fair representation.

Nor did SEIU breach its duty by taking approximately three years to decide not to arbitrate Diunugala's grievance. PERB has held that a union's delay in reaching a decision not

to arbitrate a grievance does not breach the duty of fair representation absent additional evidence the union's conduct was arbitrary, discriminatory or in bad faith. (*California School Employees Association & its Chapter 379 (Dunn)* (2009) PERB Decision No. 2028.) While SEIU may have given Diunugala a false sense of hope that his case was finally proceeding to arbitration after languishing for so long, only to decide not to proceed to arbitration after all, the facts alleged in the charge fail to show anything more than mere negligence on the part of SEIU. Further, the charge does not allege that SEIU's negligence completely extinguished Diunugala's right to arbitrate his grievance. Accordingly, the charge failed to show that SEIU breached its duty of fair representation by deciding in May 2008 not to pursue arbitration of the denial of Diunugala's 2004 MSA.

In sum, the charge failed to establish that the delay in processing Diunugala's request for arbitration of his MSA grievance or SEIU's ultimate decision to not to proceed with arbitration of the grievance violated SEIU's duty of fair representation.

ORDER

The unfair practice charge in Case No. LA-CO-127-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision.