

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DEMETRIA DELARGE,

Charging Party,

v.

SEIU LOCAL 1021,

Respondent.

Case No. SF-CO-731-E

PERB Decision No. 2068

September 29, 2009

Appearance: Demetria DeLarge, on her own behalf.

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

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (Board) on appeal by Demetria DeLarge (DeLarge) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that SEIU Local 1021 breached its duty of fair representation in violation of the Educational Employment Relations Act (EERA)¹ by its refusal to: (1) file a grievance on DeLarge's behalf; (2) hire an attorney to represent DeLarge; and (3) represent DeLarge at a hearing before the personnel commission. The charge alleged this conduct violated EERA section 3543.6.

The Board has reviewed the dismissal and the record in light of DeLarge's appeal and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal letters to be well-reasoned and in accordance with applicable law. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself.

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

ORDER

The unfair practice charge in Case No. SF-CO-731-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Acting Chair Dowdin Calvillo and Member Neuwald joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1023
Fax: (510) 622-1027



March 16, 2009

Demetria DeLarge
P. O. Box 3382
San Leandro, CA 94578

Re: Demetria DeLarge v. SEIU Local 1021
Unfair Practice Charge No. SF-CO-731-E
DISMISSAL LETTER

Dear Ms. DeLarge:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 20, 2008. Demetria DeLarge (Ms. DeLarge or Charging Party) alleges that the SEIU Local 1021 (Union or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by breaching its duty of fair representation.

Charging Party was informed in the attached Warning Letter dated January 21, 2009, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to January 30, 2009, the charge would be dismissed.

On January 21, 2009, an amended charge was filed in this office. The amended charge contains an exhaustive list of encounters between Charging Party and her supervisors dating back to 2006, numerous requests for representation by Charging Party to her Union representatives, and recitations of PERB decisions believed by Charging Party to address her concerns.

Essentially, Charging Party's argument is that the underlying tension between herself and her supervisor was the result of a severe personality conflict, rather than any misconduct on Charging Party's part. As her supervisor increased her scrutiny of Charging Party over the course of several months, the workplace became fraught with tension for Charging Party. In an attempt to get Charging Party fired, the supervisor made many allegations of misconduct. According to Charging Party, the supervisor failed to follow the Personnel Commission rules when she initiated disciplinary action against and ultimately terminated Charging Party.

As noted in the Warning Letter, the District is a Merit District, meaning that personnel matters are governed by the State Education Code. When Charging Party solicited the assistance of the

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.

Union to defend her against the allegations of misconduct, she was informed that she had to appeal the disciplinary action herself utilizing the process contained in the Personnel Commission rules, as disciplinary actions are not grievable under the collective bargaining agreement.

Charging Party now argues that even if she was unable to grieve the substance of the disciplinary action, the supervisor's failure to comply with the Personnel Commission rules should have given rise to a valid grievance.² At the time of the events in question, Union representatives with whom Charging Party spoke, instructed her to appeal the disciplinary action utilizing the Personnel Commission rules. Charging Party followed the advice of her Union representatives, and submitted her appeal to the Personnel Commission. Her appeal was ultimately denied and her discipline and termination were upheld. It is not clear what argument(s) Charging Party made in her own defense at the appeal to the Personnel Commission.³

Discussion

As stated in the January 21, 2009 Warning Letter, 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.

² Under the terms of the collective bargaining agreement, which is available on-line at www.seiu1021.org, a grievance is "a claim regarding the interpretation or application of this Agreement."

³ According to the Personnel Commission rules, there are four grounds upon which an appeal may be made. The first possible ground for appeal is "[t]hat the procedure set forth in these rules has not been followed."

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. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

However, the duty of fair representation does not extend to claims that are outside of the scope of the collective bargaining agreement. (*California School Employees Association (Garcia)* (2001) PERB Decision No. 1444; *California School Employees Association and its Chapter 130 (Simpson)* (2003) PERB Decision No. 1550.)

Based on these facts, the charge fails to establish the prima facie elements of a complaint for a breach of the Union's duty of fair representation for the following reasons.

It appears that the information and/or advice that the Union provided to Charging Party was correct—there were no grounds for a grievance pursuant to the terms of the collective bargaining agreement. As noted in the January 21, 2009 Warning Letter, the District is a Merit District, meaning that personnel matters were not subject to collective bargaining. Further, Charging Party's claim that her supervisor failed to properly comply with the District's disciplinary procedural requirements was a subject that needed to be raised in Charging Party's appeal to the Personnel Commission. Accordingly, there does not appear to be a duty on the part of the Union to represent Charging Party at the hearing before the Personnel Commission. Indeed, according to the Personnel Commission rules, employees are permitted to have representation at any stage in the disciplinary process, but are authorized at all levels, including a formal hearing, to act in their own behalf.⁴

It does appear that Charging Party pursued an appeal of the Personnel Commission's discipline and termination. Charging Party could have timely raised procedural defenses at her

⁴ The Personnel Commission rules are available on-line at www.haywardusd.org.

disciplinary hearing. Charging Party does not provide facts establishing the grounds for that appeal, however.

Additionally, if Charging Party believed that there were matters that were subject to the grievance provisions under the collective bargaining agreement, she could have filed a grievance on her own behalf.⁵ It does not appear that she ever filed or pursued a grievance on her own behalf, instead she repeatedly requested that the Union take such action on her behalf. Even assuming there were grounds for a grievance under the collective bargaining agreement, Charging Party has not provided facts establishing how the Union's failure to file a grievance on her behalf was arbitrary, discriminatory, or in bad faith. As noted above, mere negligence in failing to file a grievance, even if warranted by the facts presented, would not rise to the level of a breach of the Union's duty of fair representation.

Finally, many of the facts alleged in this charge occurred more than six months before the date this charge was filed. The only facts in this charge that remain timely occurred in April and May of 2008, after Charging Party had been terminated by her employer. Essentially, these facts appear to establish Charging Party's repeated attempts during April and May of 2008 to secure Union representation at the appeal of her dismissal before the Personnel Commission. The facts tend to indicate that Charging Party continued to request Union assistance to appeal her dismissal, in an extra-contractual forum, while the Union continually informed her that there was no further conduct they would take on her behalf and that if she appealed the termination, she would have to do so without Union assistance. As noted above, the fact that the Union chose not to assist Charging Party in her appeal of an extra-contractual dismissal hearing does not give rise to a breach of the duty of fair representation.

Therefore, the charge is hereby dismissed based on the facts and reasons set forth in this and the January 21, 2009 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,⁶ Charging Party 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. (Cal. Code Regs, tit. 8, sec. 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.

⁵ Under the terms of the collective bargaining agreement, unit members may file grievances with or without the assistance of the exclusive representative through step 2. The exclusive representative must agree to proceed through step 3, binding arbitration. Forms for filing grievances are prepared and distributed by the District.

⁶ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 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 PERB 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. (Cal. Code Regs, tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(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. (Cal. Code Regs, tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 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. (Cal. Code Regs, tit. 8, sec. 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. (Cal. Code Regs, tit. 8, sec. 32132.)

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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 _____
Alicia Clement
Regional Attorney

Attachment

cc: Vincent Harrington, Jr., Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1023
Fax: (510) 622-1027



January 21, 2009

Demetria DeLarge
P. O. Box 3382
San Leandro, CA 94578

Re: Demetria Delarge v. SEIU Local 1021
Unfair Practice Charge No. SF-CO-731-E
WARNING LETTER

Dear Ms. DeLarge:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 20, 2008. Demetria DeLarge (Ms. DeLarge or Charging Party) alleges that the SEIU Local 1021 (Union or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by breaching its duty of fair representation.

My investigation revealed the following facts. Charging Party was employed at the Hayward Unified School District (District) as a para-professional. This was a classified position, exclusively represented by the Union. The District is a Merit District organized under the Education Code. As such, personnel matters concerning classified employees are administered by District's Human Resources Department in accordance with the Personnel Commission Rules based on the merit system principles of the State Education Code. These rules include a description of the grounds for discipline and the procedures to be taken in the event that an employee is charged with misconduct.

In November 2007, Ms. DeLarge filed an unfair practice charge alleging that the Union violated the Act by failing to file a grievance with respect to the District's action of conducting a disciplinary hearing in which Ms. DeLarge was accused of, among other actions, "discourteous, abusive or threatening treatment of the public, employees or students." That unfair practice charge was withdrawn by Ms. DeLarge on April 10, 2008, without prejudice. Also in November 2007, Ms. DeLarge filed an unfair practice charge against the District alleging retaliation and interference in violation of the EERA, and a number of violations of other statutes not administered by PERB. That charge resulted in PERB issuing a complaint which was subsequently withdrawn by Ms. DeLarge as the result of a settlement agreement she reached with the District.

On October 20, 2008, Charging Party filed the present charge in which she alleges that the Union failed to represent her at a disciplinary hearing despite her repeated requests, and that

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.

the District terminated her as a result of the Union's: 1) refusal to file grievances on Charging Party's behalf; 2) refusal to hire an attorney to represent Charging Party; and 3) refusal to represent her at hearings of the Personnel Commission. In support of her allegations, Charging Party provides the following facts.

From November 2007 through March 13, 2008, Charging Party was on paid leave. During this period, she made repeated requests of various Union representatives for assistance. Also during this period, she charges the Union with failing to prevent the District from sending her written notices of disciplinary actions against her, and of refusing to hire an attorney to represent her in her defense of the District's disciplinary action against her.² According to Charging Party, Union Representative Angela Thomas refused to process her grievance, and Union Field Supervisor Nely Obligacion refused to provide her a grievance form or to file one on her behalf. Instead, Ms. Obligacion encouraged and counseled Charging Party to appeal the disciplinary decision of the District's Personnel Commission, per the Personnel Commission's rules.

Charging Party was terminated from her employment with the District on or about March 17, 2008. At the time, Charging Party's earlier unfair practice charges were still pending against both the Union and the District.

On April 29, 2008, Charging Party sent a letter to Ms. Thomas, informing her that the appeal of her dismissal before the Personnel Commission was scheduled to take place at 5:30 on May 7, and that she wished to meet with Ms. Thomas before the meeting to "go over her rights."

On May 5, 2008, Charging Party participated in an informal settlement conference at PERB's Oakland office, which resulted in the settlement of her unfair practice charge against the District. On May 7, 2008, the Personnel Commission heard Charging Party's appeal. However, the Union did not represent Charging Party at the appeal, and although she participated in the appeal hearing, she did so without representation.

Discussion

PERB Regulation 32615(a)(5)³ 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." 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

² Though not explicitly stated in the current charge, the disciplinary charges which are presently complained of are a continuation of the same disciplinary process which began with Charging Party's November 2007 suspension.

³ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (Los Angeles Unified School District (2007) PERB Decision No. 1929; City of Santa Barbara (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005), 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.)

In cases alleging a breach of the duty of fair representation, the six month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (Los Rios College Federation of Teachers, CFT/AFT (1991) PERB Decision No. 889; United Teachers of Los Angeles (2001) PERB Decision No. 1441.) Repeated union refusals to process a grievance over a recurring issue do not start the limitations period anew. (California State Employees Association (1985) PERB Decision No. 497-S.)

Charging Party's statement of facts is a chronological list of her attempts to secure the Union's assistance with the disciplinary hearing and appeal. The Union appears to have consistently refused to assist Charging Party throughout the time period detailed in her charge. Indeed, given the earlier unfair practice charge against the Union, filed on November 27, 2007, it appears that Charging Party knew or should have known as early as November 2007 that the Union would no longer provide her assistance with the disciplinary charges she was facing. Even assuming that after November 2007 Charging Party still did not know that the Union would no longer provide her assistance, Charging Party must still allege facts that occurred within six months of this charge that support her allegations. Because this charge was filed on October 20, 2008, only those events occurring on or after April 20, 2008 will be considered as evidence of an unfair practice.

The only actions alleged to have occurred after April 20, 2008 were Charging Party's April 29, 2008 request to Ms. Thomas to assist her at her appeal before the Personnel Commission on May 7, 2008, and the Union's failure to assist Charging Party at the appeal.

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.

(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.)

Additionally, PERB has held that there is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such an employee can obtain a particular remedy. (San Francisco Classroom Teachers Association (Chestangue) (1985) PERB Decision No. 544.) The general rule is that when bargaining unit members are free to represent themselves or hire an attorney to pursue their claim, the union is not bound by the duty of fair representation. (CSEA and its Chapter 130 (Simpson) (2003) PERB Decision No. 1550.)

Based on the standard stated above, Charging Party must demonstrate more than simply that the Union failed to assist her at a disciplinary hearing before the Personnel Commission. Charging Party must demonstrate that the Union owed her a duty to take the specific conduct she requested of them and that its failure to take such action was the result of bad faith, discrimination or arbitrary conduct. In this case, it is not clear that the Union was required to represent Charging Party before the Personnel Commission. The duty of fair representation attaches to matters within the scope of the collective bargaining agreement. (California School Employees Association (Garcia) (2001) PERB Decision No. 1444.) Indeed, it appears that the Personnel Commission operates independently from the collective bargaining relationship between the Union and the District, such that the Union would owe no duty to assist bargaining unit members with Commission proceedings.

Charging Party also alleges that the Union's refusal to hire an attorney to represent her in her appeal of the Personnel Commission's decision was a breach of the Union's duty to represent her. PERB has long held that unions do not owe a duty to their members to provide financial assistance for securing outside counsel. (California State Employees Association (Fox) (1995) PERB Decision No. 1099.)

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, Charging Party may 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 an authorized agent of 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 an amended charge or withdrawal is not filed on or before January 30, 2009, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia Clement
Regional Attorney

AC