

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DAVID FLOWERS,

Charging Party,

v.

IBEW LOCAL 1245,

Respondent.

Case No. SA-CO-62-M

PERB Decision No. 2079-M

November 24, 2009

Appearance: Law Office of Steven B. Bassoff by Steven B. Bassoff, Attorney, for David Flowers.

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

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by David Flowers (Flowers) of a dismissal of his unfair practice charge by a Board agent. The charge alleged that the IBEW Local 1245 (IBEW) violated the Meyers-Milias-Brown Act (MMBA)¹ when it failed to adequately pursue a grievance filed on Flowers' behalf. Flowers alleged that this conduct was without rational basis and/or devoid of honest judgment and, therefore, constituted a breach of IBEW's duty of fair representation.

The Board agent dismissed the charge, finding that Flowers failed to allege sufficient facts to demonstrate a prima facie case that IBEW breached its duty of fair representation. Flowers appealed. We have reviewed the entire record and find that Flowers established a prima facie violation that IBEW breached its duty of fair representation. In addition, we find that Flowers established a prima facie violation that IBEW breached its duty to provide an

¹ MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

explanation to Flowers why it chose not to elevate the grievance to arbitration. Accordingly, for the reasons set forth below, we remand this charge to the General Counsel's Office for the issuance of a complaint consistent with this decision.

BACKGROUND

Flowers was employed by the Sacramento Municipal Utility District (SMUD) as an electrician technician/splicer. IBEW was his exclusive representative. In November of 2007, Flowers was terminated from his employment "for cause." Under the SMUD-IBEW memorandum of understanding, the grievance procedure was the exclusive method for challenging "for cause" terminations. The procedure consists of four steps, with the final step being binding arbitration.

IBEW filed a grievance on Flowers' behalf on November 30, 2007. Flowers, however, received no further communication from IBEW regarding his grievance. He was not interviewed regarding the termination and he was not consulted regarding potential issues raised by SMUD in support of the termination. In fact, Flowers was not even advised of the status of the grievance or whether the grievance steps were being followed.

On February 19, 2008, Flowers received a telephone call from Sam Glero (Glero), an IBEW business agent, who informed Flowers that IBEW was not going to arbitrate his grievance. Glero did not offer an explanation for IBEW's decision.

On April 2, 2008, Flowers filed the instant unfair practice charge alleging that IBEW's failure to investigate the facts surrounding the termination and its subsequent prosecution of the grievance without sufficient facts was irrational and devoid of honest judgment. Accordingly, Flowers contends IBEW's conduct amounted to a breach of its duty of fair representation. IBEW did not respond to the charge.

The Board agent concluded that Flowers' allegation that IBEW never investigated his claim was conclusory and speculative. Accordingly, the Board agent dismissed the charge, finding that Flowers failed to allege sufficient facts to demonstrate a prima facie case. Flowers appealed, making the same arguments as those set forth in the amended charge. IBEW did not file a response to the appeal.

DISCUSSION

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213 (*Hussey*)). In *Hussey*, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power."

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.)

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without

a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wylar)* (1993) PERB Decision No. 970.)

A. Flowers Pled Sufficient Facts To Demonstrate A Prima Facie Case

In the instant case, the Board agent found that the allegations that IBEW never investigated the facts to his claim and that IBEW never intended to resolve his grievance were conclusory and speculative. We agree that Flowers failed to plead sufficient facts to demonstrate IBEW did not intend to resolve his grievance. However, Flowers did assert the fact that IBEW never contacted him while prosecuting his grievance. Typically, an investigation regarding the propriety of a termination includes the questioning of the terminated employee. Therefore, Flowers' allegation that IBEW did not investigate his claim is not a bald assertion; rather, it is supported by the fact that IBEW failed to interview the actual terminated employee.

In *California Faculty Association (Macdonald)* (1994) PERB Decision No. 1046-H, PERB noted that a "perfunctory" handling of a grievance constituting "arbitrary" conduct "could result from a complete failure to investigate the facts underlying a grievance." Accordingly, since Flowers pled sufficient facts to demonstrate that IBEW failed to conduct an investigation, we find Flowers established a prima facie case that IBEW breached its duty of fair representation.

B. IBEW Failed To Adequately Explain Why It Chose Not To Arbitrate Flowers' Grievance

The Board has held that a reasonable decision not to pursue a grievance, regardless of the merits of the grievance, is not a violation of the duty of fair representation. (*California*

State Employees' Association (Calloway) (1985) PERB Decision No. 497-H.) Similarly, the Board has held that case handling errors and simple negligence do not constitute violations of the duty of fair representation. (*American Federation of State, County and Municipal Employees, Council 10 (Olson)* (1988) PERB Decision No. 682-H.) Notwithstanding these authorities, however, the Board has held that the exclusive representative must explain why it chose not to process an employee's grievance. (*United Faculty Association of North Orange County Community College District (Kiszely)* (1998) PERB Decision No. 1269; *Oakland Education Association, CTA/NEA (Mingo)* (1984) PERB Decision No. 447 (*Mingo*).

In this case, Flowers alleges that on February 19, 2008, he received a telephone call from Glero and was informed that IBEW was not going to arbitrate his grievance. Flowers further alleges that Glero did not offer an explanation for IBEW's decision. Based on *Mingo* and its progeny, we find that IBEW breached its duty to explain to Flowers why it chose not to elevate the grievance to arbitration.

C. Conclusion

We find that Flowers established a prima facie violation that IBEW breached its duty of fair representation when it failed to conduct an investigation into Flowers' grievance. In addition, we find that Flowers established a prima facie violation that IBEW breached its duty to provide an explanation to Flowers why it chose not to elevate the grievance to arbitration.

ORDER

The Board hereby REVERSES the dismissal of the unfair practice charge in Case No. SA-CO-62-M and REMANDS this case to the General Counsel's Office for the issuance of a complaint consistent with this Decision.

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