

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ERIC LEE GALLARDO,

Charging Party,

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1245,

Respondent.

Case No. SA-CO-83-M

PERB Decision No. 2146-M

December 7, 2010

Appearance: Eric Lee Gallardo, on his own behalf.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Eric Lee Gallardo (Gallardo) of a Board agent's dismissal of his unfair practice charge. As amended, the charge alleged that the International Brotherhood of Electrical Workers, Local 1245 (IBEW) breached its duty of fair representation in violation of the Meyers-Milias-Brown Act (MMBA)¹ when it failed to properly represent Gallardo regarding his grievance. The Board agent dismissed the charge for failure to state a prima facie case.

The Board has reviewed the dismissal and the record in light of Gallardo's appeal and the relevant law. Based on this review, the Board affirms the dismissal of the charge as discussed below.

¹ The MMBA is codified at Government Code section 3500 et seq.

BACKGROUND

Gallardo is employed as a public works maintenance worker by the City of Redding (City) and is in the bargaining unit represented by IBEW. In November 2009,² the City imposed a disciplinary demotion on Gallardo because he used his cell phone while working during a traffic flagging assignment. Gallardo filed a grievance alleging the discipline was excessive when compared to the discipline imposed on other employees for other types of safety violations.

On December 3, Gallardo's supervisor, Dave Rader (Rader), superintendent of the Transportation and Engineering Department, met with Gallardo and IBEW Shop Steward Matt Cervenka (Cervenka) to discuss the grievance. Gallardo felt threatened and intimidated by some of Rader's comments. The next day, Gallardo requested that Cervenka provide a written statement verifying the comments made by Rader. Cervenka told Gallardo he did not view the comments as threatening and declined to provide a written statement.

On December 4, Gallardo contacted IBEW Senior Business Representative Ray Thomas (Thomas) to request that Cervenka be required to provide a written statement.³ Thomas informed Gallardo that he had talked with Cervenka and was aware that Cervenka did not believe Rader's comments were threatening. Thomas and Gallardo also discussed Gallardo's grievance. Thomas was set to meet with Brian Crane (Crane), director of

² Unless otherwise noted, all dates hereafter refer to 2009.

³ The charge alleges that IBEW's website provides guidance to its shop stewards, including the following:

When investigating a complaint, it is important to take notes. . . . This is especially true if discipline may be involved. A detailed written record that can be made available to higher levels of the grievance procedure could mean the difference between a successful defense based on facts, and a failed defense based on faulty memory

transportation and engineering, for the next level grievance meeting. A series of emails between Gallardo and Thomas followed. Thomas continued to refuse to require Cervenka to prepare a written statement.

On December 10, Thomas notified Gallardo by letter and email that following his meeting with Crane, IBEW had decided not to pursue Gallardo's grievance further. The letter stated, in relevant part:

Subsequent to my meeting with Director Crane, and based on the facts of the case, I have determined that the disciplinary demotion as outlined in Director Crane's 'Notice of Demotion' internal communication to you dated November 11, 2009 was for just cause.

Your disregard for the safety of your co-workers and the public while you utilized your personal cellular phone during a traffic flagging operation on October 23, 2009 violated both City of Redding Street Division Handbook Policies and Work Rules (Personal Electronic Devices), and City Personnel Policies (17.60 C #5, and 17.60 B #10).

Your disciplinary demotion grievance is settled without adjustment.

Gallardo responded to Thomas that he disagreed with the resolution of his grievance and asserted that IBEW failed to adequately compare his disciplinary action with that of another employee disciplined for other safety violations. Gallardo also continued to demand that Cervenka provide a written statement.

Subsequently, Gallardo contacted IBEW Staff Attorney Jenny Marston (Marston). Marston also refused to direct Cervenka to prepare a statement and she agreed with Thomas' resolution of Gallardo's grievance.

The Board agent concluded that the charge did not state a prima facie case, finding no evidence that IBEW acted in an arbitrary, discriminatory or bad faith matter in violation of its duty of fair representation.

On appeal, Gallardo continues to make the same arguments, asserting that IBEW did not properly consider evidence of lesser discipline imposed on another employee for safety violations.

DISCUSSION

Gallardo has alleged that IBEW breached its duty of fair representation in its grievance representation. 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* (1995) 35 Cal.App.4th 1213.) In *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board.

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, a charging party must show that the respondent’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 rationale [sic] 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.)

In deciding whether this standard is met, PERB does not determine whether the union's decision is correct but whether it "had a rational basis, or was reached for reasons that were arbitrary or based upon invidious discrimination." (*Sacramento City Teachers Association (Fanning, et al.)* (1984) PERB Decision No. 428.)

Thomas discussed the grievance with Gallardo, including Gallardo's assertions that the discipline was excessive. Thomas then met with the department director and considered the applicable policies and contract provisions. Based on his review, Thomas concluded that the City's actions were justified. Although Gallardo may not agree with IBEW's decision not to pursue the grievance, the charge does not demonstrate that Thomas' decision was without a rational basis, or was arbitrary or based on invidious discrimination.

Gallardo also asserted that IBEW breached its duty when it refused his requests to prepare a written statement concerning the meeting with Gallardo's supervisor. Absent evidence of arbitrary, discriminatory or bad faith conduct, a union's decision to conduct its representation in a manner contrary to the wishes of a bargaining unit employee, does not violate the duty of fair representation. (*United Teachers-Los Angeles (Simms)* (1992) PERB Decision No. 932; *California Faculty Association (Pomerantsev)* (1988) PERB Decision No. 698-H.) The charge does not provide evidence that the refusal to prepare a written statement was arbitrary, discriminatory or in bad faith. The shop steward told Gallardo he did

not view the statements as threatening and he declined to provide his observations in writing. Furthermore, PERB does not have jurisdiction over the internal affairs of an employee organization unless there is evidence of a substantial impact on the employer-employee relationship. (*Service Employees International Union, Local 99 (Kimmitt)* (1979) PERB Decision No. 106; *California State Employees Association (Hutchinson, et al.)* (1998) PERB Decision No. 1304-S.) The charge does not provide evidence that IBEW's conduct here had a substantial impact on Gallardo's relationship with his employer. Accordingly, the charge does not state a prima facie violation of the duty of fair representation.

ORDER

The unfair practice charge in Case No. SA-CO-83-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.