

with applicable law. Accordingly, the Board adopts the dismissal and warning letters as the decision of the Board itself, supplemented by the discussion below.

DISCUSSION

Compliance with Requirements for Filing Appeal

Pursuant to PERB Regulation 32635(a),² an appeal from dismissal must:

- (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
- (2) Identify the page or part of the dismissal to which each appeal is taken;
- (3) State the grounds for each issue stated.

To satisfy the requirements of PERB Regulation 32635(a), the appeal must sufficiently place the Board and the respondent “on notice of the issues raised on appeal.” (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H (*State Employees Trades Council*); *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent’s dismissal fails to comply with PERB Regulation 32635(a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381 (*Pratt*); *Lodi Education Association (Hudock)* (1995) PERB Decision No. 1124; *United Teachers - Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635(a). (*Pratt*; *State Employees Trades Council*; *Contra Costa County Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.)

² PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The appeal in this case merely restates facts alleged in the original charge that CSEA failed to adequately represent Erwin concerning his transfer. It fails, however, to reference any portion of the Board agent's determination or otherwise identify the specific issues of procedure, fact, law or rationale to which the appeal is taken, the page or part of the dismissal to which appeal is taken, or the grounds for each issue. Thus, it is subject to dismissal on that basis. (*City of Brea* (2009) PERB Decision No. 2083-M.)

New Evidence and Allegations on Appeal

In his appeal, Erwin presents new factual allegations that were not presented in the original charge or the amended charge. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b); see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)

On December 30, 2009, the Board agent issued a letter advising Erwin that the charge failed to state a prima facie case and warning him that the charge would be dismissed unless he amended the charge by January 13, 2010 to state a prima facie case. Erwin did not file an amended charge, but filed additional information in support of the charge on January 26 and February 4, 2010. Thereafter, the Board agent dismissed Erwin's charge on February 16, 2010. Erwin filed an appeal from the dismissal on March 8, 2010. The appeal includes new factual allegations and evidence provided for the first time on appeal that all predate the dismissal letter. The appeal provides no reason why they could not have been alleged in the original charge or in an amended charge. Thus, we do not find good cause to consider these new allegations.

ORDER

The unfair practice charge in Case No. SF-CO-745-E is hereby DISMISSED WITHOUT
LEAVE TO AMEND.

Member McKeag joined in this Decision.

Member Huguenin's concurrence begins on page 5.

HUGUENIN, Member, concurring: I concur in the result reached by the majority, which is to dismiss the unfair practice charge for failure to state a prima facie violation of the duty of fair representation. I write separately to express concern over another issue discussed in the majority's opinion.

Having affirmed the Public Employment Relations Board (PERB) agent's dismissal on the merits, the majority then backtracks by suggesting that the appeal "is subject to dismissal" on the basis that Jack Erwin failed to comply with PERB's appeal procedures. If that is the case, then in my view PERB should so hold, and not reach the merits. Either we dismiss the appeal outright for its procedural defects, or we hold the procedural defects to be insufficient for that purpose, and reach the merits. I can support either, but not both.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377



February 16, 2010

Jack Erwin
1779 Paulson Way
Napa, CA 94558

Re: *Jack Erwin v. California School Employees Association*
Unfair Practice Charge No. SF-CO-745-E
DISMISSAL LETTER

Dear Mr. Erwin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 17, 2009. Jack Erwin (Mr. Erwin or Charging Party) alleges that the California School Employees Association (CSEA or Respondent) failed to properly represent him and thus violated the Educational Employment Relations Act (EERA or Act).¹

Charging Party was informed in the attached Warning Letter dated December 30, 2009, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to January 13, 2010, the charge would be dismissed.

Mr. Erwin did not file an amended charge but did file additional information in support of his charge on January 26 and February 4, 2010.²

Discussion

The charge filed by Mr. Erwin focuses on a claim that CSEA's representation of another bargaining unit member adversely affected Mr. Erwin. The earlier Warning Letter explained that Mr. Erwin had failed to demonstrate that CSEA's conduct violates the EERA, given the discretion that the Board, and the federal courts, have determined is appropriate for an exclusive representative (*California School Employees Association and its Chapter 107 (Chacon)* (1995) PERB Decision No. 1108), or that CSEA's conduct was "without a rational

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

² The materials "filed" on January 26, 2010 were received by PERB on January 19, 2010 but proof of service on the Respondent was not provided until the later date.

basis or devoid of rational judgment.” (*Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124.)

The additional materials filed by Mr. Erwin in support of his charge largely consist of documents relating to the employment history of the other employee, and the Last Chance Agreement negotiated by CSEA and the Vallejo City Unified School District (District) with respect to that other employee. Also submitted, however, is a copy of a grievance filed by CSEA on behalf of Mr. Erwin, dated November 19, 2009. In that grievance, CSEA appears to address the harm allegedly done to Mr. Erwin by the District by its implementation of the Last Chance Agreement. No information on the disposition of that grievance is provided with the charge.

As was explained in greater detail in the Warning Letter, the duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members. (*California School Employees Association and its Chapter 107 (Chacon)*, *supra*, PERB Decision No. 1108; *Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889.) Here, even if CSEA negotiated an agreement that had an adverse effect on Mr. Erwin, the charge and the supplemental materials provided by Mr. Erwin simply fail to demonstrate how CSEA acted in a manner that was “without a rational basis or devoid of rational judgment,” and thus breached its statutory duty of fair representation. (*Rocklin Teachers Professional Association (Romero)*, *supra*, PERB Decision No. 124.)³

Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein, as well as in the December 30, 2009 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,⁴ 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, § 32635, subd. (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.

³ It is further noted that charging party’s burden to provide a “clear and concise statement” of the charge is not satisfied merely by referencing facts contained in documents attached to the charge, but not set forth in the charge itself. (*Regents of the University of California* (2004) PERB Decision No. 1585-H; see, also, *Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959.)

⁴ PERB 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, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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, § 32635, subd. (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, § 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, § 32135, subd. (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, § 32132.)

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



Les Chisholm
Division Chief

Attachment

cc: Maureen C. Whelan

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
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December 30, 2009

Jack Erwin
1779 Paulson Way
Napa, CA 94558

Re: *Jack Erwin v. California School Employees Association*
Unfair Practice Charge No. SF-CO-745-E

WARNING LETTER

Dear Mr. Erwin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 17, 2009. Jack Erwin (Mr. Erwin or Charging Party) alleges that the California School Employees Association (CSEA or Respondent) violated section 3541.5 of the Educational Employment Relations Act (EERA or Act).¹

Mr. Erwin is an employee of the Vallejo City Unified School District (District). According to PERB's case files, CSEA is the exclusive representative of a bargaining unit including the District's classified employees. The statement of the charge reads in its entirety and verbatim as follows:

I applied for and was selected for a promotion to Maintenance Task/Project Leader on 06/01/2009 with a stipulation that if the previous employee received a valid California Drivers License by 08/25/2009 I would step down to my old position as Carpenter. Unbeknownst to me or my immediate supervisors CSEA altered the agreement so that the date was changed to 09/03/2009. I then was given an involuntary transfer back to my old position and my old rate of pay as of 09/14/2009. An involuntary transfer is a step back but should be at the same rate of pay as the Maintenance Task/Project Leader. My union did not work for my best interest when changing the dates of the above mentioned stipulation. I seek to be reinstated to the Maintenance Task/Project Leader position that I am highly qualified for or to receive all back pay and current pay rate of the difference between the Carpenter position and the Maintenance Task/Project Leader pay.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB's Regulations may be found at www.perb.ca.gov.

Discussion

As noted, Charging Party alleges on the face of his charge form that CSEA has violated EERA section 3541.5. However, section 3541.5 describes the authority and jurisdiction of the Board to adjudicate unfair practice charges filed by employees, employee organizations and employers, and does not establish any duty or responsibility of an employee organization that might be violated by, for example, CSEA. Based on the statement of the charge, it appears to be more appropriate to consider the instant charge as an allegation that CSEA has breached the duty of fair representation established by EERA section 3544.9,² in violation of EERA section 3543.6(b).

The duty of fair representation imposed on an exclusive representative applies both to the negotiations process and 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, Mr. Erwin must show that CSEA's conduct was arbitrary, discriminatory or in bad faith. (*Ibid.*)

As a general rule, an exclusive representative enjoys a wide range of bargaining latitude. As the United States Supreme Court stated in *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338.³

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to good faith and honesty of purpose in the exercise of its discretion.

² EERA section 3544.9 reads as follows:

The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

³ When interpreting EERA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Los Angeles Unified School District* (1976) EERB* Decision No. 5 (*Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board, or EERB.); *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

Acknowledging the need for such discretion, PERB determined that an exclusive representative is not expected or required to satisfy all members of the unit it represents. (*California School Employees Association (Chacon)* (1995) PERB Decision No. 1108.) Moreover, the duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members, nor is an employee organization obligated to bargain a particular item benefiting certain unit members. (*Ibid.*; *Los Rios College Federation of Teachers (Violett)* (1991) PERB Decision No. 889.) The mere fact that an employee is not satisfied with an agreement is insufficient to demonstrate a prima facie violation. (*Ibid.*)

With respect to grievance representation, the Board has 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.

(*United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.)

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.)

Here, Mr. Erwin's statement of the charge makes clear that he is displeased with an agreement entered into by CSEA with the District. The charge, however, does not provide sufficient facts from which a conclusion may fairly be drawn that CSEA's conduct violates the EERA, given the discretion that the Board, and the federal courts, have determined is appropriate for an exclusive representative. There are no facts presented with the charge, for example, that establish CSEA's conduct was "without a rational basis or devoid of rational judgment." (*Rocklin Teachers Professional Association (Romero)*, *supra*, PERB Decision No. 124.)

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.)

For these reasons the charge, as presently written, does not state a prima facie case.⁴ 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 13, 2010,⁵ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Les Chisholm
Division Chief

⁴ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

⁵ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)