

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MARK A. CAUBLE,

Charging Party,

v.

BARSTOW COLLEGE FACULTY
ASSOCIATION,

Respondent.

Case No. LA-CO-1444-E

PERB Decision No. 2256

April 25, 2012

Appearance: Mark A. Cauble, on his own behalf.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Mark A. Cauble (Cauble) of the PERB Office of the General Counsel's dismissal (attached) of his unfair practice charge. The charge alleged that the Barstow College Faculty Association (Association) violated the Educational Employment Relations Act (EERA)¹ by entering into a memorandum of understanding (MOU) modifying the collective bargaining agreement concerning adjunct instructor evaluations without providing proper notice, requiring a quorum or giving the membership a vote in accordance with the Association's bylaws. The question before the Board agent was whether this conduct breached the Association's duty of fair representation. The Board agent dismissed the charge, finding that it failed to state a prima facie case.

The Board has reviewed the entire record in this matter and given full consideration to the issues raised on appeal and the arguments of the parties. Based thereon, the Board finds

¹EERA is codified at Government Code section 3540 et seq.

the Board agent's warning and dismissal letters to be well-reasoned, adequately supported by the record and in accordance with the applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself subject to a brief discussion of the issues raised on appeal.

DISCUSSION

Compliance with Requirements for Filing Appeal

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

- (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 this regulation, 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; *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, subdivision (a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381; *Lodi Education Association (Huddock)* (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, subdivision (a). (*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.

Here, the appeal consists entirely of allegations previously made and new allegations and supporting evidence raised for the first time on appeal. The appeal does not reference any portion of the Board agent's determination or otherwise state the specific issues of procedure, fact, law or rationale to which the appeal is taken. Nor does it identify the page or part of the dismissal to which the appeal is taken or state the grounds. Thus, the appeal is subject to dismissal on this ground alone. (*City of Brea* (2009) PERB Decision No. 2083-M.)

New Evidence and Allegations on Appeal

In the appeal, Cauble presents allegations and supporting evidence that was not presented during the processing of the charge. The new supporting evidence consists of a news article concerning the unveiling of an observatory on the college campus. The article is dated February 4, 2010. Cauble alleges for the first time on appeal that the MOU was a quid pro quo for the observatory.

PERB Regulation 32635, subdivision (b) provides: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." 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.)

Here, the Board agent dismissed the charge by letter of June 1, 2010. The dates of the events alleged for the first time on appeal concerning the observatory predate the dismissal of the charge, as does the news article. The appeal provides no reason why these allegations could not have been included in the original or amended charges or why the article could not have been provided to the Board agent during the processing of the charge. Thus, we find no good cause to consider on appeal the new allegations or the new supporting evidence concerning the observatory.

ORDER

The unfair practice charge in Case No. LA-CO-1444-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8387
Fax: (916) 327-6377



June 1, 2011

Mark A. Cauble
24530 Willow Pass Drive
Tehachapi, CA 93561

Re: *Mark A. Cauble v. Barstow College Faculty Association*
Unfair Practice Charge No. LA-CO-1444-E

DISMISSAL LETTER

Dear Mr. Cauble:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 2, 2010 and amended on September 7, 2010. Mark A. Cauble (Cauble or Charging Party) alleges that the Barstow College Faculty Association (BCFA or Union or Respondent) violated section 3544.9 of the Educational Employment Relations Act (EERA or Act)¹ as enforced through section 3543.6(b) by depriving Charging Party of the opportunity to vote on a specific issue, by failing to give proper notice of an item up for vote, and by failing to follow the rules relating to quorum.

Charging Party was informed in the attached Warning Letter dated April 7, 2011, 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, he should amend the charge. On April 21, 2011, Charging Party filed a Second Amended Charge to address the deficiencies explained in the Warning Letter.

Charging Party's Second Amended Charge states, verbatim:

The 3/24/10 Memorandum of Understanding, which modified the collective bargaining agreement between BCFA and the Barstow College District, has had a substantial impact on unit members relationship to their employer so as to give rise to a duty of fair representation and demonstrates the need for PERB intervention.

Barstow College will evaluate thirty-six temporary/hourly faculty during the Spring 2011 Semester (see attached Instruction Office email). Faculty experience shows that it takes about four hours for each evaluation. . . . As a result, the MOU has saved the District about seven weeks of administrative work this school

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.

year and as per the Barstow College Business Office figures the MOU has saved the District around sixty-five thousand dollars this school year []. However, the MOU does not give the BCFA an equivalent value in exchange for the administrative savings. The only concession to BCFA was, "Every attempt will be made to make sure that a full-time faculty member is not selected to serve on more than three evaluation teams per semester..."

Additionally, the MOU has placed the full-time Faculty in substantial legal jeopardy without a clear idea of if the administration of the BCFA would defend them. Originally, the evaluation process for temporary/hourly faculty was, "conducted by an instructional administrator, assisted by a full-time faculty member..." [] Under the MOU, "The full-time faculty evaluator will conduct the classroom observations... Instructional administrators will be responsible for reviewing the evaluation report based upon the full-time faculty observations" []. The hiring of a temporary/hourly faculty is thus based on the full-time faculty members evaluation! If a temporary/hourly faculty member launched a legal challenge to the evaluation, the MOU would place a legal burden on the faculty that did not exist before. Finally, who would defend the full-time faculty evaluations for temporary/hourly faculty? By performing an administrative function, would the full-time faculty be defended by the administration or as union members, would the full-time faculty be defended by the BCFA?

Consequently, the 3/24/10 MOU has had a substantial impact on the BCFA members relationship to the Barstow College District so as to give rise to a duty of fair representation and demonstrates a need for PERB intervention.

Charging Party's original and First Amended Charge alleged that Charging Party was not given proper notice of an MOU item up for vote, that Respondent did not follow its rules relating to quorum, and that he was not provided with the opportunity to vote on the "evaluation of faculty members" issue. As explained in the Warning Letter, these allegations concern internal union affairs for which PERB does not have jurisdiction. (*Stationary Engineers Local 39 (May) (2010) PERB Decision No. 2098-M.*) The Warning Letter explained that in very limited situations the Board has intervened in the internal affairs of a union when alleged union reprisals against members substantially impacted the employment relationship. For example, in *California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S*, the union filed a citizen's complaint against an employee with his employer, causing the employer to initiate an investigation of the employee's conduct. In finding a violation, the Board held that the union's conduct directly and substantially impacted the employee's employment relationship with his employer.

Nothing in the original, First Amended Charge, or Second Amended Charge demonstrates that the Union retaliated against Charging Party, which resulted in a substantial impact on the employment relationship of bargaining unit employees to their employer.

Moreover, with respect to the duty of fair representation, Charging Party has not established bad faith, discrimination, or arbitrary conduct by the Union. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) 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:

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.

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 (Violet)* (1991) PERB Decision No. 889.) The mere fact that Charging Party was not satisfied with the agreement is insufficient to demonstrate a prima facie violation. (*Los Rios College Federation of Teachers (Violet)*.)

Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein and the April 7, 2011 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,² 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.

² 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.)

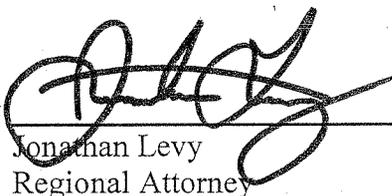
Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By



Jonathan Levy
Regional Attorney

Attachment

cc: Robert E. Lindquist

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
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April 7, 2011

Mark A. Cauble
24530 Willow Pass Drive
Tehachapi, CA 93561

Re: *Mark A. Cauble v. Barstow College Faculty Association*
Unfair Practice Charge No. LA-CO-1444-E
WARNING LETTER

Dear Mr. Cauble:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 2, 2010 and amended on September 7, 2010. Mark A. Cauble (Cauble or Charging Party) alleges that the Barstow College Faculty Association (BCFA or Respondent) violated section 3544.9 of the Educational Employment Relations Act (EERA or Act)¹ as enforced through section 3543.6(b) by depriving Charging Party of the opportunity to vote on a specific issue, by failing to give proper notice of an item up for vote, and by failing to follow the rules relating to quorum.

FACTUAL BACKGROUND

Charging Party's Position

The charge provides, verbatim:

A vote was taken at the 3/11/10 meeting of the Barstow College Faculty Association that modified the BCFA collective bargaining agreement with the Barstow Community College District through a Memorandum of Understanding [cite omitted]. The MOU dealt with the evaluation of temporary, hourly faculty by full-time faculty. The item wasn't on the agenda, so I wasn't aware that it was to be voted on [cite omitted]. There wasn't a quorum at the meeting as per the BCFA Bylaws. A quorum for a BCFA meeting requires forty percent of the membership [cite omitted]. At the time BCFA had forty-two members [cite omitted]. Only ten members were present at the 3/11/10 meeting, which was short of the sixteen necessary for a quorum [cite omitted]. I was not afforded the opportunity to vote as provided

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.

by California Teachers Association BYLAWS, which includes under "Rights and Privileges of Members," the following statement, "The right to vote on all matters submitted to the chapter membership" [cite omitted] and by the contract between BCFA and BCCD, which mandates, "...after reaching agreement, the Association shall submit the Agreement to its members for ratification..." [cite omitted].

The President Scott Bulkley signed an MOU with the District on 3/24/10 [cite omitted]. All attempts to convince the previous and present BCFA Presidents to give all members a chance to vote on the MOU have failed. I spoke directly to President Scott Bulkley before the Barstow College graduation ceremony on May 21, 2010, and he led me to believe that he would take action in June to solve the problem. He did not. I exchanged e-mails with the newly elected president, Lewis Goldstein, and I was under the impression that a solution would be found during our first meeting of the school year on August 13, 2010. The matter was discussed, but no resolution was found.

As a result, I have been forced to file an unfair labor practice charge against BCFA. My remedy is to go back to the situation before the vote was taken and to have a new vote where I and all other members of the BCFA have an opportunity to vote on the MOU.

Respondent's Position

Respondent asserts that as per the February 10, 2010 faculty-wide e-mail message delivered to employees, including Charging Party, the allegation that "the item wasn't on the agenda, so [Charging Party] wasn't aware that it was to be voted on" is without merit. Alternatively, Respondent asserts that Charging Party's charge concerns internal union affairs which fall outside the scope of representation and PERB's jurisdiction.

DISCUSSION

PERB Regulation 32615(a)(5)² 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 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.)

A. Duty of Fair Representation

Based on the charge as written, it appears that Charging Party is alleging that Respondent breached its duty of fair representation.

1. *Internal Association Affairs*

Generally, PERB will not review matters concerning internal union affairs unless they have a substantial impact on the relationship of unit members to their employer so as to give rise to the duty of fair representation. (*Service Employees International Union, Local 99 (Kimmitt)* (1979) PERB Decision No. 106 (holding that only such activities that have a substantial impact on the relationships of unit members to their employer are subject to the duty); see also, *California State Employees Association (Hutchinson, et al.)* (1998) PERB Decision No. 1304-S (noting that PERB has traditionally refrained from reviewing the internal affairs of unions); *California State Employees Association (Hard, et al.)* (1999) PERB Decision No. 1368-S (holding that, "PERB's function is to interpret and administer the statutes which govern the employer-employee relationship, not to police internal relationships among various factions within employee organizations ... internal union disputes are more appropriately presented in a different forum"); *California State Employees Association (Gonzalez-Coke, et al.)* (2000) PERB Decision No. 1411-S (holding that charging parties fail to meet their threshold burden when no factual evidence of impact on the employer-employee relationship is provided in the charge).)

In *Stationary Engineers Local 39 (May)* (2010) PERB Decision No. 2098-M, the Board held that:

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 (Wylser)* (1993) PERB Decision No. 970.)

It is well-established, however, that PERB does not have jurisdiction over matters concerning internal union affairs unless they have a substantial impact on the relationship of bargaining unit employees to their employer so as to give rise to a duty of fair representation. (*Service Employees International Union, Local 99 (Kimmitt)*, *supra*, PERB Decision No. 106; *California State Employees Association (Hutchinson, et al.)*, *supra*, PERB Decision No. 1304-S.) In *California State Employees Association (Hutchinson)* PERB Decision No. 1369-S, the Board dismissed allegations that the union conducted elections outside the timeframe required by union bylaws; and mailed election ballots, improperly validated ballots, failed to properly distribute election results, and improperly installed union officers in violation of union bylaws. In *California State Employees Association (Hackett)* (1993) PERB Decision No. 1012-S, the Board found no substantial impact on the employee-employer relationship where the union suspended the bargaining team; submitted a proposal to the membership for ratification that was not approved by the bargaining team; failed to provide a secret ballot; and failed to give the membership any choice on the ballot except to vote for ratification or strike.

In comparison, the Board has intervened in the internal affairs of a union when alleged union reprisals against members substantially impacted the employment relationship. For example, in *California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S, the union filed a citizen's complaint against an employee with his employer, causing the employer to initiate an investigation of the employee's conduct. In finding a violation, the Board held that the union's conduct directly and substantially impacted the employee's employment relationship with his employer.

Based on the cases cited above, Charging Party's allegations that he was not given proper notice of an item up for vote, that Respondent did not follow its rules relating to quorum, and that he was not provided with the opportunity to vote on the "evaluation of faculty members" issue are matters concerning internal union affairs. Additionally, Charging Party fails to allege specific factual details that demonstrate these internal union affairs had a substantial impact on the relationship of employees to their employer so as to give rise to the duty of fair representation.

April 7, 2011

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For these reasons the charge, as presently written, does not state a prima facie case.³ 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 Second 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 April 18, 2011,⁴ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Jonathan Levy
Regional Attorney

JL

³ 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.*)

⁴ A document is “filed” on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)