

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



SEAN JOSEPH TOBIN,

Charging Party,

v.

CAL FIRE LOCAL 2881,

Respondent.

Case No. SA-CO-494-S

PERB Decision No. 2580-S

August 17, 2018

Appearances: Kelley Tobin, Representative, for Sean Joseph Tobin; Messing Adam & Jasmine, by Gary M. Messing, Attorney, for Cal Fire Local 2881.

Before Banks, Shiners and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Sean Joseph Tobin (Tobin) from an Order of Dismissal (attached) by a PERB administrative law judge (ALJ) dismissing the complaint and Tobin's unfair practice charge on a pre-hearing motion brought by Cal Fire Local 2881 (Local 2881). The complaint alleged that Local 2881 breached its duty of fair representation by ignoring Tobin's request for assistance with a Name-Clearing hearing and failing to assist Tobin in appealing his termination by the California Department of Forestry and Fire Protection to the State Personnel Board. The complaint also alleged that Local 2881's Chapter Director Jason Graziano lied to other union representatives about whether he had ignored Tobin's request for assistance in the Name-Clearing hearing.

The Board has reviewed the entire case file and has fully considered the relevant issues and contentions on appeal in light of applicable law. Based on our review, we find the Order

of Dismissal accurately describes the allegations included in the complaint and the undisputed material facts contained in Local 2881's motion to dismiss. The ALJ's legal conclusions are well reasoned and in accordance with applicable law. We therefore adopt the Order of Dismissal as the Decision of the Board itself, subject to the brief discussion below of two issues raised in the appeal.

DISCUSSION

As we recently affirmed in *Santa Ana Unified School District* (2017) PERB Decision No. 2514, a Board agent considering a pre-hearing motion to dismiss applies the standard governing the pre-complaint investigation of an unfair practice charge and should therefore grant such a motion only when the facts alleged in the complaint and/or subject to administrative notice establish a fatal defect, such as lack of jurisdiction or standing or, based on the undisputed material facts, the charging party is unable to prove one or more essential elements of the prima facie case as a matter of law. (*Id.* at pp. 26-28; see also PERB Regs. 32190, subd. (a); 32635.¹) The Order of Dismissal scrupulously adheres to this standard. Tobin's opposition to Local 2881's motion to dismiss cited various authorities regarding the scope of the duty of fair representation but, as the ALJ correctly concluded, none of the authorities cited recognize any obligation to represent employees, unless the exclusive representative possesses the exclusive means by which such member can vindicate an individual right, and the right in question derives from a collective bargaining agreement. (*National Education Association-Jurupa (Norman)* (2014) PERB Decision No. 2371, pp. 14-15.) Because the Name-Clearing hearing and State Personnel Board appeal are statutory and

¹ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

regulatory (Cal. Code Regs., tit. 2, § 63.1), rather than collectively-bargained for, Local 2881 owed Tobin no duty of fair representation in either of these contexts.

The appeal identifies two “important factors” which Tobin asserts were not addressed in the ALJ’s Order of Dismissal. One of the asserted errors is that State Rank and File Director Tim Edwards (Edwards) denied Tobin his right to file a grievance. This assertion is without merit. As explained in the Order of Dismissal, the duty of fair representation applies to the exclusive representative’s negotiation and administration of agreements with the employer. (*Service Employees International Union Local 521 (Garcia)* (2018) PERB Decision No. 2575-M (*SEIU Local 521 (Garcia)*), p. 8.) Neither the amended charge nor the appeal identifies any provision of the Memorandum of Understanding (MOU) between Local 2881 and the State of California that would allow Tobin or Local 2881 to grieve his termination under the circumstances. Although Tobin appears to assert that he was entitled to appeal his termination to the collectively-bargained Board of Adjustment procedure in Article 19 of the MOU, as explained in the Order of Dismissal, this procedure was struck down as unconstitutional by the California Supreme Court in 2005 (*State Personnel Bd. v. Department of Personnel Admin.* (2005) 37 Cal.4th 512, 523–527), and was therefore unavailable to Tobin in 2016 when his employment was terminated. Consequently, Local 2881’s failure to grieve Tobin’s termination could not have breached the duty of fair representation.

The other “important factor” identified in Tobin’s appeal and purportedly neglected by the ALJ is Local 2881’s alleged practice “that its officers, including the State Rank and File Director, Tim Edwards, cannot hear a member’s side of their [sic] issue or grievance” because, in the absence of attorney-client privilege, there is no guarantee of confidentiality of any information shared by the member with the union’s officers. As discussed in the Order of

Dismissal, Edwards allegedly advised Tobin that Edwards was not an attorney and could not guarantee the confidentiality of Tobin's communications. Accordingly, Edwards further advised Tobin that he should refrain from sharing any information with Edwards about the incident that led to Tobin's termination, as Edwards could be called to testify in a separate investigation, including any criminal proceedings that might be brought against Tobin. The appeal asserts that this alleged practice prohibits the union from investigating complaints and their merits, and therefore from fulfilling its duty to provide fair representation to the employees it represents. We find no merit to this argument.

Because Local 2881 did not control Tobin's access to any appeal rights, and thus had no duty of fair representation, this allegation, even if true, would not alter the outcome and is therefore irrelevant.

Moreover, Edwards' statement, as alleged by Tobin, is a correct statement of the law. Although PERB follows federal precedent protecting certain communications under specified circumstances (see, e.g., *State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S, pp. 16-20 [endorsing quasi-privileges/protections under *Cook Paint and Varnish Co. v. NLRB* (D.C. Cir. 1981) 648 F.2d 712 and *Johnnie's Poultry Co.* (1964) 146 NLRB 770]; *Colton Joint Unified School District/Rialto Unified School District/San Bernardino City Unified School District* (1981) PERB Order No. Ad-113, p. 6 [endorsing protections under *Berbiglia, Inc.* (1977) 233 NLRB 1476]), the California Evidence Code presently includes no privilege protecting communications between a grievant and a non-attorney union representative. (*American Airlines, Inc. v. Superior Court* (2003) 114 Cal.App.4th 881, 888–896.) Moreover, while courts in other states have recognized such a privilege as implicit in their public-sector labor relations statutes (*Peterson v. State*

(Alaska 2012) 280 P.3d 559, 566–567; *City of Newburgh v. Newman* (N.Y. App. Div. 1979) 70 A.D.2d 362, 365–366), there is to date no such decision interpreting the Ralph C. Dills Act² or California’s other public sector labor relations statutes on this issue.

Edwards’ advice to Tobin, and the practice it is alleged to reflect, were therefore well within the wide range of reasonableness afforded to the union, including its broad discretion to determine how best to represent employees in the adjustment of grievances. (*SEIU Local 521 (Garcia)*, *supra*, PERB Decision No. 2575-M, p. 9.) Accordingly, we reject the appeal’s contention that the ALJ erred by not considering Edwards’ statement to Tobin or Local 2881’s alleged practice of not investigating matters that are still under investigation in other proceedings.

Having raised no other issues warranting consideration by the Board, we deny the appeal and adopt the Order of Dismissal as the Decision of the Board itself.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CO-494-S are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shiners and Krantz joined in this Decision.

² The Ralph C. Dills Act is codified at Government Code section 3512 et seq.



**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD**

SEAN JOSEPH TOBIN,
Charging Party,

v.

CAL FIRE LOCAL 2881,
Respondent.

UNFAIR PRACTICE
CASE NO. SA-CO-494-S

ORDER OF DISMISSAL
(January 31, 2018)

Appearances: Sean Tobin, on his own behalf; Messing Adam & Jasmine by Gary M. Messing, Attorney, for CAL FIRE Local 2881.

Before Robin W. Wesley, Administrative Law Judge.

INTRODUCTION

The Respondent filed a motion to dismiss the complaint and unfair practice charge, asserting that the Charging Party failed to state a prima facie case of a breach the duty of fair representation under the Ralph C. Dills Act (Dills Act or Act).¹ The Charging Party opposed the motion to dismiss.

PROCEDURAL HISTORY

On November 21, 2016, Sean Tobin (Tobin) filed an unfair practice charge against CAL FIRE Local 2881 (Local 2881 or Union), and filed a first amended charge on May 23, 2017. On June 6, 2017, Local 2881 submitted a position statement in response to the original and amended charge.

¹ The Dills Act is codified at Government Code section 3512 et seq. All statutory references are to the Government Code, unless otherwise stated.

On August 8, 2017, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that Local 2881 breached its duty of fair representation when it ignored Tobin's request for assistance with his Name-Clearing hearing, Chapter Director Jason Graziano (Graziano) lied to other union representatives when he said he did not ignore Tobin's request, and when Local 2881 failed to assist Tobin with the appeal of his termination of employment.

On August 29, 2017, Local 2881 filed an answer to the complaint admitting jurisdictional allegations, denying substantive allegations, and asserting affirmative defenses.

On August 29, 2017, Local 2881 filed a motion to dismiss the complaint and unfair practice charge. Tobin filed a response to the motion on December 14. On December 22, Local 2881 submitted a reply to Tobin's opposition to its motion.

TOBIN'S FACTUAL ALLEGATIONS²

Tobin worked as a seasonal firefighter for the California Department of Forestry and Fire Protection (CAL FIRE) from 2006 to 2016. Tobin was a member of Local 2881.

On May 27, 2016,³ CAL FIRE served Tobin with a termination letter, which alleged off-duty misconduct.⁴

On May 27, Tobin called Graziano for help. A conference call was held with Tobin, Graziano, and State Rank and File Director Tim Edwards (Edwards). Edwards advised Tobin

² All factual allegations come from Tobin's original and amended charges, and their attachments. The only information referenced from Local 2881 are provisions of the MOU, State Personnel Board Appeals Reference Guide, and Local 2881 Operating Procedures.

³ Hereafter all dates refer to 2016, unless otherwise stated.

⁴ On an unspecified date, Tobin was involved in a car accident. He had poor cell service at the site and eventually reached someone for help. His captain picked him up and invited him to stay at the station so he could deal with the accident in the morning. At some point, Tobin was arrested. Ultimately, no criminal charges were brought against him.

not to give him information about the incident because there was no attorney-client privilege between them, and he could be interviewed in an investigation. Edwards told Tobin that he had a right to appeal to the State Personnel Board (SPB), but advised that he wait to file an appeal until his criminal issues were resolved.

On May 28, Tobin emailed Graziano asking several follow up questions.

First, I'd like to thank you for your help yesterday. After reviewing the employee handbook, it looks as though I have the right to appeal the adverse action to the state personnel board. Does this right apply to me as a seasonal firefighter? If so, do I do this in lieu of the name clearing appeal? Do I do both? What does the union suggest in this instance?

I would also like to get the ball rolling on union reps that have experience with cases similar to mine. If you can provide names it would be greatly appreciated.

Thanks again and I look forward to hearing from you.

On May 28, Graziano forwarded Tobin's email to Edwards. Edwards responded to Graziano, stating:

I explained it to him on the phone yesterday, he can appeal once his court case is resolved. Right now he is under criminal investigation. SPB will not consider it until that is resolved. Remember I told him that on the phone. Also we do not handle terminations with cause or FFI terminations as a whole in SPB. That is something they do on their own.

Graziano forwarded Edwards' response to Tobin.

On June 30, Tobin contacted Union attorney Jenny Horst (Horst), stating that he was not being supported by Union officials. Tobin reported that he had never received a response to his request for a list of representatives.

Horst forwarded the email to Edwards, who called Tobin. Edwards said that he believed Graziano had contacted him about representatives. Tobin claimed Graziano did not respond. Edwards told Tobin to work it out with Graziano.

On June 30, Tobin emailed Graziano reporting that his termination with cause was upheld, and stating that he “felt a lack of support doing all of this on my own without the union.”⁵ Tobin told Graziano that Edwards believed Graziano had been in contact with him, but Tobin recounted that he had no assistance from Graziano after receiving the forwarded email on May 28.

On July 8, Graziano replied, telling Tobin to contact Edwards with any questions.

On July 11, Tobin emailed Edwards stating that he had not received any assistance from Graziano. Tobin advised that he would be appealing his termination to the SPB and asked for help from the Union.

On July 18, after no response from Edwards, Tobin sent another email asking whether Local 2881 would help with his SPB appeal.

On July 20, Edwards responded, stating in part:

On multiple phone conversations with you, I advised you that the union does not get involved with SPB appeals for FFI’s who were terminated. I also told you that it would be in your best interest to wait until your legal issue is settled before filing an appeal with the State Personnel Board (SPB).

[¶ . . . ¶]

I have offered you sound advice on when you should appeal your termination with cause to the SPB and that would be after your legal issues have been resolved. So after talking with both you and the chapter officers concerning whether or not you contacted the Chapter advising them of your time and date of your name

⁵ It appears that Tobin participated in a name-clearing hearing prior to this date. He attended the hearing without union representation.

clearing and whether or not you requested a union representative to attend, I couldn't determine which one of you is right or wrong. So, as stated on the phone to you, unless determined otherwise the union would continue our practice of not appealing Fire Fighter I terminations to SPB.

On July 20, Tobin replied, disputing that Graziano had previously contacted him.

Tobin continued, stating in part:

I have been a dues paying member for more than ten seasons and I deserve more support than I have been given.

[¶ . . . ¶]

I did not contact any other officers after that [May 28] email because I requested a list of representatives and the reply I received was 'the union does not help firefighters who are terminated with cause.' Nothing more on my request. How else was I supposed to understand that response besides we are not helping you and we are not providing you with representatives?

On August 5, the SPB notified Tobin that he did not have a right to appeal his termination due to his status as a seasonal employee.

On August 7, Tobin again emailed Horst complaining about the lack of support from the Union.

On August 8, Edwards responded to Tobin's email, stating:

As a Seasonal Firefighter you have very limited rights when it comes [to] appealing a termination. With CAL FIRE you are considered an at will employee and they can end you[r] position at any time. It's unfortunate that your actions that night caused you to lose your position with CAL FIRE. CAL FIRE Local 2881 has done everything we can for you and I have personally offered advice on how to proceed. Even though you accused me of being bias[ed], I have discussed your situation with our attorney and both of us concur there is nothing more we can do for you.

On August 8, Tobin wrote to Edwards stating that the Union should have offered him the ability to file a grievance. He also claimed that his name-clearing hearing was not properly conducted.

On August 8, Edwards responded, in part:

It appears that SPB ruled you did not fall under any of the listed categories below, so they did not have the Jurisdiction. This union does not represent Fire Fighter I's appeals to SPB and grievances are filed when the Department violates the MOU (our contract). Your termination with cause was not a violation of our contract, so there was no reason to notify you of this process. The section that you may be referring to is Appendix B, which refers to when there was a Board of Adjustment. The state no longer has this process and all disciplinary actions go through SPB process. That language in the MOU is outdated and scheduled to be removed during the next contract. Once again another reason you were not informed of this process.

Tobin and Edwards continued to exchange email, with Edwards reiterating that Memorandum of Understanding (MOU) "Section 19 and Appendix B relate to the Board of Adjusters (sic.), which no longer exist," and the only appeal option is through the SPB.

On August 8, Local 2881 attorney Gary Messing (Messing) replied to Tobin's email, stating:

There is a grievance procedure in the MOU, but it does not cover discipline. The SPB has jurisdiction over discipline but does not hear terminations of seasonals --- the only appeal available for seasonal employees from a termination is an informal (skelly-type) hearing (meeting) within the unit.

On August 9, Edwards clarified that Messing was referring to the name-clearing hearing, which was already held.

Local 2881 and CAL FIRE are parties to a MOU effective July 1, 2010 – July 1, 2013. In June 2012, the MOU was extended four years from July 1, 2013, to July 1, 2017. MOU Article 19 includes an alternate dispute resolution process for resolving disciplinary grievances

through the Board of Adjustment rather than through the SPB. Appendix B is the form used to elect to use the Board of Adjustment process.⁶

The SPB Appeals Resource Guide describes the appeal procedure for “Termination of Limited-Term/Seasonal/Temporary Authorization Appointment (Liberty Interest/Name-Clearing Hearing).” Based on statutory and regulatory authority, the SPB Appeals Guide describes the process:

If a department terminates an employee’s limited term, seasonal or temporary authorization appointment “with fault” or “with cause” for allegedly wrongful behavior that might stigmatize the employee’s reputation, seriously impair the employee’s opportunity to earn a living, or seriously damage the employee’s standing in the community, the employee has a right to file a request for a limited name-clearing hearing with his or her appointing authority. The sole purpose of the name-clearing hearing is to give the employee an opportunity to rebut the charges and remove the stigma. Reinstatement and back salary are not available as remedies in this instance. The request for a limited name-clearing hearing must be filed within 5 business days of the effective date of the notice of the termination of the appointment.

The name-clearing hearing will be conducted by a neutral, impartial representative of the appointing authority. During the hearing, the employee bears the burden of proving that the “with fault” or “with cause” designation is improper. After reviewing all the evidence that is presented at the hearing, the impartial decision-maker will determine whether the “with fault” or “with cause” designation will be removed and the termination will reflect that it was without fault. However, the termination of the employee’s appointment will remain in effect.

An employee whose limited term, seasonal or temporary authorization appointment is either terminated without fault or is terminated with fault for a reason that does not stigmatize the employee is not entitled to a name-clearing hearing.

⁶ The California Supreme Court invalidated the alternate dispute resolution process set forth in Article 19. (*State Personnel Board v. Department of Personnel Administration* (2005) 37 Cal.4th 512.)

The SPB does not conduct name-clearing hearings and does not review the decisions reached in the name-clearing hearing conducted by the appointing authority.

[Emphasis in original.]

Local 2881's Operating Procedures Handbook states, in part:

0520 Duty of Fair Representation

.01 Consistent with Article II of the CAL FIRE Local 2881 Constitution, CAL FIRE Local 2881 has a duty of fair representation toward its rank and file members for matters that arise out of the collective bargaining relationship.

.A This includes negotiating contracts for all employees (members and fair shares) in the bargaining unit,

.B And representing all rank and file employees (members and fair shares) in grievances.

.02 The duty of fair representation is the duty to represent people fairly, and in a manner that is not arbitrary, not capricious, and not discriminatory.

[¶ . . . ¶]

.D Appeals

.1 When the rank and file director decides not to proceed with a grievance/complaint the person bringing the grievance/complaint has the right to appeal in writing to the Executive Board within 14 days of receiving the decision. Upon receipt of an appeal, the rank and file director shall request an extension, or if necessary file the appeal, to protect the member's timelines, pending the decision by the board on the members appeal.

[¶ . . . ¶]

0525 Disciplinary Representation

.01 The organization will represent members in disciplinary proceedings, utilizing the "duty of fair representation" standard described above.

.A However, it will not provide representation, directly or indirectly, in major discipline matters as defined in the Memorandum of Understanding (MOU) with the state where the member (or fair share non-member) elects to appeal to the State Personnel Board (SPB) rather than to utilize the appellate procedures provided in the MOU.^[7]

LOCAL 2881's MOTION TO DISMISS

Local 2881 asserts that it does not have an obligation under the Dills Act to represent members in extra-contractual proceedings. The Union contends that both the name-clearing hearing and the SPB appeal are extra-contractual proceedings.

Local 2881 also asserts that there is no valid disciplinary appeal process in the MOU to which Tobin is entitled. Local 2881 states that the Board of Adjustment disciplinary dispute resolution process was found to be invalid by the Court and is not operative.

Finally, even if the duty of fair representation applies, Local 2881 contends that its conduct was not arbitrary, capricious, or in bad faith.

TOBIN'S OPPOSITION TO MOTION TO DISMISS

Tobin disputes Local 2881's claim that the duty of fair representation does not cover disciplinary representation. He also argues that the Union's conduct was arbitrary, capricious, or in bad faith based on Graziano's dishonesty, Edwards' refusal to hear his side of the story, and the failure to conduct an investigation. Tobin contends that Edwards discriminated against him by repeatedly referring to his arrest even though there was no conviction.

Even if Local 2881 had no duty of fair representation, when it voluntarily undertook representation by promising to provide a list of representatives, it had a duty to act with the requisite degree of care.

⁷ This section appears to reference MOU Article 19, the Board of Adjustment disciplinary dispute resolution process, which was invalidated by the Court.

LOCAL 2881's REPLY

Local 2881 reasserts that it has no duty to represent employees in disciplinary matters that arise in extra-contractual proceedings. If Tobin is referencing the disciplinary appeal process in MOU Article 19, the Union states that procedure was not available to him. In addition, the MOU does not contain provisions that require Local 2881 to undertake representation of seasonal employees at a name-clearing hearing or in an appeal to the SPB.

Furthermore, Local 2881 argues that Tobin's facts contradict his claim that Graziano was dishonest. The Union points to Tobin's claim that he requested names of representatives on May 28, and that Graziano failed to reply to his request. The May 28 email reflects that Graziano forwarded Edwards' response to Tobin the same day, which stated that the Union does "not handle terminations with cause or FFI terminations as a whole . . ." Thus, Local 2881 contends that the facts do not demonstrate that it promised him any sort of representation.

Local 2881 also asserts that Tobin did not appeal Edwards' denial of representation to the Executive Board despite receiving email from Edwards stating that it did "not handle terminations with cause."

ISSUE

Should the motion to dismiss be granted because the facts as alleged by the Charging Party do not state a prima facie case of a violation of the duty of fair representation?

DISCUSSION

When considering a motion to dismiss a complaint prior to a formal hearing, PERB must assume the facts alleged in the unfair practice charge are true. (*San Juan Unified School*

District (1977) EERB⁸ Decision No. 12; *Eastside Union School District* (1984) PERB Decision No. 466.) Where the charging party offers conflicting facts, the version most favorable to the charging party's case is accepted to determine whether a charge states a prima facie case. (*Hartnell Community College District* (2015) PERB Decision No. 2452.)

Information provided by the respondent may be considered when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (*Hartnell Community College District, supra*, PERB Decision No. 2452.) The moving party bears the burden of demonstrating that no disputed issue of fact exists and that it is entitled to judgment as a matter of law. (*San Bernardino Superior Court* (2014) PERB Decision No. 2392-C.)

PERB is charged with enforcing public agency collective bargaining statutes, including the Dills Act, which is applicable to State employees. If a matter is not covered by the Dills Act, PERB is without jurisdiction to remedy claims that do not arise under the Act.

The Dills Act imposes on exclusive bargaining representatives a duty to fairly represent every member of the bargaining unit. (Dills Act § 3515.7, subd. (g); *California State Employees' Association (Norgard)* (1984) PERB Decision No. 451-S, fn. 1.) The duty of fair representation applies to contract negotiations, administration of the contract, and grievances. (*California Association of Professional Scientists (Opong-Mensah)* (1998) PERB Decision No. 1288-S; *Redlands Teachers Association (Faeth and McCarty)* (1978) PERB Decision No. 72; *Mount Diablo Education Association (DeFrates)* (1984) PERB Decision No. 422; *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; *Fremont Teachers Association (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles*

⁸ Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

(*Collins*) (1982) PERB Decision No. 258.) A breach of the duty of fair representation is “deemed to have occurred if the employee organization’s conduct in representation is arbitrary, discriminatory, or in bad faith.” (Dills Act § 3515.7, subd. (g).)

The duty of fair representation under the Dills Act is limited to contractually based procedures and remedies over which the union has exclusive control. In other words, an exclusive representative’s duty of fair representation covers only to those proceedings and remedies that are negotiated and contractually agreed to by the union and employer. Thus, the duty of fair representation does not apply in noncontractual (or extra-contractual) proceedings, where the forum is not connected to negotiations or administration of the collective bargaining agreement, and the union does not exclusively control the means to the particular remedy.

(*International Union of Operating Engineers, Local 501, AFL-CIO (Huff)* (2000) PERB Decision No. 1382-S.) PERB does not have authority to impose or enforce the duty of fair representation in extra-contractual proceedings.⁹

PERB has held that the duty of fair representation does not apply to extra-contractual proceedings such as pre-termination *Skelly*¹⁰ hearings (*Bay Area Air Quality Management District Employees Association (Mauriello)* (2006) PERB Decision No. 1808-M); disciplinary appeals before the SPB (*California Union of Safety Employees (John)* (1994) PERB Decision No. 1064-S; *California State Employees Association (Parisi)* (1989) PERB Decision No. 733-S.); civil service hearings (*SEIU Local 790 (Hein)* (2004) PERB Decision No. 1677.); rejection on probation proceedings (*California State Employees Association (Sandberg)* (2004) PERB

⁹ An exclusive representative may choose to represent employees in extra-contractual forums. The decision to do so, however, does not establish a Dills Act duty of fair representation. (*National Education Association-Jurupa (Norman)* (2014) PERB Decision No. 2371.)

¹⁰ *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*).

Decision No. 1694-S.); *Coleman*¹¹ hearings on absence without leave terminations (*California Association of Professional Scientists (Opong-Mensah)*, *supra*, PERB Decision No. 1288-S.); workers compensation matters (*California School Employees Association (DeLauer)* (2003) PERB Decision No. 1523.); Americans with Disabilities Act (ADA) matters (*SEIU Local 790 (Hein)*, *supra*, PERB Decision No. 1677.); unemployment hearings (*Service Employees International Union Local 790 (Lowery)* (2004) PERB Decision No. 1666-M.); and court claims and judicial appeals (*California Association of Professional Scientists (Opong-Mensah)*, *supra*, PERB Decision No. 1288-S.). Nor does the duty of fair representation create an obligation to provide an attorney for extra-contractual proceedings. (*National Education Association-Jurupa (Norman)*, *supra*, PERB Decision No. 2371.)

The complaint alleges that Local 2881 breached its duty of fair representation when it ignored Tobin's request for assistance with the name-clearing hearing. The purpose of a name-clearing hearing is to give seasonal employees terminated "with cause," the opportunity to rebut the "with cause" charges. This type of proceeding is similar to *Skelly* and *Coleman* hearings by providing employees with an opportunity to present information to the employer. As noted above, *Skelly* and *Coleman* hearings are extra-contractual because they are not negotiated procedures. (*Bay Area Air Quality Management District Employees Association (Mauriello)*, *supra*, PERB Decision No. 1808-M; *California Association of Professional Scientists (Opong-Mensah)*, *supra*, PERB Decision No. 1288-S.)

It is clear that a name-clearing hearing is also an extra-contractual proceeding. Name-clearing procedures are set by statute, and are not based in the contract between Local 2881 and CAL FIRE. The duty of fair representation does not attach to name-clearing hearings.

¹¹ *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102 (*Coleman*).

Therefore, Local 2881 does not have a duty under the Dills Act to represent bargaining unit employees in a name-clearing hearing.

The complaint also alleges that Chapter Director Graziano lied to Edwards by indicating that he did offer Tobin union representation for the name-clearing hearing. Even if Graziano did misrepresent that he offered assistance, Local 2881 did not have a duty of fair representation in the extra-contractual name-clearing hearing. Therefore, any misrepresentation by Graziano does not violate the duty of fair representation under the Dills Act.

Finally, it is alleged that Local 2881 failed to assist Tobin with the appeal of his termination of employment before the SPB. Edwards informed Tobin on several occasions that the Union did not represent seasonal fire fighters in appeals of their termination before the SPB. The SPB disciplinary appeal process is an extra-contractual proceeding. (*California Union of Safety Employees (John)*, *supra*, PERB Decision No. 1064-S; *California State Employees Association (Parisi)*, *supra*, PERB Decision No. 733-S.) Thus, the duty of fair representation does not attach in matters before the SPB.

The duty of fair representation does not apply to name-clearing hearings and disciplinary appeals before the SPB as a matter of law. Because no duty exists under the Dills Act, Local 2881 did not breach the duty of fair representation when it failed to assist Tobin. Accordingly, the complaint and unfair practice charge do not state a prima facie case and are dismissed.

ORDER

Local 2881's motion to dismiss the unfair practice charge and complaint, on the grounds that the charge and complaint fail to state a prima facie case, is GRANTED. The

complaint and unfair practice charge in Case No. SA-CO-494-S, *Sean Joseph Tobin v. CAL FIRE Local 2881*, are hereby DISMISSED.

Right to Appeal

Pursuant to PERB Regulations, the Charging Party may obtain a review of this dismissal of the unfair practice charge by filing an appeal to the Board itself within 20 calendar days of 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 an original and five (5) copies of all documents must be provided to the Board.

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 together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135, subdivision (d), or received by electronic mail, before the close of business, 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; see also Cal Code Regs., tit. 8, §§ 32090, 32091, 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
E-FILE: PERBe-file.Appeals@perb.ca.gov

If the Charging Party files a timely appeal of the dismissal of the complaint and unfair practice charge, any other party may file with the Board an original and five (5) copies of a

statement in opposition within 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 or electronic mail on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135.)

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.