

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



PETER HEFFNER, )  
 )  
 Charging Party, ) Case No. S-CO-344  
 )  
 v. ) Administrative Appeal  
 )  
 DAVIS TEACHERS ASSOCIATION, CTA/NEA, ) PERB Order No. Ad-270  
 )  
 Respondent. ) November 7, 1995  
 )  
 \_\_\_\_\_ )

Appearances: Greisen Law Corporation by Paul H. Greisen, Attorney, for Peter Heffner; California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for Davis Teachers Association, CTA/NEA.

Before Garcia, Johnson and Caffrey, Members.

DECISION AND ORDER

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a PERB administrative law judge's (ALJ) order granting motion to dismiss complaint (attached). In his order, the ALJ dismissed the complaint and unfair practice charge in which Peter Heffner (Heffner) alleged that the Davis Teachers Association, CTA/NEA (Association) breached its duty of fair representation guaranteed by section 3544.9 of the Educational Employment Relations Act (EERA), thereby violating EERA section 3543.6(b)<sup>1</sup> when it refused

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Section 3544.9 states:

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.

to assist him in challenging his dismissal from employment.

The Board has reviewed the entire record in this case, including the ALJ's order, Heffner's appeal and the Association's response thereto. The Board finds the ALJ's order to be free of prejudicial error and adopts it as the decision of the Board itself.

The complaint and unfair practice charge in Case No. S-CO-344 are hereby DISMISSED.

Members Garcia and Johnson joined in this Decision.

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Section 3543.6 states, in pertinent part:

It shall be unlawful for an employee organization to:

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.



STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD

PETER HEFFNER,	)	
	)	
Charging Party,	)	Unfair Practice
	)	Case No. S-CO-344
v.	)	
	)	
DAVIS TEACHERS ASSOCIATION, CTA/NEA,	)	
	)	
Respondent.	)	
_____	)	

ORDER GRANTING MOTION TO DISMISS COMPLAINT

NOTICE is given that the July 27, 1995, motion of the Davis Teachers Association, CTA/NEA, (Union) to dismiss the complaint and charge in the above-entitled matter is hereby GRANTED. The dismissal is made because of untimeliness and failure to state a prima facie case. (See Cal. Code of Regs., tit. 8, sec. 32646.) Unfair Practice Case No. S-CO-344 is hereby DISMISSED and the hearing previously scheduled for December 19, 20 and 21, 1995, is hereby CANCELLED.

The original charge in this matter was filed on March 21, 1995. It set out a narrative of events that commenced with Mr. Heffner's hiring as a teacher by the Davis Unified School District (District). The narrative described the circumstances of his termination from employment with the District on March 11, 1994, and efforts by him to secure Union representation. The latest date mentioned in the original charge was June of 1994.

There followed a first amended charge, filed on March 29, 1995, which restated the allegations in the original charge and added, in relevant part, the following:

The Association has denied my repeated requests for negotiation with me of my future with the District. . . . The foregoing requests were made to DTA's [Davis Teachers Association] representative Robert Rodden, to the President of the DTA, Michael Woodcock, to California Teacher [sic] Association's (CTA) regional representatives, Joan Stout and Estelle Lemieux, to the Association's attorney Carolyn Langenkamp, and to Associate Director/Chief Counsel of CTA, Beverly Tucker.

The charge is filed based on a final denial received in a letter from Associate Director, Beverly Tucker, on March 9, 1995 and dated February 28.

On April 28, 1995, Mr. Heffner filed a second amended charge which included a 14-page narrative of his relationship with the Union. This narrative traces events through his termination in 1994 and his discussions with Union and District representatives. It also describes conversations with an attorney hired by the California Teachers Association (CTA) to represent him. It concludes with the repeated assertion that the Union had failed to represent him, culminating with:

. . . the Association's Associate Director and Chief Counsel spending four months to decline my request for representation in March of 1995, exactly one year to the day after the date of my final dismissal.

A complaint was issued by the general counsel of the Public Employment Relations Board (PERB) on July 20, 1995. The complaint, in relevant part, alleges that "through its agents" the Davis Teachers Association took the following actions:

a. On or about March 3, 1994, following Charging Party's request for assistance, Respondent's representative, Robb Rodden, declined to be present at a meeting with Charging Party and a representative of the employer, Davis Unified School District, regarding Charging Party's continued employment with the District.

b. On or about March 7, 1994, site representative, Kris King, advised Charging Party that he, as representative of Respondent, would do nothing to help him in regards to his employment status with the Davis Unified School District.

c. On or about March, 1994, Respondent's agent, King, instigated a student protest at Holmes Junior High School which was attributed to Charging Party.

d. On or about March 8, 1994, following a meeting with Charging Party, Respondent's representative King presented a critical letter of Charging Party's work performance to Charging Party. King provided a copy of this letter to the employer's representative, Principal Mark Hagemann.

e. Following the initial processing of a grievance regarding Charging Party's termination of employment, Respondent, in May, 1994, declined to pursue the grievance beyond Level II of the grievance procedure. Charging Party was not advised of the Respondent's decision not to further pursue the grievance until it was too late to appeal the decision through the internal process available to members.

f. Respondent, through its parent association, California Teachers Association, on February 28, 1995, refused to further assist Respondent, in the pursuit of his rights under the Education Code and the written agreement between Respondent and Davis Unified School District.

The complaint alleges that these actions demonstrate bad faith by the Union and its agent, Kris King. The complaint alleges that the Union's conduct was inconsistent with its duty to fairly represent employees as required under Educational Employment Relations Act (EERA)<sup>1</sup> section 3544.9 and therefore in violation of section 3543.6(b).

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<sup>1</sup>The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

The Union on July 27, 1995, filed a motion to dismiss the complaint and underlying unfair practice charge. The motion alleges that the allegations set out in paragraphs (a) through (e), above, occurred more than six months prior to the filing of the unfair practice charge. The motion alleges further that the allegation in paragraph (f) cannot revive the stale claims because: 1) neither the charge nor the complaint allege facts to show that the conduct in paragraph (f) was undertaken by the respondent, and (2) even if it were, the alleged conduct falls outside the duty of fair representation.

The administrative law judge (ALJ) assigned to process the case at the time of the filing of the motion to dismiss gave the charging party 14 days to respond. Mr. Heffner wrote to the ALJ on August 3 asking for an extension. In his letter, he made certain responses to the motion to dismiss, including a contention that the CTA agency relationship with the Union is a matter of public record. The ALJ extended the time for a response to August 15. The charging party did not file a further response to the motion.

#### Timeliness

The PERB is precluded under EERA section 3541.5(a)<sup>2</sup> from issuing a complaint based on conduct

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<sup>2</sup>Section 3541.5(a) provides that the Board shall not:

- (1) Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge;

that occurred more than six months prior to the filing of the charge. Construing an identical provision of the Higher Education Employer-Employee Relations Act (HEERA),<sup>3</sup> the PERB has held that the six-month time period is jurisdictional.

(California State University (San Diego) (1989) PERB Decision No. 718-H.) Timeliness cannot be waived either by the parties or the Board itself and need not be plead affirmatively. It is the charging party's burden to show timeliness as part of its prima facie case. (Regents of the University of California (1990) PERB Decision No. 826-H.)

The limitations period "begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to [engage in the prohibited conduct], providing that nothing subsequent to that date evinces a wavering of that intent." (Regents of the University of California, supra, PERB Decision No. 826-H.) The six-month period is to be computed by excluding the day the alleged misconduct took place and including the last day, unless the last day is a holiday, and then it also is excluded. (Saddleback Valley Unified School District (1985) PERB Decision No. 558.)

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(2) . . . The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

<sup>3</sup>HEERA is found at section 3560 et seq. The provision setting out filing deadlines for unfair practice charges is found at section 3563.2(a).

The question here, therefore, is when Mr. Heffner had "actual or constructive notice" of the actions by the Union that allegedly comprise a failure of the duty of fair representation. That Mr. Heffner may not have understood the legal significance of the actions until later will not excuse an otherwise untimely filing. (California State Employees Association (Darzins) (1985) PERB Decision No. 546.)

Since the original charge was filed on March 21, 1995, allegations concerning events prior to September 21, 1994, are untimely. Paragraphs (a) through (d) involve events in March of 1994, a year and longer prior to the filing of the unfair practice charge. Paragraph (e) involves an event that occurred in May of 1994, some four months prior to the September 21 deadline. The allegations in paragraphs (a) through (e) are plainly untimely unless they somehow are revived by the allegation in paragraph (f).

Some types of acts are held to be "continuing violations." In such cases, even if the first act in a series was outside the period of timeliness, the underlying unfair practice may be revived by a subsequent act within the statutory period. Although the prior incidents may not be the basis for the finding of a violation, the underlying unfair practice can be "revived" by the new wrongful act that was timely raised. (Compton Community College District (1991) PERB Decision No. 915.) But it is critical in allegations involving continuing violations that the subsequent act itself set out a prima facie unfair practice.



The subsequent act here is that the Union, on or about February 28, 1995, refused to further assist Mr. Heffner "in the pursuit of his rights under the Education Code and the written agreement between Respondent and Davis Unified School District." The Union acted, according to the allegation, "through its parent association, California Teachers Association." This allegation, the Union counters, fails to set out a prima facie violation of the EERA. This is because there is no showing of agency between the Union and the CTA and, in any event, the Union has no obligation to help unit members in the pursuit of rights under the Education Code.

The duty of fair representation is the obligation of an exclusive representative. It is well settled in PERB case law that the California Teachers Association does not become, through affiliation with a local chapter, an exclusive representative. (Washington Unified School District (1985) PERB Decision No. 549; Fresno Unified School District (1982) PERB Decision No. 208.) Thus, as the Union argues, the allegation in paragraph (f) of the complaint does not set out a prima facie case unless there are factual allegations to support an agency relationship between the CTA and the Union. There are no factual allegations in the charge or any of its various amended versions from which it could be alleged that the CTA was the agent of the Union when it declined to further represent Mr. Heffner.

Even more fundamentally, however, the allegation that the Union failed to assist Mr. Heffner "in the pursuit of his rights

under the Education Code" does not set out a prima facie case. The PERB long has held that an exclusive representative does not violate the duty of fair representation by refusing to represent a unit member who seeks vindication of rights under the Education Code. (San Francisco Classroom Teachers Association, CTA/NEA (Chestanque) (1985) PERB Decision No. 544.) This is because the duty to fairly represent extends only to rights where the exclusive representative has the sole right to seek a remedy. Proceedings that may provide non-contractual administrative or judicial relief are not controlled by the exclusive representative and are not subject to the duty. (California State Employees Association (Lemmons) (1985) PERB Decision No. 545-S and California State Employees Association (Darzins), supra, PERB Decision No. 546-S.)

Finally, paragraph (f) of the complaint alleges that the Union on February 28, 1995, also refused to assist Mr. Heffner in the pursuit of his rights under the collective bargaining agreement. As is set out in paragraph (e) of the complaint, the underlying unfair practice charge places the date of the Union's refusal to further pursue the grievance in May of 1994. There is no allegation in the charge that the Union took any action regarding Mr. Heffner's grievance in February of 1995.

In his request for an extension of time to reply to the motion to dismiss, Mr. Heffner asserts that CTA counsel Eugene Huguenin "admits acceptance of the case and continuous processing and inaction until February 28." The declaration, however, makes

no admission regarding the grievance. On February 28, CTA Chief Counsel Beverly Tucker wrote a letter to Mr. Heffner reaffirming her earlier decision not to authorize CTA payment for a lawsuit against the District on Mr. Heffner's behalf. Her letter makes no mention of the grievance process. The allegation in paragraph (f) regarding the pursuit of rights under the contract must therefore be dismissed because there are not allegations to support it in the charge.

For these reasons, I conclude that the complaint in unfair practice case S-CO-344 and underlying unfair practice charge must be dismissed.

#### Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge and complaint by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code of Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number. To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Attention: Appeals Assistant  
Public Employment Relations Board  
1031 18th Street  
Sacramento, CA 95814

If you file a timely appeal of the dismissal of the charge and 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 of Regs., tit. 8, sec. 32635(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 of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed.

#### 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 of Regs., tit. 8, sec. 32132.)

Final Date

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

August 29, 1995

Ronald E. Blubaugh /  
Administrative Law Judge