

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MICHAEL EDWARD POTTORFF,)
)
Charging Party,) Case No. LA-CO-85
)
v.) PERB Decision No. 203
)
SERVICE EMPLOYEES INTERNATIONAL)
UNION, LOCAL 99,) March 30, 1982
)
Respondent.)
_____)

Appearances: Michael Edward Pottorff, in pro per; Jeff Paule, Attorney (Geffner & Satzman) for Service Employees International Union, Local 99.

Before Gluck, Chairperson; Moore and Tovar, Members.

DECISION

The instant case is brought before the Public Employment Relations Board (hereafter PERB or Board) by Michael Edward Pottorff (hereafter charging party) who contends that the Service Employees International Union, Local 99 (hereafter SEIU or Local 99), improperly withdrew objections to a decertification election and thereby violated its duty of fair representation. Except as modified below, the Board affirms the hearing officer's decision and orders that the unfair practice charge be dismissed.

PROCEDURAL HISTORY AND FACTS

The hearing officer's statement of the procedural history and findings of fact in this case, attached hereto, are free from prejudicial error and are adopted by the Board itself.

DISCUSSION

Charging party asserts that Local 99 breached its duty of fair representation as set forth in section 3544.9 of the Educational Employment Relations Act (hereafter EERA or

Act).¹ He also alleged that Local 99 violated subsection 3543.6(b) of the Act² by withdrawing election objections without consulting with Local 99's executive board or officers.

In addressing the charging party's allegation that Local 99 breached its duty of fair representation, the hearing officer reasoned that the filing of a valid decertification petition by a rival union created a question concerning representation. He concluded, therefore, that at the time the objections to the decertification election were withdrawn, Local 99 was no longer the exclusive representative and owed no duty of fair representation. We disagree with this analysis and find that, in this case, SEIU lost its status as exclusive representative only when PERB certified the results of the decertification election after the objections were withdrawn.

Assuming that the hearing officer correctly concluded that the validly-filed decertification petition created a question

¹The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all citations are to the Government Code. 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.

²Subsection 3543.6(b) states:

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.

concerning Local 99's representation status,³ the existence of such a question does not necessarily vitiate a union's duty of fair representation. The question concerning representation status relates to the uncertainty as to whether an employee organization continues to enjoy the majority support of the unit employees. The question concerning representation is responsive to the employer's dilemma vis-a-vis the employee organization and its obligation to negotiate. See Midwest Piping and Supply Co., Inc. (1945) 63 NLRB 1060 [17 LRRM 40]. The duty of fair representation, on the other hand, refers to the organization's responsibility to the unit membership which is not terminated by the appearance of a question concerning representation.

As the NLRB said in Shea Chemical Corp. (1958) 121 NLRB 1027 [42 LRRM 1486],:

We now hold that upon presentation of a rival or conflicting claim which raises a real question concerning representation, an employer may not go so far as to bargain collectively with the incumbent (or any other) union unless and until a question concerning representation has been settled by the Board. This is not to say that the employer must give an undue advantage to the rival union by refusing to permit the incumbent union to continue administering the contract or processing grievances through its stewards.

Shea Chemical distinguishes between preservation of current representation rights under an existing agreement and negotiations over new terms and conditions of employment. The Midwest Piping doctrine imposes neutrality on the employer

³The National Labor Relations Board (hereafter NLRB) has ruled that a decertification petition creates a question concerning representation. Teleautograph Corp. (1972) 199 NLRB 892 [81 LRRM 1337]; Essex International, Inc. (1976) 22 NLRB 121 [91 LRRM 1413]. Federal appellate courts, however, have reached conflicting decisions on the issue. Compare Royal Typewriter Company v. NLRB (8th Cir. 1974) 494 F.2d 189 [185 LRRM 2657], permitting reliance by employer on existence of decertification petition alone as creating a question concerning representation and allowing refusal to bargain, with NLRB v. Swift & Co. (3d Cir. 1971) 294 F.2d 285 [48 LRRM 2699]; Allied Industrial Workers v. NLRB (D.C. Cir. 1973) 476 F.2d 868 [82 LRRM 2225], disapproving reliance on petition alone.

confronted with two or more rival unions and a valid question concerning representation. But as indicated by Shea, supra, until the results of the decertification election were certified, there remained one incumbent which retained its responsibility to its membership.

Since Local 99's duty of fair representation was not extinguished when the decertification petition was filed, we have examined its decision to withdraw the election objections consistent with the obligations imposed by the duty of fair representation.

In Thomas A. Romero v. Rocklin Teachers Professional Association (3/26/80) PERB Decision No. 124, the Board delineated the unions obligations:

A union must conform its behavior to each of these standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

Charging party has failed to prove that the withdrawal of election objections was arbitrary, discriminatory or in bad faith. While he asserts that the objections were withdrawn by a union officer disgruntled by Local 99's endorsement of his opponent, no proof in support of this allegation appears on the record. Indeed, charging party failed to call the officer as a witness. The charging party, relying on conjecture and speculative testimony of witnesses called, has failed to show that withdrawal of the election objections abrogated any requirements of the duty.

In this case, SEIU's withdrawal of the election objections is in accordance with decisions under the National Labor Relations Act which permit an exclusive representative to unequivocally and in good faith disclaim further interest in representing the unit. Corrugated Asbestos Contractors, Inc. v. NLRB (5th Cir. 1972) 458 F.2d 683 [80 LRRM 2023]. Such a disclaimer will not be given effect if it is inconsistent with the union's conduct (IBEW and Local 59 (Textile Inc.) (1958) 119 NLRB 1792 [41 LRRM 1392], enf., (5th Cir. 1959) 266 F.2d 329 [43 LRRM 2875]) or if it is made for an improper purpose, such as the evasion of the terms and obligations of a

collective bargaining agreement. East Manufacturing Corp. (1979) 242 NLRB No. 5 [101 LRRM 1079]. See also Joint Council of Teamsters No. 42 (1979) 235 NLRB 1168 [98 LRRM 1356], aff'd. in Dycus v. NLRB (9th Cir. 1980) 615 F.2d 820 [103 LRRM 2686], in which the NLRB said about withdrawing representation status:

Withdrawal is not a breach of the duty of fair representation. For that duty is the corollary to an exclusive representative's power and authority. The representative having disclaimed that power and authority, the predicate for the duty fails.

As with a disclaimer, withdrawal of election objections is not a per se violation of the duty of fair representation and, as in this case, it is permissible for an organization to relinquish its representation status if the evidence fails to establish that it acted arbitrarily, capriciously or in bad faith.

Finally, the hearing officer considered the alleged violation of subsection 3543.6(b) relying on Kimmett v. SEIU, Local 99 (10/19/79) PERB Decision No. 106. In that case, the Board stated that the conduct proscribed by subsection 3543.6(b) of the Act encompasses more than a breach of the duty of fair representation.

However, noting that EERA does not describe the internal workings or structure of employee organizations nor does it define the internal rights of organization members, the Board concluded that:

Unless the internal activities of an employee organization have such a substantial impact on employees' relationship with their employer as to give rise to a duty of fair representation, we find that public school employees do not have any protected rights under EERA in the organization of their exclusive representative. In brief, sections 3540 and 3543 do not give employees more rights in the internal activities of an employee organization than they have under section 3544.9. [Emphasis added.]

Thus, although the Board in Kimmett stated that the conduct proscribed by subsection 3543.6(b) encompasses more than a breach of the duty of fair representation, it in fact held that in order for internal union activities to violate subsection 3543.6(b), they must impact in such a way as "to give rise to a

duty of fair representation." Thus, relying on Kimmett, a union's internal activities, when examined under either statutory provision, are subject to the same analysis. In the instant case, having determined that the withdrawal of election objections did not violate the duty of fair representation, no violation of subsection 3543.6(b) is found.

ORDER

Upon the entire record and the foregoing decision, the Public Employment Relations Board ORDERS that the unfair practice charge filed by Michael Edward Potorff against Service Employees International Union, Local 99, is hereby DISMISSED.

By: Barbara D. Moore, Member

Harry Glück, Chairperson

Irene Tovar, Member

PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA



MICHAEL EDWARD POTTORFF,)	
)	
Charging Party,)	Unfair Practice
)	Case No. LA-C0-85-
)	78/79
v.)	
)	
SERVICE EMPLOYEES INTERNATIONAL)	PROPOSED DECISION
UNION, LOCAL 99,)	(12/12/79)
)	
Respondent.)	
)	

Appearances: Michael Edward Pottorff, in pro per; Jeff Paule, Attorney (Geffner & Satzman) for Service Employees International Union, Local 99.

Before Kenneth A. Perea, Hearing Officer.

This matter raises the issue of whether Respondent's failure to pursue objections to a representation election between itself and the California School Employees Association, Chapter 157 constitutes a violation of the duty of fair representation pursuant to sections 3544.9 and 3543.6(b).¹

PROCEDURAL HISTORY

The events preceding the administrative hearing in the above-captioned matter held in Los Angeles on October 18, 1979 before the above-named hearing officer of the Public Employment Relations Board (hereafter PERB) are summarized as follows:

¹All statutory references are to the California Government Code unless otherwise specified.

(1) On May 18, 1979 Michael E. Pottorff (hereafter Charging Party) filed an unfair practice charge with the PERB alleging violations of sections 3543.6(b) and 3544.9 naming Willie J. Griffin, secretary-treasurer, Service Employees International Union, Local 99 as respondent;

(2) On June 15, 1979 Willie J. Griffin filed an Answer to Unfair Practice Charge and Motion to Dismiss Unfair Practice Charge;

(3) On July 10, 1979 Charging Party filed an amended unfair practice charge alleging violations of sections 3543.6(b) and 3544.9 and naming Service Employees International Union, Local 99 (hereafter SEIU) as respondent;

(4) The informal conference held in the above-captioned matter on July 2, 1979 failed to resolve the matter which was thereupon set for formal hearing;

(5) On August 6, 1979 SEIU filed a Motion for Particularization of the Unfair Practice Charge;

(6) On September 11, 1979 Charging Party filed a particularization of the unfair practice charge in the above-captioned matter;

After the conclusion of the formal hearing on October 18, 1979, Charging Party and SEIU filed post-hearing briefs on October 23 and October 30, 1979, respectively.

FINDINGS OF FACT

During the administrative hearing in the above-captioned matter, official notice was taken of PERB files LA-R-42A and LA-CO-79-78/79. The hearing officer, having thoroughly reviewed the contents of the before-mentioned files, hereby makes the following findings of fact thereon:

LA-R-42A

(1) On March 23, 1977 a representation election between SEIU and California School Employees Association, Chapter 157 (hereafter CSEA) was held. The tally of ballots from the election reveals that a majority of the valid votes counted plus challenged ballots were cast for SEIU.

(2) On April 5, 1977 SEIU was certified as the exclusive representative of a unit of classified employees consisting of maintenance, operations and transportation employees (hereafter Unit A).

(3) On November 29, 1978 CSEA filed a decertification petition regarding Unit A pursuant to PERB Regulation 33240.

(4) On December 6, 1978 the Huntington Beach Union High School District (hereafter District) and SEIU were notified by PERB of the before-mentioned decertification petition, requested to post notice of the receipt of the decertification petition, confirm or refute the information contained in the petition, and provide a list to PERB of all employees in the unit.

(5) On January 15, 1979 CSEA, the District and SEIU were notified by letter from the Los Angeles Regional Director's office that PERB's investigation into CSEA's decertification petition had resulted in an administrative determination that the decertification petition had been timely filed and that the showing of support thereon was adequate.

(6) On March 8, 1979 an election was held between SEIU and CSEA pursuant to a regional director directed decertification election. A majority of the valid votes counted plus challenged ballots were cast for CSEA.

(7) On March 14, 1979 SEIU filed objections to the election.

(8) On April 3, 1979 the District filed a response to SEIU's objections to the election.

(9) On April 24, 1979 CSEA filed a Motion for Summary Judgment and Dismissal of Objections to Election.

(10) On April 30, 1979 a hearing on the objections to the election was scheduled for May 9, 1979.

(11) On May 1, 1979 SEIU filed a response to CSEA's Motion for Summary Judgment and Dismissal of Objections to Election.

(12) On May 10, 1979 SEIU filed a request to withdraw its objections to the election, PERB issued an order cancelling the formal hearing on the objections to the election and CSEA was certified by the regional director as the exclusive representative of the employees in Unit A.

LA-CO-79-78/79

(1) On April 27, 1979 CSEA filed an unfair practice charge against SEIU alleging violations of section 3543.6(a) and (b) in that SEIU allegedly filed fallacious, spurious and malicious unfair practice charges against CSEA.

(2) On July 9, 1979 Michael Heumann, Esq., staff attorney for CSEA, wrote to the above-named hearing officer stating that contingent upon SEIU's promise to withdraw its charges against CSEA and the District in case numbers LA-CO-76-78/78 and LA-CE-452-78/79, CSEA requested withdrawal of its charge in case number LA-CO-79-78/79.

Based upon the testimony of Charging Party's witnesses², Ed Cramer, Glen Dysinger (appearing under subpoena) and Ed Varela, the following findings are made:

(1) On December 12, 1978 the District and CSEA entered into a collective negotiating agreement in Unit B.

(2) The decision in Sonoma County Organization of Public Employees v. County of Sonoma, (1979) 23 Cal.3d 296 [152 Cal. Rptr. 903, 591 P.2d 1], was handed down by the California Supreme Court on February 15, 1979. Shortly after that decision was handed down, CSEA requested the District to meet and negotiate regarding an amendment to the contract between

²SEIU called no witnesses during the course of the administrative hearing in the above-captioned matter.

the District and CSEA in Unit B. On February 16, 1979 CSEA and the District reopened negotiations pursuant to their agreement.

(3) On March 1, 1979 CSEA and the District modified their contract whereby Unit B employees were granted a five (5) percent salary increase effective February 15, 1979.

(4) On March 2, 1979 CSEA distributed a flyer which is quoted in full as follows:

WHO'S KIDDING WHO!

A Salary Increase for CSEA
in Huntington Beach

YES!

Enclosed is a copy of a Memorandum of Understanding negotiated and signed by CSEA Chapter 157 and the District, granting a 5% across-the-board salary increase for the "white collar" unit members.

V O T E C S E A

MARCH 8

The Professionals in School Labor Relations

(5) On March 8, 1979 the decertification election in Unit A between SEIU and CSEA was held with the following results: 3 employees voted for no representation; 60 employees voted for CSEA, and 54 employees voted for SEIU.

(6) On May 5, 1979 SEIU held a union meeting among union members in Unit A at Marina High School. Howard Friedman, candidate for SEIU's secretary-treasurer position, and Pat Prete, business representative for SEIU, were present at said meeting. Friedman and Prete asked that Friedman be endorsed by Unit A members for secretary-treasurer.

Unit A members did endorse Howard Friedman for secretary-treasurer who eventually won the election.

All members of SEIU in Unit A were eligible to vote in the election for SEIU's secretary-treasurer. Prete told Unit A members at the meeting that SEIU had a 75 to 80 percent chance of winning the objections to the election case.

(7) On May 8, 1979 Charging Party came into the maintenance office at Marina High School and informed Ed Cramer that Willie Griffin had decided not to pursue the objections to the election's case.

(8) There are approximately 170 employees in the unit. There are approximately 70 SEIU members in the unit. After nearly a year of negotiations between the District and SEIU regarding Unit A, SEIU started to lose members. SEIU had approximately 40 members in Unit A at the time it lost the decertification election held on March 8, 1979.

(9) On May 4, 1979 Prete called Varela, a long time member of SEIU, and asked to set up a meeting between Charging Party, Cramer, Varela and Prete. Prete called Varela again on May 8

and told Varela that Willie Griffin had withdrawn the objections to the election.

ISSUES

(1) Did SEIU violate its duty of fair representation pursuant to section 3544.9 by withdrawing the objections to the decertification election in Unit A?

(2) Has SEIU's conduct otherwise discriminated against or interfered with employees in violation of section 3543.6(b)?

CONCLUSIONS OF LAW AND DISCUSSION

Issue 1

The facts are clear that as of January 15, 1979, pursuant to PERB's investigation, a valid decertification petition had been filed by CSEA and a question of representation existed in Unit A. Thus, at the time SEIU withdrew its objections to the Unit A election on March 9, 1979, a question of representation existed in Unit A and SEIU was therefore not the exclusive representative of employees in Unit A.

In its recent decision, Jules Kimmett v. Service Employees International Union, Local 99³, the PERB itself held:

The duty of fair representation in section 3544.9 applies only to exclusive representatives. Since the above actions occurred before SEIU's certification, section 3544.9 does not apply.

³(10/19/79) PERB Decision No. 106.

For the same reasons expressed in Kimmett, supra, the withdrawal of the objections to the election prior to the certification of an exclusive representative in Unit A, did not violate the duty of fair representation pursuant to section 3544.9.

Issue 2

The Charging Party's allegations must be examined to determine whether they constitute a violation of section 3543.6(b) separate and apart from any violation of section 3544.9.

Charging Party has alleged that then secretary-treasurer Willie Griffin, with malice, withdrew the exceptions to the election after SEIU Unit A members voted to support Griffin's opponent Howard Friedman for the post of SEIU's secretary-treasurer.

In Kimmett, supra, the PERB itself held that sections 3540 and 3543 do not give employees more rights in the internal activities of an employee organization than they have pursuant to section 3544.9. It is thus apparent that in endorsing Howard Friedman for the post of secretary-treasurer, the employees were engaged in strictly internal union affairs and were not exercising a right guaranteed by sections 3540 or 3543. Even assuming that Charging Party could prove a causal connection between the endorsement of Howard Friedman and

SEIU's withdrawal of the objections to the election, which Charging Party in this case has not, it is clear that the endorsement of Howard Friedman was not the exercise of a right guaranteed by the Educational Employment Relations Act and any possible discrimination which resulted therefrom is not in violation of section 3543.6(b).

ORDER

The unfair practice charge filed by Michael Edward Pottorff against Service Employees International Union, Local 99 is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on January 2, 1980, unless a party files a timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the Headquarters Office in Sacramento before the close of business (5:00 p.m.) on January 2, 1980, in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this

proceeding. Proof of service shall be filed with the Board
itself. See California Administrative Code, title 8, sections
32300 and 32305, as amended.

Dated: December 12, 1979

/ Kenneth A. Perea
Hearing Officer