

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN C. SCATES,)
)
 Charging Party,)
)
 v.)
)
 LOS ANGELES CITY AND COUNTY SCHOOL)
 EMPLOYEES UNION, LOCAL 99, SERVICE)
 EMPLOYEES INTERNATIONAL UNION, AFL-CIO,)
)
 Respondent.)

Case No. LA-CO-234

PERB Decision No. 341

August 29, 1983

SHIRAL PITTS,)
)
 Charging Party,)
)
 v.)
)
 LOS ANGELES CITY AND COUNTY SCHOOL)
 EMPLOYEES UNION, LOCAL 99, SERVICE)
 EMPLOYEES INTERNATIONAL UNION, AFL-CIO,)
)
 Respondent.)

Case No. LA-CO-235

Appearances: John C. Scates and Shiral Pitts, representing themselves.

Before Tovar, Jaeger, and Morgenstern, Members.

DECISION AND ORDER

JAEGER, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed to the administrative law judge's attached dismissal without leave to amend of the charging parties' unfair practice charges alleging that Service Employees International Union, Local 99, AFL-CIO,

violated subsections 3543.6(a), (b), and (c) of the Educational Employment Relations Act.

After a review of the entire record in this matter, the Board adopts the attached dismissal as the decision of the Board itself. Accordingly, the unfair practice charges, Case Nos. LA-CO-234 and LA-CO-235, are hereby DISMISSED without leave to amend.

Members Tovar and Morgenstern joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

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JOHN C. SCATES,)
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Charging Party,)
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v.)
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LOS ANGELES CITY AND COUNTY)
SCHOOL EMPLOYEES UNION,)
LOCAL 99, SERVICE EMPLOYEES)
INTERNATIONAL UNION, AFL-CIO,)
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Respondent.)
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Case No. LA-CO-234

SHIRAL PITTS,)
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LOS ANGELES CITY AND COUNTY)
SCHOOL EMPLOYEES UNION,)
LOCAL 99, SERVICE EMPLOYEES)
INTERNATIONAL UNION, AFL-CIO,)
)
Respondent.)
_____)

Case No. LA-CO-235

ORDER GRANTING MOTION
TO DISMISS, DENYING
MOTION TO DISQUALIFY,
AND CANCELLING FORMAL
HEARING

(2/4/83)

NOTICE IS HEREBY GIVEN that the above-captioned unfair
practice charges are dismissed and the complaints are
withdrawn.

This action is taken on the ground that the charges fail to
state a prima facie violation of the Educational Employment
Relations Act (hereafter EERA).¹

¹Government Code section 3540 et seq. All statutory
references herein are to the EERA unless otherwise noted.

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BACKGROUND

On April 21, 1982, John C. Scates filed an unfair practice charge against the Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL-CIO (hereafter Local 99 or the Union), alleging a violation of section 3544.92. In support of his charge, Scates, who is classified as a heavy bus driver, alleges, among other things, that on or about February 5, 1981, he was removed from late bus duty by his employer Los Angeles Unified School District (hereafter District) while the District conducted an investigation of an incident involving him that occurred on that same date. Subsequently, he was issued an unsatisfactory or "U-notice" on March 23, 1981. On that same date he filed a grievance with the Union against the District. He further alleges that on September 25, 1981, he "discovered that the 'U-notice' had been repealed in arbitration, but that the overtime issue from missed

2Section 3544.9 provides:

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.

1 late buses was completely ignored." Additionally, he alleges
2 that as of the date that the charge was filed, he had not been
3 reinstated to overtime status.

4 On April 21, 1982, Shiral Pitts, who likewise is classified
5 as a heavy-bus driver, also filed an unfair practice charge
6 against Local 99, identical in all respects to the Scates
7 charge, but additionally alleging that on or about May 8,
8 1981, she was transferred to a bus run in another area, and in
9 March 1982, she was transferred again without benefit of the
10 bidding procedure.

11 In response to a letter, dated April 28, 1982, from the
12 Public Employment Relations Board (hereafter PERB or Board)
13 regional attorney, noting certain deficiencies in the charges,
14 the charging parties filed identical amendments on May 20,
15 1982. The amendments are set forth in their entirety as
16 follows:

- 17 1. The letter of Oct. 12, 1981 from Clarence R.
18 Luckey, Business Representative to Steven
19 Escoboza, Sr. Division Personnel
Representative L.A.U.S.D.
- 20 2. On Dec. 1981 I called my Business
21 Representative 3 or 4 times; in Jan. 1982 I
22 did likewise 2 or 3 times; in March 1982 I
did likewise 3 or 4 times; on April 30, 1982
I again called in reference to the above
mentioned letter of Oct. 1981.
- 23 3. It was not until Sept. 25, 1981 at a General
24 Membership Meeting of Local 99 located at
25 2724 W. 8th St. that I was given the
26 decision rendered by arbitration dated
27 September 7, 1981.

1 4. This charge is amended to include 3543.6 of
2 the Educational Employees Relations Act
subsections a, b, and c. disputes.3

3 On June 29, 1982, complaints were issued and the two cases
4 consolidated for informal conference purposes only. On July
5 16, 1982, the Union filed its answer. An informal settlement
6 conference was held on August 9, 1982, but the parties were
7 unable to resolve their disputes.

8 On September 21, 1982, the Chief Administrative Law Judge
9 consolidated the complaints for further processing, and noticed
10 a formal hearing for November 15, 16, and 18, 1982. Prior to
11 the hearing date, Local 99 requested, with the concurrence of
12 the charging parties, a continuance which was granted, on
13 November 10, 1982. The case was reset for hearing on January
14 5, 6, and 7, 1983.

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16 Section 3543.6 states, in pertinent part that:

17 It shall be unlawful for an employee
18 organization to:

19 (a) Cause or attempt to cause a public
20 school employer to violate Section 3543.5.

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

24 (c) Refuse or fail to meet and negotiate in
25 good faith with a public school employer of
any of the employees of which it is the
exclusive representative.

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1 On November 16, 1982, the Union filed a motion to
2 particularize which was granted, and an order to particularize
3 was issued on December 10, 1982.

4 On December 23, 1982, charging parties filed a response to
5 the order, which stated, among other things, that the Union,
6 through its business representative Clarence Luckey, was
7 involved in the processing of the grievances filed by both
8 charging parties, and that a collective bargaining agreement
9 with an arbitration provision was in effect at the time the
10 grievances were filed. Otherwise, the response repeated the
11 allegations contained in the original charge. The Union
12 responded on December 28, 1982, with motions to strike, to
13 dismiss and for a continuance of the hearing.

14 On January 5, 1983, these motions were ruled on at a
15 pre-hearing conference held in lieu of the noticed hearing. It
16 was concluded that the responses to the order to particularize
17 were non-responsive, and therefore charging parties were
18 ordered to file supplements to their responses. February 7
19 and 9, 1983, were set as tentative dates for the formal
20 hearing.

21 On January 10, 1983, the charging parties filed a
22 supplement, to which was appended a copy of the arbitrator's
23 decision, dated September 7, 1981.

1 The supplement to the response contained the following
2 factual allegations:

3 1. Am submitting fifteen (15) page
4 decision in the matter of arbitration
5 involving the Pitts and Scates grievances.

6 2. In Re No. 3543.6(a) Local 99 did
7 cause the Public School Employer to impose
8 reprisals on employee Pitts and Scates, "the
9 District charged that on or about
10 February 4, 1981 the grievants were observed
11 to be kissing and hugging." And that "the
12 activity took place while both drivers were
13 on duty an in a paid status." The District
14 concluded that this conduct, "is
15 unprofessional and tends to lower the esteem
16 in which the service is held."

17 3. 3543.6(b) Local 99 did discriminate
18 against employees Pitts and Scates in a
19 letter dated October 12, 1981 of a letter
20 submitted by Clarence R. Luckey, Business
21 Representative to Steven A. Escoboza, Senior
22 Divisional Pesonnel Representative. It is
23 of extreme importance to note that the
24 hearing was held on August 25, 1981 and that
25 employees Pitts and Scates were not
26 informed - and then only by the fact that
27 they protested and made inquiries at a
general membership meeting on September 25,
1981 - incidentally the last regular
membership meeting held at the Union Hall at
2724 West 8th Street.

1 4. 3543.6(c) Local 99 Blatantly evaded
2 and avoided to represent employees Pitts and
3 Scates by the following documented evidence
4 which we are prepared to testify under oath
5 and penalty of perjury namely: "During
6 December 1981 employees Pitts and Scates
7 each called three or four times with direct
8 reference to the Union's action or better
9 still - inaction concerning our grievance.
10 In January, 1982, employees Pitts and Scates
11 again called business representative two or
12 three times and against in March, 1982 again
13 three or four times and on April 30, 1982 I
14 again called to the above mentioned letter
15 of October 12, 1981."

1 section to mean that an exclusive representative clearly has a
2 duty to represent all employees in the unit fairly in meeting
3 and negotiating, consulting on educational objectives, and
4 administering the written agreement. Service Employees
5 International Union, Local 99 (10/19/79) PERB
6 Decision No. 106.

7 An exclusive representative violates its duty of fair
8 representation when its conduct towards a member of the unit is
9 arbitrary, discriminatory, or in bad faith. Rocklin Teacher
10 Professional Association (3/26/80) PERB Decision No. 124,
11 citing Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].

12 A violation may occur both in contract negotiations, Steele
13 v. Louisville and Nashville Railroad (1944), 323 U.S. 192 [15
14 LRRM 708], Ford Motor Co. v. Huffman (1953), 354 U.S. 330 [31
15 LRRM 2548], and in contract administration and grievance
16 processing, Conley v. Gibson (1957), 355 U.S. 41 [41 LRRM
17 1089], Humphrey v. Moore (1954), 375 U.S. 355 [55 LRRM 2031],
18 Vaca v. Sipes, supra, 386 U.S. 171.

19 The NLRB and the courts have granted wide latitude to the
20 exclusive representative in the negotiation of collective
21 bargaining agreements. See Steele, supra. On the other hand,
22 the degree of discretion given the exclusive representative in
23 the enforcement of collective bargaining agreements is somewhat
24 more restricted. The Supreme Court in Vaca proclaimed that a
25 violation of the duty would be found in arbitrary, capricious
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1 or bad faith actions. But it also made reference to
2 "perfunctory" grievance processing in such a way as to create
3 the inference that "perfunctoriness" in handling grievances
4 would be held tantamount to arbitrariness, capriciousness or
5 bad faith. One commentator has stated that the Court's
6 phrasing of the standard "invite[s] the finding of a violation
7 when injury is caused by union carelessness without more."
8 Gorman, Labor Law (1976) p. 720. Another commentator has urged
9 that the appropriate duty of fair representation should be
10 based on "reasonableness," defined as "fairness" as that term
11 has been used in the context of constitutional due process
12 cases. See Duty of Fair Representation and Exclusive
13 Representation in Grievance Administration (1976) Syracuse
14 L.Rev. 1199, 1230. A recent federal case has held extreme
15 negligence in grievance processing to be a breach of the duty
16 of fair representation. Ruzicka v. General Motors Corp. (6th
17 Cir. 1975) 523 F.2d 306 [90 LRRM 2497]. Cf. Local 18, Int'l
18 Union of Operating Engineers (Ohio Pipeline Construction Co.)
19 (1963) 144 NLRB 1365 [54 LRRM 1235].

20 The PERB has decided that whether a union has met its duty,
21 within the context of grievance processing, depends not upon
22 the merits of the grievance, but rather upon the union's
23 conduct in processing or failing to process the grievance.
24 Absent arbitrary, discriminatory or bad faith conduct, mere
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1 negligence or poor judgment in handling a grievance does not
2 constitute a breach of the union's duty.⁴ United Teachers of
3 Los Angeles (11/17/82) PERB Decision No. 258.

4 A prima facie case alleging conduct violative of the duty
5 of fair representation must, at a minimum, set forth sufficient
6 facts from which it becomes apparent how or in what manner the
7 exclusive representative's action, or inaction, was arbitrary,
8 discriminatory, or in bad faith. Rocklin Teachers Professional
9 Association, supra; see also PERB Regulation 32615(a)(5). The
10 obligation created by section 3544.9 is actionable through
11 section 3543.6(b). Fremont Unified District Teachers
12 Association (4/21/80) PERB Decision No. 125; United Teachers of
13 Los Angeles, supra.

14 Since filing the original charges, the charging parties
15 have been given three opportunities to provide a clear and
16 concise statement of the facts and conduct alleged to
17 constitute an unfair practice. However, charging parties have
18 failed to do so, and thus, the charge remains unclear.

19 My best understanding of the charge is as follows: The
20 charging parties believe that the Union violated its duty to
21 fairly represent them by: (1) failing to litigate the overtime
22 and transfer issues in the grievance arbitration held
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24 ⁴See also Dill v. Greyhound Corp. (6th Cir. 1970) 435
25 F.2d 231, cert. denied (1971) 402 U.S. 952; Steinman v. Spector
26 Freight Systems Inc. (2d Cir. 1973) 476 F.2d 437 [83 LRRM 228].
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1 August 25, 1981 and (2) not notifying the charging parties
2 until September 25, 1981 about the arbitration decision which
3 was dated September 7, 1981. Although it may be inferred from
4 these charges that Local 99's conduct in this regard was
5 possibly negligent, unwise or otherwise unsatisfactory to the
6 charging parties, there is no specific allegation that Local
7 99, in these instances, acted in an arbitrary, capricious or
8 bad faith manner, or that its manner of handling of the
9 arbitration hearing was improperly motivated.

10 Although the charging parties further allege that Local 99
11 has discriminated against them, the only factual support
12 offered for this charge is a letter dated October 12, 1981,
13 sent by Local 99 business representative Clarence Luckey to
14 Steven Escobezza, a personnel representative for the District.
15 A review of the letter reveals that the Union was requesting a
16 date for a meeting with the District to review the overtime
17 records of Scates and Pitts "as per the stipulations by the
18 District in the arbitration of Pitts and Scates v. L.A.U.S.D."
19 Again, other than referring to it, charging parties have failed
20 to state how, or in what manner, the letter demonstrates
21 discriminatory conduct by the Union. Nor have they stated how
22 the Union's manner of notifying them about the arbitration
23 decision also constituted discrimination against them.

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1 For the above-stated reasons, it is concluded that neither
2 of these charges states a prima facie violation of the duty of
3 fair representation (section 3544.9) or section 3543.6(b) and
4 should be dismissed.

5 Alleged Section 3543.6(a) and (c) Violations

6 The allegations concerning the section 3543.6(a) and (c)
7 violations are unclear. The charging parties contend that
8 Local 99 violated section 3543.6(a)⁵ by causing the employer
9 to impose reprisals on them. In support of this allegation,
10 they refer to the "hugging and kissing" incident between
11 themselves on or about February 4, 1981, from which the
12 grievance against the District arose. Charging parties,
13 however, have failed to show how the conduct of Local 99, as it
14 relates to this set of events, attempted or caused the District
15 to violate section 3543.5 of the EERA.

16 Finally, the charging parties allege that the Union
17 "blatantly evaded and avoided to represent employees Pitts and
18 Scates," hence violating section 3543.6(c).⁶ In support of
19 this allegation, they state that they telephoned the Union
20 several times between December, 1981 and April, 1982 concerning
21 their grievances and the letter of October 12, 1981. However,
22 these factual allegations provide no basis for determining
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25 ⁵See fn. 3, supra.

26 ⁶See fn. 3, supra.

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1 or in what manner Local 99 refused or failed to meet and
2 negotiate in good faith with the District about either charging
3 party Scates or Pitts.

4 Under PERB regulations, a charge must be dismissed if it is
5 determined that the charge is insufficient to establish a prima
6 facie case. (See PERB Regulation 32620(b)(4).)

7 For the above-stated reasons, it is concluded that these
8 unfair practice charges fail to state a prima facie violation
9 of either section 3543.6(a) or (c) and, therefore, must be
10 dismissed.

11 Motion to Disqualify

12 As a separate, but related matter, on January 10, 1983,
13 charging parties also filed a motion to disqualify Jeffrey
14 Paule, attorney for Local 99, They argue that a conflict of
15 interest exists because the attorney defending the Union
16 against their unfair practice charges is paid for his services,
17 on a retainer basis, from union membership dues which are
18 contributed by the charging parties who are dues-paying members
19 of Local 99. They assert that this situation constitutes a
20 breach of the fiduciary relationship between the union
21 representatives and its members. No authority is cited for
22 this proposition.

23 Local 99 did not file a response to this motion.

24 In King City High School District Association (3/3/82) PERB
25 Decision No. 197, the charging party, who was a nonmember of
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1 the respondent association, objected to the respondent's use of
2 his service fees for legal services utilized in defending
3 itself against the charge that it had breached its duty of fair
4 representation owed to the charging party. However, the Board
5 concluded that:

6 . . . the use of service fees to defend
7 against a charge that the Association
8 violated its duty of fair representation is
9 not impermissible unless the defense is
10 frivolous or taken in bad faith. Defending
11 charges against itself preserves the
12 strength and integrity of the exclusive
13 representative, and thus benefits all unit
14 members.

15 King City, supra, at p. 31.

16 Further, if taken to its logical conclusion, the result of
17 charging parties' argument would be to totally deprive the
18 Union of the right to ever defend itself against an unfair
19 practice charge filed by one of its members.

20 Since no justifiable basis has been presented for granting
21 the motion, the motion to disqualify must be denied.

22 ORDER

23 The unfair practice charges of charging parties John C.
24 Scates and Shiral Pitts are hereby DISMISSED without leave to
25 amend. Additionally, their motion to disqualify the attorney
26 representative of Local 99 is DENIED. The formal hearing
27 tentatively scheduled for February 7 and 9, 1983 is CANCELLED.

Charging parties may obtain review of this dismissal by
filing an appeal with the Board itself within twenty (20)
calendar days after service of this dismissal. (PERB

1 Regulation 32635(a)). Such appeal must be actually received by
2 the PERB itself at the headquarters office in Sacramento before
3 the close of business (5:00 p.m.) on February 24, 1983,
4 or sent by telegraph or certified United States mail,
5 postmarked not later than the last day for filing in order to
6 be timely filed. (PERB Regulation 32135). Such appeal must be
7 in writing, must be signed by the charging parties or their
8 agent, and must contain the facts and arguments upon which the
9 appeal is based. The appeal must be accompanied by proof of
10 service upon all parties. (PERB Regulations 32140 and
11 32635 (a)).

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13 Dated: February 4, 1983.

14 W. Jean Thomas
15 Administrative Law Judge
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