8 PERC ¶ 15086

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION

California Public Employment Relations Board

Therese M. Dyer, Charging Party, v. California School Employees Association, Respondent.

Docket No. SF-CO-180

Order No. 342a

May 22, 1984

Before Hesse, Chairperson; Jaeger and Morgenstern, Members

Duty Of Fair Representation -- Breach -- Prima Facie Case -- -- 23.4, 71.9, 73.113 Request for reconsideration of decision, 7 PERC 14242 (1983), in which PERB dismissed employee's charge, alleging that union breached its duty of fair representation by refusing to appeal from decision in which court declined to take jurisdiction over transfer and reassignment dispute because employee had not exhausted her administrative remedies before PERB, denied where there were no facts that would indicate that union's decision not to appeal was discriminatory, made in bad faith, or arbitrary. Under facts of instant matter, there was no basis to determine applicability of "negligence" standard for assessing union's conduct because union's "failure to act" was grounded on conscious exercise of judgment.

APPEARANCES:

John F. Henning, Attorney (Henning, Walsh, Ritchie) for the Charging Party.

DECISION

JAEGER, Member: The Public Employment Relations Board (PERB or Board), having duly considered Therese M. Dyer's request for reconsideration, hereby denies that request.

DISCUSSION

Therese M. Dyer requests reconsideration of PERB Decision No. 342, in which the Board affirmed a Regional Attorney's dismissal of her unfair practice charge alleging a breach of the duty of fair representation by the California School Employees Association (CSEA).1 The gravamen of the charge was CSEA's failure to appeal a Superior Court decision dismissing a civil suit filed on Dyer's behalf against the Laguna Salada Union School District (District). The Court had concluded that the District's alleged violation of the Education Code could be an unfair labor practice over which the Board has initial exclusive jurisdiction. The Board found no basis for concluding that CSEA's decision not to appeal the Court decision was arbitrary, discriminatory or made in bad faith.

Dyer bases her request for reconsideration on a claimed change in the legal standard of the duty of fair representation, citing *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) __ F.2d __ [113 LRRM 3532]. Dyer contends that, under *Dutrisac, supra,* the "arbitrary, discriminatory, or bad faith" standard articutated in *Vaca v. Sipes* (1967) 386 U.S. 171 and followed by PERB in the underlying Decision, has been replaced by a standard of "negligence." CSEA did not respond to the request.

Dyer's interpretation of *Dutrisac, supra,* gives it a meaning beyond that intended by the 9th Circuit. Rather than replacing the standard for adjudicating alleged violations of the duty of fair representation enunciated by the U.S. Supreme Court in *Vaca, Dutrisac* merely clarified the term

"arbitrary," one part of the *Vaca* standard.2 Thus, the Court found that the negligent, "unexplained and unexcused" failure to perform a "ministerial act," such as failing to file a timely grievance, could support a finding of a breach of the duty of fair representation. The Court distinguished such cases from those in which the union's "failure" was essentially the consequence of a judgmental decision. The Court noted as three common examples of such cases those involving the union's evaluation of merits of a grievance, its interpretation of the collective bargaining agreement, and its decision as to the presentation of a grievance.

Here, CSEA's "failure" to appeal the Superior Court decision was the consequence of a conscious decision based on the exercise of judgment. That decision was clearly not based on an unexcused and unexplained failure to perform a ministerial act.

In addition, Dyer raises a second theory by which CSEA allegedly breached its duty of fair representation. Specifically, Dyer argues that CSEA negligently advised her that the proper forum for adjudicating her claim against the District was in superior court and not before PERB.

Dyer's argument is without merit. CSEA's decision to pursue Dyer's claim through a suit in superior court while a charge was pending before PERB,3 and the Court's subsequent decision to defer to PERB's initial exclusive jurisdiction, does not, in and of itself, state a prima facie violation of the duty of fair representation. Quite the contrary. California courts, not PERB, are empowered to enforce the Education Code, and CSEA's attempt to obtain relief through the judicial system of Dyer's claim that the District violated the Education Code by unlawfully transferring her was an appropriate exercise of judgment. That the court might dismiss the case on administrative preemption grounds was a calculated risk concerning an issue where there is emerging precedent.4 Taking that risk certainly does not evidence a negligent failure to perform a ministerial act, let alone demonstrate arbitrary, discriminatory, or bad faith conduct.

Accordingly, Dyer's request for reconsideration is denied.

ORDER

The Board, finding no grounds for reconsideration of its Decision No. 342, DENIES petitioner's request therefor.

Chairperson Hesse and Member Morgenstern joined in this Decision.

---

1 PERB rules are codified at California Administrative Code, title 8, section 31001 *et seq.* PERB rule 32410(a), which governs reconsideration requests, provides:

> Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

2 We limit this decision to the determination that the *Dutrisac* decision does not justify granting Dyer's request for reconsideration. In so ruling, we do not imply either the adoption or rejection of the Court's analysis.

3 The complicated procedural history of this case is noted in the underlying Decision. Briefly, Dyer had filed a PERB charge against the District (SF-CE-319) in October 1979, prior to CSEA's filing suit in San Mateo County Superior Court in July 1980. Dyer's private attorney withdrew that charge *with prejudice* in November 1981, prior to the Superior Court dismissal of her suit in February 1982. In July 1982, a PERB hearing

officer denied Dyer's request to reopen case SF-CE-319 because it had been withdrawn with prejudice. Dyer did not appeal this determination to the Board itself.

[4] See, e.g., *El Rancho Unified School District v. PERB* (1983) 33 Cal.3d. 946; *Link v. Antioch School District* (1983) 124 Cal.App.3d. 43; *Fresno Unified School District v. National Education Assn.* (1981) 125 Cal.App.3d. 259; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d. 1.