STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RONALD T. MINGO,	)	
	)	
Charging Party,	)	Case No. SF-CO-225
	)	
v.	)	PERB Decision No. 447
	)	
OAKLAND EDUCATION ASSOCIATION, CTA/NEA,	)	November 30, 1984
	)	
Respondent.	)	
	)	

Appearances: Susan Kramer, Attorney for Ronald T. Mingo; Priscilla Winslow, Attorney for Oakland Education Association, CTA/NEA.

Before Hesse, Chairperson; Tovar and Burt, Members.

DECISION AND ORDER

BURT, Member: This case is before the Public Employment Relations Board (Board) on an appeal by Ronald T. Mingo of the attached dismissal of his charge by a Board agent. In that charge, Mingo alleged that the Oakland Education Association, CTA/NEA, violated section 3544.9 of the Educational Employment Relations Act and thereby breached its duty of fair representation by its failure to process the charging party's grievance.

We have reviewed the dismissal and, finding it free from prejudical error, we adopt it as the Decision of the Board itself. In so doing, we note that the exclusive representative has an obligation to explain its actions in refusing to process

a grievance and there is some conflict about whether an adequate explanation was made in this case. We need not decide the sufficiency of the respondent's actions here, nor remand the case for hearing on that issue, since it is clear that the charge was untimely.

Chairperson Hesse and Member Tovar joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

February 29, 1984

Howard Moore, Jr., Esq.
Susan Kramer
445 Bellevue Avenue, Third Floor
Oakland, CA 94610

Priscilla Winslow/Kirsten Zerger
Oakland Education Association/CTA
1705 Murchison Drive
P. O. Box 921
Burlingame, CA 94010

Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
Ronald Mingo v. Oakland Education Association, CTA/NEA
Charge No. SF-CO-225

Dear Parties:

Pursuant to Public Employment Relations Board (PERB) Regulation section 32620(5), a complaint will not be issued in the above-referenced case and the pending charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Educational Employment Relations Act (EERA).[1] The reasoning which underlies this decision follows.

On February 6, 1984, the regional attorney wrote to charging party pointing out the deficiencies of the charge as written and solicited an amendment or withdrawal by February 16, 1984 (letter attached and incorporated by reference). The letter warned that if no such response was received by the deadline, the allegations would be dismissed and no complaint would issue. On February 16, 1984, charging party's counsel Howard Moore, Jr. telephoned to obtain an extension of the deadline until February 22, 1984. On February 23, 1984, this office received a letter from attorney Moore indicating that upon further review he determined that an amendment was unwarranted. Accordingly, the above-referenced charge is dismissed and no complaint will issue.

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[1]References to the EERA are to Government Code sections 3540 et seq. PERB Regulations are codified at California Administrative Code, Title 8.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on March 20, 1984, or sent by telegraph or certified United States mail postmarked not later than March 20, 1984 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 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 the document filed with the Board itself (see section 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 (section 32132).

Final Date

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

Very truly yours,

DENNIS M. SULLIVAN
General Counsel

By
PETER HABERFELD
Regional Attorney

cc: General Counsel

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

February 6, 1984

Howard Moore, Jr.
Susan Kramer

Re: Ronald Mingo v. Oakland Education Association, CTA/NEA
Charge No. SF-CO-225

Dear Mr. Moore:

On January 23, 1984 charging party Ronald Mingo filed an unfair practice charge against the Oakland Education Association, CTA/NEA (Association) alleging violation of EERA section 3543.6(c).[1] More specifically, charging party alleges the following information. In September 1982, upon receiving his first paycheck for the academic year 1982-83, Mr. Mingo discovered that he had not been fully compensated for teaching typing classes at a high school within the Oakland Unified School District. On or about September 30, 1982 Mr. Mingo formally demanded that the Association initiate and pursue a grievance related to the salary claim on his behalf. On the same date the Association

> arbitrarily, discriminatorily and in bad faith, without any just or reasonable cause or reason whatsoever, refused to initiate

the grievance. The Association's justification for not filing the claim was that it was not "grievable." On July 14, 1983, charging party

> again demanded that the OEA initiate and pursue . . . [his] salary claim pursuant to the grievance procedure contained in the collective bargaining agreement between the District and the OEA.

On August 1, 1983 the second request was denied by the Association again on the ground that it was not "grievable."

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[1]Section 3543.6(c) states that it shall be unlawful for an employee organization to:

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

My investigation of the charge revealed the following. The Association asserts that the charge must be dismissed for three reasons: (1) Charging party's allegations are time-barred pursuant to EERA section 3541.5(a)(1).[2] (2) Charging party's salary claim was not grievable under the contract. He was paid according to the contract provision which entitles a half-time employee to one-half the salary paid to a full-time employee. Whether an employee has half-time status is determined by whether or not he works half a day. Salary is based on the half-time status and not the number of periods taught. (3) Charging party's allegation that the Association's conduct was arbitrary, discriminatory and in bad faith is conclusionary and not supported by any factual allegation in the charge. Thus, it fails to meet the standard of PERB Rule 32615(a)(5) which states that an unfair practice charge must contain,

> a clear and concise statement of the facts and conduct alleged to constitute an unfair practice.

Governing Legal Principles and Application to Allegations of the Charge.

Statute of limitations: To state a prima facie violation, charging party must allege and ultimately establish that the alleged unfair practice either occurred or was discovered within the 6-month period immediately preceding the filing of the charge with PERB. EERA section 3543.5; Danzansky-Goldberg Memorial Chapels, Inc. (1982) 264 NLRB 112 [112 LRRM 1108]; American Olean Tile Co. (1982) 285 NLRB No. 206 [112 LRRM 1080; A.F.C. Industries, Inc. (Amcar Division) (1978) 234 NLRB 1063 [98 LRRM 1287], enf'd as modified (8 Cir. 1979) 596 F.2d 1344 [100 LRRM 3074]. The National Labor Relations Board cases cited here hold that the 6-month period commences on the date the conduct constituting the unfair practice is discovered. It does not rum from the discovery of the legal significance of that conduct.

Continuing violation: In some decisions interpreting the National Labor Relations Act, it has been found that a recurrence of unlawful conduct not be barred on the ground that it concerns conduct which occurred, and was known to charging party, more than six months prior to being filed as long as the conduct recurred within the six-month period. In San Dieguito Union High School District (2/25/82) PERB Decision No. 194, PERB discussed the federal cases, adopted the concept of a "continuing violation," but nevertheless

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[2]EERA section 3541.5(a)(1) states in pertinent part that the board shall not do either of the following:

> (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; . . .

dismissed the charge on the ground that the six-month limitation period had been exceeded. In that case, a school district was charged with having unilaterally changed a prior practice when it enforced on a daily basis a policy that required teachers to sign-out before leaving campus.

Equitable tolling: PERB, in some instances, has ruled that pursuit by the charging party of an alternate remedy "equitably tolls" the statute of limitations. San Dieguito Union High School District, supra; Los Angeles Unified School District (9/20/82) PERB Decision No. 237; Regents of the University of California (Berkeley) (9/27/83) PERB Decision No. 353-H. The test is whether charging party has pursued a remedy "reasonably and in good faith." PERB stated in San Dieguito Union High School District, supra,

> The alternate chosen must represent a practical effort to resolve [the] dispute expeditiously. San Dieguito Union High School District, supra.

Allegation is untimely: The charge does not state a prima facie violation of EERA section 3543.6(c). Charging party alleges that the Association refused on September 30, 1982 to file a grievance on his behalf. Charging party filed its unfair practice charge on January 23, 1984. Over six months had transpired since the occurrence of the conduct. The conduct alleged in the instant charge is not found to constitute a "continuing violation." Charging party alleges that on July 14, 1983 he sought a second time to convince the Association to file a grievance regarding his salary claim and on August 1, 1983, the Association refused again, offering the same reason. Factually the charge is not distinguishable from that found time-barred in San Dieguito Union High School District, supra.

Allegations required to set forth prima facie violation of EERA section 3543.6(b): Charging party has alleged that the Association violated his section 3544.9 right of fair representation and thereby violated section 3543.6(c).[3] The fair representation duty imposed on the exclusive representative extends to grievance handling (Fremont Teachers Association (King) (4/21/80) PERB Decision No. 124; United Teachers of Los Angeles (Collins) (1/17/83) PERB Decision No. 258). However, the exclusive representative is extended considerable latitude concerning the performance of its duty. A Union may refuse to handle a grievance in a particular manner for a "multitude of reasons." (Castro Valley Teachers Association (McElwain) (12/17/80) PERB Decision No. 159). In United Teachers of Los Angeles, supra, the exclusive representative failed to prosecute properly a grievance of a

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[3]EERA section 3543.6(b) is the appropriate subdivision to allege when seeking to remedy violation of rights guaranteed by section 3544.9. Redlands Teachers Association (Faeth) (9/25/78) PERB Decision No. 72; Romero v. Rocklin Teachers Professional Association (3/26/80) PERB Decision No. 124.

unit member. PERB, adopting the hearing officer's decision, held that no breach of the duty of fair representation occurred and stated:

> Whether a union has met its duty in . . . processing grievances depends . . . upon the union's conduct in processing or failing to process the grievance. Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. (Cases cited.)

A prima facie case alleging arbitrary conduct violative of the duty of fair representation,

> must, at a minimum, include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. Reed District Teachers Assn., CTA/NEA (Reyes) (8/15/83) PERB Decision No. 332, citing Rocklin, supra.

No prima facie case: Charging party has failed to lay a sufficient factual foundation for its claim that an unfair practice occurred. PERB Rule 32615(a)(5); Rocklin, supra. Here, charging party has not alleged facts to support his conclusion that the grievance concerning salary was meritorious. Nor has charging party provided facts to support his allegations that the conduct of the Association was arbitrary, discriminatory and/or in bad faith.

If you feel that there are facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before February 16, 1984, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (415) 557-1350.

Sincerely yours,

Peter Haberfeld
Regional Attorney