



STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SANDRA CLARK,)
)
 Charging Party,) Case No. LA-CO-471
)
 v.) PERB Decision No. 796
)
 UNITED TEACHERS OF LOS ANGELES,) March 22, 1990
)
 Respondent.)
 _____)

Appearance: Sandra Clark, on her own behalf.

Before Craib, Shank and Camilli, Members.

DECISION AND ORDER

SHANK, Member: This case is before the Public Employment Relations Board (Board) on appeal by Sandra Clark of the Board agent's dismissal, attached hereto, of her charge that the United Teachers of Los Angeles violated section 3544.9 of the Educational Employment Relations Act. We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the decision of the Board itself.

The unfair practice charge in Case No. LA-CO-471 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Craib and Camilli joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916)322-3198



December 8, 1989

Sandra Clark

Re: Sandra Clark v. United Teachers of Los Angeles, Unfair
Practice Charge No. LA-CO-471

Dear Ms. Clark:

On February 25, 1989, you filed a charge against the United Teachers of Los Angeles (UTLA). In the charge you alleged that UTLA violated its duty of fair representation by failing to proceed to arbitration on three grievances. The charge has been amended three times.

I indicated to you in my attached letter dated November 3, 1989 that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to November 13, 1989, the charge would be dismissed. The most recent amended charge was received in this office on November 22, 1989. I am dismissing your charge based on the facts and reasons contained here and in my November 3, 1989 letter.

At the time of the attached warning letter, UTLA had referred your grievances to its grievance review committee. The referral followed the assertion by the district that the grievances had been settled as part of the settlement of the disciplinary matter between you and the district. As asserted in your amended charge, "the district did not provide the union with releases of the grievances or any other proof that the grievances were not still alive." UTLA representative Patricia Bell twice requested that you supply the union with the settlement agreement. Her second letter stated that if you did not supply the settlement "I will have no choice but to withdraw the grievance." Your position is that the parties to the settlement agreed that it would not be made public and, therefore, you are not able to share the agreement with UTLA. Your amended charge states that UTLA has now decided not to take your case to arbitration.

As I indicated in the attached warning letter, to show a breach of the duty of fair representation a charging party must state

sufficient facts indicating 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 Association (1983) PERB Decision No. 332. You have stated your disagreement with UTLA's decision not to proceed with the grievances despite the district's position. However, you have not shown that the decision to not proceed in the face of the district's defense was without a rational basis or devoid of honest judgment. Disagreement with the union's decision is not sufficient. Even a showing of negligence or poor judgment is insufficient to establish a breach of the duty of fair representation. United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258. A union's estimation of the "probability of success on the merits is a judgment made by the union to which the courts have generally deferred" (Morris, The Developing Labor Law (2nd Ed. 1983) p. 1330). Accordingly, you have not shown sufficient facts to establish a breach of the union's duty of fair representation.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 dismissal (California Administrative Code, title 8, section 32635(a)). 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 (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. 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 copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Administrative Code, title 8, 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 each copy of a document served upon a party or filed with the Board itself. (See California Administrative Code, title 8, 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 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 (California Administrative Code, title 8, 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.

Sincerely,

CHRISTINE A. BOLOGNA
General Counsel

By _
Bernard McMonigle
Staff Attorney

Attachment

cc: Jesus Quinonez



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916)322-3198



November 3, 1989

Sandra Clark

Re: Sandra Clark v. United Teachers of Los Angeles. Unfair
Practice Charge No. LA-CO-471
WARNING LETTER.

Dear Ms. Clark:

On February 25, 1989, you filed a charge against the United Teachers of Los Angeles (UTLA). In the charge you alleged that UTLA violated its duty of fair representation by failing to proceed to arbitration on three grievances.

My investigation reveals the following. On January 23, 1989, you received a letter from the grievance review committee of UTLA. That letter stated that the committee had decided to proceed to arbitration on cases No. 12, 14 and 15, which had been filed against the Los Angeles Unified School District (LAUSD). Shortly thereafter, you received another letter from Sam Kresner, UTLA Director of Organizational Services, stating that the grievances would be stayed pending the outcome of statutory dismissal hearing proceedings in which you and the LAUSD were involved. Article 10, subsection 11(h) of the collective bargaining agreement between UTLA and LAUSD states in part:

If a statutory suspension or dismissal proceeding is filed based in whole or part upon the service or conduct which gave rise to the disciplinary proceeding under this section, then any grievance arising under this section not yet taken to arbitration shall be deferred pending resolution of the statutory proceeding.

Grievance No. 12 protests an unsatisfactory evaluation which allegedly was not issued for just cause and the remedy sought was reinstatement of money since 1985 and a position closer to your home. Grievance No. 14 states that "Sandra Clark, grievant, learned that dismissal case against her had been decided in her favor" and requests payment for full and half days of illness leave owed to her since 1985. Grievance No. 15, filed in October 1988, objects to the failure of the school district to process illness cards, medical and dental benefits, and half-pay provisions of the contract. The school district took the

position that the grievances arose out of the discipline which had been taken against you and no arbitration should proceed until the statutory procedures had been exhausted. At the time you filed this charge you had received a favorable decision by the Commission of Professional Competence, and that decision was the subject of a writ of mandate proceeding which had been filed by the LAUSD. Education Code 44945 provides that a commission, decision may, on petition, be reviewed by a court of competent jurisdiction by a writ of mandate.

In August 1989, you settled your disciplinary case with LAUSD. You have stated that the settlement does not cover the subject grievances. In early September you informed Sam Kresner of the settlement. He told you that the union would proceed on the grievances and advised you to call UTLA agent Patricia Bell. She informed you that the grievances would be reviewed by her in the near future and a decision would be made. In your conversations with them, you indicated to the UTLA representatives that the settlement reached with LAUSD did not include the grievances. No release with respect to the grievances was sent. On September 18, 1989, we received your amended charge which alleged that UTLA was continuing "to refuse to process grievances as of September 13, 1989." In late September or early October, UTLA made a demand on LAUSD for arbitration of the grievances. The district took the position that the grievances had been settled as part of your settlement agreement. The district did not take the position that the demand for arbitration was untimely.

On or about October 5, Patricia Bell sent a letter to you which indicated that UTLA had made an arbitration demand on the District. You were asked to contact the union and submit a copy of the settlement agreement for review in light of the district's position. On or about October 20 you received another letter from Patricia Bell which stated that it was necessary to respond to the earlier request within five days or "I will have no choice but to withdraw the grievance." On or about October 25 you talked to Patricia Bell, the UTLA agent handling the grievance. Again she indicated to you that the District was refusing to proceed to arbitration because the grievances had been settled. She further stated that it was necessary for the grievance to be sent back to the grievance review committee. She indicated that you would be contacted by the union. With regard to the union's request for a copy of the settlement agreement, your position is that the parties to that agreement agreed that it would not be made public, therefore, you are not able to share the settlement agreement with the union.

The exclusive representative is under no obligation to take a grievance to arbitration as long as it does not refuse to do so based upon arbitrary, discriminatory, or bad faith reasons. Sacramento City Teacher Association (1984) PERB Decision No. 428. This standard was adopted from the United States Supreme Court

decision in Vaca v. Sipes (1967) 386 U.S. 171 at 190. In United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258, the Board stated:

A union may exercise its discretion to determine how far to pursue a grievance on the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

Nor must a union take even a meritorious grievance to arbitration. In determining whether or not to take a grievance to arbitration (or to file a grievance in the first place) the union is free to consider whether the grievance victory would damage terms and conditions of employment for the bargaining unit as a whole. Castro Valley Teachers Association (McElwain) (1980) PERB Decision No. 149. An exclusive representative's negligence or poor judgment in the handling of a grievance is not sufficient to find a breach of the duty of fair representation. United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258. The charging party must show sufficient facts indicating 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 Association (1983) PERB Decision No. 332.

With respect to the original charge, you have not stated a prima facie case. The union contract states that if a statutory dismissal proceeding is ongoing, any grievance arising out of conduct which gave rise to the proceeding shall be deferred pending a resolution. The union takes the position that the grievances should have been stayed under this provision. Grievance 12 contests an unsatisfactory rating. You contend that because grievances 14 and 15 "occurred after the dismissal proceeding," they could not reasonably be construed as being based on conduct giving rise to the statutory disciplinary procedure. However, the district's liability in both grievances could depend directly on the outcome in the disciplinary proceedings. Grievance 14 bases the owing of illness leave and fringe benefits on the favorable ruling received from the Commission on Professional Competence. Grievance 15 also demands the restoration of certain contractual payments.

Additionally, it is reasonable to interpret the writ of mandate proceedings as part of the "statutory proceedings" to which the contract refers. Education Code section 44945 states, "The decision of the Commission on Professional Competence may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction in the same manner as a decision by a hearing officer." Accordingly, you have not

met your burden of showing that UTLA's action of putting the grievance arbitration in abeyance pending the outcome of the statutory procedure was without a rational basis or devoid of honest judgment.¹

With respect to your amended charge you have also not stated a prima facie case. In the amended charge you allege that UTLA "continues to refuse to process grievances as of September 13, 1989." However, the facts do not show that UTLA refuses to process your case to arbitration. As indicated earlier, it was not a violation for the union to hold the grievances in abeyance pending the resolution of the statutory proceedings which apparently occurred in mid to late August. Since that time the union has made a demand for arbitration upon the District. The District has taken the position that the matter was settled as part of your settlement agreement. The union has done further investigation to determine whether or not to proceed to the arbitration stage and it has now referred the matter to its grievance review committee. To date, there has been no refusal to take the cases to arbitration. The union is currently trying to assess the merit of the district's new defense.² Again, there has been no showing that the union's actions have been without a rational basis or devoid of honest judgment. Accordingly, this allegation must also be dismissed.

For these reasons, the charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that 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 must 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

¹You alleged that the UTLA actions were discriminatory and indicated that in 1985, Wayne Johnson, the President of UTLA, had said "blow her off" with respect to other grievances filed by you. However, there are no facts showing that your grievances have been handled differently than grievances of other similarly situated employees.

²In your amended charge you allege that UTLA has "refused to proceed in a timely fashion causing prejudice to the grievances and staling [sic] the evidence, and making it difficult to represent the case appropriately." As indicated, the placing of the cases in abeyance through the settlement is not a violation. Further, there is yet no showing that the union has failed to proceed in a timely fashion. The LAUSD has not taken the position that arbitration is untimely.

not receive an amended charge or withdrawal from you before November 13, 1989, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Bernard McMonigle
Staff Attorney