



STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WILLIAM PAUL FINCH,)	
)	
Charging Party,)	Case No. S-C0-142-S
)	
v.)	PERB Decision No. 959-S
)	
CALIFORNIA STATE EMPLOYEES)	November 20, 1992
ASSOCIATION,)	
)	
Respondent.)	
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Appearance: William Paul Finch, on his own behalf.

Before Hesse, Chairperson; Caffrey and Carlyle, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by William Paul Finch (Finch) to the Board agent's dismissal (attached hereto) of his unfair practice charge. Finch alleged that the California State Employees Association (CSEA) violated section 3519.5 of the Ralph C. Dills Act (Dills Act)¹ by denying his

¹The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519.5 states, in pertinent part:

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.

request for representation before the State Personnel Board (SPB).

The Board has reviewed the dismissal, and finding it to be free of prejudicial error, adopts it as the decision of the Board itself consistent with the following discussion.

DISCUSSION

Finch filed a timely appeal of the Board agent's dismissal of his unfair practice charge. Wherein he reasserts that he was not informed by CSEA of his rights to appeal and was not permitted to participate in CSEA's decision not to pursue his grievance and provide representation before the SPB.

For the first time, on appeal, Finch argues that his CSEA representative was ill and therefore, not competent to make a judgment regarding Finch's case.

PERB Regulation section 32635² states, in pertinent part:

(b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

Concerning the new allegation relating to the competence of the CSEA representative, Finch is required to show good cause for presenting new allegations or new supporting evidence. As Finch has failed to show good cause, the Board will not consider this allegation. (Association of California State Attorneys (Winston) (1992) PERB Decision No. 931-S.) Assuming, arguendo, that Finch had presented this allegation to the Board agent, the factual

²PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

allegations in the unfair practice charge do not state a prima facie violation of section 3519.5 of the Dills Act.

ORDER

The unfair practice charge in Case No. S-CO-142-S is hereby DISMISSED WITHOUT PREJUDICE.

Members Caffrey and Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



June 18, 1992

William Paul Finch

Re: William Paul Finch v. California State Employees Association
Unfair Practice Charge No. S-CO-142-S
DISMISSAL LETTER

Dear Mr. Finch:

On March 19, 1992, you filed a charge in which you allege that the California State Employees Association (CSEA) violated Government Code section 3519.5 (the Dills Act). Specifically, you allege that CSEA violated its duty of fair representation by denying your request for representation before the State Personnel Board (SPB) regarding a rejection during probation.

I indicated to you in my attached letter dated March 24, 1992, 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.

On March 31, 1992, you filed a First Amended Charge. Your First Amended Charge realleges that CSEA violated its duty of fair representation by denying your request for representation before the SPB regarding your rejection during probation and asserts the following additional information, which I have summarized:

You mailed your original charge to the Public Employment Relations Board (PERB or Board) on March 17, 1992, thinking it would get to PERB or at least be postmarked by March 18, 1992.

CSEA held two appeals panel meetings regarding your request for legal representation. The First Member Representation Appeals Panel upheld the staff's denial of your request for legal representation. The Second Level Representation Appeals Panel confirmed the decision of the First Member Representation Appeals Panel. You did not receive assistance about this appeals process from anyone at CSEA knowledgeable in the process.

You were not allowed to discuss the case with the two panels and you were informed that the Department of Health Services and the State of California management would do things to you if you pursued the matter of being rejected during probation.

You received notification in the mail from the Second Level Representation Appeals Panel on September 18, 1991. The decision of this panel was made on September 12, 1991.

You believe that the action by CSEA was discriminatory because CSEA previously helped you in 1979 and did not do so, or does not propose to help you now. You believe the action by CSEA is in bad faith because CSEA staff told you that you had a case and promised you that it was being handled and Jeff Young filed a grievance, then everything changed. You believe everything changed because a manager at the Department of Health Services was having an affair with a contractor employee, even though you do not have any evidence to verify that an affair occurred.

You believe that the action by CSEA is arbitrary because you were informed that there is another level of appeal to the CSEA Board or the Civil Service Division Board and the letter from the Second Level Representation Appeals Panel dated September 17, 1992 does not inform you that you have that right.

As I informed you in my letter of March 24, 1992, in order to state a prima facie case a Charging Party must allege and ultimately establish that the conduct complained of either occurred or was discovered within the six-month period immediately preceding the filing of the charge. San Dieguito Union High School District (1982) PERB Decision No. 194. Government Code section 3514.5(a) states in relevant part:

Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except 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, . . .

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This limitations period is mandatory and constitutes a jurisdictional bar to charges filed outside the statute of limitations. See California State University, San Diego (1989) PERB Decision No. 718-H.

Unfair practice charges are considered filed when actually received by the appropriate PERB office before the close of business on the last day set for filing, or when sent by telegraph, or certified or express United States mail postmarked not later than the last day set for filing, and addressed to the proper PERB office (California Code of Regs., tit. 8, sec. 32135). Your charge was sent by regular mail and received in the Sacramento Regional Office of PERB on March 19, 1992. Therefore, your charge is untimely and must be dismissed because it was filed outside the six-month statute of limitations.

Even assuming that your charge was filed in a timely manner, the allegations contained in your First Amended Charge fail to demonstrate a prima facie case that CSEA denied you the right to fair representation. The duty of fair representation does not extend to extra-contractual hearings such as SPB hearings. The duty is limited to contractually-based remedies under the employee organization's exclusive control. See American Federation of State, County and Municipal Employees, Local 2620, (Moore) (1988) PERB Decision No. 683-S and Professional Engineers in California Government (1989) PERB Decision No. 760-S. In other words, there is no duty of fair representation owed to a unit member unless the exclusive representation possesses the exclusive means by which such an employee can obtain a particular remedy. See San Francisco Classroom Teachers Association, CTA/NEA (Chestanque) (1985) PERB Decision No. 544, California Faculty Association (1988) PERB Decision No. 698-H. The exclusive representative possesses the sole means by which a unit member has access to the negotiating process, as well as to the grievance and arbitration procedure. This is not the case with regard to representation at a SPB hearing.

Accordingly, for the reasons contained in this letter and my letter of March 24, 1992, your charge is dismissed.

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 Code of Regs., tit. 8, sec. 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 Code of Regs., tit. 8, sec. 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 Code of Regs., tit. 8, sec. 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 Code of Regs., tit. 8, sec. 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 Code of Regs., tit. 8, sec. 32132).

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Final Date

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

Sincerely,

JOHN W. SPITTLER
General Counsel

By Michael E. Gash
Michael E. Gash
Regional Attorney

Attachment

cc: Gary Reynolds, CSEA

PUBLIC EMPLOYMENT RELATIONS BOARD



Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088



March 24, 1992

William Paul Finch

Re: William Paul Finch v. California State Employees Association
Unfair Practice Charge No. S-CO-142-S
WARNING LETTER

Dear Mr. Finch:

On March 19, 1992, you filed a charge in which you allege that the California State Employees Association (CSEA) violated Government Code section 3519.5 (the Dills Act). Specifically, you allege that CSEA violated its duty of fair representation by denying your request for representation before the State Personnel Board (SPB) regarding a rejection during probation. My investigation revealed the following facts.

Charging Party has been a member of CSEA since 1975. He is a job steward and has served CSEA in chapter and activist work.

In 1990, while working at the California Department of Health Services, Charging Party was rejected during probation. With the assistance of Jeffrey Young, CSEA representative, Charging Party filed a grievance concerning a Probationary Report. Young did not process the grievance through to completion with the State Personnel Board. Charging Party filed an appeal of the rejection with the SPB.

Young denied Charging Party's request to CSEA for representation before the SPB regarding the rejection during probation.

During two (2) secret sessions, ending with a decision made on September 17, 1991, CSEA panels decided that Young's decision would stand. Charging Party was not able to present his case before the panels, nor given an opportunity to respond to statements, made against him or his case. Charging Party also contends that CSEA did not conduct an investigation of his matter.

In order to state a prima facie case a Charging Party must allege and ultimately establish that the conduct complained of either occurred or was discovered within the six-month period immediately preceding the filing of the charge. San Dieguito Union High School District (1982) PERB Decision No. 194. Government Code section 3514.5(a) states in relevant part:

Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except 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, . . .

Your charge was filed with the Public Employment Relations Board on March 19, 1992, which means that any alleged unfair practice by CSEA should have occurred during the six-month statutory period which began on September 19, 1991.

Your charge states that a final decision was made by the two CSEA panels on September 17, 1991. Since the conduct you complained of occurred outside the six-month limitation period, your charge is untimely and must be dismissed.

Even assuming that your charge was filed in a timely manner, you have still failed to establish a prima facie case that CSEA denied you the right to fair representation. Although the Dills Act does not contain a specific section specifying an employee organization's duty of fair representation, such a duty can be implied from the fact that the Dills Act provides for exclusive representation. Government Code sections 3513(b) and 3515.5; Norgard v. California State Employees Association (1984) PERB Decision No. 451-S.

In order to state a prima facie violation of an employee organization's duty of fair representation, Charging Party must show that the employee organization's conduct was arbitrary, discriminatory, or in bad faith. United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258. There is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such an employee can obtain a particular remedy. California Faculty Association (1988) PERB Decision No. 698-H; San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 544. In this case, the duty does not apply to your request for representation by CSEA before the State Personnel

Board regarding a rejection during probation because CSEA does not possess the exclusive means of obtaining relief.

In addition, the duty of fair representation does not attach to extra-contractual hearing such as State Personnel Board hearings. American Federation of State, County and Municipal Employees, Local 2620 (Moore) PERB Decision No. 683-S.

Even assuming the duty of fair representation is applicable in this case, in order to state a prima facie violation, Charging Party must show that the exclusive representative's conduct was arbitrary, discriminatory, or in bad faith. In United Teachers of Los Angeles (Collins), Id., the Public Employment Relations Board (PERB) stated:

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.

.

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.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

. . . 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 Association. CTA/NEA (Reyes) (1983) PERB Decision No. 332, citing Rocklin Teachers Professional Association (Romero), (1980) PERB Decision No. 124.

The facts alleged in your charge fail to assert sufficient facts from which it becomes apparent how or in what manner CSEA's action or inaction, by denying your request for representation

before the State Personnel Board regarding a rejection during probation, was without a rational basis or devoid of honest judgment. In the absence of specific allegations of arbitrary, discriminatory or bad faith denial of representation, you have failed to establish a prima facie violation that CSEA breached its duty to fairly represent you.

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 not receive an amended charge or withdrawal from you before March 31, 1992, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

A handwritten signature in cursive script that reads "Michael E. Gash".

Michael E. Gash
Regional Attorney

MEG:er