

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



AUBREY SIZEMORE,)	
)	
Charging Party,)	Case No. LA-CO-597
)	
v.)	PERB Decision No. 981
)	
ASSOCIATED POMONA TEACHERS,)	March 12, 1993
)	
Respondent.)	

Appearance: Aubrey Sizemore, on his own behalf.

Before Blair, Chair; Hesse and Caffrey, Members.

DECISION AND ORDER

CAFFREY, Member: This case is before the Public Employment Relations Board (Board) on appeal by Aubrey Sizemore (Sizemore) to a Board agent's dismissal (attached hereto) of his unfair practice charge. In his charge, Sizemore alleged that the Associated Pomona Teachers violated section 3543.6(b) of the Educational Employment Relations Act (EERA)¹ by failing to pursue his grievance to arbitration.

The Board has reviewed the warning and dismissal letters,

¹EERA is codified at Government Code section 3540 et seq. Section 3543.6(b) 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.

the original and amended charge, Sizemore's appeal and the entire record in this case. The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself.

The unfair practice charge in Case No. LA-CO-597 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Blair and Member Hesse joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



October 27, 1992

Aubrey Sizemore

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
Unfair Practice Charge No. LA-CO-597
Aubrey Sizemore v. Associated Pomona Teachers

Dear Mr. Sizemore: _____

I indicated to you, in my attached letter dated October 7, 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 which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to October 16, 1992, the charge would be dismissed.

On October 19, 1992, I received from you an amended charge. The amended charge does not, however, contain significant additional factual allegations. It is still not apparent how the Association's conduct in representing you, within the six months prior to the filing of your charge, was arbitrary, discriminatory or in bad faith. Therefore, I am dismissing the charge based on the facts and reasons contained in my October 7 letter.

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. (Cal. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. 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

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Issue Complaint
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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 (20) calendar days following the date of service of the appeal. (Cal. 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 Cal. 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 (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. (Cal. Code of Regs., tit. 8, sec. 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,

ROBERT THOMPSON
Deputy General Counsel

By Thomas J. Allen
Thomas J. Allen
Regional Attorney

Attachment

cc: Charles R. Gustafson, Esq.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
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October 7, 1992

Aubrey Sizemore

RE: WARNING LETTER, Unfair Practice Charge No. LA-CO-597
Aubrey Sizemore v. Associated Pomona Teachers

Dear Mr. Sizemore:

In the above-referenced charge, you allege that the Associated Pomona Teachers (Association) denied you the right to fair representation guaranteed by Government Code section 3544.9 of the Educational Employment Relations Act (EERA) and thereby violated section 3543.6(b).

My investigation of the charge reveals the following facts.

You are employed as a teacher by the Pomona Unified School District (District) in a unit for which the Association is the exclusive representative. On April 23, 1991, you were attacked by a student. In your effort to stop the attack, you pushed the student back, and in the process your hand struck the student in the face.

You were told to meet with District Personnel Director Emmett Terrell. Association Executive Director Tom Hollister attended the meeting with you. At the meeting, Terrell placed you on paid administrative leave. Hollister had nothing to say.

Three weeks later you and Hollister again met with Terrell. Terrell assigned you to a different school. You voiced concern about the school's bad reputation and stated, "I have a lot to say about this." Hollister interrupted you, telling you to "just don't say nothing." After the meeting with Terrell, you expressed to Hollister your dissatisfaction and asked him to find you a better position, but he just shook his head and laughed.

You met with members of the Association's Professional Rights and Responsibilities (PR & R) Committee in mid-May of 1991. The Committee agreed with you that you had not been properly represented. They yelled at Tom Hollister and told you that they would get an attorney to defend you.

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A few days later you received an anonymous threatening phone call. The caller said he would "kick your ass." You recognized the voice as that of Tom Hollister.

In August 1991 you met with Association attorney Robert Lindquist, who asked whether the District had tried to do anything else to you. When you said no, he told you to be grateful and let it go.

On October 28, 1991, you received a letter from Emmett Terrell, giving you notice of an intent to suspend you for ten days without pay. You went to Association President Sue Williams, told her about your problems with Tom Hollister, and asked her to represent you. She agreed, but when you and she met with Terrell on or about November 10, 1991, she had nothing to say.

On January 10, 1991, you received a second notice of suspension. You went back to Sue Williams, and she arranged a meeting for you with the PR & R Committee about three weeks later. On March 9, 1992, you received the following letter from the Committee:

After long and careful consideration, the PR & R Committee has decided not to recommend that we pursue an arbitration at this time. We have been advised that such an action would fail.

Although the committee believes the timeliness of the discipline is very questionable, we feel this matter would best be addressed by the bargaining team at the negotiating table.

Associated Pomona Teachers has supported you and will continue to support you as a bargaining unit member. Please inform us if there is any additional action on this matter.

Based on the facts stated above, the charge does not state a prima facie violation of the EERA, for the reasons that follow.

As Charging Party, you have alleged that the Association, as exclusive representative, denied you the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB

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Decision No. 125; United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, a Charging Party must show that the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board 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. [Citations.]

A union may exercise its discretion to determine how far to pursue a grievance in 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. (Emphasis added.)" [Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

It is not apparent how the Association's decision not to pursue arbitration was without a rational basis, devoid of honest judgment, discriminatory or in bad faith. On the contrary, it appears that the decision was based on advice that arbitration would fail.¹

¹There are no alleged facts which indicate a connection between Tom Hollister's alleged threatening phone call and the decision of the PR & R Committee not to pursue arbitration. Hollister had no apparent authority from the Committee or the Association to make the alleged phone call. On the contrary, the

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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 additional facts which would correct the deficiencies explained above, please amend the charge. 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 October 16, 1992, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,



Thomas J. Allen
Regional Attorney

Committee had allegedly already yelled at Hollister for not defending you properly, and Association President Sue Williams later agreed to represent you herself. Furthermore, your alleged problems with Hollister occurred more than six months prior to the filing of your charge (on May 18, 1992) and are therefore outside the six-month statute of limitations established by EERA section 3541.5(a)(1).