

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



RICHARD A. HERNANDEZ,)
)
 Charging Party,) Case No. SF-CO-525
)
 v.) PERB Decision No. 1223
)
 EAST SIDE TEACHERS ASSOCIATION,) October 20, 1997
 CTA/NEA,)
)
 Respondent.)
 _____)

Appearances: Richard A. Hernandez, on his own behalf; California Teachers Association by Priscilla Winslow, Attorney, for East Side Teachers Association, CTA/NEA.

Before Caffrey, Chairman; Johnson and Amador, Members.

DECISION AND ORDER

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by Richard A. Hernandez (Hernandez) to a Board agent's dismissal (attached) of his unfair practice charge. Hernandez alleges that the East Side Teachers Association, CTA/NEA (Association) denied him the right to fair and impartial representation guaranteed by section 3544.9 of the Educational Employment Relations Act (EERA), in violation of section 3543.6(b),¹ by failing to assist him with a grievance

¹EERA is codified at Government Code section 3540 et seq. Section 3544.9 states:

The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

Section 3543.6 states, in part:

It shall be unlawful for an employee

related to teaching assignments.

The Board has reviewed the entire record in this case, including the Board agent's warning and dismissal letters, the original and amended unfair practice charge, Hernandez' appeal, and the Association's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SF-CO-525 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Amador joined in this decision.

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.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940



July 8, 1997

Richard A. Hernandez

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Richard A. Hernandez v. East Side Teachers Association,
CTA/NEA
Unfair Practice Charge No. SF-CO-525

Dear Mr. Hernandez:

The above-referenced unfair practice charge, filed June 17, 1997, alleges the East Side Union Teachers Association (Association) and the California Teachers Association (CTA) violated their duty of fair representation. You allege this conduct violates Government Code section 3543.6 of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated June 26, 1997, 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 July 3, 1997, the charge would be dismissed.

On July 1, 1997, I spoke with you regarding the June 26, 1997, letter. I again explained the deficiencies in the original charge, and further explained PERB's statute of limitations. On July 2, 1997, I received a first amended charge. The first amended charge states in its entirety:

See Attached Papers- Lisa Vieler (ESTA) and Bill Empy (CTA) did not represent Richard Hernandez properly in grievance procedure. Lisa Vieler and Bill Empy did not enforce article 8.3 of collective bargaining agreement. Lisa V. and Bill Empy gave Mr. Hernandez wrong information year after year and did not insist on arbitration based on violation of article 8.3.

Based on the facts contained in both the original and amended charges, the charge fails to state a prima facie violation of the duty of fair representation, and is therefore dismissed.

As noted in the June 26, 1997, letter, Government Code section 3541.5(a)(1) prohibits the Board from issuing a complaint in respect of any alleged unfair practice occurring more than six months prior to the filing of the charge. As this charge was filed on June 17, 1997, all allegations occurring prior to December 17, 1996, are untimely and outside of PERB's jurisdiction. The amended charge fails to provide any facts demonstrating an allegation of unlawful conduct during PERB's six month statute of limitations. Documents attached to the charge demonstrate the final communication between the Association and Charging Party took place on December 3, 1996, outside of PERB's jurisdiction. As such, the charge must be dismissed as untimely.

Assuming, however, the allegations are timely filed, Charging Party still fails to state a prima facie case. Charging Party's original and amended charges assert the Association provided the "wrong" information regarding the legality of Charging Party's assignment to teach CHD courses. Specifically, the original charge alleges Ms. Vieler and Mr. Empey informed Charging Party that the District could assign him to teach these courses. As noted in my June 26, 1997, letter, the collective bargaining agreement did not prohibit the District from assigning you to teach the CHD courses. While such an assignment by the District may have violated the Education Code, the Association is not obligated to notify you of a potential noncontractual remedy. (University Council. AFT (Ning-Ping Chan) (1994) PERB Decision No. 1062-H.) As such, the Association did not violate their duty of fair representation in advising you of your contractual rights.

On August 31, 1996, a new collective bargaining agreement between the District and the Association took effects. Article 8 of the new Agreement states in pertinent part:

8.3 Reassignments will not be arbitrary or capricious. Such placements must conform to Ed. Code and credential requirements.

8.5 The District will make every effort to balance teacher schedules so that equal opportunity is afforded all unit members who request to teach all levels of courses, regardless of seniority.

The amended charge asserts the Association failed to inform you of these provisions and failed to take your grievances to arbitration based on these provisions. As noted in my June 26, 1997, letter, the charge fails to present evidence that you filed a grievance that- would be governed by this contractual language. Allegations presented in the original charge contend you filed a

grievance regarding your 1994-95, 1995-96, and 1996-97 schedules. Each of these schedules were assigned prior to the effective date of the contractual language quoted above, and as such would not be governed by this contractual language. This was noted also in Mr. Empey's December 3, 1996, to Charging Party in which Mr. Empey informed Charging Party that he could attempt to raise the new contractual language during his grievance hearings and hope the District would take the new changes into consideration. As such, the Association could not have taken your grievances to arbitration based on this contractual language as it did not exist at the time your schedules were assigned or during the time when your grievances were filed. Therefore, Charging Party's allegation that the Association violated its duty of fair representation 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. (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

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
Kristin L. Rosi
Regional Attorney

Attachment

cc: Priscilla Winslow

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940



June 26, 1997

Richard A. Hernandez

Re: **WARNING LETTER**

Richard A. Hernandez v. East Side Teachers Association.
CTA/NEA
Unfair Practice Charge No. SF-CO-525

Dear Mr. Hernandez:

The above-referenced unfair practice charge, filed June 17, 1997, alleges the East Side Union Teachers Association (Association) and the California Teachers Association (CTA) violated their duty of fair representation. You allege this conduct violates Government Code section 3543.6 of the Educational Employment Relations Act (EERA or Act).

Investigation of the charge revealed the following. You are employed by the District as a high school instructor at Silver Creek High School in the East Side Union High School District (District). You are exclusively represented in your employment by the East Side Teachers Association, CTA/NEA. The Association and District are parties to a collective bargaining agreement (Agreement) which expired on August 31, 1996.

The charge alleges that for the last ten years, the District has harassed you "for no apparent reason," and that the Association has failed to represent you. Specifically, you allege the Association processed a number of grievances on your behalf, but failed to take any of the grievances to binding arbitration. Additionally, you assert the Association gave you the wrong information concerning your reassignment by the District.

Your 1994-95 schedule assigned you to teach three (3) Biology courses and two (2) Introduction to Science courses. You were also assigned to teach two (2) periods of Careers, Health and Driver's Education (CHD). You believed the assignment to CHD was outside your credentialed area and thus you requested the advice of Association President, Lisa Vieler. Ms. Vieler informed you that any credentialed teacher could be assigned to teach CHD.

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June 26, 1997
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Your 1995-96 schedule assigned you to teach three (3) Integrated Science I courses and two (2) Integrated Science II courses. However, on September 11, 1995, Associate Principal Dorothy Westerhoff reassigned you to teach all CHD courses. You again contacted Ms. Vieler regarding this change. Although specific dates are not provided, the charge indicates you filed a grievance over this reassignment in September, 1995, which was processed at least through Level III of the grievance procedure. Apparently, this grievance alleged the District violated the transfer provisions of the Agreement.

Your 1996-97 schedule again assigned you to teach five (5) periods of CHD. In November, 1996, you met with Association Executive Director, Bill Empey, and other members of the Association's grievance committee regarding your assignment to CHD classes. On December 3, 1996, Mr. Empey responded with the Association's position on the matter. Mr. Empey explained that your grievance alleged violations of Article 7, which provides for transfers between school sites. As this was not the case in your situation, Mr. Empey explained that your grievance may likely be denied on this basis. However, Mr. Empey also provided you further guidance regarding your grievance based on newly negotiated contract language concerning the assignment of teachers.

Finally, the charge asserts that over the last four years, the Association has filed numerous grievances on your behalf, but has failed to take any of these grievances to arbitration. The charge, however, presents specific facts on only grievances presented to the Association in 1993 and 1994.

Based on the above-stated facts, the charge as presently written, fails to state a prima facie violation of the EERA, for the reasons stated below.

Government Code section 3541.5(a)(1) prohibits the Board from issuing a complaint in respect of any alleged unfair practice occurring more than six months prior to the filing of the charge. This charge was filed on June 17, 1997. Therefore, all allegations of unlawful conduct occurring prior to December 17, 1997, are untimely and outside PERB's jurisdiction. As the charge fails to present any facts or allegations within the last six months, the charge is untimely and must be dismissed.

Assuming, however, Charging Party is alleging the Association acted in violation of the duty within the last six months, the charge still fails to state a prima facie case. Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section

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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 Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Association'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.]

Charging Party asserts the Association gave him misinformation regarding his reassignment into CHD courses. It appears, however, from the facts presented the Association was correct in stating that the District's action did not violate the collective bargaining agreement. While the District's action may have violated the Education Code, the Association's duty of fair representation is limited to contractually based remedies under the union's exclusive control. (San Francisco Classroom Teachers Association (Chestanque) (1985) PERB Decision No. 544 (association not obligated to represent employee in Education

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Code hearing).) Nor does a union have an obligation to notify an employee that a noncontractual remedy exists. (University Council. AFT (Ning-Ping Chan) (1994) PERB Decision No. 1062-H.) As such, the Association's information and action did not violate its duty of fair representation.

Charging Party also asserts the Association failed to take his grievances to binding arbitration. The Association has exclusive control over access to the arbitration step of the grievance machinery, and thus can determine which cases it wishes to pursue to arbitration. (San Francisco Federation of Teachers (Hagopian) (1982) PERB Decision No. 222.) In the instant allegation, Charging Party alleges the Association refused to take his grievances to arbitration as they believed the grievances lacked merit and would result in a loss for the Association. As the charge fails to present facts demonstrating such a position was unreasonable or devoid of rational basis, the allegation fails to demonstrate a prima facie case.

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 July 3, 1997. I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

Kristin L. Rosi
Regional Attorney