

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MARGARET-ANN MITCHELL,)
)
 Charging Party,) Case No. LA-CO-820
)
 v.) PERB Decision No. 1384
)
 SAN BERNARDINO TEACHERS) May 11, 2000
 ASSOCIATION, CTA/NEA,)
)
 Respondent.)
 _____)

Appearance: Margaret-Ann Mitchell on her own behalf.
Before Dyer, Amador and Baker, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of Margaret-Ann Mitchell's (Mitchell) unfair practice charge. The charge alleges that the San Bernardino Teachers Association, CTA/NEA breached its duty of fair representation in violation of sections 3544.9 and 3543.6(a) of the Educational Employment Relations Act (EERA) and discriminated against her in violation of EERA section 3543.6(b).¹

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

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 provides, in relevant part:

It shall be unlawful for an employee organization to:

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

ORDER

The unfair practice charge in Case No. LA-CO-820 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Baker joined in this Decision.

(a) Cause or attempt to cause a public school employer to violate Section 3543.5.

(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



February 2, 2000

Margaret-Ann Mitchell

Re: **DISMISSAL OP CHARGE/REFUSAL TO ISSUE COMPLAINT**
Margaret-Ann Mitchell v. San Bernardino Teachers
Association, CTA/NEA
Unfair Practice Charge No. LA-CO-820; First Amended Charge

Dear Dr. Mitchell:

The above-referenced unfair practice charge, filed December 14, 1999, alleges the San Bernardino Teachers Association, CTA/NEA (Association) breached its duty of fair representation in handling your grievances. You allege this conduct violates Government Code section Government Code section 3543.6(b) of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated January 12, 2000, 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 January 19, 2000, the charge would be dismissed.

On January 14, 2000, you telephoned the San Francisco Regional Office requesting additional time to file your amended charge. In your message, you stated you did not have enough time to compile information for the amended charge. On January 17, 2000, a state holiday, you again contacted this office and requested an extension. On January 18, 2000, I granted you an extension until January 26, 2000.

On January 19, 2000, I received a first amended charge, sent certified mail on January 15, 2000. The first amended charge is six (6) single-spaced typed pages, and alleges the charge is timely filed and further contends the Association's refusal to assist in the processing of Charging Party's grievance violates the EERA.

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In my January 12, 2000, letter, I noted that with respect to duty of fair representation claims under 3544.9, the statute of limitations period begins to run on the date the employee, in the exercise of reasonable diligence, knew or should have known that further assistance or response from the union was unlikely. (Service Employees International Union, Local 790 (Patterson) (1998) PERB Decision No. 1254; Los Rios College Federation of Teachers (1991) PERB Decision No. 889.)

The instant charge was filed on December 14, 1999. Thus, the statute of limitations extends back to June 14, 1999, and all incidents occurring prior to June 14, 1999 are untimely. On or about April 23, 1999, Charging Party was informed by Ms. Reinhold, the Association's attorney, that she would not recommend arbitration in this matter. This finding was reiterated by letter on June 11, 1999. As such my January 12, 2000, letter, stated Charging Party knew or should have known no later than June 11, 1999, that the Association would not take the grievances to arbitration. Based on this knowledge, I stated the charge was untimely filed.

Charging Party contends that she did not receive the Association's Executive Board letter until June 16, 1999, and thus the statute of limitations should not begin to run until June 16, 1999. Additionally, Charging Party states that despite the Association's unwavering position on her grievance, "it was not a foregone conclusion . . . that the arbitration would be dropped." Based on these facts, the charge timely filed.

However, the charge still fails to state a prima facie violation of the EERA. The only matter falling within the statute of limitations is the Association's failure to pursue the grievance to arbitration. Conduct by the Association occurring prior to June 14, 1999, falls outside the statute of limitations and thus will not be considered. The amended charge presents additional facts in support of Charging Party's contention that her grievance had merit. Specifically, Charging Party states with regard to her six (6) day transfer:

It is my contention that we are assigned to work sites as itinerant unit members upon being hired, by the District and that once we are given our assignments, that to be transferred from one of our work sites to another work site is covered under the Contract under the section alluding to Transfers.

There appears to be a significant dispute between the Association and Charging Party with regard to the definition of "itinerant."

Charging Party contends, as noted above, that an itinerant employee may be initially assigned to a work site or work sites, but any change to an employee's work site after the initial assignment must follow transfer procedures. To the contrary, the Association and District assert the use of "itinerant" means that employees so designated may be assigned to any work site at any time.

The amended charge further contends the Association did not support her grievance and did not support her interpretation of the Agreement. Additionally, Charging Party states not all of her questions were answered by the Association, despite receiving three letters from CTA's administration regarding her grievance. Finally, Charging Party states the Association has not provided a "clear, legally-sound explanation" for their position.

Facts provided demonstrate the Association communicated its position to Charging Party from the outset. On February 3, 1999, Mr. Ohlson represented Charging Party in a grievance meeting. During and after this meeting, Mr. Ohlson represented that the District's conduct fell within the Management Rights¹ clause of the Agreement and did not fall under the Transfer provision. Mr. Ohlson's February 15, 1999, letter summarizing the meeting indicated the District possessed the right to assign Charging Party to another site for six days. Mr. Ohlson instead advocated for an assurance from the District that Charging Party would receive additional time to complete other work. Additionally, Mr. Clark's September 20, 1999, letter explains the Association's position and attempts to respond to the questions posed in your 11 page letter.

Charging Party further contends the Association did not pursue the legal theories she suggested. More specifically, Charging Party states the Association did not pursue her discrimination theory and did not present the District's "contradictory" practice. As noted in my January 12, 1999, letter, an exclusive representative is not obligated to pursue all grievances and is not obligated to pursue an employee's legal theories.

¹ Article V states in relevant part:

It is understood and agreed that, except as limited by the terms of this Agreement, the District retains all of its powers and authority to direct, manage, and control to the extent allowed by the law. . . In addition, the District retains the right to hire, classify, assign, evaluate . . . employees.

(University Council-AFT (Chan) (1994) PERB Decision No. 1062-H.) The Association stated it did not believe your reassignment was discriminatory, and provided its reasons for this position. (See Mr. Clark's letter dated September 20, 1999.) Additionally, the Association stated its belief that the Agreement was being properly interpreted. Thus, the Association's failure to present the legal arguments Charging Party wished pursued does not demonstrate arbitrary, discriminatory or bad faith conduct.

Finally, Charging Party argues the Association has not provided a "clear, legally sound explanation" for their position. As noted in my January 12, 2000, letter, this conclusion fails to demonstrate the Association's position was arbitrary, discriminatory or in bad faith. It does not appear that the Association's position was without rational basis or devoid of honest judgement. An exclusive representative is not obligated to pursue all grievances and is not obligated to pursue an employee's legal theories. (University Council-AFT (Chan) (1994) PERB Decision No. 1062-H.) Moreover, mere negligence or poor judgment in the handling of a grievance does not establish a violation of the duty, nor do differences in grievance-handling tactics, or differing interpretations of the collective bargaining agreement. (United Teachers of Los Angeles (Buller) (1984) PERB Decision No. 438.) Facts provided herein demonstrate the parties reasonably disagreed over interpretation of the Agreement. However, nothing herein demonstrates the Association's position or actions were arbitrary or in bad faith. As the charge fails to demonstrate the Association acted without a rational basis or devoid of honest judgment, the charge fails to state a prima facie case. The Association's reluctance to file or pursue a grievance where it honestly determines the case is without merit, is insufficient to establish arbitrary, discriminatory or bad faith conduct. As such, this 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. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common

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carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8; sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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 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 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

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.

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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 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: Robert Lindquist

PUBLIC EMPLOYMENT RELATIONS BOARD



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



January 12, 2000

Margaret-Ann Mitchell

Re: **WARNING LETTER**

Margaret-Ann Mitchell v. San Bernardino Teachers
Association, CTA/NEA
Unfair Practice Charge No. LA-CO-820

Dear Dr. Mitchell:

The above-referenced unfair practice charge, filed December 14, 1999, alleges the San Bernardino Teachers Association, CTA/NEA (Association) breached its duty of fair representation in handling your grievances. You allege this conduct violates Government Code section Government Code section 3543.6(b) of the Educational Employment Relations Act (EERA or Act).

Investigation of the charge revealed the following. You are currently employed by the San Bernardino City Unified School District (District)' as a Psychologist. As a Psychologist, you are exclusively represented by the Association. The District and Association are parties to a collective bargaining agreement (Agreement) which expired on June 30, 1999.

On January 26, 1999, the District informed Charging Party that she was being temporarily reassigned to a different school site. The transfer was allegedly made to satisfy Statewide requirements regarding the availability of Psychologists to all students, and was to be in effect for only six (6) work days.

On February 3, 1999, Charging Party and her Association representative, Conrad Ohlson, met with Diane D'Agostino, Coordinator of Psychological Services. During this meeting, Mr. Ohlson and Charging Party presented Charging Party's concerns about the worksite change and Charging Party's increased workload. During this meeting, Ms. D'Agostino stated that Charging Party's workload at Anderson, her original worksite, could simply not get done in order for Charging Party to handle the additional duties. The meeting did not, however, resolve Charging Party concerns over the matter.

Additionally, it appears Mr. Ohlson instructed Charging Party not to file a grievance over the issue, as it did not appear the District violated the Agreement by assigning Charging Party to another school for six days. More specifically, Mr. Ohlson stated the Association's belief that as an "itinerant" employee, the District could assign Charging Party to more than one school site, pursuant to the Agreement.

On February 10, 1999, Charging Party filed her first grievance regarding the change in worksite location. This grievance alleged the reassignment to another worksite violated the Agreement and increased Charging Party's workload. On that same day, the grievance was denied at Level I by Ms. D'Agostino. Additionally, on that same day, Charging Party filed a second grievance over the reassignment. The second grievance alleged the reassignment violated Article 22 of the Agreement regarding instructional assignment.

On February 15, 1999, Mr. Ohlson sent a letter to Ms. D'Agostino regarding Charging Party's concerns. In this letter, Mr. Ohlson reiterated the temporary nature of the assignment and reiterated Ms. D'Agostino's assurance that Charging Party could put aside her other work in order to complete the new work. Additionally, Mr. Ohlson insisted that Charging Party not be required to work additional hours to complete the work and that she be afforded the same office time as other Psychologists.

On February 18, 1999, Charging Party responded to Mr. Ohlson's letter. In this letter, Charging Party stated additional theories she wished the Association to pursue and stated that she wished the grievance to be processed to Level II. Additionally, Charging Party informed Mr. Ohlson that she no longer wanted him to represent her with regard to the grievances.

On February 23, 1999, Charging Party's first grievance was elevated to Level II. The Level II grievance argued the work load issue had not be adequately addressed. On March 15, 1999, the grievance was denied by the District, stating no violation of Article 19 had occurred. On March 4, 1999, Charging Party's second grievance was elevated to Level II. This grievance simply stated "we would like further discussion." On March 19, 1999, the second grievance was denied at Level II by the District, stating the grievance was moot as of March 25, 1999.

On March 30, 1999, Charging Party filed a third grievance, this time alleging the District violated students' rights by not contracting out with another employee to handle the workload assigned to Charging Party. This grievance was denied on April 4, 1999 by Ms. D'Agostino.

In or about April 1999, Charging Party requested the grievances be elevated to binding arbitration. Although the Association believed the grievances lacked merit, the Association contacted attorney Marianne Reinhold and asked Ms. Reinhold to evaluate the matter. On or about April 23, 1999, Mr. Ohlson and Ms. Reinhold met to discuss Charging Party's grievances. After this meeting, Ms. Reinhold telephoned Charging Party and informed her that it was unlikely an arbitrator would award in her favor, and that she would not recommend arbitration in this matter.

Believing that Ms. Reinhold did not possess all the facts, Charging Party sent Ms. Reinhold a packet of information, in an attempt to change Ms. Reinhold's opinion regarding the likelihood of success. On June 11, 1999, Ms. Reinhold informed Charging Party that after considering all the information Charging Party and the Association presented, she could not recommend arbitration of the grievances.

On June 14, 1999, the Association informed Charging Party that it would not pursue her grievances to arbitration, as it was "not likely to result in a favorable decision from an arbitrator."

On July 10, 1999, Charging Party sent a letter to Jim Clark, an Executive Director of the California Teachers Association. In this 11 page, single-spaced letter, Charging Party complained about the assistance she received from Mr. Ohlson and other Association representatives. Specifically, Charging Party reiterated her position on her assignment to another site and criticized Mr. Ohlson and others for not raising the issues properly and for not supporting the grievances.

On September 20, 1999, Mr. Clark responded to Charging Party's complaint, question by question. Mr. Clark's six page response restates the Association's position on the assignment and attempts to explain why the Association believes the District's conduct to be within contract guidelines. Additionally, Mr. Clark explained Mr. Ohlson's involvement in the grievance process, stating that Mr. Ohlson is charged with the responsibility of seeking legal assistance if requested. Finally, Mr. Clark informed Charging Party of her rights to take this matter up with his supervisors.

On September 21, 1999, Charging Party sent a letter of complaint to Carolyn Doggett, Mr. Clark's supervisor. In this letter, Charging Party requested Ms. Doggett review Mr. Clark's response for accuracy and review Mr. Ohlson's conduct. On September 27, 1999, Mr. Doggett responded to Charging Party's letter, affirming the accuracy of Mr. Clark's letter and his investigation.

On October 25, 1999, Charging Party sent a letter to Deputy-Executive Director, Ernest Ciarrocchi. In this letter, Charging Party requested answers to five questions, including why psychologists were considered "itinerant" employees. On October 26, 1999, Mr. Ciarrocchi responded to Charging Party questions by letter.

On December 10, 1999, Charging Party sent an eight page, single-spaced letter to Ms. Doggett and Mr. Ciarrocchi. This letter apparently served as Charging Party's response to Mr. Clark's September 1999 letter. The letter again reiterates Charging Party's interpretation of the issue and complains about Mr. Ohlson's handling of the matter.

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

Government Code section 3541.5(a)(1) prohibits the Board from issuing 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. This limitations period is mandatory and constitutes a jurisdictional bar to charges filed outside the prescribed period. (University of California (1990) PERB Decision No. 826-H.) With respect to duty of fair representation claims under 3544.9, the limitations period begins to run on the date the employee, in the exercise of reasonable diligence, knew or should have known that further assistance or response from the union was unlikely. (Service Employees International Union, Local 790 (Patterson) (1998) PERB Decision No. 1254; Los Rios College Federation of Teachers (1991) PERB Decision No. 889.)

The instant charge was filed on December 14, 1999. Thus, the statute of limitations extends back to June 14, 1999, and all incidents occurring prior to June 14, 1999 are untimely. On or about April 23, 1999, Charging Party was informed by Ms. Reinhold that she would not recommend arbitration in this matter. This finding was reiterated by letter on June 11, 1999. As such, Charging Party knew or should have known as late as June 11, 1999, that the Association would not take the grievances to arbitration. Based on this knowledge, the charge is untimely filed.

Even assuming Charging Party did not know the Association would deny arbitration until June 14, 1999, 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 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.]

The instant charge presents facts demonstrating the Association disagreed with Charging Party over her grievances from the outset, and informed Charging Party of this disagreement throughout the process while still attempting to settle the matter. It does not appear that the Association's position was without rational basis or devoid of honest judgement. An exclusive representative is not obligated to pursue all grievances and is not obligated to pursue an employee's legal theories. (University Council-AFT (Chan) (1994) PERB Decision No. 1062-H.) Moreover, mere negligence or poor judgment in the handling of a grievance does not establish a violation of the duty, nor do differences in grievance-handling tactics, or differing interpretations of the collective bargaining agreement.

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(United Teachers of Los Angeles (Buller) (1984) PERB Decision No. 438.) As the charge fails to demonstrate the Association acted without a rational basis or devoid of honest judgment, the charge fails to state a prima facie case. The Association's reluctance to file or pursue a grievance where it honestly determines the case is without merit, is insufficient to establish arbitrary, discriminatory or bad faith conduct.

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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before January 19, 2000, I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

Kristin L. Rosi
Regional Attorney