

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

JEFFRY PETER LA MARCA,

Charging Party,

v.

CAPISTRANO UNIFIED EDUCATION
ASSOCIATION, CTA/NEA,

Respondent.

Case No. LA-CO-858-E

PERB Decision No. 1422

February 26, 2001

Appearances: Jeffry Peter LaMarca, on his own behalf; California Teachers Association by Robert E. Lindquist, Attorney, for Capistrano Unified Education Association, CTA/NEA.

Before Amador, Baker and Whitehead, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Jeffry Peter LaMarca (LaMarca) to a Board agent's dismissal (attached) of his unfair practice charge. The charge alleges that the Capistrano Unified Education Association, CTA/NEA (Association) breached its duty of fair representation, violating section 3543.6 of the Educational Employment Relations Act (EERA)¹, by failing to assist him in a matter with his previous employer.

After considering the entire record, the Board hereby adopts the dismissal and warning letter as the decision of the Board itself.

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

ORDER

The unfair practice charge in Case No. LA-CO-858-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

Dismissal Letter

November 13, 2000

Jeffrey Peter La Marca
17 El Vaquero
Rancho Santa Margarita, CA 92688-1959

Re: DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT
Jeffrey Peter La Marca v. Capistrano Unified Education Association,
CTA/NEA
Unfair Practice Charge No. LA-CO-858

Dear Mr. La Marca:

The above-referenced unfair practice charge, filed October 20, 2000, alleges the Capistrano Unified Education Association, CTA/NEA (Association)¹ breached its duty of fair representation by failing to assist you in a matter with your previous employer, the Victor Elementary School District (Victor School District). 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 November 1, 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 November 8, 2000, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my November 1, 2000, letter.

¹ Charging Party alleges the California Teachers Association (CTA) and the National Education Association (NEA) also breached their duty of fair representation. However, mere affiliation of the local organization with CTA or NEA is insufficient to make CTA or NEA the exclusive representative, and thus they are not liable for violations of the EERA. (Fresno Unified School District (1982) PERB Decision No. 208.)

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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 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

Dismissal Letter

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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. 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, Esq.

Warning Letter

November 1, 2000

Jeffry Peter La Marca
17 El Vaquero
Rancho Santa Margarita, CA 92688-1959

Re: WARNING LETTER
Jeffry Peter La Marca v. Capistrano Unified Education Association,
CTA/NEA
Unfair Practice Charge No. LA-CE-858

Dear Mr. La Marca:

The above-referenced unfair practice charge, filed October 20, 2000, alleges the Capistrano Unified Education Association, CTA/NEA (Association)¹ breached its duty of fair representation by failing to assist you in a matter with your previous employer, the Victor Elementary School District (Victor School District). You allege this conduct violates Government Code section 3543.6 of the Educational Employment Relations Act (EERA or Act).²

Investigation of the charge revealed the following. Charging Party has been employed by the Capistrano Unified School District (District) as a Music Teacher, since 1996. For the ten years prior to 1996, Charging Party was employed by the Victor Elementary School District. During his employment with Victor School District, Charging Party filed numerous complaints against the Principal of his school and the Victor School District itself. These complaints included alleged violations of state

¹ Charging Party alleges the California Teachers Association (CTA) and the National Education Association (NEA) also breached their duty of fair representation. However, mere affiliation of the local organization with CTA or NEA is insufficient to make CTA or NEA the exclusive representative, and thus they are not liable for violations of the EERA. (Fresno Unified School District (1982) PERB Decision No. 208.)

² Charging Party also alleges a violation of the Ralph C. Dills Act (Dills Act). However, as an employee of a school district, Charging Party is covered only by the EERA. Thus, should Charging Party amend this charge, this correction should be made.

and federal law. It appears none of the complaints resulted in action taken against the Victor School District.

On April 19, 2000, the California Commission on Teacher Credentialing sent Charging Party a letter stating it was investigating Charging Party for alleged violations occurring when Charging Party was employed by the Victor School District. Charging Party does not explain the nature of those allegations, nor does Charging Party provide PERB with a copy of the allegations filed against him. It is Charging Party's belief that these charges were filed against him in retaliation for the complaints he filed over the last several years against the Victor School District, and because of inflammatory statements made on Charging Party's website.

On April 22, 2000, Charging Party sent an electronic message to Association representatives Barbara Scholl and Chris Kirkland. The message stated in relevant part:

CTA and NEA have caused enough harm by refusing to help me - no legal assistance, negotiating pay cuts, the latest salary schedule nonsense, etc., etc. Now, they are REQUIRED to help (and no, I will NOT drop my charges against CUEA, CTA and NEA with PERBs, the United States Department of Justice, and United States Department of Labor for the harm they have already done and their refusal to represent me in good faith.) As you will see, the bastards from the Victor Elementary School District are at it again - guess my HONEST website has finally hit too close home.

I am aware that CTA was prepared to spend over \$48,000 to defend the teacher that was fired from CUSD. While I don't know the details of that case, I demand that I receive comparable legal services from CTA/NEA for this latest vicious scam. Furthermore, I am going to demand that CTA/NEA sue the Victor Elementary School District, on my behalf, for the significant long-term pain and suffering this has caused my family.

* * * * *

ANY REFUSAL ON CTA'S PART TO PROVIDE REPRESENTATION IN THIS MATTER, AS WELL AS REPRESENTATION IN GOOD FAITH (which, as I

come to expect is the norm for CTA/NEA) will result in immediate additional charges filed with PERB's, the US Dept. of Justice and the US Dept. of Labor.

The Association did not respond to this request for representation. On May 24, 2000, the Commission on Teacher Credentialing closed its investigation of Charging Party and recommended that no adverse action be taken.

On September 1, 2000, Charging Party sent another letter to the Association. This time, Charging Party requested the Association file a lawsuit against the Victor School District for its filing of allegations against Charging Party. The Association did not respond to this request.

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

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). Specifically, Charging Party alleges the Association breached its duty by (1) failing to assist him with the Commission on Teacher Credentialing investigation, and (2) by failing to file a lawsuit against the Victor Elementary School District.

The duty of fair representation is limited to contractually-based remedies under the union's exclusive control. (San Francisco Classroom Teachers Association (Chestangue) (1985) PERB Decision No. 544 (association not required to represent teacher in Education Code proceedings).) As such, PERB will dismiss charges based on a union's failure to pursue noncontractual administrative or judicial remedies. (Id.) Since the employee may retain private counsel for representation in these noncontractual matters, the union's refusal does not bar the individual from seeking redress on his or her own. (California State Employees Association (Darzins) (1985) PERB Decision No. 546-S.)

Herein, Charging Party alleges the Association failed to assist him in two noncontractual matters. As noted above, the Association is not obligated to assist Charging Party with matters before the State Commission on Teacher Credentialing, nor is Charging Party obligated to file a lawsuit against the conduct of a former employer, since the matters are clearly outside any contract. Indeed, the Association does not even possess a contractual relationship with the Victor Elementary School District, and as such, any action against the Victor School

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District would be clearly extra-contractual. As such, this charge fails to state a prima facie violation of the EERA.

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 November 8, 2000, I shall dismiss your charge. If you have any questions, please call me at (510) 622-1016.

Sincerely,

Kristin L. Rosi
Regional Attorney