

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

NAOIA FANENE,

Charging Party,

v.

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 790,

Respondent.

Case No. SF-CO-598-E

PERB Decision No. 1513

March 25, 2003

Appearance: Naoia Fanene, on her own behalf.

Before Baker, Whitehead and Neima Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Naoia Fanene (Fanene) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Service Employees International Union, Local 790 (SEIU) violated the Educational Employment Relations Act (EERA)¹ by failing to represent her regarding her termination.

After reviewing the entire record in this matter, including Fanene's unfair practice charge, the warning and dismissal letters and Fanene's appeal, the Board adopts the Board agent's dismissal as the decision of the Board itself as modified in the discussion section below.

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

DISCUSSION

After Fanene filed her unfair practice charge, she was sent a warning letter by the Board agent informing her of the deficiencies in the original charge. The Board agent provided Fanene detailed instructions on how to file an amended charge and expressly warned her that any amended charge must be served on SEIU. The original deadline for filing an amended charge was January 22, 2002. At Fanene's request, this deadline was extended until January 29, 2002. It was not until February 7, 2002, that Fanene sent the Board agent a cover letter and a memorandum with factual allegations under the heading, "How was my Union Involvement related to My Termination from OUSD." Fanene did not serve this document on SEIU as required. In any event, the Board agent concluded that this letter and memorandum failed to cure the deficiencies in the warning letter and dismissed Fanene's charge. On appeal, Fanene argues that the Board agent erred in dismissing her charge.

The Board must decide this case based on the record. Because Fanene did not serve the February 7, 2002, letter and memorandum on SEIU, they are not part of the record. Thus, the Board agent should not have referenced them in the dismissal letter. Accordingly, the Board does not adopt the portion of the dismissal letter discussing Fanene's letter and memorandum entitled, "How was my Union Involvement related to My Termination from OUSD."

The record before the Board contains evidence that SEIU did attempt to dissuade the Oakland Unified School District from terminating Fanene and provided representation at Fanene's Skelly hearing. SEIU's refusal to represent Fanene in the advisory arbitration appears to be legitimately based upon a review of Fanene's employment history and a reasonable conclusion that the chances for success were minimal.

In her appeal, Fanene does not even mention SEIU's failure to represent her in the advisory arbitration challenging her termination. Instead she raises what appear to be new allegations regarding actions of SEIU in 1999 and 2000. She offers no good cause for raising these allegations for the first time on appeal and they are therefore not considered by the Board. (South San Francisco Unified School District (1990) PERB Decision No. 830.) Additionally, the new allegations appear to be outside of the EERA six-month statute of limitations. Accordingly, the Board agent correctly found that Fanene has not stated a prima facie case.

ORDER

The unfair practice charge in Case No. SF-CO-598-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

Dismissal Letter

February 11, 2002

Naoia Fanene
1435 2nd Avenue
Oakland, California 94606

Re: Naoia Fanene v. SEIU Local 790
Unfair Practice Charge No. SF-CO-598-E
DISMISSAL LETTER

Dear Ms. Fanene:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 14, 2001. Naoia Fanene alleges that the Service Employees International Union, Local 790 (SEIU) violated the Educational Employment Relations Act (EERA)¹ by failing to represent her regarding her termination.

I indicated to you in my attached letter dated December 26, 2001, 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 22, 2002, the charge would be dismissed.

On or about January 22, 2002, I granted you an extension of time until January 29, 2002 to file an amended charge. No amended charge was received by January 29, 2002. I contacted you on or about February 5, 2002. You indicated you were having difficulties responding. On February 7, 2002, you submitted a cover letter and a memorandum with factual allegations under the heading, "How was my Union Involvement related to My Termination from OUSD." This memorandum recounts contacts with SEIU regarding the District's failure and/or refusal to implement payments to employees' annuity account per the recently negotiated agreement, in which you played a hand. These allegations fail to cure the deficiencies identified in my December 26, 2001 letter. Your February 7, 2002 submission also indicated that you were continuing to work on providing additional information. However, as of this date, nothing further has been received. You have been provided ample opportunity to file an amended charge, but have failed to do so. Therefore, I am dismissing the charge based on the facts and reasons set forth herein as well as those contained in my December 26, 2001 letter.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Right to Appeal

Pursuant to PERB Regulations,² 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. (Regulation 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. (Regulations 32135(a) and 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 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. (Regulation 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 Regulation 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. (Regulation 32135(c).)

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

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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. (Regulation 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
General Counsel

By _____
Donn Ginoza
Regional Attorney

Attachment

cc: Vincent A. Harrington

DNG

Warning Letter

December 26, 2001

Naويا Fanene
1435 2nd Avenue
Oakland, California 94606

Re: Naويا Fanene v. Service Employees International Union Local 790
Unfair Practice Charge No. SF-CO-598-E
WARNING LETTER

Dear Ms. Fanene:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 14, 2001. Naويا Fanene alleges that the Service Employees International Union, Local 790 (SEIU) violated the Educational Employment Relations Act (EERA)¹ by failing to represent her regarding her termination.

Investigation of the charge revealed the following. Fanene was employed by the Oakland Unified School District as a Senior Account Clerk II until her termination in the spring of 2001. She was a member of the bargaining unit exclusively represented by SEIU.

On or about February 1, 2001, the District notified Fanene of its intent to take disciplinary action against her. Fanene contacted SEIU Executive Director Josie Moony and requested representation at her upcoming Skelly hearing. Moony responded that she could not grant the request and referred Fanene back to the local representatives. Fanene claimed that she did not trust these representatives. Mooney instructed Fanene to put her request in writing. She did, but Moony failed to respond. Fanene did indicate that there was another local representative (named Karega Hart) with whom she was willing to work. Hart rebuffed Fanene's telephone calls for some time, until he eventually left a message that he could not assist Fanene. For some unexplained reason, Hart and one of the other local representatives whom Mooney had referred to Fanene were present at the Skelly hearing and represented Fanene.

At the Skelly hearing, the District notified Fanene that she was being terminated for "incompetency [sic] or inefficiency in performances of duty," "inability or unwillingness to perform work as required or directed," "discourteous, offensive or abusive conduct or language

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

toward school District officers, other employees, pupils or the public," and "willful failure of good conduct tending to injure the lawful interest of the school District." Documents and verbal testimony were presented to the District's hearing officer, Barbara Elmore, Human Resources Coordinator.

By letter dated March 8, 2001, Elmore informed Fanene that she was sustaining the recommendation based on evidence of discourteous and abusive conduct, inefficiency in the performance of duties, and unwillingness to perform work as required or directed. Fanene was advised also of her right to appeal the decision to advisory arbitration under the terms of the collective bargaining agreement. By the terms of the agreement, Fanene may be represented by SEIU or her own representative.

Fanene appealed the decision through SEIU. After reviewing her request for representation, SEIU Staff Director Larry Hendel wrote to Fanene by letter dated July 11, 2001 informing her that SEIU was willing to assist in scheduling the arbitration but declining to provide representation at the arbitration. Hendel stated, in pertinent part:

. . . We have met with management in an attempt to dissuade them from [their] action, but they have proceeded ahead and you were terminated effective March 8, 2001.

The Union has carefully reviewed the underlying case, and as well, the past history of your service with the School District. Your employment history show a series of progressive disciplinary actions taken against you by the District, and certain warnings or other notices given to you by the District, which were not formal disciplinary actions, but which gave you notice of the District's expectations with regard, primarily, to your behavior toward co-workers, the public and supervisors.

. . . SEIU Local 790 has decided, after review of this action, and your employment history with the District, that it will not represent you in the advisory arbitration hearing.

Fanene asserts that the District terminated her because of personal differences with her supervisor, which were aggravated by "harassment, intimidation, and badgering." She began to suffer this unfair treatment in the first week of her employment. Other workers were granted privileges she was denied. Fanene also served as the chairperson of an SEIU committee that advocated for the reinstatement of a supplemental annuity for unit employees. These activities were instrumental in the restoration of benefits for employees. After Fanene complained about problems in the implementation of the provisions, the District's negotiator and human resources director, Mike Helms, who had been protecting her from disciplinary action, appeared to withdraw his support for her, beginning in the spring of 2000.

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

Charging Party has alleged that the exclusive representative denied her 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 Respondent'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 omitted.]

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.]

Here Charging Party has failed to demonstrate that SEIU refused to provide representation for arbitrary, discriminatory, or bad faith reasons. SEIU did provide representation to the extent it attempted to dissuade the District from terminating Fanene and provided representation at the Skelly hearing. When asked to provide representation in the arbitration, SEIU reviewed Fanene's employment history and concluded that its chances for success were minimal. SEIU informed Fanene of these findings.

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 that 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

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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 22, 2002**, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Donn Ginoza
Regional Attorney

DNG