

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

ROBERT J. O'MALLEY,

Charging Party,

v.

CALIFORNIA NURSES ASSOCIATION,

Respondent.

Case No. SA-CO-22-H

PERB Decision No. 1651-H

June 29, 2004

Appearance: Robert J. O'Malley, on his own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Robert J. O'Malley (O'Malley) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the California Nurses Association violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by its reporting, calculating, and auditing of agency fees.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters and O'Malley's appeal.² The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

¹HEERA is codified at Government Code section 3560, et seq.

²O'Malley's request for oral argument is denied.

ORDER

The unfair practice charge in Case No. SA-CO-22-H is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

Dismissal Letter

May 11, 2004

Robert J. O'Malley
1709 Costa Verde Street
Davis, CA 95616

Re: Robert J. O'Malley v. California Nurses Association
Unfair Practice Charge No. SA-CO-22-H
DISMISSAL LETTER

Dear Mr. O'Malley:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 9, 2004. You allege that the California Nurses Association (CNA) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by committing what you have outlined as six specific violations in reporting, calculating and auditing of agency fees on behalf of nurses employed by the University of California (UC).

I indicated to you in my attached letter dated May 4, 2004, that the above-referenced charge did not state a prima facie case as you had not demonstrated that you had standing. 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 May 12, 2004, the charge would be dismissed.

On May 10, 2004, you filed a First Amended Charge in which you contend that I have ignored undisputed facts that you have alleged that establish that CNA withheld agency fees from you in July, August, October and November 2003 without providing a proper Hudson notice. You assert that this fact does establish standing to file as you were a member of a class of employees who "suffered some harm." (Quoting from my inaccurately cited reference to Sheila Ann Hopper v. United Teachers of Los Angeles (2001) PERB Decision No. 1441.)

You continue to argue that you are not asserting an agency fee objection but rather a claim as to the inadequacy of CNA's Hudson notice. You point out that my letter which quotes Judge D'Orazio's recent ruling in a proposed decision that finds a two part process; one, a timely and adequate notice and two, an opportunity to challenge. You contend that you did not receive a timely notice for monies withheld by CNA prior to its 10/30/03 Notice mailing.

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Finally, you quote the Board's decision in Golden Plains Unified School District (2001) PERB Decision No. 1489 for the proposition that I should not judge the merits of your case. That case states "Disputed facts or conflicting theories of law should be resolved in other proceedings after a complaint has issued." You argue that I should accept the facts as you allege them as true and further process your charge by issuing a complaint.

Your First Amended Charge does not overcome the deficiencies I spelled out in my May 4, 2004 letter. The PERB in its recently decided Case No. 1607-H which involved you and a similar fact situation dismissed your case for failure to establish standing. The Board held that if you are not an agency fee payer than you have no standing to file claims regarding agency fee payer rights. This lack of standing also impairs your right to challenge the adequacy of notice.

Therefore, I am dismissing the charge based on the facts and reasons contained in my May 4, 2004 letter.

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. (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

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

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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. (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).)

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 _____
Roger Smith
Labor Relations Specialist

Attachment

cc: M. Jane Lawhon

Warning Letter

May 4, 2004

Robert J. O'Malley
1709 Costa Verde Street
Davis, CA 95616

Re: Robert J. O'Malley v. California Nurses Association
Unfair Practice Charge No. SA-CO-22-H
WARNING LETTER

Dear Mr. O'Malley:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 9, 2004. You allege that the California Nurses Association (CNA) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by committing what you have outlined as six specific violations in reporting, calculating and auditing of agency fees on behalf of nurses employed by the University of California (UC).

In your cover letter attached to the charge you advise that "(w)hile the charges are similar to those before the Public Employment Relations Board or Administrative Law Judge D'Orazio, there has been no resolution of those charges to date." You continue by asserting that if CNA has failed to provide an adequate Hudson notice to you than it affects all unit non-members.

The six specific violations are:

1. CNA has violated HEERA section 3583.5 by refunding your agency fees
2. The Report of Chargeable and Non-Chargeable Expenditures and CNA audited statements do not correspond in 13 of 19 expenditure categories.
3. CNA's Report of Chargeable and Non-Chargeable Expenditures was not independently verified by an auditor.
4. CNA failed to report chargeable expenditures.

¹HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

5. CNA charged different agency fees at each UC campus.
6. CNA used a formula for calculating agency fees that resulted in a greater cost for UC nurses that resulted in excess fees.

Allegation 1 has been reviewed previously by the Board. The Board decided in your earlier case, Robert J. O'Malley v. California Nurses Association (2004) PERB Decision No. 1607-H (California Nurses Association) that you failed to state a prima facie violation of HEERA section 3583.5. The Board found that section 3583.5 should not be interpreted to require either mandatory membership or agency fees. In situations like yours, where the employee organization has no interest in either collecting dues or fees and has no interest in pursuing your termination for non-compliance, there is simply no violation.

As you indicated, a number of these charges are similar to those that were on review by Administrative Law Judge D'Orazio in Case No. SA-CO-17-H. On April 30, 2004, Judge D'Orazio dismissed your case in that matter reciting the rationale of the Board in California Nurses Association and Los Rios College Federation of Teachers, Local 2279, CFT/AFT (1992) PERB Decision No. 950. The principle finding in California Nurses Association revolved around your standing to file an unfair practice charge.

The Board reasoned, as did Judge D'Orazio in SA-CO-17-H, that the procedural guarantees in place to prevent misuse of agency fees has no realistic impact on an employee who pays no dues or fees to the union. You are a nonmember for whom CNA collects no agency fee. PERB indicated that "there is no possibility for harm to O'Malley that the Board could remedy." Based on these findings, I find that you do not have standing to pursue allegations 2-6.

Further as to your theory that other agency fee members could be harmed by CNA's misuse or miscalculation of agency fees, the Board held in Sheila Ann Hopper v. United Teachers of Los Angeles (2001) PERB Decision No. 1440 that an employee who is not a member of a class of employees who may have suffered some harm, has no standing to make a claim on other employees' behalf before PERB. At footnote 8 in California Nurses Association the Board stated that "O'Malley may not assert agency fee objections on behalf of other unit employees." Therefore, your theory that agency fee payers rights are being violated must be dismissed again for lack of standing.

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 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

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amended charge or withdrawal from you before May 12, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Roger Smith
Labor Relations Specialist

RCS