

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CINDY LYNN,

Charging Party,

v.

COLLEGE OF THE CANYONS FACULTY
ASSOCIATION,

Respondent.

Case No. LA-CO-1127-E

PERB Decision No. 1706

November 16, 2004

Appearances: Cindy Lynn, on her own behalf; California Teachers Association by John F. Kohn, Attorney, for College of the Canyons Faculty Association.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by Cindy Lynn (Lynn) to an administrative law judge's (ALJ) proposed decision (attached). The underlying unfair practice charge alleged that the College of the Canyons Faculty Association (Association) violated the Educational Employment Relations Act (EERA)¹ by breaching its duty of fair representation. The ALJ's found that Lynn failed to establish that the Association breached its duty of fair representation.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, Lynn's exceptions and the Association's response. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

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

ORDER

The unfair practice charge and complaint in Case No. LA-CO-1127-E is hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



CINDY LYNN,

Charging Party,

v.

COLLEGE OF THE CANYONS FACULTY
ASSOCIATION, CCA/CTA/NEA,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CO-1127-E

PROPOSED DECISION
(7/30/04)

Appearances: Cindy Lynn, in propria persona; California Teachers Association by John F. Kohn, Attorney, for College of the Canyons Faculty Association, CCA/CTA/NEA.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On February 16, 2003, Cindy Lynn (Lynn) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the College of the Canyons Faculty Association, CCA/CTA/NEA (COCFA). The charge alleged various violations of the Educational Employment Relations Act (EERA or Act).¹

On July 24, 2003, PERB's general counsel, after an investigation of the charge, issued a complaint alleging violations of subdivision (b) of section 3543.6.²

¹ All section references, unless otherwise noted, are to the Government Code. EERA is codified at section 3540, et seq.

² Subdivision (b) of section 3543.6 states that it shall be unlawful for an employee organization to:

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.

On August 11, 2003, COCFA answered the complaint denying all material allegations and propounding various affirmative defenses. An informal conference was held on September 22, 2003, in an unsuccessful attempt to reach a voluntary settlement. One day of formal hearing was held before the undersigned on February 2, 2004.

After the conclusion of the hearing, transcripts were prepared, and briefs were filed. The case was submitted for a proposed decision on May 6, 2004.

INTRODUCTION

Lynn, a College of the Canyons (College) employee, alleges that over several years she left messages for COCFA elected officials and a staff member concerning her allegation that she was being required to work more than the 35 hours specified in the faculty's collective bargaining agreement (CBA). She alleges that she received few return calls and no actual assistance. COCFA denies these allegations.

In August 2002, Lynn personally contacted COCFA's staff employee, Ray Barney (Barney), regarding her overtime claim. Barney advised her to meet with COCFA's grievance officer, Lee Corbin (Corbin). When she met with Corbin, he told her that her grievance was barred by the statute of limitations.

Lynn contends that COCFA did not tell her of the existence of a grievance procedure until September 2002, at which time her complaint was barred by a CBA ten-day limitation.

FINDINGS OF FACT

Jurisdiction

The parties stipulated, and it is therefore found, that the charging party is a public school employee, and COCFA is an employee organization and an exclusive representative within the meaning of EERA.

Background

Prior to the 1996-97 school year, Lynn was employed by the College as an hourly employee. Beginning in September 1996, she was promoted to the position of "Head Teacher" at the College's Child Development Center (Center) as a salaried full-time member of the faculty. Lynn contends that at the time she started in this position, she was told that her position only required her to work 35 hours per week. She did not identify the person that made this statement. She supported this contention with a reference to CBA Article 11, which, in pertinent part, states:

ARTICLE 11: WORKLOAD AND WORK DAYS

The normal workday for full-time counseling faculty members who are members of the bargaining unit shall be seven (7) hours of campus related duty (prorated for part-time counselors).
(Emphasis added.)

Contacts with Stewart

At the end of her first school year, she went to her immediate supervisor, Diane Stewart (Stewart), and asked her to clarify the 35-hour issue. Stewart told her that her position was not limited by the CBA 35-hour maximum. Stewart said that the Center was open from 7:30 a.m. to 4:30 p.m. five days a week, and Lynn was required to be there during that entire time.

Contacts with Hartley

She next went to Dr. Phillip Hartley (Hartley), Stewart's immediate supervisor and the College's vice superintendent. Lynn contends that Hartley told her that she (Lynn) was considered a full-time counseling faculty member, because her position was not an instructional position. Lynn admits that Hartley also told her that most faculty worked more than 35 hours each week, and she was not entitled to overload pay. Hartley did not testify, so there was no direct ratification or rebuttal of Lynn's allegation. However, there is no mention of a 35-hour workweek in any of Lynn's employment documentation, including the official

College job description. Hartley suggested that she contact Lea Templar (Templar), COCFA's 2001-02 president.

Contacts with Templar

Lynn attempted to contact Templar, but they had some difficulty in reaching one another (approximately ten calls back and forth). They eventually spoke to each other three or four times. Templar remembers that Lynn's primary concerns dealt with overtime, compensatory time off, overload pay, and the proper number of hours she was required to work.

Templar told Lynn that the proper number of work hours for a faculty member depended on the individual's position. She also said that (1) the CBA did not specifically set forth a maximum number of hours for faculty members, and (2) even for those positions that were within the parameters of CBA Article 11, no overtime or compensatory time off is available. Lynn denies Templar made these last two statements.

Templar contends she also explained to Lynn that her head teacher position at the Center did not come within the 35-hour standard set forth in CBA Article 11 for two reasons (1) it was "instructional" and (2) it was not a counseling position. However, Templar admits that all full-time faculty who are not instructors do fall within this 35-hour limitation, even though its only specific reference is to faculty that are counselors.

Templar advised Lynn to go to Stewart, her immediate supervisor. Lynn explained she had already done that. Then Templar suggested she go to Hartley. Lynn explained that she had already seen him. However, she contacted him again, but still received no substantive assistance.

Templar did not give Lynn a grievance form, as neither COCFA nor the College had developed such a form. The CBA clearly assigns the responsibility for filing grievances to the

individual employees, not COCFA. The College had a practice of responding to written complaints. Therefore, formal grievances were not deemed necessary. To Templar's knowledge, there had not been an academic employee grievance filed at the College in years.

Contacts with Morris

In the spring of 2002, Lynn went to Anita Morris (Morris), the College's director of human resources. Morris told her to put her concerns in writing in the form of a formal request and send it to her. Lynn did so, but never heard anything in response.

Contacts with Barney

Lynn explains that she also attempted to speak to Barney, a chapter services consultant with CTA, who was assigned to COCFA. She contends that she originally attempted to contact Barney several times in 1999, but did not receive a response.³ Barney has no records or recollection of these alleged 1999 attempted contacts, or any other attempted contacts from Lynn between 1999 and early 2002.

In May 2002, Lynn left at least one message on Barney's phone. Barney admits that he received that message, but contends that he responded by leaving her a message. He states that he also sent her an e-mail message explaining that he was awaiting her return call. Barney contends that Lynn did not respond to either his telephone or e-mail message.

In August 2002, Lynn introduced herself to Barney at the faculty meeting immediately prior to the start of the 2002-03 school year. After a short conversation she realized that Barney was not aware of either her or her problem. She had affected an accommodation⁴ from the College to limit her work week to 35 hours for school year 2002-03, but she wanted

³ Lynn placed great importance on these 1999 attempts to reach Barney. She subpoenaed the College records of her personal phone at the Center in an attempt to show that she made these calls. Unfortunately for her case, the College did not retain a record of the telephone numbers called from Lynn's office in 1999.

his help in obtaining overtime pay for the prior years in which she worked more than 35 hours per week.

In their August 2002 conversation, Barney explained to Lynn that the accepted procedure was to go through chapter officials before she came to him. Barney referred Lynn to Brad Reynolds (Reynolds), COCFA's 2002-03 president. She spoke to Reynolds and he referred her to Corbin, COCFA's grievance officer and a College mathematics professor.

Barney's next, and last, contact with Lynn was when she requested a referral to California Teachers Association's group legal services referral, which he granted.

Contacts with Corbin

Corbin remembers meeting Lynn during the first week of the 2002-03 school year. It was in her meeting with Corbin that Lynn first learned of the existence of the CBA grievance procedure. She wanted his assistance in the filing of a grievance. Corbin met with her two or three times. The first time was to discuss her grievance. He asked her to write a formal letter to the College outlining the problem. After she wrote it, they went over it, and they mailed it to the College. Corbin went to Hartley to discuss Lynn's allegations.

At their second meeting, Lynn told Corbin that she had discussed her overtime issue with Stewart earlier that spring. He explained that the CBA requires her to file a grievance within ten days after discussing the matter with her supervisor. Therefore, her potential grievance was barred by this ten-day limitation. However, he agreed to attend a meeting with her and Hartley to discuss the matter, although this meeting was never held. Lynn never did file a grievance.

⁴ This accommodation was not a settlement of her overtime claim, but rather was an attempt on the college's part to assist her in completing her work on a Master's degree.

Contacts with Rohrbacher

In October 2002, Barney arranged for Lynn to meet with a COCFA attorney, Bernard Rohrbacher (Rohrbacher), regarding a potential legal action against the College to secure retroactive back pay. However, since she also wanted to pursue legal remedies against COCFA, Rohrbacher could not continue to discuss her issue, as it would have been a conflict of interest for him to do so.

Lynn's Contention

It is Lynn's contention that all faculty are divided into two groups, instructional and non-instructional. She contends that she was in the latter category. Therefore, her position fell under the 35-hour maximum limitation, even though she was not a counselor. She insists that there was no other category in which to place her. She cites no CBA provision, College rule or regulation, or any other authority to support this contention, other than her statement that (1) when she was first given the head teacher position, she was told by some unknown person, that the 35-hour limitation applied to her position, and (2) Hartley told her, sometime prior to 2002, that she was considered a counseling faculty member, because her position was not "instructional."

COCFA's Contention

COCFA insists that it assisted Lynn every time she asked for help, but her underlying complaint regarding her 35-hour workweek was not meritorious.

ISSUE

Did COCFA fail to meet its duty of fair representation with regard to Lynn's overtime grievance, thereby violating subdivision (b) of section 3543.6?

CONCLUSIONS OF LAW

Standard for a Duty of Fair Representation

In order to establish a violation of the duty of fair representation,⁵ the charging party must provide persuasive evidence that the employee organization's conduct was arbitrary, discriminatory or in bad faith. (Rocklin Teachers Professional Association (1980) PERB Decision No. 124 (Rocklin)), citing precedent set by the National Labor Relations Board and affirmed by the U. S. Supreme Court in Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].)

The Board in Rocklin, affirmed this concept, as set forth in Griffin v. United Auto Workers (4th Cir. 1972) 469 F.2d 181 [81 LRRM 2485], as follows:

... A union must conform its behavior to each of these standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

The repeated references in *Vaca* to "arbitrary" union conduct reflected a calculated broadening of the fair representation standard. . . . Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation. . . .

In this case Lynn has two primary allegations: (1) she was entitled to receive additional salary because she was required to work more than the 35-hour CBA maximum, and (2) COCFA did nothing to assist her in obtaining this additional salary.

⁵ EERA's duty of fair representation is set forth in section 3544.9, as follows:

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.

Lynn's first allegation is unsupported by persuasive evidence. There is no doubt that she was not a counselor. However, the issue of whether or not her position was "non-instructional," and therefore entitled to the CBA Article 11 hourly maximum is admittedly not clear. The only evidence supporting her contention is (1) some unidentified person, at the time of her promotion to head teacher, told her that her new position was governed by Article 11, and (2) Hartley told her that she did not have an "instructional" position.

On the other hand, the evidence rebutting her allegation is consistent and pervasive. She was told by (1) Stewart, (2) Hartley, (3) Templar, and (4) Morris that her position was not within the parameters of CBA Article 11.

Her second allegation, that COCFA did nothing to assist her, is rendered moot by the conclusion set forth above. A union is not required to pursue grievances that are unmeritorious grievances. (See United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.)

However, even if Lynn's claim had been meritorious, the evidence clearly shows that COCFA met its statutory obligations. Templar, Barney, Reynolds, Corbin, and Rohrbacker all discussed Lynn's concerns and attempted to provide some assistance for her. The fact that the grievance procedure was not explained until her claim was barred is unfortunate, but there are two reasons this does not support a conclusion that COCFA failed to meet its duty to Lynn.

First, the evidence suggests that the College's history is one of accommodation, not confrontation. According to Templar, there had not been an academic grievance filed at the College in years. Secondly, the CBA vests the responsibility of filing grievances on the individual employee, not COCFA. Certainly, the association is responsible for providing advice and expertise, but Lynn had a concomitant responsibility to read the CBA, learn of her right to file a grievance, and to take the steps necessary to do so. She cannot fault COCFA for her personal failure to take this action.

The evidence failed to show that (1) any COCFA representative acted in an arbitrary manner, (2) Lynn was treated discriminatorily in that her issues were handled differently from those of any other member of the bargaining unit, or (3) that anyone manifested any bad faith in the manner in which s/he assisted her.

Summary

It is determined that COCFA did not violate its duty of fair representation with regard to Lynn's allegations regarding overtime pay in her position as head teacher at the College.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is concluded that the College of the Canyons Faculty Association, CCA/CTA/NEA, did not violate the Educational Employment Relations Act, Government Code section 3543.6(b). It is ORDERED that all aspects of the complaint, and its underlying charge, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

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A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 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 California Code of Regulations, title 8, section 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, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Allen^RLink
Administrative Law Judge