STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MARIE ILLUM and VIRGINIA DeMURO,	)	
Charging Parties,	)	Case No. S-CO-333
v.	)	Administrative Appeal
TEAMSTERS LOCAL 137,	)	PERB Order No. Ad-265
Respondent.	)	February 17, 1995

Appearances: Marie Illum and Virginia DeMuro, on their own behalf; Beeson, Tayer & Bodine by John Provost, Attorney, for Teamsters Local 137.

Before Carlyle, Garcia and Johnson, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Marie Illum (Illum) and Virginia DeMuro (DeMuro) of an administrative law judge's (ALJ) order granting a motion to dismiss (attached) which was filed by the Teamsters Local 137 (Teamsters). Illum and DeMuro's unfair practice charge alleged that the Teamsters violated their right to fair representation guaranteed under the Educational Employment Relations Act (EERA) section 3544.9 thereby violating section 3543.6(b).[1] The ALJ found that Illum and DeMuro failed

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3544.9 provides that:

> 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.

to state a prima facie case and dismissed the unfair practice charge and complaint. After reviewing the case, the Board hereby affirms the ALJ's order and dismissal.

JURISDICTION

PERB has jurisdiction over this case for the following reasons: Illum and DeMuro are employees under EERA. The Teamsters are an employee organization under EERA. The dispute is not subject to any grievance agreement between the Teamsters and Illum or DeMuro. The charge was timely filed.

ILLUM and DeMURO'S APPEAL

Illum and DeMuro filed a one-page appeal of the dismissal of their unfair practice charge and complaint in which they claim that the employer's disciplinary actions were based on lies, and that Teamsters helped management remove them from their jobs. The appeal also challenges the fairness of the mediation process and seeks PERB's assistance in "finding the truth." The appeal does not address the legal rules and conclusions upon which the dismissal was based, other than a statement that "If lies don't matter with the law, then our laws need to be changed."

EERA section 3543.6 provides, in pertinent part, that:

> It shall be unlawful for an employee organization to:
>
> (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.

TEAMSTERS' RESPONSE TO THE APPEAL

Teamsters argue that this appeal is invalid because motions must be appealed by another process.

The Teamsters further argue that the appeal fails to state any grounds on which an appeal can be sustained, citing PERB Regulation 32635(a),[2] since the appeal fails to identify how the ALJ erred and on what legal and factual grounds such allegations rest.

DISCUSSION

The appeal fails to comply with Regulation 32635(a) because it does not address how the ALJ erred in applying the law to the allegations before him.

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[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32635(a) provides that:

> (a) Within 20 days of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself. The original appeal and five copies shall be filed in writing with the Board itself in the headquarters office, and shall be signed by the charging party or its agent. Except as provided in section 32162, service and proof of service of the appeal on the respondent pursuant to section 32140 are required.
>
> The appeal shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

The record supports the ALJ's analysis of the Teamsters' statements and actions. No complaint should have been issued because, from the outset, Illum and DeMuro failed to sufficiently allege or provide evidence that the Teamsters' conduct, statements, or inaction comprise a prima facie case of a breach of the duty of fair representation.

While Illum and DeMuro's allegations are assumed to be true, they 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. [Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124; emphasis added.]

Illum and DeMuro made allegations of inconsistent statements, disparaging remarks and conflict of interest by Teamsters, but failed to explain how Teamsters' decision not to pursue arbitration was devoid of honest judgment. Since no prima facie case was ever shown, the ALJ properly dismissed the unfair practice charge and complaint.

ORDER

For the reasons discussed above, the Board AFFIRMS the ALJ's order dismissing the unfair practice charge and complaint in Case No. S-CO-333.

Members Carlyle and Johnson joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MARIE ILLUM and VIRGINIA DeMURO, Charging Parties, v. TEAMSTERS LOCAL 137, Respondent.	Unfair Practice Case No. S-CO-333 ORDER GRANTING MOTION TO DISMISS

NOTICE is given that the motion of Teamsters Local 137 (Teamsters or Union) to dismiss the above charge and complaint, on the ground that they fail to state a prima facie case, is GRANTED. Unfair Practice Case No. S-CO-333 is hereby DISMISSED and the hearing previously scheduled for January 25 and 26, 1995, is hereby CANCELLED.

The charge at issue was filed on August 15, 1994, by Marie Illum and Virginia DeMuro, former employees of the Black Butte Elementary School District (District). In a lengthy narrative, the charge sets out an allegation that Teamsters Local 137 failed to fairly represent the charging parties, first in a grievance and then in a challenge to their terminations.[1]

On September 23, 1994, the Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint against the Union alleging that the Union breached its duty of

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[1]The duty of fair representation, which is set out at Government Code section 3544.9 provides 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.

fair representation. By this action, the complaint alleges, the Union violated Government Code section 3543.6(b).[2] The Union answered the complaint on October 11, 1994, denying that it had failed to fairly represent the charging parties. The motion to dismiss followed on October 27. The charging parties did not file a response.[3]

The charging parties were employed as cafeteria workers by the District. One of the charging parties, Virginia DeMuro, was notified on or about January 10, 1994, that her hours of work would be reduced. Both of the charging parties were notified orally on or about January 21, 1994, that they would be terminated for allegedly falsifying their time sheets and other alleged misconduct. They were notified in writing of the charges against them on or about February 1, 1994. Their terminations were upheld by the District school board on or about March 1, 1994. The Teamsters Union notified the charging parties on or about July 6, 1994, that the Union would not take their grievances to arbitration.

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[2]In relevant part, section 3543.6 provides as follows:

> It shall be unlawful for an employee organization to:
>
> (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.

[3]Under PERB Regulation 32190(b) responses to pre-hearing motions are to be filed within 14 days.

The complaint in its operative paragraphs alleges the following:

> 3. During the period of time from March through June 1994, Respondent, acting through its agents Dave Hawley and Gerry Flanigan, made several inconsistent statements to Charging Parties concerning Charging Parties' ability to settle their pending grievances by resigning jointly or separately and their eligibility to receive pay for the period of their suspension. In addition, Respondent, acting through its agent Dave Hawley, made disparaging remarks about Charging Parties and continued to work on their grievance despite a conflict of interest and his assurance to Charging Parties that he would not work on the grievance.
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> 4. On or about June 24, 1994, Respondent refused to authorize proceeding to arbitration concerning the grievance filed by Charging Parties over their termination from employment by the Black Butte Elementary School District.

Regarding the settlement proposals, the unfair practice charge traces this dispute to an offer made by the District on March 1 prior to a hearing before the school board. The charge alleges that Teamster business agent Gerry Flanigan told the charging parties that District settlement proposals were contingent upon the resignation of both of the charging parties. Mr. Flanigan allegedly stated that one of the charging parties could not accept the settlement separately from the other.

The question of whether the charging parties could act separately on settlement proposals next was raised on May 18. The charge alleges that Mr. Flanigan again stated that the charging parties both had to resign under the terms of the proposed settlement. On May 19, the charge continues,

Mr. Flanigan called the charging parties to advise them that after conferring with his legal counsel he had determined that they did not have to resign together to get the settlement.

Regarding salary payment to the charging parties during the period of their pre-dismissal suspensions, the charge alleges that on March 1 Mr. Flanigan told them that they would be paid. The charge alleges that on March 2, Union shop steward Steve Lynch told them that the superintendent had told him the charging parties would not be paid. The charge alleges that on March 24 they were told by David Hawley, Teamster local secretary-treasurer, that the contract between the District and the Union does not provide for payment to suspended employees. Nevertheless, the charge asserts, the District on May 18 paid the charging parties their wages for the five weeks they were suspended before termination.

The only specific allegation of a disparaging remark set out in the charge is that Mr. Hawley on January 10 called Ms. DeMuro a "hysterical female." The charge also alleges that at a Teamsters meeting on February 15 Mr. Hawley told school employees in attendance that the Teamsters Union represents all its members, "even if someone gets caught red-handed stealing." The charge alleges that by the choice of this example Mr. Hawley created the impression among those in attendance that the charging parties had been terminated for theft.

Finally, the charge alleges that Mr. Hawley's representation of the charging parties put him in a conflict between their best

interests and those of his wife, District employee Sue Hawley. The charge alleges that District Superintendent/Principal Judith Menoher on or about January 10, told Ms. DeMuro that she could not be reassigned to perform certain duties on a computer because that work would be done by Sue Hawley. Later that day, the charge continues, Mr. Hawley told Ms. DeMuro that because of the appearance of a conflict he would let someone else from the Teamsters represent the charging parties.

Thereafter, the charge continues, although Gerry Flanigan supposedly was representing the charging parties, Mr. Hawley continued to be involved. The charge alleges that at the meeting of February 15 Mr. Hawley said that he still was actively involved in their case behind the scenes. On March 24, the charging parties met with Mr. Hawley to give him a letter about their complaints against him and the Teamsters. During a lengthy discussion that ensued, the charge alleges, Mr. Hawley told the charging parties that although he had officially removed himself from their case he continued to be "very much involved with our discharge."

In its motion to dismiss, the Union argues that the allegations in the complaint do not set out a prima facie breach of its duty of fair representation. The making of "inconsistent statements" about the Union's ability to settle a grievance and to receive back pay does not, the Union asserts, constitute arbitrary, discriminatory or bad faith action. Although it denies that it made such statements, the Union argues that even

if it had this would not be evidence it had failed to fairly represent the charging parties. Inconsistent statements could have been due to a change in the employer's position, of the Union's discovery of new information, or the Union's re-evaluation of the grievance.

Similarly, the Union continues, even if a Union agent made a disparaging remark about the charging parties it would not constitute a breach of the duty of fair representation. The issue, the Union asserts, is whether the Union made a good faith determination that the grievance was without merit, "not whether Union agents spoke about the grievants in a complimentary fashion."

Finally, the Union argues, the complaint does not set out any allegations that show a conflict of interest on the part of Union agent Hawley. Neither does it allege facts to show that he acted in bad faith.

The duty of fair representation applies to the handling of grievances. (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 breach of the duty of fair representation, a charging party must show that the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the PERB 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. [Citation.]

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 <u>inaction</u> was without a rational basis or devoid of honest judgment. (Emphasis added.) [<u>Reed District Teachers Association, CTA/NEA (Reyes)</u> (1983) PERB Decision No. 332, p. 9, citing <u>Rocklin Teachers Professional Association (Romero)</u> (1980) PERB Decision No. 124.]

The ultimate harm suffered by the charging parties in this case is that the Union refused to proceed to arbitration with the grievance about their terminations. Refusing to take a case to arbitration can be a breach of the duty of fair representation if the decision was arbitrary, discriminatory or in bad faith. The complaint and the underlying allegations in the charge fail to allege facts sufficient to set out a prima facie case.

The complaint finds evidence that the decision not to take the case to arbitration was arbitrary, discriminatory or bad faith conduct in allegations that Union agents: 1) made inconsistent statements about a settlement offer and entitlement to back pay, 2) made disparaging remarks about charging parties,

and 3) proceeded to represent them despite a conflict of interest and a promise to have someone else handle their grievance.

I believe that the allegation that a Union agent made inconsistent statements about a settlement offer to be of virtually no probative value. Basically this allegation is that a Union agent, after telling the charging parties for two months that they both had to resign to get a settlement offer, called them to state that he had been wrong. The Union agent, under the theory of the complaint, thus made inconsistent statements: an incorrect version of the settlement offer and a correct version of the offer. A Union agent's recantation of an error is hardly evidence of bad faith. A much more compelling allegation of bad faith would have existed if the Union agent had done exactly the opposite of what he did here. A Union agent's failure to correct mistaken advice might well be evidence of bad faith.

Similarly unpersuasive is the allegation that Union agents gave the charging parties inconsistent information about whether they were entitled to pay for the period of their suspensions. The charge alleges that the first Union agent, Mr. Flanigan, told the charging parties they would be paid for the five-week period. The charge alleges that the second Union agent, shop steward Lynch, told them that the superintendent had told him that they would not be paid for the period. The charge alleges that the third Union agent, Mr. Hawley, told the charging parties that the contract between the Union and the District does not provide for payment to employees who are suspended. Finally, the charge

alleges, the charging parties were given payment. Thus three different Union agents at three different times told the charging parties different things. There is no allegation in this sequence that any of the agents told the charging parties anything but the truth as they understood it at the time.

Nor does the allegation that a Union official told one of the charging parties that she was a "hysterical female" show that he acted in bad faith toward her. While such a comment obviously would be impolite and insensitive, breaches of courtesy do not demonstrate bad faith. Nor do I find bad faith in the allegation that a Union agent told a gathering of employees that the Union represented even people caught in theft. Evidence of such a statement by a Union agent is not probative of whether the Union acted in bad faith when it refused to take an employees grievance to arbitration.

Finally, the complaint alleges that Mr. Hawley continued to represent the charging parties even though his representation put him in a conflict of interest. The alleged conflict was that Mr. Hawley's wife, who operates a computer for the District, temporarily assumed certain cafeteria tabulation duties formerly performed manually by one of the charging parties. In addition, the complaint and charge allege, despite Mr. Hawley's promise to remove himself from the processing of the grievance because of this potential conflict, he failed to do so.

A contention that this dispute put Mr. Hawley in a conflict of interest is somewhat problematical. There are no allegations,

for example, which demonstrate how Mr. Hawley could have assisted his wife by failing to pursue an arbitration over the dismissal of the charging parties. Moreover, the mere possibility of a conflict does not show that the Union acted in bad faith by refusing to take the matter to arbitration.

The charge reveals that the Union's decision not to proceed to arbitration followed a May 18 mediation conducted by a State of California mediator as part of the grievance procedure between the parties. The charge reveals that the mediator ruled against the charging parties.[4] Subsequently, the charge reveals, Mr. Flanigan secured a waiver of the contractual timelines from the District so he could consult with a Teamsters attorney prior to deciding whether to take the case to arbitration. Thereafter, the Union declined to take the grievance to arbitration. There is no allegation that Mr. Hawley was involved in the final decision.

None of these allegations is sufficient to show that the Union's refusal to take the grievance to arbitration was arbitrary, discriminatory or in bad faith. There is no allegation to show that the refusal was "without a rational basis or devoid of honest judgment." Accordingly, I conclude that unfair practice charge S-CO-333 must be dismissed.

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[4]The letter from the mediator is contained in the case file. In the letter, State mediator William B. Hehir concludes that the discharges of the two charging parties were for good cause and offers an opinion that an arbitrator would deny their grievances.

Pursuant to Public Employment Relations Board regulations, the charging parties 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 of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If the charging parties file a timely appeal of the dismissal of the 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 of Regs., tit. 8, sec. 32635(b).)

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 of 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 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 of Regs., tit. 8, sec. 32132.)

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

RONALD E. BLUBAUGH
Administrative Law Judge

DATED: November 17, 1994