STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CLEMON MORGAN, Charging Party,	)	Case No. LA-CO-392
v.	)	PERB Decision No. 645
LOS ANGELES CITY AND COUNTY SCHOOL EMPLOYEES UNION, LOCAL 99, Respondent.	)	December 18, 1987

Appearances; Clemon Morgan, on his own behalf.

Before Hesse, Chairperson; Porter, Craib and Shank, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (Board) on appeal by charging party of the Board agent's dismissal, attached hereto, of its charge alleging that the Los Angeles City and County School Employees Union, Local 99, violated section 3543.6(a), (b) and (c) of the Educational Employment Relations Act (EERA).

We have reviewed the dismissal and, finding it free from prejudicial error, adopt it as the Decision of the Board itself, insofar as the Board agent concludes that the allegations in the instant charge fail to state a prima facie violation of EERA.[1]

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references

ORDER

The dismissal of the unfair practice charge in Case No. LA-CE-392 is hereby AFFIRMED.

Chairperson Hesse and Member Craib joined in this Decision.

Member Porter's dissent begins on page 3.

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herein are to the Government Code. Section 3543.6 provides, in pertinent part, as follows:

> (a) Cause or attempt to cause a public school employer to violate section 3543.5.
>
> (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.
>
> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

Porter, Member, dissenting: This case involves the respondent employee organization's representation of the charging party in connection with proceedings before the Los Angeles Community College District Personnel Commission (Personnel Commission). Specifically, charging party alleges that the respondent violated EERA by breaching its duty of fair representation to him by the manner in which it represented him at a dismissal hearing before a hearing officer of the Personnel Commission and, further, by not appealing an adverse decision of the hearing officer. The charge alleges, in pertinent part:

> The dismissal was appealed and a hearing was held regarding the [dismissal] on June 30, 1986. I was represented by Cheryl Washington of Local 99. Among the charges against me was unauthorized absences and tardiness, yet my representative, Cheryl Washington failed to subpoena my daily time sheets. I gave Cheryl Washington a list of eight witnesses other than myself to be called on my behalf. The only witness Cheryl Washington called was myself. At the close of trial my representative . . . did not make a closing statement.
>
> Cheryl Washington never challenged the presentation of evidence by LACCD about events that allegedly took place over three years prior to the dismissal proceeding as being remote, unreliable, and inadmissible.
>
> Cheryl Washington of Local 99 refused to appeal or object to the decision rendered July 23, 1986 or to order a transcript although the findings of fact were not consistent with the testimony at trial. . . .

Unlike my colleagues, I would find that charging party's allegations on their face speak of arbitrary and/or bad faith conduct beyond mere negligence and, accordingly, state a prima facie case of breach of the duty of fair representation. (Rocklin Teachers Professional Association (1980) PERB Decision No. 124, pp. 6-8.) Rather than ordering the issuance of a complaint, however, I would instead remand this case back to the regional attorney inasmuch as there exists a threshold question, recognized but not analyzed or resolved by the regional attorney, as to whether the duty of fair representation attached to the hearing at the Personnel Commission.

It has been established under our precedent that since the duty of fair representation stems from an exclusive representative's status as the only employee organization which may represent employees in their employment relations, it follows that the duty attaches in representational matters such as negotiations and grievance arbitration. (Service Employees International Union Local 99 (Kimmet) (1979) PERB Decision No. 106.) It has further been stated that there is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which an employee can obtain a remedy. (San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 544.)

On this limited record, it is impossible to determine whether the exclusive representative controlled charging party's access to proceedings before the Personnel Commission. Even if the Personnel Commission rules are silent on the matter, Education Code section 45260[1] provides that the parties, through collective bargaining, can agree to rules superseding those of the commission. Thus, there is an issue presented as to whether or not the applicable collective bargaining agreement contains a provision enabling only the exclusive representative to have access, on behalf of charging party, to proceedings before the Personnel Commission. I would, therefore, remand the case back to the regional attorney for further inquiry into this issue.

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[1]Education Code section 45260(a) provides, in pertinent part:

> The commission shall prescribe, amend, and interpret, subject to this article, such rules as may be necessary to insure the efficiency of the service and the selection and retention of employees upon a * * * basis of merit and fitness. The rules shall not apply to bargaining unit members if the subject matter is within the scope of representation, as defined in Section 3543.2 of the Government Code, and is included in a negotiated agreement between the governing board and that unit.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088

February 19, 1987

Mr. Clemon Morgan

RE: Clemon Morgan v. Los Angeles City and County School Employees Union, Local 99, Case No. LA-CO-392
Dismissal of Charge

Dear Mr. Morgan:

You have filed a charge alleging that Respondent Los Angeles City and County School Employees Union, Local 99, (Local 99) violated the Educational Employment Relations Act (EERA) by failing to fairly represent you during a suspension proceeding.

I indicated to you in my attached letter dated February 4, 1987, 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 accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew them prior to February 18, 1987, it would be dismissed.

I have not received either a request for withdrawal or an amended charge and am therefore dismissing the charge based on the facts and reasons contained in my February 4, 1987 letter.

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 (California Administrative Code, title 8, section 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

(5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. Code of Civil Procedure section 1013 shall apply (section 32135). The Board's address is:

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

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 calendar days following the date of service of the appeal (section 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 section 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.

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 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 (section 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,

JEFFREY SLOAN
General Counsel

By _____
Jorge A. Lepn
Staff Attorney

Attachnent

cc: Mr. Jonathan Newson

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STATS Of CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088

February 4, 1987

Mr. Clemon Morgan

RE: Clemon Morgan v. Los Angeles City and County School Employees Union, Local 99, Case No. LA-CO-392

Dear Mr. Morgan:

You have filed a charge alleging that Respondent Los Angeles City and County School Employees Union, Local 99, (Local 99) violated the Educational Employment Relations Act (EERA) by failing to fairly represent you during a suspension proceeding.

You filed a charge containing the same essential allegations on August 15, 1986. That charge was given the designation, LA-CO-373. On November 19, the undersigned sent, you a letter explaining that the charge suffered certain infirmities. Following an opportunity to amend or withdraw the charge, the charge was dismissed on December 2, 1986.

My investigation revealed the following information concerning the new charge.

During the years 1981 through 1986, you were employed as a custodian at the Los Angeles Community College District. In January, 1986, the District issued you a Notice of Unsatisfactory Service. Thereafter, on April 11, 1986, the District sent you a letter and a "Statement of Charges." explaining that you were to be dismissed effective May 8, 1986 for "inefficiency, inattention to or dereliction of duty, and frequent unexcused absence or tardiness," which allegedly occurred during the preceding three and a half years. You requested that Local 99 help you in challenging the District's action. You contacted Jonathan Newson, who referred your request to Cheryl Washington.

Ms. Washington assisted you in filing an appeal of the dismissal action and represented you at a hearing which was held on June 30, 1986 before a hearing officer for the Los Angeles Community College District Personnel Commission. You were dissatisfied with her representation because: she failed to subpoena your daily time sheets; she failed to call any of the eight witnesses which you suggested; she failed to challenge the presentation of evidence by the District, which you assert was remote, unreliable and inadmissible; and she refused to appeal the subsequent unfavorable decision on the basis that her superiors at Local 99 had told her that nothing further could be done.

ANALYSIS

First, Local 99's duty to represent you at all in the hearing before the Personnel Commission is questionable since a labor organization's duty generally extends only to grievance mechanisms under the collective bargaining agreement. San Francisco Classroom Teachers Association, CTA/NEA (1985) PERB Decision No. 544.

Assuming that the Local 99 owed you a duty of fair representation, in order to show a breach of the duty of fair representation, a charging party must demonstrate that the employee organization's conduct in processing the grievance was arbitrary, discriminatory or in bad faith. United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258.

To show arbitrary conduct violative of the duty of fair representation the charging party "must, at a minimum include an assertion of facts from which it becomes apparent how in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment." Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332. Mere negligence or poor judgment in the handling of a grievance does not constitute a breach of the duty of fair representation. United Teachers of Los Angeles (Collins), supra. Although the instant case involves representation at a Personnel Commission hearing, the cases involving grievance representation are applicable by analogy.

The charge does not contain sufficient facts from which it may be determined that Local 99's conduct in representing you at the hearing was arbitrary, discriminatory or in bad faith. While the charge contains allegations that Washington may not have utilized arguments and procedures available to a knowledgeable legal professional, there are no facts which indicate that she did so arbitrarily, out of a discriminatory motive or in bad faith. Washington is not a lawyer. While it may be argued that her representation of you was negligent or an exercise of poor judgment (the facts do not necessarily reach even this threshold), such conduct is not sufficient to constitute a breach of the duty of fair representation. United Teachers of Los Angeles, supra. Furthermore, it has been held that the duty which a union representative owes to a member is not one of attorney to client. Beverly Manor Convalescent Center (1977) 229 NLRB 692, n. 2 [95 LRRM 1156].

Washington's refusal to appeal the adverse decision, according to the charge itself, was based on the instructions from her superiors that "nothing else could be done." This does not constitute arbitrary, discriminatory or bad faith conduct. As the PERB Board pointed out in United Teachers of Los Angeles, supra:

> 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. (Ibid)

For these reasons, the charge as presently written does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. 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 be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or

withdrawal from you before February 18, 1987, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (916) 323-8015.

Sincerely,

Jorge A. Leon
Staff Attorney

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