STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOAB PACILLAS, Charging Party, v. CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Respondent.	)	Case No. LA-CO-17-S PERB Decision No. 657-S December 31, 1987

Appearance: Joab Pacillas, on his own behalf; Steven R. Yamaguchi, Attorney for California Correctional Peace Officers Association.

Before Craib, Porter and Shank, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board on appeal by Charging Party of the Board agent's dismissal, attached hereto, of his charge alleging that the California Correctional Peace Officers Association violated section 3519.5(d) of the Ralph C. Dills Act (Gov. Code sec. 3512 et seq.).

We have reviewed the dismissal and, finding it free from prejudicial error, adopt it as the Decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-17-S is DISMISSED WITHOUT LEAVE TO AMEND.

Member Porter's concurring opinion follows on page 2.

Porter, Member, concurring: I concur in the dismissal of the charges in that they fail to allege a prima facie violation of the State Employer-Employee Relations Act. (SEERA, Gov. Code, secs. 3512-3524.) I write separately to express my view and the reasons for it, that, while an alleged breach of the "duty of fair representation" as to a state employee who is a member of the exclusive representative organization is actionable in the courts, such a breach does not also constitute a violation of SEERA actionable before this Board.

The unfair practice charges filed in this case allege in essence that the respondent employee organization failed to adequately represent the Charging Party in connection with a "reasonable accommodation/handicap discrimination" matter which the Charging Party sought to pursue before the State Personnel Board in an attempt to retain his state employment status notwithstanding an alleged physical handicap. Charging Party asserted that such conduct by the respondent employee organization constituted a violation of SEERA, section 3519.5, subdivision (d), which makes it an unfair practice for an employee organization to refuse or fail to participate in good faith in statutory mediation procedures.

After first determining that the charges did not constitute a violation under section 3519.5, subdivision (d), the Board agent then analyzed whether such charges alleged a violation by the respondent employee organization of its "duty of fair

representation" and thus, pursuant to this Board's analysis in Norgard v. California State Employees Association (1984) PERB Decision No. 451-S, would be actionable as a violation of SEERA under subdivision (b) of section 3519.5.[1] Concluding that the duty of fair representation does not apply to "extra-contractual" proceedings before the State Personnel Board, the Board agent dismissed the charges.[2]

I agree that an exclusive representative's duty of fair representation does not extend to extra-contractual matters before the State Personnel Board and, accordingly, that any alleged conduct with respect to matters before the State Personnel Board could not constitute a breach of the duty of

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[1]Subdivision (b) of SEERA section 3519.5 makes it an unfair practice for an employee 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.

[2]In his appeal to the Board, Charging Party has also alleged new facts concerning an apparent formal grievance, emanating from the collective bargaining agreement, and filed and pursued in 1983 through the various grievance levels, but allegedly not taken by the respondent employee organization to arbitration. Even assuming, arguendo, that these new facts and charges may be raised on appeal, such new charges concerning alleged conduct occurring in 1983 are clearly untimely, having occurred more than six months prior to the filing of the instant charges with this Board in July 1985. (Gov. Code, sec. 3514.5(a).)

fair representation.[3] I disagree with Norgard's footnote analysis and holding that a breach of the duty of fair representation as to a union member constitutes a violation of SEERA and is thus actionable before this Board. This Norgard analysis was relied upon by the Board agent in his analysis of the charges and has been affirmed and perpetuated sub silentio by my colleagues' adoption of the Board agent's determination as the decision of the Board itself.

In Norgard, the charging party, who was a member of the union that was the exclusive representative of the charging party's bargaining unit, alleged that his union had violated its duty of fair representation by affiliating with an international union. Before reaching the merits of the case, the following analysis and holding was set forth in footnote 1 with respect to the charging party's allegation that his union had breached its duty of fair representation in violation of SEERA section 3519.5, subdivision (b):

> The duty of fair representation under the State Employer-Employee Relations Act (SEERA or Act, Government Code section 3512 et seq.), unlike that under the Educational Employment Relations Act (Government Code section 3540 et seq.), is not expressly set forth in a specific section of the Act. We do not consider this omission to reflect an intention on the part of the Legislature to

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[3]It may be observed that an alleged misfeasance concerning an extra-contractual representation undertaken by an employee organization might constitute a different type of delict recognizable in the courts.

deny SEERA-covered employees the right to be fairly represented by their employee organizations. Rather, the duty of fair representation under SEERA arises as a quid pro quo for the granting of exclusive representational rights to employee organizations. Such has long been the view held by the federal courts in implying a duty of fair representation under the National Labor Relations Act. See Morris, The Developing Labor Law, Chap. 28; Steele v. Louisville & Nashville Railroad (1944) 323 U.S. 192 [15 LRRM 708]; Textile Workers v. Lincoln Mills (1957) 353 U.S. 448 [40 LRRM 3113]; Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].

Under SEERA, violations of the duty of fair representation are actionable under section 3519.5(b). That section provides in pertinent part:

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

In this case, the charging party appropriately alleged a violation of section 3519.5(b). However, in addition, the charging party alleged violations of sections 3515, 3518.5, and 3522.2. These sections do not involve the duty of fair representation and, as the charging party alleges no facts to support a finding of violations of these sections, his unfair practice charge with respect to them is dismissed. (Norgard v. California State Employees' Association (1984) PERB No. 451-S, fn. 1, pp. 1-2.)

I respectfully submit that this Board erred in its analysis and holding in Norgard that a breach of the duty of fair representation as to a member of the union constitutes a violation of SEERA and is actionable before this Board under SEERA section 3519.5, subdivision (b).

The "duty of fair representation" (DFR) is a judicially developed doctrine, with the duty enforceable in the courts through a civil cause of action for injunction, damages and/or other appropriate relief. The DFR is imposed on an employee organization which, under a statutory authority or grant (or by contract[4]), has become the exclusive representative of employees in a bargaining unit and thus exclusively bargains with the employer and administers any resultant collective bargaining agreement, including the handling of employee grievances and arbitration.

The DFR was first recognized and established by the courts in Steele v. Louisville & Nashville Railroad Co. & Brotherhood of Locomotive Firemen (1944) 323 U.S. 192 [89 L.Ed. 173, 15 LRRM 708], and Tunstall v. Brotherhood of Locomotive Firemen (1944) 323 U.S. 210 [89 L.Ed. 187, 15 LRRM 715]. In Steele, a union that was the exclusive representative of a unit of railway employees under the federal Railway Labor Act had, in bargaining with the employer, discriminated against minority members of the bargaining unit. The minority members brought

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[4]Lerma v. D'Arrigo Brothers Co. (1978) 77 Cal.App.3d 836, 842.

suit in the Alabama state courts, seeking damages and injunctive relief. The state courts dismissed the complaint for failure to state a cause of action. In reversing the dismissal, the U.S. Supreme Court set forth in pertinent part:

> The question is whether the Railway Labor Act [citation] imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a class or craft of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation.
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> If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise.
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> Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interest . . . . The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf . . . .

> We hold that the language of the Act to which we have referred, read in the light of the purpose of the Act, expresses the aim of congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.
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> . . . . . .
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> So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft . . . it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.
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> We conclude that . . . the statute contemplates resort to the usual judicial remedies in injunction and award of damages when appropriate for breach of that duty. (323 U.S. at 193-194, 198, 201-204, 207.)

In the campanion Tunstall case, a minority railway employee had filed a complaint for injunction and damages against the union, not in a state court as in Steele, but in a federal district court. The lower federal court dismissed the complaint on the ground that the court was without jurisdiction. On appeal, the U.S. Supreme Court held that such a complaint could also be brought in the federal courts (as well as in the state courts), inasmuch as the union's DFR as the exclusive bargaining representative arose under laws of the

United States: the federal Railway Labor Act.

Following Steele and Tunstall, the DFR doctrine was extended by the courts to cover unions acquiring exclusive representative status under the National Labor Relations Act (NLRA), with a civil cause of action in the courts for damages and injunctive relief when the duty was breached either in bargaining or in administering the ensuing collective bargaining agreement. (Ford Motor Co. v. Huffman (1953) 345 U.S. 330, 337-338 [97 L.Ed. 1048, 1057-1058]; Sykes v. Oil Workers International Union (1955) 350 U.S. 892 [100 L.Ed. 785]; Humphrey v. Moore (1964) 375 U.S. 335, 342 [11 L.Ed.2d 370, 377].)

In 1962, in a three-to-two decision, the National Labor Relations Board (NLRB) held--for the first time since the 1935 enactment of the NLRA--that unions acquiring an exclusive representative status under the NLRA have a duty of fair representation, and that a breach of the duty constitutes an unfair labor practice under the NLRA and is actionable before the NLRB. (Miranda Fuel Co. (1962) 140 NLRB 181 [51 LRRM 1584] enforcement den. 326 F.2d 172 (2nd Cir. 1963) [54 LRRM 2715].)

In various DFR civil lawsuits brought in the courts after Miranda Fuel Co., the issue was raised that, since the NLRB had now found DFR breaches to be unfair labor practices under the NLRA, the courts were preempted from entertaining DFR lawsuits because of the exclusive jurisdiction of the NLRB over unfair

practices. The courts have consistently rejected this preemption argument, with the leading decision being Vaca v. Sipes, supra, 386 U.S. 171 [17 L.Ed.2d 842], wherein the U.S. Supreme Court declined to hold whether a DFR breach also constituted an unfair labor practice under the NLRA, but took the stance that even assuming the latter, preemption was not applicable inasmuch as the courts had been dealing with and enforcing the DFR for years before the NLRB first asserted such jurisdiction in Miranda Fuel Co. (see 386 U.S. at 176-186 [17 L.Ed.2d at 850-855]). As succinctly set forth by the U.S. Supreme Court in Motor Coach Employees v. Lockridge (1971) 403 U.S. 274, 299-301 [29 L.Ed.2d 473, 490-491]:

> . . . in Vaca v. Sipes, 386 U.S. 171, 17 L.Ed.2d 842 (1967), we held that an action seeking damages for injury inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective agreement.
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> The duty of fair representation was judicially evolved, without the participation of the NLRB, to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers. (Emphasis added.)

The U.S. Supreme Court has still not ruled on whether a breach of the DFR constitutes a violation of the NLRA. In Del Costello v. International Brotherhood of Teamsters (1983)

462 U.S. 151 [76 L.Ed.2d 476], a case involving the issue of what was the appropriate statute of limitations as to filing civil lawsuits for breaches of the DFR, the court stated (462 U.S. at 170):

> The NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices. E.g., Miranda Fuel Co., 140 NLRB 181 (1962), enf. denied, 326 F.2d 172 (CA2 1963). We have twice declined to decide the correctness of the Board's position,[22] and we need not address that question today.
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> [22]Vaca, supra, at 186, 17 L.Ed.2d 842, 87 S.Ct. 903; Humphrey, 375 U.S., at 344, 11 L.Ed.2d 370, 84 S.Ct. 363; see Mitchell, 451 U.S., at 67-68, n 3, 67 L.Ed.2d 732, 101 S.Ct. 1559. (Emphasis added.)

And in affirming a court's liberal approach to the sufficiency of a complaint filed in court against a union for breach of its duty of fair representation, the U.S. Supreme Court reiterated with approval the statement of the lower federal circuit court of appeals that "where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation, complaints should be construed to avoid dismissals . . . ." (Czosek v. O'Mara (1970) 397 U.S. 25, 27 [25 L.Ed.2d 21, 24], emphasis added.)

California case law is in accord with the federal view concerning a union's duty of fair representation being enforceable in the (state) courts through civil lawsuits for damages and/or injunctive relief (Griffin v. United Transportation Union (1987) 190 Cal.

App.3d 1359, 2361-1265; Kerna v. D'Arrigo Brothers Co. (1978) 77 Cal.App.3d 836, 839-842; Shaw v. Metro-Goldwyn-Mayer, Inc. (1974) 37 Cal.App.3d 587, 599-601; Masgallanes v. Local 300, Laborers' Inter. Union of No. America (1974) 40 Cal.App.3d 809, 815-816, hrg. den.; Sarro v. Retail Store Employees Union (1984) 155 Cal.App.3rd 206, 212; Rosales v. General Motors Corp. (1978) 78 Cal.App.3d 94, 102-103, hrg. den.). Furthermore, the judicial enforcement of a union's DFR applies to exclusive representatives in the public sector (Logan v. Southern Calif. Rapid Transit District (1982) 136 Cal.App.3d 116, 128).

Hence, it is well established in both federal and state case law that when an employee organization becomes the exclusive representative of a bargaining unit -- whether such exclusivity is acquired under a federal or state statute, or by contract -- a reciprocal duty of fair representation arises which is enforceable in the courts through a civil lawsuit for damages and/or injunctive relief.

Turning to the instant case, it is self-evident that an employee organization that has obtained exclusive representative status under SEERA has the reciprocal duty of fair representation towards all members of the bargaining unit it represents, and that breaches of this judicially recognized duty are remediable in the California state courts through civil lawsuits for damages and/or injunctive relief (Lerma v.

D'Arrigo Brothers Co. (1978) 77 Cal.App.3d 836, 839-842; Logan v. Southern Calif. Rapid Transit District (1982) 136 Cal.App.3d 116, 128; and see Griffin v, United Transportation Union 1987) 190 Cal.App.3d 1359, 1361-1365).

Independent of the judically recognized and enforced DFR, is the issue of whether, under SEERA, breaches of a DFR are also actionable and remediable before this Board. In looking, as we must, to SEERA's provisions for the answer, it is incumbent upon us to view those provisions against the legislatively inscribed statutory backdrop which surrounds them (Regents of the Univ. of Calif. v. Public Employment Relations Board (1985) 168 Cal.App.3d 939, 942-944).

In 1975, the Legislature enacted the Educational Employment Relations Act (EERA, Stats. 1975, ch. 961; Govt. Code secs. 3540-3549) which established this Board and vested it with the power to enforce the provisions of EERA with respect to unfair practices or other violations of EERA (Govt. Code sec. 3541.3, subdivs. (h) & (i); Leek v. Washington Unified School District (1981) 124 Cal.App.3d 43, 46, ftnte 1, 47-51, hrg. den.; Link v. Antioch Unified School District (1983) 142 Cal.App.3d 765, 768-769). EERA includes sections authorizing exclusive representatives (Govt. Code secs. 3544-3544.7) and a separate section bearing the heading, "DUTY OF FAIR REPRESENTATION," which specifically prescribes a duty of fair representation for exclusive representatives as to "each and every employee" in

the bargaining unit (Govt. Code sec. 3544.9).

In 1977, the Legislature enacted the State Employer-Employee Relations Act (SEERA, Stats. 1977, ch. 1159; Govt. Code secs. 3512-3524) which vested this Board with the power to enforce the provisions of SEERA with respect to unfair practices or other violations of SEERA (Govt. Code secs. 3513, subdiv. (g); and see Leek v. Washington Unified School District, supra, 124 Cal.App.3d 43, 46, ftnte. 1, 47-41, hrg. den.; Link v. Antioch Unified School District, supra, 142 Cal.App.3d 765, 768-769). SEERA included sections authorizing exclusive representatives (Govt. Code secs. 3515.5 and 3520.5) but--unlike EERA (supra) and HEERA (post)--omitted any statutory provision prescribing a duty of fair representation for exclusive representatives.

In 1978, the Legislature enacted the Higher Education Employer-Employee Relations Act (HEERA, Stats. 1978, ch. 744; Govt. Code secs. 3560-3599) which vested this Board with the power to enforce the provisions of HEERA with respect to unfair practices or other violations of HEERA (Govt. Code sec. 3563, subdivs. (g) and (h); and see Leek v. Washington Unified School District, supra, 124 Cal.App.3d 43, 46 ftnte. 1, 47-51, hrg. den.; Link v. Antioch Unified School District, supra, 142 Cal.App.3d 765, 768-796). HEERA includes sections authorizing exclusive representatives (Govt. Code secs. 3573-3577), a separate section bearing the heading, "DUTY OF FAIR

REPRESENTATION" which specifically prescribes a duty of fair representative for exclusive representatives as to "all employees" in the bargaining unit (Govt. Code sec. 3578), and a specific provision in another section with the heading "UNLAWFUL PRACTICES: EMPLOYEE ORGANIZATION", making it an unlawful practice for an exclusive representative to breach its duty of fair representation (Government Code sec. 3571.1, subdiv. (e).).

Lastly, in 1981, the Legislature amended SEERA (Stats. 1981, chapter 1572, effect. January 1, 1983) to add a new section (Government Code section 3515.7) dealing with maintenance of membership and the collection of "fair share fees" from employees who are not members of the exclusive representative organization. This new section included a subdivision (g) which prescribes:

> (g) An employee who pays a fair share fee shall be entitled to fair and impartial representation by the recognized employee organization. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith. (Govt. Code sec. 3515.7, subdiv. (g), emphasis added)

Thus, in EERA and HEERA the Legislature has specifically prescribed a duty of fair representation for exclusive representatives as to "each and every employee" and/or "all employees" in the bargaining unit (EERA: Government Code sec. 3544.9; HEERA: Govt. Code sec. 3578), but omitted such a

DFR in SEERA.

A breach of the DFR under EERA is actionable and remediable before this Board as a violation of EERA's DFR section 3544.9 (Govt. Code sec. 3541.3, subdiv. (h) and (i); Leek v. Washington Unified School District, supra; Link v. Antioch Unified School District, supra. A breach of the DFR under HEERA is actionable and remediable before this Board as either an unlawful practice (Govt. Code sec. 3571.7, subdiv. (e)) or as a violation of HEERA's DFR section 3578 (Govt. Code sec. 3563, subdivs. (g) and (h); and see Leek v. Washington Unified School District, supra; Link v. Antioch Unified School District, supra).

The 1981 amendment to SEERA, which provides for the collection of "fair share fees" from employees in the bargaining unit who are not members of the exclusive representative organization, prescribes a DFR for exclusive representatives as to "(a)n employee who pays a fair share fee" (Govt. Code sec. 3515.7, subdiv. (g).). As set forth in SEERA section 3513, subdivision (j):

> (j) 'Fair share fee' means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general

assessments of the recognized employee organization, (Emphasis added.)

The DFR set forth in subdivision (g) of SEERA section 3515.7 does not apply to "each and every employee"[5] and/or "all the employees"[6] in the bargaining unit but only to the nonmember employees from whom a fair share fee is collected. Accordingly, a breach or violation of the DFR prescribed by subdivision (g) of SEERA section 3515.7 is actionable and remediable before this Board only with respect to a nonmember, fair-share fee payor.

In the instant case, the charging party is not a nonmember fair-share fee payor; he is a member of the exclusive representative organization. Charging Party's remedy, if there is a DFR breach as to him, lies in the courts (Lerma v. D'Arrigo Brothers Co. (1978) 77 Cal.App.3d 836, 939-942; Logan v. Southern Calif. Rapid Transit District (1982) 136 Cal.App.3d 116, 128; Griffin v. United Transportation Union (1987) 190 Cal.App.3d 1359, 1361-1365).

In Norgard v. California State Employees Association (1984) PERB No. 451-S, although this Board recognized that the

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[5]See EERA's DFR section: Government Code section 3544.9.

[6]See HEERA's DFR section: Government Code section 3578.

Legislature had omitted a DFR from SEERA[7], it went on to consider this omission as not being reflective of a legislative intent to deny employees the right to a DFR. This Board then effectively inserted a DFR into SEERA. But this Board may not by administrative interpretation insert into a statute that which the Legislature has omitted[8] (Regents of the University of California v. PERB & Laborers' Local 1276, LIUNA, AFL-CIO (1985) 168 Cal.App.3d 937, 942-945; Cadiz v. Agricultural Labor Relations Board (1979) 92 Cal.App.3d 365, 372, hrg. den. Vallerga v. Dept. of Alcoholic Beverage Control (1959) 53 Cal.2d 313, 318; Estate of McDill (1975) 14 Cal.3d 831, 838; Bailey v. Superior Court (1977) 19 Cal.3d 970, 977-978; Westminster School District v. Superior Court & Westminster Teachers Assn. (1972) 28 Cal.App.3d 120, 128-120, hrg.den.; Code of Civil Procedure sec. 1858).

Finally, while state employees who are members of the exclusive representative organization have a remedy for DFR breaches only in the courts and not before this Board, it is appropriate to distinguish those possible situations where an exclusive representative does not fairly represent a member as

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[7]The Norgard decision recognized the omission of the DFR as between SEERA and EERA, but it did not identify or analyze the presence of a DFR provision in HEERA or the 1981 addition to SEERA providing for a DFR as to nonmember fair-share fee payors.

[8]Whether the omission was intentional, inadvertent, or the result of political compromise, only the Legislature may change the statute.

a reprisal or discrimination because of the member's exercise of his or her SEERA rights. In such a situation, the exclusive representative would be in violation of SEERA section 3519.5, subdivision (b)[9] and the violation would thus be actionable and remediable before this Board.

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[9]See Fn. 1, supra.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD
LOS ANGELES REGIONAL OFFICE
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(213) 736-3127

October 17, 1985

Joab Pacillas

Re: LA-CO-17-S, Joab Pacillas v. California Correctional Peace Officers Association

Dear Mr. Pacillas:

The above-referenced charge alleges that the California Correctional Peace Officers Association (CCPOA) failed to fairly represent you on a "reasonable accommodation" request filed with the State Personnel Board (SPB). This conduct is alleged to violate Government Code section 3519.5(d) of the State Employer-Employee Relations Act (SEERA).

Facts

Joab Pacillas was employed as a Parole Agent II by the Department of Corrections, Parole and Community Services Division. After a two-year absence from work due to injuries in an automobile accident he returned to work full-time on October 13, 1983.

On September 16, 1983, Lee Chism, CCPOA Legal Assistant, filed a request with the SPB Affirmative Action for the Disabled Unit for reasonable accommodation by the Department of Corrections in assigning Pacillas to work he was able to perform. The SPB has jurisdiction over such requests based upon section 504 of the Federal 1973 Rehabilitation Act and California Government Code section 19230 which declares the policy of the State to enable disabled persons to be employed in state service.

On or about October 4, 1983, Pacillas called the CCPOA office and was advised that Chism no longer worked for CCPOA and that attorney Steve Yamaguchi would handle his case. On or about December 15, 1983, Pacillas informed Yamaguchi that he was again not working and on industrial disability leave status.

On January 9, 1984, Yamaguchi received a letter from the SPB stating they assumed the case was inactive because CCPOA had not returned a telephone call made on September 22, 1983.

On January 27, 1984, Pacillas and Yamaguchi discussed the case. Pacillas states that Yamaguchi attempted to disuade him from pursuing the accommodation request and in acquiesing in retirement instead. On or about February 22, 1984 Pacillas advised Yamaguchi that he wished CCPOA to continue pursuing the request.

On March 19, 1984, Yamaguchi called the SPB regarding the status of the request. Thereafter he received a letter dated March 19, 1984 stating that the SPB would not take action on the request because the request did not indicate that Pacillas had first requested and been denied reasonable accommodation at the departmental level. On May 4, 1984 Yamaguchi sent the SPB letter to Pacillas and stated that he would refile the request with the SPB since the Department of Corrections had in fact denied reasonable accomodation.

On October 5, 1984 CCPOA Chief Counsel Buddingh brought the case to Yamaguchi's attention. He had not acted on the case. Yamaguchi does not recall what he did at this time.

On December 3, 1984 Buddingh received a letter from Pacillas requesting a written update on the status of his case. On December 10, 1984 Buddingh wrote to Pacillas stating that Yamaguchi would pursue the reasonable accommodation request with the SPB since the request had been denied at the departmental level.

Pacillas retired on December 22, 1984. On January 28, 1985 Buddingh wrote Pacillas that CCPOA would not further represent him since he had retired. On February 8, 1985 a second letter from Buddingh to Pacillas advised him that the SPB remedy must be pursued within one year and he should see a private attorney.

The negotiated agreement between the State of California and the CCPOA covering Corrections Unit 6 makes no reference to requests for reasonable accommodation of disabled employees. Article VI entitled "Grievance and Arbitration Procedure" defines "grievance" in section 22 as:

> a. A grievance is a dispute of one or more employees or a dispute between CCPOA and the State involving the interpretation, application or enforcement of this agreement.

> b. A grievance is also a dispute of one or more employees or a dispute between CCPOA and the State involving a law, policy, or procedure concerning employment related matters not covered in this Agreement and not under the jurisdiction of the State Personnel Board. (Emphasis added.)

No Breach of Duty of Fair Representation

Mr. Pacillas alleged a violation of Government Code section 3519.5(d) which makes it an unfair labor practice for an employee organization to fail to participate in the mediation procedure prescribed by SEERA. The facts above do not relate to this type of violation. However, they do concern an alleged failure to fairly represent Pacillas, which would constitute a violation of section 3519.5(b).

Although SEERA does not contain a specific section specifying an employee organization's duty of fair representation, such a duty can be implied from the fact that SEERA provides for exclusive representation. Government Code sections 3513(b) and 3515.5; Norgard v. California State Employees Association (1984) PERB Decision No. 451-S.

Although the Public Employment Relations Board (PERB) has ruled that the duty of fair representation applies to the handling of contractual grievances, none of its decisions concern the employee organization's duty to pursue extra-contractual remedies. Such a question, however, has been considered by the federal court system.[1]

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[1]The California Supreme Court in Firefighters Union v. City of Vallejo (1974) 12 Cal. 3d 608, stated that where the National Labor Relations Act does not contain specific wording comparable to the state act, if the rationale that generated the language "lies embedded in the federal precedent under the NLRA" and:

> The federal decisions effectively reflect the same interests as those that promoted the inclusion of the [language in the SEERA], [then] federal precedent provides reliable if analogous authority on the issue.

In Hawkins v. Babcock and Wilcox Co. (1980) (U.S.D.C., N. Ohio) 105 LRRM 3438, a case involving an employee who alleged that the union should have advised him regarding administrative and judicial remedies to alleged discriminatory conduct by his employees, the District Court ruled:

> The National Labor Relations Act, authorizing unions to represent employees in the creation and administration of collective bargaining agreements with employers, together with the correlative duty of fair representation, however, is limited to the collective bargaining process. Outside of the employer-employee relationship, the union has no authority to represent union members, nor duty to advise those members of their extra-contractual legal rights. The union's duty of fair representation is restricted to the context of the collective bargaining agreement and does not extend to legal remedies available outside the employment context. See, International Bro. of Electrical Wkrs. v. Foust, 442 U.S. 42, 101 LRRM 2365 (1979); Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1952); Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 15 LRRM 708 (1944).
>
> In the present case, the defendant union was not under any duty to advise the plaintiff of his legal rights outside the context of the collective bargaining agreement. The Union had no duty to act as an attorney at law advising the plaintiff of all possible alternatives of legal recourse. The Court therefore finds that the defendant did not, in fact, inadequately represent the plaintiff by not advising the plaintiff of all possible administrative and judicial remedies available. The plaintiff's claim, consequently, that the defendant B&W violated 29 U.S.C. section 151 et seq., relating to unfair labor practices because of the union's alleged inadequate representation is hereby dismissed. Hines v. Anchor Motor Freight,

424 U.S. 554, 91 LRRM 2481 (1976); Baldini v. Local Union No. 1095, 581 F.2d 145, 99 LRRM 2535 (7th Cir. 1978); Smart v. Ellis Trucking Co., Inc., 580 F.2d 215, 99 LRRM 2059 (6th Cir. 1978).

This quoted case does not state what duty an employee organization might have in representing a member once it voluntarily takes a case it has no duty to pursue. However, in Archer v. Airline Pilots Association International (9th Cir. 1979) 609 F.2d 934, 102 LRRM 2827, 2830, cert. den. (1980) 446 U.S. 953, 104 LRRM 2303, the Court held that an estoppel argument does not apply to create a fiduciary duty where none previously existed. See also American Federation of Government Employees v. DeGrio (1985, Ct. App. Fla., 3rd Dist.) 116 LRRM 3298, 3300-1, There the Court held the union had no duty of fair representation to a nonmember under federal labor policy when it voluntarily represented him in a discharge case. However, the union did have a duty to exercise due care in his representation under the common law of negligence and the employee was allowed to seek damages in a civil action.

Following the rationale of the above-quoted cases, Pacillas' request for reasonable accommodation filed with the SPB must be found to be outside of CCPOA's duty of fair representation. Therefore, the charge does not state a prima facie case and must be dismissed.

Opportunity to Amend

For the reasons stated above, the charge as presently written does not state a prima facie violation of the EERA. If you feel that there are facts or legal arguments which would require different conclusion, an amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, should contain all the allegations you wish to make and be signed under penalty of perjury. 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 by October 24, 1985, I shall dismiss your charge. If you have any questions regarding how to proceed, please call me at (213) 736-3127.

Sincerely,

Barbara T. Stuart
Regional Attorney

BTS:djm

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD
LOS ANGELES REGIONAL OFFICE
3470 WILSHIRE BLVD., SUITE 1001
LOS ANGELES, CALIFORNIA 90010
(213) 736-3127

October 31, 1985

Joab Pacillas

Re: LA-CO-17-S, Joab Pacillas v. California Correctional Peace Officers Association
DISMISSAL OF UNFAIR PRACTICE CHARGE

Dear Mr. Pacillas:

The above-referenced charge alleges that the California Correctional Peace Officers Association (CCPOA) failed to fairly represent you on a "reasonable accommodation" request filed with the State Personnel Board (SPB). This conduct is alleged to violate Government Code section 3519.5(d) of the State Employer-Employee Relations Act (SEERA).

I indicated to you in my attached letter dated October 17, 1985 that certain allegations contained in the 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 these allegations to state a prima facie case, or withdrew them prior to October 24, 1985, they would be dismissed. On October 22, 1985, we agreed upon an extension until October 25, 1985 for you to mail any amendment.

To date, I have not received either a request for withdrawal or an amended charge and am therefore dismissing those allegations which fail to state a prima facie based on the facts and reasons contained in my October 17, 1985 letter.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

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 (section 32635(a). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on November 20, 1985, or sent by telegraph or certified United States mail postmarked not later than November 20, 1985 (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, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) 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 documents 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 (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for 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.

Very truly yours,

Dennis Sullivan
General Counsel

Barbara T. Stuart
Regional Attorney

cc: Berrit Jan Buddingh, Esq.

Attachment

BTS:djm