STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GEORGE V. MRVICHIN, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Respondent.	)	Case No. LA-CO-413 PERB Decision No. 660 April 1, 1988

Appearances: George V. Mrvichin, on his own behalf; Marci B. Seville, Attorney, for California School Employees Association.

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

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by Charging Party of the Board agent's dismissal, attached hereto, of his charge that the California School Employees Association violated sections 3543.6 and 3544.9 of the Educational Employment Relations Act. We have reviewed the dismissal and, finding it to be free of prejudicial error, adopt it as the Decision of the Board itself.

The unfair practice charge in Case No. LA-CO-413 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
SACRAMENTO REGIONAL OFFICE
1031 18TH STREET, SUITE 102
SACRAMENTO, CALIFORNIA 95814
(916) 322-3198

November 19, 1987

Mr. George Mrvichin

RE: Mrvichin v. California School Employees Association, Unfair Practice Charge No. LA-CO-413, First Amended Charge

Dear Mr. Mrvichin:

You have filed a charge against the California School Employees Association (CSEA) alleging that it violated the Educational Employment Relations Act (EERA) by failing to properly represent you in regard to grievances and unfair practice charges. Specifically, you allege that CSEA: (1) failed to represent you in a disciplinary meeting on December 11, 1986; (2) rejected on January 13, 1987 as invalid, grievances you filed against CSEA itself under the collective bargaining agreement between CSEA and your employer; (3) failed to represent you in some 50 grievances you have filed against the employer between September, 1986 and June, 1987; (4) refused to provide "satisfactory" representation in March, 1987; and (5) failed to provide representation regarding an unfair practice charge in August, 1983.

You were informed by the attached letter dated October 6, 1987, from staff attorney Jorge A. Leon that your charge as originally written did not state a prima facie case and that unless you withdrew or amended the charge prior to October 15, 1987 it would be dismissed. This deadline was subsequently extended to October 22, 1987. On October 21, 1987 a first amended charge was filed. On October 22, 1987, this case was transferred to the undersigned. The first amended charge added the following information to each allegation.

1. Failure to represent you in a disciplinary meeting on December 11, 1986.

You assert in the first amended charge that CSEA representatives attended the December 11, 1986 hearing and: (1) dismissed your witnesses; (2) did not approach the case with an open mind in an honest effort to achieve a fair result;

(3) did not investigate the case with care and pursue all evidence suggested by the Charging Party; (4) failed to treat the Charging Party in the same way it has treated him in similar grievances in the past; and (5) failed to adequately present the case.

This information does not provide a factual basis for a finding that CSEA violated its duty of fair representation. Rather, these statements are Charging Party's conclusions rather than evidentiary facts. For example, failing to do an adequate job in presenting the case is the Charging Party's conclusion as to CSEA's treatment of the grievance. To demonstrate a prima facie case a Charging Party must present evidentiary facts which support such conclusions. Los Angeles Unified School District (1984) PERB Decision No. 473. Due to the lack of such evidentiary facts, this allegation does not state a prima facie case.

2. Rejection of grievances filed against the Association.

In the first amended charge you do not add any new facts but realize that CSEA did not process your grievances against itself with an open mind. Again, this is a factual conclusion rather than a statement of evidentiary fact. Without these facts a prima facie case is not stated and this allegation must also be rejected based on this and the rationale contained in Mr. Leon's October 6 letter.

3. Failure to represent you in 50 grievances against the employer.

In the first amended charge you state that you have filed approximately 50 grievances since December 1987 (sic) and that these grievances were not treated at the state level and received questionable treatment at the local level. As explained in Mr. Leon's October 6 letter, CSEA reviewed these grievances and determined them to be without merit. Other than your conclusion that they received questionable treatment, there are no evidentiary facts indicating that these grievances were treated in an arbitrary, capricious, or bad faith manner by CSEA. Absent such assertions, this allegation does not state a prima facie violation of the EERA.

4. Failure to provide representation in a PERB unfair practice charge from August 1986 through October 1987.

In the first amended charge, you assert that Charging Party was forced to proceed with an unfair practice charge against his

employer between August 1986 and March 1987 without representation by CSEA. In addition, the amended charge alleges that on September 18, 1987 you requested representation on this matter from CSEA and that on October 5, 1987, it failed to appear at the scheduled PERB hearing. You asserted during the investigation that CSEA representatives Mr. Armas and Mr. Fields promised that you would be at the PERB proceeding. However, it would appear that CSEA is under no obligation to represent employees in cases involving extra-contractual remedies. San Francisco Classroom Teachers' Association (Chestangue) (1985) PERB Decision No. 544.

In Hawkins v. Babbock and Wilcox Co. (1980) (U.S. DC, N. Ohio) 105 LRRM 3458,[1] involving an employee who alleged that the union should have advised him regarding administrative and judicial remedies to alleged discriminatory conduct by his employer, 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 agreement process. . . . 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 of the employment context. See International Brotherhood of Electrical Workers 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, 331 LRRM 2548 (1952).
>
> In the present case, the defendant union was not under any duty to advise the plaintiff of its legal rights outside the context of

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[1]PERB has followed decisions of the federal courts and the National Labor Relations Board interpreting the National Labor Relations Act involving the duty of fair representation. Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; and see SEIU, Local 99 (Kimmett) (1979) PERB Decision No. 106.

> 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.

Similarly, a federal district court has stated:

> In the typical fair representation case, it is asserted that the union has breached its duty to represent the employee fairly as regards a employment contract. However, in such cases it is expressly provided by law that the union shall be the exclusive representative of all the employees in the unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . . Thus, in the typical fair representation case, the union has the right, derived from law or from its constitution, to represent the employee exclusively in certain classes of cases. This right imposes a correlative duty to perform diligently the duties of its agency, and not to engage in conduct which is arbitrary, discriminatory or in bad faith. Vaca v. Sipes, supra. Such is not the case here.
>
> The statute provides that a petition for certification of eligibility to apply for adjustment assistance may be filed either by a group of employees or by their union. . . . Therefore, [the union] had no exclusive right, nor correlative duty to file on behalf of plaintiffs in their proposed class. Plaintiffs could have filed for themselves. Lacy v. Local 287, United Automobile, Aerospace, and Agricultural Implement Workers of America (1979) (U.S. DC, S. Dist. Ind.) 102 LRRM 2847. (Emphasis added.)

Section 3541.5 does not provide to employee organizations the exclusive right of filing unfair practice charges. Indeed, as you know, an individual employee can file an unfair practice charge before PERB. Accordingly, the Association has no correlative duty of fair representation to provide assistance for an individually filed unfair practice.

Even if CSEA promised to appear and then failed, you have not alleged facts demonstrating the reason for its failure to appear. Without facts showing that CSEA's failure was motivated by bad faith, arbitrary conduct or capriciousness, there is not a prima facie case stated.

5. Failure to provide representation regarding an unfair practice charge filed with PERB in 1983.

The amended charge does not add any new material concerning this allegation and therefore it is dismissed based on the discussion in Mr. Leon's October 6, 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 (section 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 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,

John Spittler
Acting General Counsel

By _____
Robert Thompson
Regional Attorney

Attachment

cc: Christina Bleuler

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STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
SACRAMENTO REGIONAL OFFICE
1031 18TH STREET, SUITE 102
SACRAMENTO, CALIFORNIA 95814
(916) 322-3198

October 6, 1987

Mr. George Mrvichin

RE: Mrvichin v. California School Employees Association, Case LA-CO-413

Dear Mr. Mrvichin:

You have filed a charge against the California School Employees Association (CSEA) alleging that it violated the Educational Employment Relations Act (EERA) by failing to properly represent you in regard to grievances and unfair practice charges. Specifically, you allege that CSEA: (1) failed to represent you in a disciplinary meeting on December 11, 1986; (2) rejected on January 13, 1987 as invalid, grievances which you filed against CSEA itself under the collective bargaining agreement between CSEA and your employer; (3) failed to represent you in some 50 grievances which you have filed between September, 1986 and June, 1987 against the employer; (4) refused to provide "satisfactory" representation in March, 1987; (5) failed to provide representation regarding an unfair practice charge in August, 1983.

My investigation revealed the following information. You are employed as an Athletic Trainer by the Chino Unified School District and have been so employed for some ten years. Your duties include training and conditioning student athletes in injury prevention, issuance of safety equipment to students and administering first aid.

1. Failure to represent you in a disciplinary meeting on December 11, 1986.

On December 9, your employer directed you to attend a meeting with Principal Carr. On December 10, you called CSEA Field Representative Mr. Armas and asked that he represent you at the meeting. Mr. Armas asked whether the meeting had to do with

discipline. You stated that the District had not clearly advised you. He told you that you that you should go to the meeting and if you determine that it is disciplinary in nature, to ask for representation at that point. You assert that in this conversation, Mr. Armas said that you should be fired from your position. Respondent asserts, in response, that Armas actually said words to the effect:

> This is the second time you've gotten in trouble with the District about altering forms. You were out of line. If you were my employee I would have fired you.

Armas then called Ms. Isley, the Chapter President to find out about whether the meeting was to be disciplinary. Having found out that it was, he called Mr. Carr and arranged to have the meeting scheduled for December 11, so he and Isley could attend. They subsequently did attend the meeting and represented you at that meeting.

2. Rejection of grievances filed against the Association

You filed three grievances against the Association on December 18, 1986 alleging that it failed to provide assistance, failed to provide you with grievance forms, and failed to represent you. On December 23, 1986, you filed three more grievances. On January 13, 1987, Mr. Armas sent you a letter advising you that the grievances were invalid inasmuch as the grievance process is intended to be used for raising disputes with the employer -- not the Association. Mr. Armas advised you that the mechanism for raising disputes with the Association is through Policy 606. You pursued the grievances to State President Mr. Bill Regis and later up to the CSEA Board of Directors through Mr. Wally Blice. At each step, CSEA advised you that it would not accept your grievances and directed you instead to use Policy 606.

3. Failure to represent you in 50 grievances against the employer.

Between September, 1986 and June, 1987, you filed some 50 grievances against the employer for various alleged contract violations. CSEA did not assist you in filing any of these grievances. You did not consult with CSEA prior to filing these grievances. However, after they were filed, you asked

that it assist you by providing representation. CSEA responded that it had reviewed your grievances, that the grievances did not present valid claims, and that therefore, it would not represent you. For example, concerning the grievance which you filed on December 10, 1986 regarding Kathleen Small, Mr. Armas, on behalf of CSEA sent you a letter dated December 22, 1986 which states that the grievance had been reviewed, that it was determined not to state a valid claim, and that you may appeal Armas' determination through Policy 606. Mr. Armas went on to explain that he had explained to you what a valid grievance states and that your failure to follow his advice is creating an undue workload for the Chino CSEA Chapter.

4. March, 1987 failure to provide "satisfactory" representation.

The charge states that from about August, 1986 through March, 1987, the CSEA through Mr. Armas, "declined satisfactory representation, which resulted in a violation of the PERB timeline." The charge does not provide any further information about this matter. Although questioned on this point, Charging Party has not provided any further facts concerning the allegation.

5. Failure to provide representation regarding an unfair practice charge filed with PERB in 1983.

The instant charge was filed with the PERB on April 20, 1987. In 1983, you filed an unfair practice charge against the District. You requested that CSEA assist you in pursuing the charge against the District. According to the instant charge, "prior to August 1983 and since" then (August 1983) the Association has denied you representation regarding the charge. You and the District entered into a settlement agreement which provided, in part, that the District would conduct reevaluations of your work performance in December, 1983 and again in April, 1984. The District failed to conduct the April, 1984 evaluation and, although the charge is not clear on this point, it can be read to allege that you requested, and CSEA refused assistance in April, 1984 as well.

ANALYSIS

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation

guaranteed by EERA section 3544.9 and thereby violated section EERA 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258. In order to state a prima facie violation of this section of the EERA Charging Party must show that the Association's conduct was arbitrary, discriminatory, or in bad faith. In United Teachers of Los Angeles (Collins), Id., the Public Employment Relations Board (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.
>
> . . . . . .
>
> 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.

In order to state a prima facie case alleging arbitrary conduct violative of the duty of fair representation the 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 inaction was without a rationale basis or devoid of honest judgment. Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

1. Failure to represent you in a disciplinary meeting on December 11, 1986.

The charge alleges that the CSEA failed to represent you at the December 11, 1986 meeting. However, the charge also

acknowledges at paragraph #12 of the factual statement of the charge that Mr. Armas and Ms. Isley were in fact present at the meeting to represent you. During the investigation of the charge, you acknowledged that they were present. For these reasons, this allegation does not state a prima facie case of an EERA violation.

To the extent that the charge asserts that Mr. Armas' statement that you should be fired is a violation of the EERA, that allegation does not appear to present a prima facie for these reasons. Armas' statement appears to be an expression of a personal opinion. Standing alone, the statement does not rise to the level of arbitrary, bad faith, or discriminatory conduct. The charge does not present any information to demonstrate that Armas' personal opinion in any way led CSEA to fail to exercise the duties it has toward you nor that it led CSEA to act in an arbitrary, bad faith, or discriminatory way toward you. Further, there are no facts which demonstrate that Armas in any way interfered with the relationship between you and your employer. For these reasons, this allegation fails to state a prima facie case of an EERA violation.

2. Rejection of grievances filed against the Association.

The Association refused to accept grievances which you filed against the Association itself pursuant to the collective bargaining agreement between the District and the Association. Instead, it referred you to the internal dispute resolution mechanism provided for in its Policy 606. The collective bargaining agreement does not specifically provide that its grievance mechanism shall be used for member grievances against the Association. During the investigation, you asserted that the agreement does not bar such grievances and that the Agreement binds both the employer and the District. Thus, the grievances should be allowed. Regardless of whether the contract grievance procedure is properly used to lodge grievances against the union by its members, the charge does not demonstrate that the Association engaged in arbitrary, discriminatory, or bad faith conduct. Although it rejected your grievances, it provided you with an alternative mechanism in order to air your grievances by referring you to Policy 606. For these reasons, this allegation does not state a prima facie case of an EERA violation.

3. Failure to represent you in 50 grievances against the employer

You were notified by CSEA that it would not pursue the various grievances which you filed against the District because the grievances were determined to be unmeritorious. The CSEA referred you to its grievance appeals committee in each instance. You proceeded to file appeals on each of the grievances, and the rejections were upheld at each procedural step. The charge does not present any facts indicating that CSEA's determinations were made for any reasons other than that they had been determined to be unmeritorious. The charge does not demonstrate bad faith, discriminatory, or arbitrary conduct on the part of CSEA in refusing to pursue the grievances which you filed. For these reasons, this allegation does not state a prima facie case of an EERA violation.

4. March, 1987 failure to provide "satisfactory" representation.

CSEA's duty to its members is to refrain from arbitrary, bad faith, or discriminatory conduct. During the investigation of the charge you did not present any further factual information regarding the allegation. As stated, the charge does not present any concrete facts in support of the allegation that CSEA failed to provide "satisfactory" representation. Even if there were, there is no duty that it provide "satisfactory" representation. The charge fails to present information showing that the CSEA acted in a bad faith, discriminatory, or bad faith manner. For these reasons, this allegation does not state a prima facie case of an EERA violation.

5. Failure to provide representation regarding an unfair practice charge filed with PERB in 1983.

Government Code section 3541.5 (a) provides that the PERB shall not issue a complaint:

> [i]n respect of any charge based upon an alleged unfair practice ocurring more than six months prior to the filing of the charge.

The charge alleges that CSEA refused to provide representation regarding the 1983 charge "prior to August 1983 and since." The charge can also be read to state that CSEA failed to

provide assistance in enforcing the settlement agreement in April, 1984. This charge was filed in April, 1987, which is more than six months following August, 1983 and more than six months following April, 1984. The allegation does not state a prima facie case of an EERA violation because it is not timely filed. Moreover, assuming arguendo that the charge is timely filed, it does not reveal that CSEA engaged in any arbitrary, discriminatory, or bad faith conduct in refusing to participate in an unfair practice charge which it had not filed. The CSEA's obligation is limited to pursuing available contractual remedies and does not extend to assisting employees in pursuing remedies in other forums. California State Employees Association (Darzins) (1985) PERB Decision No. 546-S.

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 <u>all</u> 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 October 15, 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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