STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JAMES ALIN MOORE, Charging Party,	)	Case No. SF-CO-12-S
v.	)	PERB Decision No. 683-S
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2620, Respondent.	)	June 20, 1988

Appearances; James Alin Moore on his own behalf; Beeson, Tayer, Silbert & Bodine by Joseph R. Colton for American Federation of State, County and Municipal Employees, Local 2620.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (Board) on appeal by charging party of the attached Board agent's dismissal of his charge that the American Federation of State, County and Municipal Employees, Local 2620 (AFSCME) violated section 3519.5(b) of the Ralph C. Dills Act (Dills Act).[1]

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

[1]Formerly referred to as the State Employer-Employee Relations Act, the Dills Act is codified at Government Code section 3512 et seq.

concluded that allegations relating to AFSCME's actions in the State Personnel Board hearing are untimely, and that the allegations also fail to state a prima facie violation of the Dills Act.

ORDER

The dismissal of the unfair practice charge in Case No. SF-CO-12-S is hereby AFFIRMED.

Members Craib and Shank joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street. Suite 900
San Francisco, CA 94108-4737
(415) 557-1350

April 6, 1988

James Alin Moore

Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
James Alin Moore v. American Federation of State, County, Municipal Employees AFSCME 2620, Unfair Practice Charge No. SF-CO-12-S

Dear Mr. Moore:

The above-referenced charge alleges that the American Federation of State, County and Municipal Employees, Local 2620 failed to fairly represent you in a discipline and termination hearing before the State Personnel Board and further failed to fairly represent you by deciding not to take your grievance concerning the discipline and termination to arbitration. I indicated to you in my attached letter dated March 21, 1988, 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 it prior to April 4, 1988, it would be dismissed.

I have received an amended charge, but it does not cure the deficiencies in your case, as explained below. Therefore, I am dismissing the charge based on the facts and reasons contained in my March 21, 1988 letter and those below.

SPB HEARING REPRESENTATION

With regard to the timeliness of the allegation regarding the violation of the duty of fair representation in the conduct of the proceeding before the SPB, you now state that you put the union on notice by phone in February, March, April and May that it failed in its duty. You also attach letters dated in May and June, 1987. Even assuming that all these communications put the union on notice of your complaint against it, the arbitration procedure which you were attempting to use concerned your grievance against the employer, not against the union. The statute of limitations is only tolled when an alternative procedure for settling the case is pursued. Therefore, you have alleged no facts indicating that you pursued an alternative procedure for settling your complaint against the union in the period from the end of the SPB hearing (Dec. 1986) or from the issuance of the SPB decision (May 1987) until the filing of this charge on February 8, 1988, well beyond the six month limitation contained in Government Code section 3514.5(a).

Moreover, there are no new facts alleged to indicate that there was a duty of fair representation applicable or that the representation was so grossly negligent as to violate the duty of fair representation of a non-attorney

union representative. See also California State Employees Assn (Darzins) (1985) PERB Decision No. 546-S.

DECISION NOT TO TAKE GRIEVANCE TO ARBITRATION

You have added the following facts: a) the headings of correspondence evolved from "Dear Jim" to "Dear Mr. Moore"; b) the letters themselves which you characterize as hostile; c) an outside lawyer presented the no-arbitration position at the second AFSCME arbitration committee; d) at the SPB hearing, Mr. Sharpe moved to have the charges dismissed as untrue, unfounded and unproven but later posited that the case should not be taken to arbitration. The remainder of the material in your amended charge is argument, including many characterizations of Richard Sharpe's actions as "in bad faith", or pure speculation.

The new facts do not indicate that the decision not to arbitrate was without a rational basis or devoid of honest judgment. The evolution of the headings of the letters do not indicate hostility which would color honest judgment. The tenor of the letters to you do not indicate hostility either. No facts regarding the content of the phone calls are alleged; you have merely made the conclusory statement that they were hostile. The fact that a lawyer presented the non-representation position does not indicate hostility which would color honest judgment; it is more amenable to the interpretation that the union wished to keep Mr. Sharpe's personal views out of consideration. Mr. Sharpe's motion to dismiss the charges at the SPB was consonant with the performance of a zealous advocate, whether or not he believed the charges to have merit. On the other hand, when advising the union whether to take a grievance to arbitration, considerations other than those of a zealous advocate for the individual grievant come into play. These factors include union finances, impact on other unit members, and the effect of the SPB judgment.

In sum, the question is whether the union, not Mr. Sharpe alone, failed in its duty of fair representation in not taking the grievance to arbitration. The union may consider whether taking a grievance to arbitration will spark divisiveness among employees. See Castro Valley Teachers Association (McElwain) (1980) PERB Decision No. 149. Other considerations were detailed in the letters to you from the two arbitration committees. Our inquiry focuses on whether the Association's judgment had a rational basis, or was arbitrary or based upon invidious discrimination, not whether the judgment was correct. See Sacramento City Teachers Assn (Fanning) (1984) PERB Decision No. 428. The letters from the arbitration committees indicate a rational, nonarbitrary, good faith assessment that your grievance should not go to arbitration. You have not presented any facts indicating the decision was arbitrary, discriminatory or in bad faith. Thus, your allegations still do not rise to the level of a prima facie case of a violation of the duty of fair representation.

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 nail postage paid and properly addressed.

Extension of Time

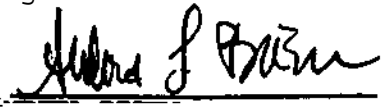
A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The 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 
ANDREA BIRN
Staff Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, Suite 900
San Francisco, CA 94108-4737
(415) 557-1350

March 21, 1988

James Alin Moore

Re: Moore v. AFSCME 2620, Charge No. SF-CO-12-S

Dear Mr. Moore:

The above-referenced charge alleges that the American Federation of State, County and Municipal Employees, Local 2620 failed to fairly represent you in a discipline and termination hearing before the State Personnel Board and further failed to fairly represent you by deciding not to take your grievance concerning the discipline and termination to arbitration. This conduct is alleged to violate Government Code section 3519.5(b) of the Ralph C. Dills Act (formerly known as SEERA).

Facts

My investigation revealed the following facts. Mr. Moore has been a state employee since 1972. Re became a member of unit 19, represented by AFSCME Local 2620, in June 1984. In October 1985, Mr. Moore became a union board member and rehabilitation occupational chairperson.

In November 1985, a female worker filed a complaint against Mr. Moore alleging improper conduct and sexual harassment. In February 1986, Mr. Moore received a written reprimand for this and sought union help in filing an appeal with the State Personnel Board (SPB). Richard Sharpe, a union staff person, agreed to handle the case.

One week before the SPB hearing, Mr. Moore was fired following a second complaint from a different female alleging sexual harassment. Richard Sharpe undertook to appeal the termination also, and the discipline and termination matters were heard together in December 1986. Mr. Moore felt that Mr. Sharpe did not give him adequate representation. Specifically, Mr. Moore was dissatisfied because Mr. Sharpe did not: 1) allow Mr. Moore to be present when Mr. Sharpe interviewed witnesses; 2) allow Mr. Moore to look at the witnesses; 3) raise union animus as an issue; 4) question the credibility of the accusing witnesses although Mr. Moore provided him with information which might reflect on credibility; 5) allow Mr. Moore to bring in an outside attorney to work with the union. Mr. Moore felt that AFSCME had a conflict of interest because it is the exclusive

representative for both Mr. Moore and one of the accusing witnesses. The final SPB decision issued on May 5, 1987, upholding both the discipline and the termination.

Meanwhile, in February 1987, Mr. Moore filed an unfair practice charge against the state employer alleging that the termination was retaliatory based on Moore's union activities. This was filed without the union's participation. It was deferred to binding arbitration on May 7, 1987 and Mr. Moore informed the union of this through Richard Sharpe in May 1987. Mr. Sharpe did not feel the union should undertake this arbitration. However, pursuant to AFSCME's representation policy subsection E, in June 1987, an arbitration committee did review the matter and also decided that the union would not take the case to arbitration. After that decision, Mr. Moore appealed to the Executive Board which formed another arbitration committee, consisting of different individuals, to review the request again. On August 6, 1987, that committee informed Mr. Moore orally of its unanimous decision not to pursue his grievance to arbitration. A further appeal to the Executive Board was waived by Mr. Moore.

Timeliness

Under Government Code section 3514.5(a), this Board cannot issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. The charge alleges two possible violations of the duty of fair representation - the inadequate representation at the SPB and the decision not to take the retaliatory dismissal case to arbitration. The SPB decision was issued on May 5, 1987, more than six months before the February 8, 1988 filing date of this charge. However, Mr. Moore claims that the statute of limitations was tolled during the period during which he attempted to get the union to represent him in the arbitration because some of the issues were the same and the remedy, reinstatement, would be the same. The decision not to arbitrate was final on August 6, 1987. Six months from August 6, 1987 was February 6, 1988, a Saturday. Thus, the final date for filing a charge relating to the decision not to arbitrate was February 8, 1988, the first working day following the Saturday, and the charge was filed on that date. (See PERB Regulation 32130(b).)

However, the statute of limitations is only tolled when a procedure is followed which will put the charged party on notice that the charging party has a grievance and exactly what

that grievance is. The arbitration proceeding involved the decision of the employer to terminate Mr. Moore. Mr. Moore has alleged no facts which show that the union was on notice during that period that Mr. Moore believed the union had violated the duty of fair representation in its representation of him before the SPB. Hence, it does not appear that the statute of limitations was tolled during the period Mr. Moore sought to bring his grievance to arbitration. Therefore, the allegations regarding the representation at the SPB hearing are untimely.

No Breach of the Duty of Fair Representation

Even assuming that the charge with regard to the representation at the SPB is timely, it does not state a prima facie case as currently written. In California Correctional Peace Officers Assoc. (1987) PERB Decision No. 657-S, the Board upheld the dismissal of a similar charge in which a state employee sought "a reasonable accommodation" to his disability from the SPB, and felt that his union did not adequately represent him in that forum. Essentially, this case stands for the proposition that there is no duty of fair representation for extra-contractual remedies such as those pursued through the SPB. Furthermore, there is no duty of fair representation even though the union voluntarily takes a case it has no duty to pursue. (See Archer v. Airline Pilots Association International (9th Cir. 1979) 609 F.2d 934, 102 LRRM 2827, 2830, cert. den. (1980) 446 U.S. 953). In American Federation of Government Employees v. De Grio (1985 Ct. App. Fla.) 116 LRRM 3298, 3300-1, however, the court held that though a union had no duty of fair representation when it voluntarily undertook to represent a nonmember in a discharge case, it did have a duty to exercise due care in his representation under the common law of negligence and the employee would be allowed to seek damages in a civil action in court. Furthermore, the duty which a union representative owes to a member is not one of attorney to client, nor does the union representative necessarily violate the duty of fair representation by failing to perform at the level of a competent attorney. See e.g. Beverly Manor Convalescent Center (1977) 229 NLRB 692, n.2 [95 LRRM 1156]. Applying this law to the facts alleged, Mr. Moore has not made a prima facie case because the representation was not by a lawyer, was before the SPB, and was voluntarily undertaken. However, Mr. Moore may have a cause of action in court.

As to the decision not to take the discrimination charge to arbitration, the facts alleged also do not support a prima facie case of failure to carry out the duty of fair

representation. The facts alleged must indicate that the union, while acting within the scope of its duty as an exclusive representative, acted arbitrarily, discriminatorily, or in bad faith. (United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258.

> 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.

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 Assoc, CTA/NEA (Reyes) (1983) PERB Decision No. 332.) Here, the charge and its attachments show that the union convened not one but two arbitration committees, the second one with entirely uninvolved individuals, both of which rejected the request for arbitration. The letters detailed the reasons therefor, which included that the grievance is not winnable because the evidence of anti-union motivation was too weak and the two independent complaints against Mr. Moore were extremely serious. The facts alleged do not show a prima facie case of a violation of the duty of fair representation because they fail to indicate any arbitrary, discriminatory or bad faith action on the part of the union.

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 April 4, 1988, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (415) 557-1350.

Sincerely.

ANDREA BIREN
Staff Attorney