

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN J. PEARCE,)	
)	
Charging Party,)	Case No. SF-CO-339
)	
v.)	PERB Decision No. 695
)	
AMERICAN FEDERATION OF TEACHERS,)	July 28, 1988
LOCAL 2121,)	
)	
Respondent.)	
_____)	

Appearances: John J. Pearce, on his own behalf; Robert J. Bezemek, Attorney, for American Federation of Teachers, Local 2121.

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

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by the charging party of the Board agent's dismissal, attached hereto, of his charge that the respondent violated section 3543.6(b) of the Educational Employment Relations Act (EERA).¹ While, inter alia, charging party

¹EERA is codified at Government Code section 3540 et seq. Section 3543.6 reads, in pertinent part, as follows:

It shall be unlawful for an employee organization to:

.

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

alleged that respondent handled his grievance in a perfunctory manner, we do not find the conduct of respondent in this case to be perfunctory or arbitrary.²

The unfair practice charge in Case No. SF-CO-339 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD

²See also, Los Angeles City and County School Employees Union, Local 99 (Morgan) (1987) PERB Decision No. 645.

PUBLIC EMPLOYMENT RELATIONS BOARD



Son Francisco Regional Office
177 Post Street Suite 900
SAN Francisco, CA 94108-4737
(415) 557-1330



March 17, 1988

John Pearce

Re: John Pearce v. American Federation of Teachers. Local
2121;
Unfair Practice Charge No. SF-CO-339

Dear Mr. Pearce:

In the above-referenced charge, you allege that the American Federation of Teachers, Local 2121 (AFT or Federation) breached its duty of fair representation in violation of section 3543.6(b) of the Educational Employment Relations Act (EERA or Act). On December 17, 1987, you submitted an amended charge in this case. Specifically, you allege that the Federation failed to subpoena documents regarding student retention rates and hiring practices of the San Francisco Community College District (District). You also assert that the Federation failed to consult with the chairperson of the District's mathematics department and accepted the math department's version of the facts. The amended charge also contends that AFT Staff Secretary Chris Hanzo failed to meet with you during the seven month hiatus between the informal and formal steps of the grievance machinery and failed to file a grievance based on age discrimination.

For the reasons set forth below as well as for those set forth in my letter to you dated November 25, 1987, attached hereto, the instant unfair practice charge does not allege sufficient facts to sustain a claim that the Federation acted contrary to its duty of fair representation.

The underlying dispute in this matter concerns the District's failure to hire you for a full-time position in the math department in the spring of 1986. The basis for your opinion that the District was obligated to do so rests on Article 12 of the negotiated agreement between the District and AFT.

Article 12 permits upgrading of faculty members with less than a full-time teaching load and, in paragraph D, states in pertinent part as follows:

Employees of the District will be given
first consideration when additional hours
are available for assignment.

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The upgrading procedure requires that part-time unit members who are candidates for the positions offered be interviewed prior to outside candidates. Thereafter, a subgroup of qualified candidates is presented to the hiring committee from which a selection is eventually made.

In your case, you were not among the qualified candidates submitted for consideration to the hiring committee. You approached the Federation and a grievance was filed on your behalf. The instant unfair practice charge concerns the manner in which the Federation handled your grievance and their decision not to pursue this matter to arbitration.

In this amended charge, you claim that the Federation failed to subpoena student retention rates or hiring data and thereby violated its duty of fair representation. While there is no provision in the contract entitling AFT to subpoena these records, the Federation is entitled to information that is necessary to enforce its contractual obligation with the District. Stockton Unified School District (1980) PERB Decision No. 143. While the retention data you sought is supportive of your claim that you are an instructor capable of retaining a great percentage of students in your classroom through the duration of the semester, the Federation's failure to collect the retention data does not indicate that your grievance was handled in a perfunctory manner. If the contract provision required the District to select the inside candidate with the best retention rates and the union failed to request such information, then a strong case could be made to support the contention that the union acted unlawfully. This is not the case here and the Federation's failure to collect data you deemed essential to your case does not equate with perfunctory conduct.

Similarly, the hiring data you sought would allegedly have demonstrated that the District had not hired inside instructors to full time positions. While this data may have been helpful to your case, the contract provision on which your grievance was based does not restrict the District's right to hire outside candidates but only requires that the District give such qualified candidates first consideration. Thus, the fact that the Federation failed to collect this data does not constitute conduct that is arbitrary, discriminatory or in bad faith.

Your claim that the Federation failed to meet with the chairperson of the math department does not amount to conduct violative of the duty to provide fair representation. There is no requirement that the union conduct its investigation of a grievance in a particular manner so long as the grievance representation is not perfunctory. The allegations set forth in the charge indicate that you met with Hanzo and discussed your grievance with him on several occasions. You were represented by AFT at the informal and formal stage of your grievance. In sum, while you may have wished that Hanzo meet with a certain individual, his failure to do so does not rise to a duty of fair representation breach.

Your amended charge alleges that the Federation acted unlawfully because seven months elapsed between the informal and formal stages of the grievance procedure. While certain delays in grievance handling may evidence perfunctory handling of an employee's claim, those situations are those where some harm results in the delay. San Francisco Classroom Teachers Association (Bramell). (1984) PERB Decision No. 430. In this case, you have alleged no facts to support the claim that this delay worked to your disadvantage. Absent any such showing, delay in grievance processing does not meet the standard necessary to demonstrate conduct violative of the Act.

The upgrading provision of the contract entitled you and other teachers with less than a full-time load to "first consideration". This does not mean that inside part-time instructors must be selected over outside candidates. Moreover, even if the contract provision is read to mean that an inside candidate must be selected if he/she is as qualified as an outside candidate, you were not among the subgroup of qualified candidates whose names were submitted to the hiring committee. In light of this, the facts you allege with regard to the upgrading provision do not demonstrate how the Federation's conduct was arbitrary, discriminatory or in bad faith.

The restrictions imposed on the District's hiring process stem from its contractual obligation. In other words, at a minimum, it must be demonstrated that the District violated some grievable contract provision in order for you to prevail. The propriety of the Federation's conduct in declining to arbitrate

your grievance must be judged in light of those contractual rights on which your claim rests. The Federation's appraisal of your case necessarily must look to the applicable contract provisions, the District's obligations thereunder and the likelihood of proving that the District's conduct departed from that contractually required. The Federation is not required to pursue meritless claims. Los Angeles Unified School District (1985) PERB Decision No. 526. Based on the language of the upgrading article and the facts surrounding the selection in the spring of 1986, I cannot conclude as a matter of law that AFT's decision not to pursue your grievance to arbitration was devoid of honest judgment.

Finally, the amended charge refers to the failure of the Federation to pursue an age discrimination grievance on your behalf. The contract between AFT and the District does not permit such a grievance. Article 5, paragraph B states in pertinent part:

The Grievance Procedure herein may not be used for any claims arising hereunder for which another administrative forum, such as the Equal Employment Opportunities Commission or Fair Employment Practices Commission is provided by law.

In light of this language, it cannot be said that AFT's failure to file an age discrimination grievance on your behalf was a breach of the Federation's duty. Moreover, there is no indication in your charge on what factual basis you believed an age discrimination cause of action could be made out. For these reasons, there is no merit to your allegation that the Federation violated its duty of fair representation because it failed to file such a grievance.

In sum, the conduct complained of fails to satisfy the standards used to judge union conduct. While you may have hoped that AFT had conducted its investigation otherwise or that the Federation would have decided to arbitrate your grievance, the facts as you have described them fail to cross the line into the area of impermissible, and unlawful conduct.

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).

John Pearce
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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 _____
Carol A. Vendrillo
Staff Attorney

Attachment

CC:

PUBLIC EMPLOYMENT RELATIONS BOARD

Son Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350



November 25, 1987

John Pearce

Re: John Pearce v. American Federation of Teachers. Local
2121;
~~Unfair Practice Charge SF CO 339~~

Dear Mr. Pearce:

I am in receipt of the above-referenced charge in which you allege that the American Federation of Teachers, Local 2121 (AFT or Federation) breached its duty of fair representation in violation of section 3543.6(b) of the Educational Employment Relations Act (EERA or Act).

My investigation of this charge has revealed the following facts. The Federation is the exclusive representative of all certificated employees of the San Francisco Community College District (District). You are currently employed as a part-time instructor in the mathematics department of the District and have been so during all times pertinent herein. In the spring of 1985, you received an evaluation of your teaching qualifications. Among those participating in the evaluation process was the Chairperson of the math department, Frank Cerrato. You were again evaluated in the Fall of 1985.

In the Spring of 1986, two full-time positions were available in the department. You were not notified of these vacancies, however, you submitted an application and were interviewed. Prior to the interview which took place on April 26, 1986, you had a conversation with Guy de Primo, a member of the hiring committee. You told de Primo that, unlike other District employees, your interview was scheduled for the second week rather than the first. According to you, de Primo said that you were probably lucky because some things affect hiring decisions that shouldn't, such as age. He said that those interviewed during the first week are often forgotten by the time the candidate is chosen. Article 5 of the negotiated agreement between the San Francisco Community College District and the American Federation of Teachers Local 2121 prohibits discrimination based on age in Section 5.A.

In preparation for your interview, you asked Leon Luez, a member of the math department, to write a letter on your behalf. He did so but you were disappointed in what Luez wrote. He indicated that your performance in the classroom that he had observed was satisfactory. You allege that Luez was AFT treasurer at the time he wrote this letter and that this fact later influenced the Federation's decision regarding arbitration.

You were not selected for the instructor positions and you approached the Federation to ask about the possibility of filing a grievance. When you first spoke to AFT Staff Secretary Chris Hanzo, he was very encouraging and told you he thought your case had merit. You also allege that Hanzo said that there were people in the Federation who did not think that the union should get involved in helping part-time teachers get upgraded to full-time instructors. He also told you that there was no chance of winning your case at either the informal or formal level and that you had to go to arbitration to win.

On a subsequent occasion, you spoke to Steve Levinson, a member of AFT's grievance committee. You allege that Levinson was very discouraging. He told you that filing a grievance would only stir up ill will and that Cerrato could discredit you and destroy your chances of getting a job anywhere. You state that Levinson told you that the math department was very tight knit and that the District prided itself on always going to the outside to fill their full-time positions. You state that Levinson's office is in the same building and on the same floor as the math department and you feel that his attempt to discourage you from challenging the math department was affected by his friendship with these individuals.

The informal stage of the grievance was conducted on June 9, 1986. Hanzo attended as your representative. About this time, you learned that the permanent vacancy was filled by an employee who had been a full-time temporary employee the previous year. The temporary portion was filled with someone not previously an employee of the District. A third position was added during the summer and was filled by someone who had previously been a full-time temporary employee. Article 12 of the negotiated agreement contains a provision regarding upgrading. It provides that affirmative action, seniority, job performance, credentials, training, experience in the field, special job-related skills and District needs shall be considered in all decisions regarding upgrading. It also

provides that employees of the District will be given first consideration when additional hours are available.

After the informal level meeting, you state that you called Hanzo on a monthly basis. You allege that Hanzo had become guarded and unresponsive and would not meet with you to discuss developments you believed were important. These facts included a high student retention rate in your calculus class, an award received by one of the professors who had written a recommendation on your behalf and numerous letters of support you had received from students. You state that Hanzo claimed District representative Ron Lee was stalling. In any event, the formal stage was not conducted until January 6, 1987, seven months after the informal meeting.

Hanzo again was your representative at the formal stage of the grievance. You met with Hanzo about one hour before your meeting with Natalie Berg. This was the first meeting with Hanzo since June. You spoke to him about Edward Walsh, a teacher in the math department who had criticized your teaching abilities. You allege that Hanzo said that Walsh was a great guy and that he was active in the union. The District's response to the formal step of the grievance was to admit that it had failed to properly notify you of the positions. The remaining allegations raised in your grievance were denied.

Thereafter, Hanzo agreed to submit two grievances to arbitration. Those concerned the evaluation and the upgrading issues. Initially, he declined to submit those grievances regarding an allegation of reprisal, age discrimination and violations of the contractual provisions regarding personnel files. You were able to convince Hanzo to include the reprisal claim among the grievances submitted to arbitration, however, he told you that the age discrimination claim was too hard to prove.

On or about February 25, 1987, you met with Hanzo in order to provide him with documents related to your case. Among the materials were a large number of letters of support from your students. You believe Hanzo was impatient at having to copy such a large number of documents. At this point, Hanzo began discussing preparation for an appeal of a decision on the part of AFT not to proceed with your case to arbitration. In sum, you began to sense that it was a foregone conclusion that the union would not take your case to arbitration.

On or about March 2, 1987, Hanzo informed you that the grievance committee meeting had been rescheduled for March 5, 1987. This rescheduling posed some difficulty for you since you had a three hour class the night before the meeting.

On or about March 4, 1987, Hanzo called you and indicated it was his recommendation that your case not be taken to arbitration. On March 5, 1987, you addressed the executive board in order to appeal their decision earlier that afternoon not to take your case to arbitration. You spoke to the board for approximately 15 minutes. At that point, you were advised by the AFT president that you should finish up your presentation quickly. Based on your experience before the board, you were not of the opinion that your appeal would be given serious consideration. One member of the board, Levinson, stated that full-time faculty members wonder what is wrong with the part-time teachers who continue to return to the District year after year.

On or about March 11, 1987, you received a letter from AFT indicating that your appeal had been denied. You were directed to telephone Roger Scott, a member of the grievance committee, about possible ways to resolve your grievances. It is your claim that Scott later told you that he was not a member of the grievance committee that year. After several attempts, you were able to contact Scott on or about March 18, 1987. You indicate that Scott pointed out two legal weaknesses in your case. He indicated that the District's failure to notify you of the job opening had not caused you to suffer actual damage since you learned of the job elsewhere and were interviewed. Scott also told you that since you had not been a finalist in the selection process, the legal remedy would not be immediate promotion to a full-time position. Scott suggested three avenues to pursue that might resolve your grievance. He proposed a meeting with yourself, Cerrato, and one other full-time math teacher. During this meeting, Scott suggested that participants might review your qualifications and discuss things in a more rationale manner. Scott also suggested that you apply for a new full-time position then being offered by the math department. He also suggested that you apply for jobs elsewhere.

On or about March 24, 1987, Scott called you and said he had met with Cerrato and Walsh the previous day. Scott proposed a meeting, however, Cerrato refused to meet. You also allege that Scott spoke to Walsh at this time and Walsh indicated that, while you were unquestionably very bright in math, that

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November 25, 1987

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did not make you a good teacher. Also on this date, you received a letter from the District indicating that all full-time positions for the fall of 1987 had been canceled.

Based on the foregoing, the charge as presently written does not state a prima facie violation of EERA for the reasons that follow. Section 3544.9 imposes on the employee organization recognized or certified as the exclusive representative a duty to fairly represent each and every employee in the bargaining unit. The Board has concluded that a union breaches its duty of fair representation if it acts arbitrarily, discriminatorily or in bad faith. Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124. The Board has adopted the ruling of the United States Supreme Court in Vaca v. Sipes (1976) 386 U.S. 171. In that decision, the Supreme Court declared that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. In this case the factual allegation relevant to the manner in which AFT handled your grievance concerns the fact that Hanzo failed to meet with you until the day of the formal meeting. This allegation, without more, does not demonstrate that your grievance was handled in a perfunctory manner.

In relying on the Vaca decision in cases arises under the EERA, the Board has also held that an individual employee does not have an absolute right to have his/her grievance taken to arbitration. The Board will dismiss charges that the duty of fair representation has been breached if a union has made a honest, reasonable determination that a grievance lacks merit. Modesto Teachers Association (Lagos) (1986) PERB Decision No. 576; Sacramento Teachers Association (Fanning) (1984) PERB Decision No. 428. In this case, your allegations do not demonstrate that AFT's decision not to pursue your grievance to arbitration was devoid of honest judgment. The fact that Hanzo first believed your case had merit and thought otherwise thereafter is not sufficient reason to question AFT's decision not to pursue arbitration in your case. Hanzo's subsequent impressions were consistent with those of Levinson who was discouraging and pointed out the potential pit falls in your case.

The major contention you raise discrediting the union's assessment of your case concerns the animosity between the full-time and part-time instructors. You have indicated that within the mathematics department, membership in AFT is high. You have made several suggestions as to why this internal animosity affected AFT's decision to pursue your case to arbitration. However, the fact that Luez was AFT treasurer at the time he wrote the letter of recommendation is not linked in

any way to the Federation's decision regarding your arbitration. Nor does the fact that Levinson told you of the math department's propensity to fill full-time positions from the outside relate to AFT's decision to pursue arbitration. Finally, neither does the proximity of Levinson's office to the math department.

In addition, my review of the merits of your case further dispels your claim that AFT's decision not to pursue your grievance to arbitration was arbitrary, discriminatory or motivated by bad faith. AFT's analysis that your upgrading grievance would be difficult to prove is not unfounded. The contract provision upon which you rely appears in Article 12, paragraph D. In pertinent part, it states that employees of the District will be given first consideration when additional hours are available for assignment. Aside from the scheduling of in-house applicants during the first week, a matter de Primo thought was a disadvantage, you have alleged no facts suggesting a breach of that provision. Moreover, Article 12, paragraph B, includes numerous factors to be considered in all decisions involving upgrading. Given the arguable nature of your contract claim, it is difficult to conclude that AFT's decision not to pursue your case to arbitration lacked reasoned judgment. In sum, I do not find from all the factual allegations raised in this charge sufficient evidence to indicate arbitrary, discriminatory, or bad faith conduct.

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 December 4, 1987, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (415) 557-1350.

Sincerely,

Carol A. Vendrillo
Staff Attorney

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