STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GARY CAVIGLIA, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715, AFL-CIO, Respondent.	)	Case No. SF-CO-490 PERB Decision No. 1116 September 14, 1995

Appearances; Gary Caviglia, on his own behalf; Van Bourg, Weinberg, Roger & Rosenfeld by Vincent A. Harrington, Jr., Attorney, for Service Employees International Union, Local 715, AFL-CIO.

Before Carlyle, Johnson and Caffrey, Members.

DECISION AND ORDER

CAFFREY, Member: This case is before the Public Employment Relations Board (Board) on an appeal of a Board agent's dismissal (attached) of an unfair practice charge filed by Gary Caviglia (Caviglia). In his charge, Caviglia alleged that the Service Employees International Union, Local 715, AFL-CIO (SEIU) violated section 3543.6(c) of the Educational Employment Relations Act (EERA) when it failed to respond to his complaints about representation matters. The Board agent also considered whether by this conduct SEIU breached its duty of fair representation to Caviglia guaranteed by EERA section 3544.9, thereby violating section 3543.6(b).[1]

[1]EERA is codified at Government Code section 3540 et seq. EERA section 3544.9 states:

The Board has reviewed the entire record in this case, including the warning and dismissal letters, the unfair practice charge, Caviglia's appeal and SEIU's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SF-CO-490 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Carlyle and Johnson joined in this Decision.

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

EERA section 3543.6 states, in pertinent part:

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

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

July 13, 1995

Gary Caviglia

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Gary Caviglia v. Service Employees International Union. Local 715. AFL-CIO
Unfair Practice Charge No. SF-CO-490

Dear Mr. Caviglia:

The above-referenced unfair practice charge, filed on April 24, 1995, alleges that the Service Employees International Union, Local 715, AFL-CIO (SEIU) failed to respond to a complaint letter filed by Gary Caviglia regarding improper representation in a dispute with the Morgan Hill Unified School District (District). This conduct is alleged to violate Government Code section 3543.6(c) of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated June 27, 1995, 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. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to July 11, 1995, the charge would be dismissed.

On July 10, 1995, Caviglia submitted a letter containing corrections to the statement of facts set forth in the June 27, 1995 letter.

Caviglia indicates that the December 19, 1994 letter from the District was not a notice that it intended to proceed with terminating his employment. Rather it was a notice that the District intended to recoup its alleged overpayment resulting from his leaving work early. Nevertheless, Caviglia was aware of the District's intent to terminate. Caviglia's decision not to contest the termination occurred after SEIU advised him against an appeal.

Caviglia alleges that SEIU's failure to represent him was evident from its failure to give him advice with respect to the December 19 letter or explain to him what its contents were. The telephone receptionist for SEIU seemed irritated that he would want to speak to a representative about the letter before

receiving it. She advised him to open the letter and, if it were important, notify SEIU. In addition, when his representative, Kazi Fried, was out of the office on leave, he would be transferred to another representative who was too busy to keep the momentum going in his settlement discussions with the District designed to avoid termination. He was not provided updates on these discussions.

On January 11, 1995, SEIU's executive board met and decided not to challenge the District's demand that Caviglia resign, but to negotiate a settlement instead. Fried put the SEIU chapter president in charge of his case while she was gone for the next four days, without notifying him of the change. On January 12, 1995, the District presented Caviglia with an ultimatum: that he resign by January 13, or face termination. Caviglia tried unsuccessfully on several occasions on January 13 to reach the chapter president by telephone to obtain advice, but was forced to leave messages. It is not clear how he knew to contact the chapter president if he did not receive notice of the substitution.

In any event, unable to reach the chapter president on January 13, Caviglia talked to two SEIU stewards who were unwilling to advise him or be a witness to his discussion with the District. He was concerned that prior tentative verbal agreements surrounding the resignation, not committed to writing, would not be honored by the District if he submitted the resignation letter. He submitted the resignation letter under duress. The subsequent letter, in which Caviglia sought to postpone the effective date of resignation to January 31 was submitted the same day (January 13, not January 31), after he decided he should pursue his objective in negotiations of a later resignation date --an objective that he and SEIU had earlier agreed to pursue.

Caviglia alleges that throughout the course of the events he promptly answered telephone messages left by SEIU but that SEIU did not respond in kind.

Although Caviglia alleges new facts indicating a lack of diligence on the part of SEIU in pursuing objectives on his behalf in the negotiations for an alternative to termination, these allegations are insufficient to establish that the SEIU acted in an arbitrary, discriminatory or bad faith manner with respect to its representation of him. The critical decision (i.e., recommendation that he not appeal the termination) appears to have been made on the basis of the improbability of prevailing in the appeal, and therefore was properly based on an assessment of the merits of the case. (Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Dec. No. 332.)

While it can certainly be argued that Caviglia would not have faced the District's ultimatum to resign had SEIU been more diligent in reaching closure on a settlement, there is no guarantee that such added diligence would have altered the outcome. Nor is that the appropriate test for a breach of the duty of fair representation. The result in this case that was unacceptable to Caviglia could also have stemmed from the apparent lack of leverage that he and SEIU had with respect to the District's alleged basis for terminating him, or simply the District's unwillingness to compromise. Accordingly, the charge does not establish a prima facie violation of the EERA. (United Teachers of Los Angeles (Collins) (1983) PERB Dec. No. 258.)

Therefore, I am dismissing the charge based on the facts and reasons stated above and those contained in my June 27, 1995 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. (Cal. Code of Regs., tit. 8, sec. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 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 (3) 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. (Cal. Code of Regs., tit. 8, sec. 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,

ROBERT THOMPSON
Deputy General Counsel

By _____
DONN GINOZA

Regional Attorney

Attachment

cc: Vincent A. Harrington, Jr.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)557-1350

June 27, 1995

Gary Caviglia

Re: **WARNING LETTER**
Gary Caviglia v. Service Employees International Union, Local 715. AFL-CIO
Unfair Practice Charge No. SF-CO-490

Dear Mr. Caviglia:

The above-referenced unfair practice charge, filed on April, 24, 1995, alleges that the Service Employees International Union, Local 715, AFL-CIO (SEIU) failed to respond to a complaint letter filed by Gary Caviglia regarding improper representation in a dispute with the Morgan Hill Unified School District (District). This conduct is alleged to violate Government Code section 3543.6(c) of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. Caviglia was employed as a custodian by the District prior to his resignation in January 1995. In a memorandum to Caviglia dated December 6, 1994, the District accused Caviglia of leaving one hour and twenty minutes early every night for four months. The District also demanded return of the alleged overpayment, calculated at $11.37 per hour for 77 hours. Caviglia was represented in a "Skelly" hearing by SEIU steward Jesus Estrada on December 12, 1994. By letter dated December 19, 1994, the District informed Caviglia that it would proceed with its intended termination, effective January 13, 1995. SEIU voted not to support Caviglia in an appeal of the termination.

According to SEIU, Caviglia indicated that he would not contest the termination but wished to negotiate a substitute result. SEIU negotiated an agreement whereby the resignation date was extended to January 20, 1995, Caviglia would receive unemployment benefits, vacation pay and wages from January 1 through January 20, 1995. Caviglia alleges that telephone calls and questions were rarely answered during the first two weeks of January 1995 during the settlement negotiations. He further alleges that SEIU failed to support him when he was reluctant to sign for a certified letter from the District, apparently, announcing its decision to proceed with the termination. He also claims that SEIU was not diligent in pursuing his desired terms of settlement, lost momentum in the negotiations, and failed to achieve a satisfactory result.

SEIU provided to the undersigned a copy of a handwritten memorandum purporting to be from Caviglia to Lee Cunningham, Director of Personnel, file stamped on January 13, 1995, stating that his resignation date would be January 20, 1995. In a subsequent memorandum, Caviglia wrote to Cunningham the following: "I was in error on my resignation date. It should read . . 'Effective 31 January 1995.'" This memorandum was left on Cunningham's desk on January 31, 1995.

In response to this change, the District took the position that it was excused from performance of the initial settlement agreement based on Caviglia's breach of its terms and consequently withheld $843.92 (the amount it contended was owed by Caviglia) from Caviglia's final paycheck.

SEIU representative Kazi Fried spoke to Cunningham on February 3, 1995 regarding the matter. According to SEIU, the District proposed to restore the deducted amount if Caviglia would agree to a repayment plan. SEIU refused to accept this offer and insisted on the original terms of the agreement. SEIU claims that it left a telephone message for Caviglia conveying this settlement offer but did not receive any return communication until the complaint letter of March 25, 1995, described below.

By letter dated March 25, 1995, Caviglia complained to SEIU President Marlene Smith that the District had yet to repay the $843.92 and had incorrectly calculated his pay for the month of January 1995. The figure was short between $126.70 and $190.52. According to Caviglia, Fried told him that Cunningham had admitted that deduction of the $843.92 was illegal and that the money would be restored. Caviglia also contends that the accrued vacation check issued to him was grossly miscalculated.

SEIU contends that it continues to attempt to achieve a voluntary settlement from the District regarding these issues, but contends that regardless of the outcome, it has not breached its duty of fair representation.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the EERA for the reasons that follow.

Caviglia lacks standing to allege that the SEIU has failed to meet and negotiate in good faith with the District in violation of section 3543.6(c). In Oxnard Education Association (Gorcey) (1988) PERB Dec. No. 664, the Public Employment Relations Board (PERB) held that a charge of a refusal by the exclusive representative to bargain in good faith must be brought by the employer, and cannot be brought by an individual employee since

the employee organization's duty to bargain is owed to the employer, not to the individual unit employees. PERB went on to note that the employee could address the dispute through a claim of a breach of the duty of fair representation.

In order to state a prima facie violation regarding a breach of the duty of fair representation with respect to grievance representation, which appears to be in issue here, the Charging Party must show that SEIU refused to process a meritorious grievance for arbitrary, discriminatory, or bad faith reasons. In United Teachers of Los Angeles (Collins) (1983) PERB Dec. No. 258), the 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. [Citations.]
>
> 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.

It has also been stated that in order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a 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 rational basis or devoid of honest judgment. (Emphasis added.)" (Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Dec. No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Dec. No. 124.)

The charge fails to allege sufficient facts from which it can be concluded that a prima facie violation occurred under the standards articulated above. There is insufficient evidence to demonstrate that SEIU failed to pursue a meritorious grievance, or if it did, that it did so for arbitrary, discriminatory, or bad faith reasons.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. 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 **July 11, 1995.** I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

DONN GINOZA
Regional Attorney