STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOSE ANTONIO COOKE, Charging Party,	)	Case No. LA-CO-778
v.	)	PERB Decision No. 1306
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 99, Respondent.	)	January 14, 1999

Appearance; Jose Antonio Cooke, on his own behalf.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by Jose Antonio Cooke (Cooke) of a Board agent's dismissal (attached) of his unfair practice charge. In his charge, Cooke alleged that the Service Employees International Union, Local 99 breached the duty of fair representation guaranteed by section 3544.9 of the Educational Employment Relations Act (EERA) and thereby violated EERA section 3543.6(b)[1].

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

> 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.

Section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee organization to:

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

ORDER

The unfair practice charge in Case No. LA-CO-778 is DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.

(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.

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) 439-6940

October 8, 1998

Jose Antonio Cooke

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
Jose Antonio Cooke v. Service Employees International Union, Local 99
Unfair Practice Charge No. LA-CO-778; First Amended Charge

Dear Mr. Cooke:

The above-referenced unfair practice charge, filed September 1, 1998, alleges the Service Employees International Union (SEIU) breached its duty of fair representation by failing to represent you regarding your termination. You allege this conduct violates Government Code section 3544.9 and 3543.6 of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated September 16, 1998, 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 September 23, 1998, the charge would be dismissed. I later extended this deadline to September 30, 1998.

On September 30, 1998, I received a first amended charge. The amended charge addresses only your contention that SEIU owed you a duty of fair representation at your termination hearing and subsequent appeals. However, the amended charge fails to address the statute of limitations issue noted in my September 16, 1998, letter.

Government Code section 3541.5(a)(1) prohibits the Board from issuing a complaint in respect of any alleged unfair practice charge occurring more than six months prior to the filing of the charge. Facts provided demonstrate SEIU rejected your request for representation in November 1995, nearly three (3) years ago. As such, the charge is time barred and must be dismissed.

Rather than addressing the statute of limitations argument, Charging Party argues SEIU owes him a duty of fair representation for the following reasons: (1) SEIU represented other employees who had failed drug and alcohol tests and (2) the duty of fair representation should extend to noncontractual remedies. Charging Party also contends SEIU discriminated against him because he signed a severance petition years ago.

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

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
Kristin L. Rosi
Regional Attorney

Attachment

cc: Janett Humphries, President

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415)439-6940

September 16, 1998

Jose Antonio Cooke

Re: **WARNING LETTER**
Jose Antonio Cooke v. Service Employees International Union, Local 99
Unfair Practice Charge No. LA-CO-778

Dear Mr. Cooke:

The above-referenced unfair practice charge, filed September 1, 1998, alleges the Service Employees International Union (SEIU) breached its duty of fair representation by failing to represent you regarding your termination. You allege this conduct violates Government Code section 3544.9 and 3543.6 of the Educational Employment Relations Act (EERA or Act).

Investigation of the charge revealed the following. Until November 21, 1995, Charging Party was employed by the Los Angeles Unified School District (District) as a Permanent Light Duty Bus Driver. At all times relevant herein, SEIU has been the exclusive representative of classified Unit C, which includes the Bus Drivers. In 1990, 1993 and 1994, Charging Party filed an application to become a "full member" of SEIU. Charging Party contends SEIU "blocked" his application by intentionally misplacing the applications. In 1994, Charging Party turned in an application for full membership, and was accepted as a group member instead of an agency fee payer.

On October 31, 1995, Mr. Cooke was suspended by the District for twenty-one (21) days as a result of a random positive drug test.[1] On that same date, Charging Party contacted SEIU Local 99 and requested to speak with a representative regarding his suspension. He was informed that representatives were unavailable and that his call would be returned. Representatives

[1] Charging Party tested positive for cocaine use. Pursuant to past practice and policy, the District may conduct random drug tests on its drivers. (See, Los Angeles Community College District (1996) PERB Decision No. 1181; Los Angeles Community College District (1998) PERB Decision No. 1266.)

from SEIU failed to return Charging Party's call. On November 3, 1995, Charging Party filled out a request for representation form at the Local 99 office. SEIU representatives did not respond to his request at any time.

In early November 1995, Charging Party hired private attorney Greg Humphries to represent him in administrative hearings with the District's Personnel Commission. On November 13, 1995, the District held an Administrative Review regarding Mr. Cooke's termination. At this meeting, he was represented by Mr. Humphries. On November 27, 1995, the District informed Charging Party that the recommendation for dismissal would proceed to the Board of Education without modification.

In early 1996, Charging Party filed a civil action against the District in Los Angeles County Superior Court. Charging Party was again represented by Mr. Humphries. During this civil action, the District refused to provide Charging Party with several pieces of information.

In May 1996, Charging Party testified in a PERB hearing regarding a severance petition filed by District Bus Drivers. Charging Party was not employed by the District during his testimony, and the severance petition was denied by PERB.

On June 16, 1997, Charging Party sought assistance from the American Civil Liberties Union (ACLU). The ACLU referred Charging Party to several other agencies and suggested he retain private counsel. On August 18, 1997, Mr. Humphries withdrew his representational services, and Charging Party was substituted in as his own counsel.

On August 28, 1997, Charging Party sent two letters to SEIU, requesting the union represent him in his civil case and in the Personnel Commission appeals, pursuant to their duty of fair representation. On October 21, 1997, SEIU Interim Director, Paul Smith, informed Charging Party that SEIU would not represent him with regard to matters outside the collective bargaining process. SEIU also refused to pay Charging Party's attorney's fees.

On May 5, 1998, Charging Party again requested SEIU assistance in his appeal of the Personnel Commission's decision. SEIU again informed Charging Party that it would not represent him.

Based on the above stated facts, the charge as presently written, fails to state a prima facie violation of the duty of fair representation, for the reasons provided below.

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 3543.6(b). In order to state a prima facie violation of this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers

of Los Angeles (Collins). the Public Employment Relations Board 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.

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 Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

Charging Party contends SEIU failed to represent him because of his testimony in the PERB hearing and because of other alleged protected activities.

Government Code section 3541.5(a)(1) prohibits the Board from issuing a complaint in respect of any alleged unfair practice charge occurring more than six months prior to the filing of an unfair practice charge. PERB has applied the six-month bar to cases alleging a breach of the duty of fair representation, measuring the time that has elapsed between a specific event or conduct and the filing of the charge. (Los Angeles County Building and Construction Trades Council (1984) PERB Decision No„ 439.)

The statute of limitations begins to run on the date the employee, acting with reasonable diligence, knew or should have known that further assistance or response from the union was unlikely. (Los Rios Federation of Teachers (1991) PERB Decision

No. 889.) Repeated union refusals to process a grievance over a recurring issue does not start the limitations period anew. (California State Employees Association (Calloway) (1985) PERB Decision No. 497-S.)

In the instant charge, Charging Party knew or should have known as soon as late 1995 that SEIU would not represent him. SEIU did not return Charging Party's phone calls, nor did they respond to his request for representation. Moreover, in October 1997, SEIU reiterated its refusal to represent Charging Party. As Charging Party knew nearly two years ago that SEIU would not represent him, the charge is time barred and therefore fails to state a prima facie case.[2]

Even assuming the charge is not time barred, Charging Party's allegations fail to state a prima facie case. As SEIU itself noted, a union's duty of fair representation is limited to contractually based remedies under the union's exclusive control. As such, PERB has dismissed charges based on alleged union failures to pursue noncontractual administrative or judicial relief. (See, California Union of Safety Engineers (John) (1995) PERB Decision No. 1064-S (no duty of fair representation obligations attaches to disciplinary matter before the State Personnel Board).)

In the instant charge, Charging Party requested SEIU represent him in a matter before the District's Personnel Board. Facts presented demonstrate the Personnel Board in a noncontractual body that regulates some disciplinary matters. All employees are entitled to a Personnel Board hearing, pursuant to District regulations, not the collective bargaining agreement. As such, any employee may represent him or herself in front of the Board, and may seek outside legal representation. SEIU is not obligated to represent its bargaining unit members in this forum, and thus SEIU's refusal to assist Charging Party in this forum is not a violation of the EERA.

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

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[2] Although the May 1998 request for representation falls within the six month statute of limitations period, under Calloway, the union's refusal is simply a restatement of its earlier refusals. As such, the statute of limitations period does not start anew.

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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before September 23. 1998. I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

Kristin L. Rosi
Regional Attorney