**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| JEREMY PETERSON MARTIN, | ) | |
| | ) | |
| Charging Party, | ) | Case No. LA-CO-775 |
| | ) | |
| v. | ) | PERB Decision No. 1321 |
| | ) | |
| AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, | ) | April 2, 1999 |
| | ) | |
| Respondent. | ) | |
| | ) | |

Appearance: Jeremy Peterson Martin, on his own behalf.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION AND ORDER

AMADOR, Member: This case is before the Public Employment Relations Board (Board) on appeal by Jeremy Peterson Martin (Martin) to a Board agent's dismissal (attached) of the unfair practice charge. Martin alleged that the American Federation of State, County and Municipal Employees denied him the right to fair and impartial representation guaranteed by section 3544.9 of the Educational Employment Relations Act (EERA), in violation of EERA section 3543.6(b),[1] by failing to continue to appeal a

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

> 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:

grievance arbitration.

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

The unfair practice charge in Case No. LA-CO-775 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

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(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.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

September 25, 1998

Jeremy P. Martin

Re: Jeremy Peterson Martin v. American Federation of State, County and Municipal Employees
Unfair Practice Charge No. LA-CO-775
**DISMISSAL LETTER**

Dear Mr. Martin:

On August 10, 1998, you filed the above-referenced unfair practice charge in which you allege that the American Federation of State, County and Municipal Employees (AFSCME), violated the Educational Employment Relations Act (EERA) by failing to continue to appeal a grievance arbitration ruling of May 27, 1998. This charge is being analyzed as an allegation that AFSCME failed to adequately represent you in violation of 3543.6(b) and 3544.9.

I indicated to you, in my attached letter dated September 10, 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 18, 1998, the charge would be dismissed.

You were granted an extension of time to submit an amended charge. On September 21, an amended charge was received. In reviewing the additional materials you have submitted, you have not provided any additional facts to support your charge but rather you argue why you believe you were not well served by AFSCME or the arbitrator. As I pointed out in my warning letter, the NLRB looks for "blatant unfairness" in deciding if a union has violated its duty to represent by not appealing an arbitration award. Likewise PERB, in its Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, requires a Charging Party to provide sufficient facts to show why the exclusive representative's decision does not have "a rational basis" or is "devoid of honest judgement". You have not provided those facts. Therefore, I am dismissing the charge based on the facts and reasons contained in my September 10, 1998, 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
Roger Smith
Board Agent

Attachment

cc: Carol Wheeler

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

September
1998
Jeremy P. Martin

Re: Jeremy Peterson Martin v. American Federation of State, County and Municipal Employees
Unfair Practice Charge No. LA-CO-775
**WARNING LETTER**

Dear Mr. Martin:

On August 10, 1998, you filed the above-referenced unfair practice charge in which you allege that the American Federation of State, County and Municipal Employees (AFSCME), violated the Educational Employment Relations Act (EERA) by failing to continue to appeal a grievance arbitration ruling of May 27, 1998. This charge is being analyzed as an allegation that AFSCME failed to adequately represent you and thus as a violation of 3543.6(b) and 3544.9.

The investigation of the charge reveals that you filed a grievance regarding your termination from your position as a probationary Athletic Field/Equipment Manager II in April, 1997. The grievance raised a challenge to the evaluation procedures used by the District in terminating you from your position. Pursuant to Article 4 of the 1996-1999 written agreement between AFSCME and your former employer, Anaheim Union High School District (District), the grievance was processed to the final stage, an arbitration hearing at which AFSCME represented you. The hearing was held and the grievance was dismissed by the arbitrator's decision which issued on May 27, 1998.

The July 1, 1996 - June 30, 1999 written agreement between AFSCME and the District provides at Article 4.3.4.7 that "(t)he decision of the arbitrator, within the limits herein prescribed, shall be binding on the Union, the District and the grievant." It is your contention that the arbitrator exceeded the limits prescribed in the written agreement and that AFSCME should have appealed the decision pursuant to rules of the American Arbitration Association (AAA). Your argument points to Sections 4, 10 and 11 of the Federal Arbitration Act which provides grounds for granting rehearing if the arbitrator fails to consider the specific contract language or the award is based on materials not submitted to them. You further argue that a hard copy of the award was not received until more than a week after it allegedly issued. For all of these reasons you contend that AFSCME should

have challenged the arbitrator's decision which upheld your termination.

You contend that AFSCME chapter president, Terry Mitchell, sent a letter to the arbitrator on June 22, 1998, effectively withdrawing an appeal of the award. You contend that Mitchell did this without consulting with you. You further contend that lawyers for the District threatened retaliation against Mitchell and AFSCME if the letter withdrawing the appeal was not sent. Finally, you assert that the award should not stand because the arbitrator did not apply proper standards nor comply with the intent of the terms of the collective bargaining agreement.

You have alleged that the exclusive representative denied you the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 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) (1982) PERB Decision No. 258.) 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.]

In the instant charge, you make several allegations regarding how AFSCME handled your grievance. As previously stated, a decision not to continue to pursue a grievance, regardless of the merits of the grievance is not a violation of the duty of fair representation. (California State Employees Association (Calloway) (1985) PERB Decision No. 497-H.) Nor are case handling errors and simple negligence violations of the duty to fairly represent. (American Federation of State, County and Municipal Employees, Council 10 (Olson) (1988) PERB Decision No. 682-H.)

In this case, AFSCME processed the grievance through the final step of the grievance process, the arbitrator's award issued. You wanted AFSCME to challenge the award on procedural grounds either through AAA or the Courts. The chapter president decided not to. You contend that this was at the urging of the District.

The question of whether the union has a duty of fair representation after arbitration is discussed by The U.S. Court of Appeals, First Circuit, in Sear, et. al. v. Cadillac Automobile Company 107 LRRM 3218 (1981). The Court held that:

> . . . When a collective bargaining contract calls for final and binding grievance arbitration, as here, an arbitration decision is ordinarily final, for the employees have obtained what their union has bargained for. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599, 80 S.Ct. 1358, 1362, 4 L.Ed.2d 1424 (1960). The rule of judicial deference to such finality clauses is in part designed to encourage grievance arbitration and decentralized, informal settlement of industrial disputes. Id. at 596, 80 S.Ct. at 1360. The rule is important for "grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government". United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 80 S.Ct. 1347, 1350, 4 L.Ed.2d 1409 (1960).
>
> There is an exception to the "finality" rule where the union does not represent the employee properly at the arbitration proceeding. Then the employee did not

receive the remedy of arbitration that the contract promised him. Vaca v. Sipes, 386 U.S. 171, 185-86, 87 S.Ct. 903, 914, 17 L.Ed.2d 842 (1967) . But that exception is narrow. To take" advantage of it, the employee must show a union breach of duty that "seriously undermine(d) the integrity of the arbitral process". Hines v. Anchor Motor Freight, Inc., 424 U.S. at 567, 96 S.Ct. at 1057. He must show more than a "mere error in judgment" or "occasional instances of mistake", for "grievance processes cannot be expected to be error free". Id. at 571, 96 S.Ct. at 1059. He must establish that the union was guilty of "malfeasance", "dishonesty", "bad faith", or "discriminatory treatment", id. at 568-69, 571, 96 S.Ct. at 1058, 1059, or acted in a "perfunctory" or "arbitrary" fashion, Vaca v. Sipes, 386 U.S. at 190, 191, 87 S.Ct. at 916. See Comment, Employee Challenges to Arbitral Awards: A Model for Protecting Individual Rights Under the Collective Bargaining Agreement, 125 U.Pa.L.Rev. 1310, 1320 (1977).

(2) The burden that these terms are meant to impose upon a union member is particularly heavy if he attacks the union's failure to appeal from an admittedly fair arbitration proceeding a proceeding untainted by any union failure to represent its members in good faith. While we need not hold, as did the district court, that a union's failure to appeal could never breach its representational duty, it is obvious that courts ought to allow such actions, if at all, only in unusual instances where unfairness is blatant. See generally Tobias, Individual Employee Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation, 5 Toledo L.Rev. 515, 539-40 (1974) . Otherwise, the. threat of suit by disappointed members will too often lead unions, against their better judgment, to appeal arbitration awards to the courts. And, the advantages of grievance arbitration the informal, speedy, inexpensive nonjudicial settlement of disputes can be eroded.

You have provided no evidence to demonstrate that AFSCME's decision not to appeal the arbitrator's award constituted blatant unfairness.

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 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 18, 1998, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, extension 358.

Sincerely,

ROGER SMITH
Board Agent

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