STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANNETTE (BARUDONI) DEGLOW, Charging Party,	)	Case No. SA-CO-424
v.	)	PERB Decision No. 1350
LOS RIOS COLLEGE FEDERATION OF TEACHERS/CFT/AFT/LOCAL 2279, Respondent.	)	September 29, 1999

Appearance; Annette (Barudoni) Deglow, on her own behalf.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

AMADOR, Member: This case is before the Public Employment Relations Board (Board) on appeal by Annette (Barudoni) Deglow (Deglow) from a Board agent's partial dismissal (attached) of her unfair practice charge. As amended, the charge alleged that the Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Federation) breached its duty of fair representation in violation of section 3544.9 of the Educational Employment Relations Act (EERA).[1] The charge also alleged that the Federation interfered with her exercise of rights under EERA section 3543, thus violating EERA section 3543.6(b), when it

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3544.9 provides:

> 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.

failed to represent her in pursuing seven grievances challenging the Los Rios Community College District's (District) out-of-sequence evaluations of her during the Spring of 1998. In addition, the charge alleges that the Federation caused or attempted to cause the District to violate EERA section 3543.6(a).[2]

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[2]EERA section 3543 states:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
>
> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

EERA section 3543.6 states, in pertinent part:

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

ORDER

The partial dismissal charge in Case No. SA-CO-424 is hereby AFFIRMED.

Chairman Caffrey and Member Dyer joined in this Decision.

It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause a public school employer to violate Section 3543.5.

(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

June 25, 1999

Annette (Barudoni) DeGlow

Re: Unfair Practice Charge No. SA-CO-424
Annette (Barudoni) DeGlow v. Los Rios College Federation of Teachers/CFT/AFT/Local 2279
PARTIAL DISMISSAL LETTER

Dear Ms. DeGlow:

The above-referenced unfair practice charge, filed on December 7, 1998, alleges that the Los Rios College Federation of Teachers (Federation) caused or attempted to cause the Los Rios Community College District's (District) to violate the EERA in violation of EERA section 3543.6(a).

I indicated to you, in my attached letter dated May 19, 1999, 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 May 26, 1999, the charge would be dismissed. At your request, I extended this deadline to June 15, 1999.

On June 15, 1999, you filed an amended charge. You state that the purpose of the amended charge is to provide additional documentation to demonstrate that the District and the Federation have accepted your work-related disability, to demonstrate that the aforementioned grievances were meritorious, to reiterate your that the Federation breached its duty of fair representation, to demonstrate a connection between your protected activity and the Federation's decision not to represent you, and to update the record regarding the damage caused by the Federation's decision not to represent you. The charge allegations and arguments are discussed below.

In the fall of the 1997-98 school year, the District performed an evaluation of charging party. The District rated charging party "Needs Improvement" in 7 out of 17 categories, and rated charging party "Needs Improvement" overall. In addition, the evaluation committee recommended that charging party not be assigned to teach Math 52 (Geometry) again until her depth of knowledge of geometry could be documented. After some negotiations, the

Federation agreed to represent charging party in challenging the unfavorable evaluation.

During the Spring of 1998, the District informed charging party that it intended to re-evaluate her to determine whether to assign her to teach Geometry in the fall. The District informed charging party that she had the option to refuse the re-evaluation.

The District evaluated charging party on March 23, March 25, and 15, 1998. In July of 1998, charging party filed seven (7) grievances challenging the conclusions of this evaluation. Charging party requested Federation representation in pursuing those grievances. By letter dated July 10, 1998, the Federation declined to represent charging party in pursuing these grievances. The Federation indicated that an arbitrator had recently held that the collective bargaining agreement (CBA) permitted employees to grieve only procedural errors in the evaluation process. Since charging party's grievances challenged ratings and recommendations rather than procedural defects, the Federation decided not to pursue the seven grievances. Further, since each of the seven grievances concerned the same operable facts, the Federation determined that pursuing the grievances would place an unnecessary strain on its resources.

The amended charge alleges that the Federation's failure to represent charging party in her grievances either caused or was an attempt to cause the District to violate the EERA. In order to state a violation of EERA section 3543.6 (a), a charge must allege facts demonstrating how and in what manner the Federation caused or attempted to cause the District to violate the EERA. (American Federation of State, County and Municipal Employees (Waters) (1988) PERB Decision No. 697-H; California School Employees Association (Kotch) (1992) PERB Decision No. 953.)

The charge does not provide facts which demonstrate how or in what manner the Federation caused or attempted to cause the District to discriminate or retaliate against charging party. Further, the charge provides no support for the interesting proposition that the failure to pursue a grievance could actually be the cause of the allegedly grievable conduct. PERB case law, including those cases noted above, indicate that a union must take affirmative actions in its attempt to cause an employer to violate the EERA. The facts alleged in the charge fail to demonstrate that the Federation affirmatively caused or attempted to cause the District to discriminate against you. Accordingly, this allegation is dismissed.

Based on the facts and reasons contained herein and in my May 19, 1999 letter, the this portion of charge is dismissed.

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 Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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 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 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c) .)

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 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
Charles Sakai
Board Agent

Attachment

cc: Robert Perrone

STATE OF CALIFORNIA C GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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

May 19, 1999

Annette (Barudoni) DeGlow

Re: Unfair Practice Charge No. SA-CO-424
Annette (Barudoni) DeGlow v. Los Rios College Federation of Teachers/CFT/AFT/Local 2279
WARNING LETTER

Dear Ms. DeGlow:

You filed the above-referenced unfair practice charge on December 7, 1998. We have discussed this and two related charges on a number of occasions, both in person and over the telephone. This charge alleges that the Los Rios College Federation of Teachers (Federation) breached the duty of fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b) when it failed to represent you in pursuing seven grievances challenging the Los Rios Community College District's (District) out-of-sequence evaluations of charging party during the Spring of 1998. The charge alleges the following facts.

The District is a public school employer within the meaning of the Educational Employment Relations Act (EERA). Charging party is an employee within the meaning of the EERA. The Federation is an employee organization within the meaning of the EERA and the exclusive representative of the bargaining unit that includes charging party. The District and the Federation are parties to a collective bargaining agreement (CBA) effective from July 1, 1996 through June 30, 1999. Section 8.10.2.2 of the CBA provides that, "[a] faculty member who alleges a violation of the review process in his or her evaluation may use the grievance procedures . under this agreement."

Over the past several years, charging party has vigorously pursued her rights under the EERA in a number of unfair practice charges and grievances filed against both the District and the Federation. Both the District and the Federation were aware of charging party's exercise of her protected rights.

In the fall of the 1997-98 school year, the District performed an evaluation of charging party. The District rated charging party "Needs Improvement" in 7 out of 17 categories, and rated charging party "Needs Improvement" overall. In addition, the evaluation committee recommended that charging party not be assigned to teach Geometry again until her depth of knowledge of geometry could be documented. After some negotiations, the Federation

agreed to represent charging party in challenging the unfavorable evaluation.

During the Spring of 1998, the District informed charging party that it intended to re-evaluate her to determine whether to assign her to teach Geometry in the fall. The District informed charging party that she had the option to refuse the re-evaluation.

The District observed charging party's class on three occasions and performed student evaluations on one of those days. In July of 1998, charging party filed seven (7) grievances challenging the Spring 1998 evaluation. Charging party faxed copies of these grievances to the Federation.

By letter dated July 10, the Federation declined to represent charging party in pursuing these seven grievances. A recent arbitration decision had held that an employee could grieve only procedural violations of the CBA's evaluation procedures. However, charging party's grievances focused exclusively on the ratings and recommendations of the evaluation committee. In addition, each of the seven grievances concerned the same operable facts, and the Federation was concerned that seven proceedings would be duplicative and would place unnecessary strain on Federation's "legal, financial, and representational" resources. Charging party had not consulted the Federation regarding the wording of the grievances, the remedy requested, or the tactic of filing multiple grievances concerning the same issues. For the foregoing reasons, the Federation declined to represent charging party in the grievance process. The CBA permits charging party to file and pursue grievances without the Federation's assistance.

The charge alleges that the Federation breached the duty of 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 Federation'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 this case, charging party alleges that the Federation's decision not to represent her in challenging the Spring 1998 evaluations was arbitrary, discriminatory and in bad faith. However, there is no evidence that the Federation arbitrarily ignored these grievances. As the Federation noted, charging party had the option to forego the Spring 1998 evaluations. While charging party's decision not to do so is understandable, the Federation's belief that the seven grievances did not allege facts that violated the CBA is also reasonable. Nothing provided in the charge indicates that the Federation's decision not to pursue grievances challenging the Spring 1998 evaluations was without a rational basis.

Charging party also alleges that the Federation's decision not to challenge the Spring 1998 evaluations constituted discrimination in violation of EERA section 3543.6(b). In analyzing allegations of discrimination violating the duty of fair representation, the Board follows the principles applicable for violations of EERA section 3543.5(a), a parallel provision prohibiting employer interference and reprisals. (Service Employees International Union. Local 99(Kimmett) (1979) PERB Decision No. 106, at p. 13.)

In order to prevail on a discrimination theory, the charging party must establish that the employee was engaged in protected activity, that the activities were known to the employee organization and that the employee organization took adverse action against the employee because of the protected activity. (Novato Unified School District (1982) PERB Decision No. 210 at pp. 5-6 (Novato).) The Board has long recognized that, because motivation is a state of mind which may be known only to the

actor, direct proof of unlawful motivation is rarely possible. (Carlsbad Unified School District (1979) PERB Decision No. 89 at p. 11.) Accordingly, the Board recognizes the following circumstantial indications of unlawful motivation: (1) the proximity of time between the protected activity and the adverse action; (2) disparate treatment of the affected employee(s); (3) departure from established procedures; (4) inconsistent or contradictory justifications for the employer's actions; and (5) inadequate investigation. (Novato at p. 7.)

In this case, charging party has engaged in substantial protected activity. Further, the Federation was certainly aware of charging party's protected activities. However, charging party has failed to establish the requisite connection between her protected activity and the Federation's decision not to challenge her reassignment.

Charging party contends that the Federation's refusal to pursue her grievances constituted disparate treatment. Charging party bases this contention on the fact that, during the past two years, the Federation has pursued two grievances concerning academic freedom on behalf of other instructors. A finding of disparate treatment is a finding that others have been treated differently for similar or identical conduct or in a similar situation. (See, e.g. Belridge School District (1980) PERB Decision No. 157.) Here, there is no allegation that the two other grievances arose under similar circumstances. The charge merely alleges that all three grievances raised the issue of academic freedom. Obviously, two grievances may raise the sam issue and yet have very different bases. Further, an arbitrator denied one of the academic freedom grievances referenced in the charge. As noted above, the Federation chose not to represent charging party in part because of the arbitrator's decision in that case. Under these circumstances, the Federation's decision not to represent charging party's grievances does not constitute disparate treatment.

Charging party also contends that the Federation deviated from its established policies when it declined to pursue her grievances. Charging party alleges that the Federation has sometimes pursued grievances on behalf of the bargaining unit without unit members' permission and represented charging party in a 1994 grievance challenging a below-average evaluation. It is not clear, however, that the Federation had any established policy of providing representation for all grievances or that the Federation's conduct in ...this case deviated from its established procedures for dealing with grievances.

Charging party also contends that the Federation has provided inconsistent justifications for its decision not to represent her in the seven grievances. However, there is no evidence that the Federation provided any reasons different from those stated in

its July 10 letter. Although the Federation indicated in early March that it would be willing to represent a grievance challenging the Spring 1998 evaluations, the District subsequently gave charging party the option not to undergo the evaluations. This fact apparently weighed heavily in the Federation's decision not to pursue these grievances. (See Warning Letter Case No. SA-CE-420.)

Charging party also claims that the Federation performed an inadequate investigation into her grievances. However, while charging party clearly disagrees with the results of the Federation's investigation, the charge does not provide any facts demonstrating that the Federation did not adequately investigate the grievances.

Finally, charging party contends that the Federation failed to offer an adequate justification for its decision not to represent her in the seven grievances. However, there is nothing in the charge which explains why the rationale set forth in the Federation's July 10, 1998 letter was insufficient.

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 May 26. 1999 . I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Charles Sakai
Board Agent