

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LE ROY F. GILLEAD,

Charging Party,

v.

UNITED EDUCATORS OF SAN FRANCISCO,

Respondent.

Case No. SF-CO-657-E

PERB Decision No. 1897

April 10, 2007

Appearance: Le Roy F. Gillead, on his own behalf.

Before Shek, McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (Board) on appeal by Le Roy F. Gillead (Gillead) from a Board agent's dismissal (attached) of his unfair practice charge alleging that the United Educators of San Francisco violated the Educational Employment Relations Act (EERA)¹ by breaching its duty of fair representation.

After review of the entire record in this case, including the unfair practice charge, the amended charge, the Board agent's dismissal and warning letters, and Gillead's appeal,² the Board finds the unfair practice charge must be dismissed for failure to state a prima facie case. The Board hereby adopts the Board agent's dismissal and warning letters as the decision of the Board itself.

¹EERA is codified at Government Code section 3540, et seq.

²On June 21, 2005, the Board's Appeals Assistant informed Gillead of the due dates for filing appeals of dismissals in Case Nos. SF-CE-2499-E and SF-CO-657-E. On July 5, 2005, Gillead filed a letter disagreeing with the due dates for filing appeals of the dismissal in both cases. The July 5, 2005, letter included his appeal of the dismissal in this case. Case No. SF-CE-2499-E is being issued under a separate decision.

ORDER

The unfair practice charge in Case No. SF-CO-657-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Shek and McKeag joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



June 13, 2005

Leroy Gillead
P.O. BOX 880452
San Francisco, CA 94188-0452

Re: Leroy Gillead v. United Educators of San Francisco
Unfair Practice Charge No. SF-CO-657-E; First Amended Charge
DISMISSAL LETTER

Dear Mr. Gillead:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 13, 2005. Leroy Gillead alleges that the United Educators of San Francisco violated the Educational Employment Relations Act (EERA)¹ by breaching its duty of fair representation.

I indicated to you in my attached letter dated May 19, 2005, 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, 2005, the charge would be dismissed.

On May 25, 2005, I received a first amended charge. The first amended charge reiterates your allegation that the UESF breached its duty of fair representation by having your grievance consolidated with a class action grievance and by failing to assist you with two other grievances. The relevant facts are as follows.

UESF and the District are parties to a collective bargaining agreement that expired on June 30, 2004. With regard to the grievance procedure, Article 18 provides as follows:

When two (2) or more grievances involving the same alleged violation, or which present common questions of fact and law, have been submitted, the Union and District may agree that said grievances be consolidated and that they be heard at Level 2.

On September 20, 2004, you filed a Step 2 grievance with the District. It appears you alleged the District violated the Transfer provisions of the MOU by reducing your hours from 32 per

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

week to 30 per week. You further allege the District violated the seniority provisions of the contract by placing you lower on the seniority scale, and therefore subject to the employer-initiated transfer.

On September 29, 2004, UESF filed a class action grievance against the District alleging substantially the same allegations as your grievance. Although you contend your grievance was factually different from UESF's grievance, analysis of the facts provided demonstrate UESF's grievance alleged the District violated its seniority and transfer policy by failing to use District wide seniority to allow the most senior person in the classification to retain their hours of assignment when involuntarily transferred.

On October 1, 2004, you sent a letter to UESF President Dennis Kelly regarding your Step 2 grievance hearing. In this letter, you requested a labor relations attorney represent you at the Step 2 hearing.

The District scheduled your Step 2 grievance hearing for October 5, 2004, at the same time it scheduled UESF's Step 2 hearing, as the issues were substantially similar. Prior to the hearing, a UESF representative urged you to consolidate your grievance with the class action grievance UESF had filed on behalf of your unit. The class action grievance appears to be on the same subject matter as your individual grievance. You refused to consolidate your grievance and asked to be heard separately. The hearing officer allowed you to present your case.

On or about October 6, 2004, you requested UESF assist you with two grievances you planned to file. Your letter to UESF indicates that you wish the union to file a grievance regarding the District's calculation of seniority in your classification. You again reference the involuntary transfer and reduction in work hours you received as a result of the alleged miscalculation of seniority. UESF did not respond to this request. On October 26, and October 27, 2004, you filed two grievances pertaining to the calculation of seniority.

On November 4, 2004, the hearing officer issued a decision in your grievance and UESF's grievance. The hearing officer's decision notes that although you filed your grievance separately and were heard separately, the grievances were consolidated pursuant to an agreement with UESF. The hearing officer's decision indicates that the District complied with its transfer and seniority provisions when it unilaterally reduced the work hours of several Elementary Advisors.

On November 29, 2004, you requested that the District remove your grievance from the class action grievance. Additionally, you requested another written Step 2 decision pertaining only to your grievance. On December 10, 2004, the District responded to your request. Therein, the District indicated that as your exclusive representative, UESF was afforded the right to represent your entire classification. Moreover, the District noted that the MOU provided UESF with the right to consolidate grievances. Lastly, the District indicated that it could not negotiate with you directly on the consolidated grievance.

On some unspecified date, in December 2004, UESF informed you in person that it would not be arbitrating your grievance.

Based on the facts provided in the original and amended charges, the allegations still fail to state a prima facie violation of the EERA, 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). 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 Respondent'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 omitted.]

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.]

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270 [113 LRRM 3532], at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090].)

You contend that UESF's decision to consolidate your grievance with a class action grievance violates the duty of fair representation. First, despite the factual differences, your grievance and the class action grievance concern the same contract provisions and the same overall allegation. That is, both grievances allege the District violated its seniority and transfer policy by reducing the work hours of Elementary Advisors. As such, it is unclear how you were prejudiced by UESF's decision to consolidate your grievance. Moreover, as indicated by the District, UESF is the exclusive bargaining representative for your entire classification, and as such, is bound to represent the entire classification's interests. As such, the union is not required to have individual consent to pursue a grievance if preservation of a unit-wide interest is at stake. (Fremont Unified School District (1980) PERB Decision No. 125.) Herein, the union's course of conduct does not demonstrate arbitrary, capricious or discriminatory behavior. As such, the charge fails to state a prima facie violation of the EERA.

Right to Appeal

Pursuant to PERB Regulations,² 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. (Regulation 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. (Regulations 32135(a) and 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 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. (Regulation 32635(b).)

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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 Regulation 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. (Regulation 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. (Regulation 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
General Counsel

By



Kristin L. Rosi
Regional Attorney

Attachment

cc: Stewart Weinberg

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax: (510) 622-1027



May 19, 2005

Leroy Gillead
P.O. BOX 880452
San Francisco, CA 94188-0452

Re: Leroy Gillead v. United Educators of San Francisco
Unfair Practice Charge No. SF-CO-657-E
WARNING LETTER

Dear Mr. Gillead:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 13, 2005. Leroy Gillead alleges that the United Educators of San Francisco violated the Educational Employment Relations Act (EERA)¹ by breaching its duty of fair representation.

Investigation of the charge revealed the following. You are employed by the San Francisco Unified School District as an Elementary Advisor. As such, you are considered a paraprofessional employee and are exclusively represented by the United Educators of San Francisco. UESF and the District are parties to a collective bargaining agreement that expired on June 30, 2004. With regard to the grievance procedure, Article 18 provides as follows:

18.8.3. Step 3 — Arbitration

18.8.3.1. Within fifteen (15) days after receiving the decision of the Superintendent or designee, the Union has the exclusive right to appeal the decision to arbitration. Within the fifteen (15) days the Union shall notify Classified Personnel Office that it intends to request arbitration. The Union shall have five (5) days after notifying the Classified Personnel Office to request arbitration.

With regard to grievance consolidation, Article 18 also provides as follows:

When two (2) or more grievances involving the same alleged violation, or which present common questions of fact and law, have been submitted, the Union and District may agree that said grievances be consolidated and that they be heard at Level 2.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

On some unspecified date in 2004, you filed a grievance with the District. The charge fails to provide any details regarding the grievance or the underlying conduct leading to the filing of a grievance. The grievance was denied at Step 1 and appealed to Step 2.

On September 24, 2004, you participated in a Step 2 grievance hearing. At that hearing, a UESF representative urged you to consolidate your grievance with the class action grievance UESF had filed on behalf of your unit. The class action grievance appears to be on the same subject matter as your individual grievance. You refused to consolidate your grievance and asked to be heard separately. The hearing officer allowed you to present your case.

On or about October 6, 2004, you requested UESF assist you with two grievances you had previously filed. The charge does not indicate any additional facts regarding these grievances nor are copies of the grievances attached to the charge. UESF did not respond to this request. On October 26, 2004, you appealed these two grievances to Step 2, having received no communication from UESF.

On November 4, 2004, the hearing officer denied your first grievance. A copy of the hearing officer's decision was not provided with the charge. On November 29, 2004, you requested the grievance be elevated to Step 3 arbitration. On December 10, 2004, the District denied this request indicating that only UESF has the right to elevate a grievance to Step 3. On some unspecified date, UESF informed you by letter that it would not be arbitrating your grievance. A copy of that letter was not provided with the charge.

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

The charge alleges the union breached its duty of fair representation by failing to take your grievance to binding arbitration.² 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). 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 Respondent'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 omitted.]

² Allegations regarding conduct that occurred prior to November 13, 2005, are time barred and will not be considered herein. (Government Code section 3541.5(a)(1).)

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.]


With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270 [113 LRRM 3532], at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090].)

Herein, you indicate that UESF provided you with notice that it would not be taking your grievance to binding arbitration. However, the charge fails to provide UESF's rationale for denying the arbitration request. As such, it is impossible for PERB to determine whether the union's conduct was arbitrary, capricious or devoid of honest judgment. Without such facts, PERB cannot issue a complaint. As such, if you wish to amend the charge, please provide PERB with the facts surrounding your grievance and all correspondence between yourself and the union regarding this matter.

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 that 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, 2005, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

SF-CO-657-E
May 19, 2005
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Sincerely,

A handwritten signature in black ink, appearing to read "Kristin L. Rosi". The signature is fluid and cursive, with a prominent initial "K" and a long, sweeping underline.

Kristin L. Rosi
Regional Attorney

KLR