STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LEON J. WASZAK, Charging Party, v. GLENDALE GUILD/AFT LOCAL 2276, Respondent.	Case No. LA-CO-1319-E PERB Decision No. 2003 January 30, 2009

Appearance: Leon J. Waszak, on his own behalf.

Before Neuwald, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

NEUWALD, Chair: This case is before the Public Employment Relations Board (Board) on appeal by Leon J. Waszak (Waszak) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Glendale Guild/AFT Local 2276 (Guild) breached its duty of fair representation, and thereby violated section 3543.6 of the Educational Employment Relations Act (EERA),[1] by refusing to file a grievance regarding Waszak's late performance evaluation and encouraging an individual to apply for a vacant tenure track position for which Waszak also applied.

The Board has reviewed the entire record in this matter, including but not limited to, the original and amended unfair practice charge, the Guild's position statement, the Board agent's warning and dismissal letters, and Waszak's appeal. Based on this review, the Board finds the Board agent's warning and dismissal letters to be a correct statement of the law and well reasoned, and therefore adopts them as the decision of the Board itself.

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

ORDER

The unfair practice charge in Case No. LA-CO-1319-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8384
Fax: (916) 327-6377

November 18, 2008

Leon J. Waszak
235 South Avenue 66
Los Angeles, CA 90042

Re: Leon J. Waszak v. Glendale Guild/AFT Local 2276
Unfair Practice Charge No. LA-CO-1319-E
DISMISSAL LETTER

Dear Dr. Waszak:

You filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board) on October 16, 2007. The charge was transferred to PERB's Sacramento office on September 26, 2008. The charge alleges that the Glendale Guild/AFT Local 2276 (Guild) breached the duty of fair representation, and thereby violated section 3543.6 of the Educational Employment Relations Act (EERA or Act),[1] when: (1) the Guild refused to file a grievance regarding a late performance evaluation and (2) the Guild encouraged an individual to apply for a vacant position that you "assumed" belonged to you. PERB sent you a Warning Letter dated October 15, 2008. You filed an amended charge on November 15, 2008.

As the Warning Letter explained, a charge must allege facts. (Cal. Code Regs., tit. 8, § 32615(a)(5); United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944 (Ragsdale).) Mere legal conclusions are not sufficient. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.) The facts alleged in the original charge showed that the Guild had a rational basis for not filing a grievance challenging the District's failure to issue you a timely performance evaluation. The amended charge does not allege any additional *facts* regarding this incident. Rather, the amended charge broadly asserts that the "Guild's actions [were] colored by nepotism, conflicting interests, and political ideology." These broad legal conclusions fail to provide the *facts* necessary to show that the Guild arbitrarily refused to file a grievance. (Ragsdale, supra, PERB Decision No. 944.)

Like the original charge, the amended charge alleges that you were denied a full-time position because Roger Bowerman, the chairman of the hiring committee, "was prejudiced in favor of the so-called 'successful' candidate" and that by "suppressing" your performance evaluation until after the hiring committee acted, Bowerman undermined your application. There are two problems with this assertion. First, and most important, it appears that Bowerman is a Department Chair and thus a District manager. Unlike the Guild, the District is not a party to

[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.

this action. Thus, PERB cannot issue a complaint against the District based on Bowerman's alleged conduct. (See Cal. Code Regs., tit. 8, § 32615(a)(1) (charge must name party who allegedly committed the unfair).) Second, even if Bowerman's conduct can somehow be imputed to the Guild—which based on the alleged facts, it cannot—it is difficult to determine how Bowerman hurt your job prospects by "suppressing" your performance evaluation. Again, the charge states that the evaluation was so negative that it made you "livid." Had Bowerman released the document *before* the committee acted, the document would have harmed, not helped, your job prospects.

The amended charge also alleges that a Guild officer, Gordon Alexander, has violated federal employment discrimination laws because he has "consistently" and publicly argued "that the so-called 'baby boomers' [should] step aside and give way to the younger faculty." In support of this allegation, you have submitted an article from a Guild Newsletter dated October 2007.[2] The article is a "profile" of Alexander. Under the article's subheading "Talking to younger members," you have highlighted the following material:

> [As a Guild officer] Alexander is also concerned that the local bring a new generation of active members into leadership. "I'm 61, and our active core has been dominated by baby boomers," [Alexander] explains. "Unless we involve younger members, we will become much weaker." Alexander and other current officers hold a monthly meeting with younger members, in which they listen to the issues they present, and in turn talk about the history of the union.

Although PERB has jurisdiction over several California public sector collective bargaining statutes, including EERA, it does not have jurisdiction over federal employment discrimination prohibitions or similar State statutes. (Union of American Physicians & Dentists (Menaster) (2007) PERB Decision No. 1918-S.) The Board has long held that it lacks jurisdiction, for example, over allegations of discrimination based on race, age, or disability. (Alum Rock Union Elementary School District (2005) PERB Decision No. 1748; Salinas City Elementary School District (1996) PERB Decision No. 1131.)

Thus, to the extent that Alexander's comments are alleged to violate a federal statute, the allegations must be dismissed as outside of PERB's jurisdiction. (Ibid.) To the extent that Alexander's comments are alleged to violate EERA, no case has been found in which a union breached its duty of fair representation by encouraging younger members to become involved in union affairs.

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[2] You submitted the newsletter article to PERB on November 18, 2008. There is no evidence that you served a copy of the article on the Guild.

CONCLUSION

For these reasons and the reasons discussed in the Warning Letter, the amended charge fails to allege that the Guild breached the duty of fair representation. Accordingly, PERB hereby dismisses the amended charge.

Right to Appeal

Pursuant to PERB Regulations,[3] Charging Party 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, § 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 during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135(a) and 32130; see also Gov. Code, §. 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB 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. (Cal. Code Regs, tit. 8, §§ 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, §§. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
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, § 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, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document

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

may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 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, § 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,

TAMI R. BOGERT
General Counsel

By _____
Harry J. Gibbons
Senior Regional Attorney

Attachment

cc: Gordon Alexander

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8384
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October 15, 2008

Leon J. Waszak
235 South Avenue 66
Los Angeles, CA 90042

Re: Leon J. Waszak v. Glendale Guild/AFT Local 2276
Unfair Practice Charge No. LA-CO-1319-E
WARNING LETTER

Dear Dr. Waszak:

You filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board) on October 16, 2007. The charge was transferred to PERB's Sacramento office on September 26, 2008. The charge alleges that the Glendale Guild/AFT Local 2276 (Guild) breached the duty of fair representation, and thereby violated section 3543.6 of the Educational Employment Relations Act (EERA or Act),[1] when: (1) the Guild refused to file a grievance regarding a late performance evaluation and; (2) the Guild encouraged an individual to apply for a vacant position you "assumed" belonged to you.

BACKGROUND

1. The Performance Evaluation

You are employed by the Glendale Community College (College) as an adjunct professor. The Guild is the exclusive representative for your bargaining unit.

In early 2007,[2] the College began interviewing for a full-time, tenure-track, history professor. You applied for the position and were scheduled to interview on an unspecified date in March. Because you had been employed with the College for 13 years, "it had been assumed the position was [yours]." Perhaps erring on the side of caution, you nevertheless wanted to submit a current performance evaluation to the "screening committee."

Roger Bowerman is the chair of your department and is responsible for evaluating your work. As your interview with the screening committee was approaching, Bowerman was "three

[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.

[2] All dates are in 2007, unless otherwise noted.

months" late with your evaluation.[3] Mike Allen was the Guild President at the time. You spoke to Allen about your late evaluation. Allen "suggested" that you "find some creative way to submit the draft evaluation." You followed Allen's advice and, "persisted in getting" the draft evaluation "submitted" to the screening committee as a "point of information." It is assumed that the draft evaluation was favorable, because otherwise you would not have "persisted" in submitting it.

Although Allen's advice regarding the draft evaluation proved successful, you were nevertheless displeased with Allen because he "took no action against the chair."[4]

On March 22, the College rejected your application and hired another candidate for the full-time position. You "complained again" to the Guild about your belated evaluation. The College, however, issued you an evaluation on March 30, but the evaluation was so unfavorable you became "livid."

During the first week of April, you submitted a rebuttal to the belated and unfavorable evaluation. On April 26, you gave a copy of the rebuttal to "Ms. St. Ama," the Guild's "grievance officer." St. Ama discussed the rebuttal with the Guild's Executive Committee (committee) and "reported back" to you on May 3. According to St. Ama, the committee "acknowledged" that the College had violated the "stated procedures" and "suggested" that you might be "reevaluated."[5] St. Ama further reported that, despite the College's alleged procedural violation, "no disciplinary action would be taken" against Bowerman for having issued a late evaluation.

Subsequently, you and St. Ama exchanged several e-mail messages in which you continued to discuss the belated evaluation. You told St. Ama that the "larger issue" was your "rejection from the full-time job" and that the belated evaluation "had prejudiced" your pursuit of that job.[6] St. Ama, however, "advised against filing a grievance." She also said that if you wanted to pursue a "legal action beyond the scope of the grievance for a timeline violation," then you

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[3] Because Bowerman was "late," it is clear there are certain evaluation "deadlines." The charge, however, fails to allege whether the deadlines are set forth in the collective bargaining agreement, the College's written policies, or in some other document. The charge also fails to describe, or include copies of, the evaluation and grievance procedures.

[4] The charge fails to allege exactly what "action" Allen could have taken "against the chair," had he decided to act.

[5] Without more information and a copy of the "procedures," it is difficult to tell whether the committee based its opinion on the fact that the College had issued a *late* evaluation or because it had issued an *unfavorable* one.

[6] This reasoning is questionable. If the College *had* issued a timely evaluation, the screening committee would have reviewed an *unfavorable* evaluation, rather than the *favorable* draft submitted by you.

would have do so "at your own expense." By May 8, it was "obvious" to you that the Guild had decided not to file a grievance.

2. The Successful Candidate for the Full-Time Position

Gordon Alexander was the Guild's "head negotiator" in December 2006. He continued in that position until he became the Guild's President on May 15.

In December 2006, and again the following month, Alexander publicly expressed an opinion about the type of individual the College should hire for the full-time history position. Among other things, Alexander said the College should look for "individuals who would serve at least twenty years." You were "appalled" by Alexander's opinions because, among other things, you believed he was encouraging age discrimination.

Although the charge's factual allegations regarding this following incident are sketchy, it appears that the successful candidate for the full-time history position "was asked to apply for the job by Alexander himself." You discovered this information on June 14. The charge asserts that by asking the successful candidate to apply, Alexander violated "his trust as a union official."

DISCUSSION

1. The Charging Party's Burden and the Applicable Statute of Limitations

A charging party must provide a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (Cal. Code Regs., tit. 8, § 32615(a)(5).) This means the charging party must allege the "who, what, when, where and how" of the underlying conduct. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944 (Ragsdale).) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

Also, PERB is prohibited from issuing a complaint based on conduct that occurred more than six months prior to the filing of the charge. (Gov. Code, § 3541.5(a)(1); Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charge in this case was filed on October 16, 2007. Thus, the statute of limitations prohibits PERB from issuing a complaint based on conduct that occurred before April 16, 2007.

(a) Allen's Failure to Take Action Against the Chair

The charge alleges that Allen, the Guild President at the time, failed to take "action against the chair" for being late with your evaluation. Your conversation with Allen occurred sometime

before March 22, which is the day the screening committed rejected your application. Thus, if it is assumed for the sake of discussion that the duty of representation required Allen to "take action against the chair" in March—an action Allen clearly failed to take—then Allen's inaction falls outside the six-month statute of limitations. Thus, PERB is prohibited from issuing a complaint based on that incident.

(b) Alexander's Public Statements

The charge also alleges that Alexander, the Guild's head negotiator at the time, made controversial public statements in December 2006 and January 2007. To the extent that the statements are alleged to show discrete, independent violations of EERA, a complaint based on those statements is also barred by the statute of limitations.

2. The Duty of Fair Representation

The remaining incidents occurred within the six-month statute of limitations. It must therefore be determined whether those incidents constitute a breach of the duty of fair representation.

A union has exclusive control over the collective bargaining process, including exclusive control over the grievance-arbitration procedures. As a quid pro quo for that exclusive control, courts have imposed on unions the "duty of fair representation." (California State Employees' Association (Nogard) (1984) PERB Decision No. 551-S, pp.1-2, fn.1, citing Vaca v. Sipes (1967) 386 U.S. 171.)

The duty requires unions "to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (Hussey v. Operating Engineers (1995) 35 Cal.App.4th 1213, 1219.) In Hussey, the court held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power." (Ibid.) Thus, it is insufficient to show that the union's decision was flawed or even wrong. Rather, in order to state a prima facie *breach* of the duty of fair representation, a charging party must allege facts to show that the union's action or inaction was without a rational basis or devoid of honest judgment. (International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M (Attard).) It is the charging party's burden to show how a union abused its discretion; it is not the union's burden to show that it properly exercised its discretion. (United Teachers of Los Angeles (Wyler) (1993) PERB Decision No. 970.)

(a) St. Ama's Decision not to File a Grievance

Between April 26 and May 8, you and St. Ama, the Guild's grievance officer, discussed—both in person or via e-mail—whether you should file a grievance regarding the College's "timeline violation." St. Ama "advised against" filing a grievance and told you that if you wanted to pursue the matter you would have to do so "at your own expense." You disagreed with St. Ama's reasoning. But, as will be explained below, it appears St. Ama had a "rational basis" for not filing a grievance. (Attard, supra, PERB Decision No. 1474-M.)

For example, the College was required—presumably by the collective bargaining agreement—to issue an evaluation by a date certain. The College, however, had missed that date certain. One option available to the Guild was to file a grievance demanding that the College issue an evaluation. However, even if the Guild pursued that grievance all the way to arbitration, it could not obtain an evaluation by a "date certain" that had already passed. Rather, the Guild *probably* would have obtained an order directing the College to issue an evaluation as promptly as possible. Such an order was, however, unnecessary because by the time you and St. Ama were discussing the problem, the College had already issued an evaluation. Thus, if the Guild *had* filed a grievance in April, the Guild arguably would have been pursing a remedy it had already obtained.

Also, in your discussions with St. Ama, you asserted that the "larger issue" was your "rejection for the full-time job" and that your pursuit of that job was "prejudiced" when you were unable to present a current evaluation to the screening committee. This argument suggests that you envisioned a grievance remedy in which a second round of interviews was to be conducted. If it is assumed that the language in the collective bargaining agreement might justify a second round of interviews, it is unlikely that such a remedy would benefit you. After all, the screening committee had rejected you during the original round of interviews, even though it had seen your favorable draft evaluation. If—as result of a Guild grievance—a second round of interviews was to have been held, then the screening committee would see an evaluation that was so unfavorable to you that it made you "livid." Given the possibility that a second round of interviews may have placed you in an even worse position, a "rational basis" for not filing a grievance is readily apparent.

(b) Alexander and the Successful Candidate

The charge alleges that Alexander breached the duty of fair representation when he encouraged the ultimately successful candidate to apply for the full-time position. The duty of fair representation is generally limited to contract negotiations (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124) and to grievance processing and related issues of contract administration. (United Teachers of Los Angeles (Valadez, et al.) (2001) PERB Decision No. 1453.) No cases have been found in which the duty has prevented union officers from encouraging individuals to apply for vacant positions.

CONCLUSION

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, Charging Party may 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 an authorized agent of 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 an amended charge or withdrawal is not filed on or before November 7, 2008, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Harry J. Gibbons
Senior Regional Attorney

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