

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



RHODA LUBNAU,)
)
 Charging Party,) Case No. LA-CE-109
 v.) PERB Decision No. 73
)
 SANTA ANA UNIFIED SCHOOL DISTRICT,) September 25, 1978
 Respondent.)
_____)

Appearances: Lawrence Rosenzweig, Attorney (Levy, Koszdin, Goldschmid and Sroloff) for Rhoda Lubnau; John L. Bukey, Attorney (Biddle, Walters, and Bukey) for Santa Ana Unified School District.

Before Gluck, Chairperson; Gonzales and Cossack Twohey, Members.

DECISION

The Public Employment Relations Board (hereafter Board) has reviewed and considered the attached recommended decision of the hearing officer in light of the record, exceptions, and briefs filed in this case. The hearing officer dismissed a charge filed by the charging party¹ which alleged that the Santa Ana Unified School District (hereafter District) had violated certain

¹The Federation of Association Classifieds and Teachers (FACT) and James Stevens originally were included as charging parties. At the hearing of February 28, 1978, the only charging party was Rhoda Lubnau, the others having withdrawn as charging parties.

provisions of the Educational Employment Relations Act, Government Code Section 3540 et seq., in that it:

... discriminated against and restrained Mrs. Rhoda Lubnau by refusing to allow her to be represented by counsel of her choosing in several grievance matters....

The hearing officer found, and the Board agrees, that an agency relationship exists between Mrs. Lubnau's "counsel" and a non-exclusive employee organization in the District which disqualifies him from representing her in grievance proceedings before the District, considering that certificated employees in the District have already selected an exclusive representative.

The Board summarily adopts the hearing officer's recommended decision, affirming his findings of fact and conclusions of law.

ORDER

Upon the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

The unfair practice charge filed by Rhoda Lubnau against the Santa Ana Unified School District is dismissed.

By: Raymond J. Gonzales, Member Harry Gluck, Chairperson

Jerilou Cossack Twohey, Member

PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

In the Matter of:)	
)	
JAMES P. STEVENS, RHODA LUBNAU, AND)	Case No. LA-CE-109
THE FEDERATION OF ASSOCIATED CLASSIFIEDS)	
AND TEACHERS (FACT),)	
)	PROPOSED UNFAIR DECISION
Charging Party,)	ON REMAND FROM
vs.)	EERB Decision No. 44
)	
SANTA ANA UNIFIED SCHOOL DISTRICT,)	March 23, 1978
)	
Respondent.)	
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Appearances: Lawrence Rosenzweig, Attorney, for Charging Party; John L. Bukey, Attorney, for Respondent.

Before Jeff Paule, Hearing Officer.

PROCEDURAL HISTORY

On April 20, 1977, the charging party filed an unfair practice charge against the Santa Ana Unified School District (hereinafter respondent or District) alleging a violation of Government Code Sections 3543.5(a), (b), and (d).¹

¹These sections provide that:

It shall be unlawful for a public school employer to:

(a) 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.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

Paragraph one of the charge alleges that the respondent denied to the FACT the right to represent one of its members in a grievance proceeding.

Paragraph two of the charge alleges that the respondent informed all certificated employees of the District that only the exclusive bargaining agent (Santa Ana Educators Association) could represent certificated employees in grievance proceedings.

The gist of the charge is contained in paragraph three thereof and states as follows:

The Santa Ana Unified School District did discriminate against and restrain an employee, Mrs. Rhoda Lubnau, by refusing to allow her to be represented by counsel of her choosing in several grievance matters and particularly in an employer-employee consultation matter before Dr. Harrison on April 7, 1977.

On May 6, 1977, an answer was filed by the respondent.

On May 25, 1977, on the hearing officer's own motion, the charge was dismissed with leave to amend. The charge was dismissed on the basis that only an exclusive representative or an individual can present a grievance.² The notice of dismissal concluded with the following comment:

It is noted that the prohibition of representation through an employee organization other than the exclusive representative does not preclude representation through others, however. This was expressly so stated in Hughes Tool v. NLRB, [147 F. 2d 69 (5th Cir. 1945)], where the court suggested that a grievant might enlist the aid of "a more experienced friend" which would include, presumably, retaining private counsel. It is unclear from the unfair practice charge in the instant case whether the employer is allegedly denying to employees their right to present their own grievances through representatives not associated with FACT or any other rival employee organization. The charging parties are given leave to amend in this regard.

²The Santa Ana Educators Association is the exclusive representative of the certificated employees of the District.

On June 2, 1977, the charging party filed an amendment to charge. The amendment consisted of the following sentence to paragraph three:

Mrs. Lubnau had designated a "friend and advisor" to be her representative in the grievance procedure .

On June 17, 1977, the respondent filed an amended answer, a motion to dismiss and a motion to particularize paragraph three. The respondent moved to dismiss paragraphs one and two of the charge because the amendment filed by the charging party added nothing to the charge and "the issue has already been decided in the Notice of Dismissal with Leave to Amend, dated May 25, 1977." As to paragraph three, the respondent moved to particularize by having the charging party designate who the "friend and advisor" is and whether this individual is in any way associated with any employee organization other than the exclusive representative.

On June 21, 1977, the PERB hearing officer granted the motions and the charging party thereupon filed a timely appeal to the Board itself.

On December 30, 1977, the Board itself rendered its decision in Stevens, Lubnau and Federation of Associated Classifieds and Teachers v. Santa Ana Unified School District, EERB Decision No. 44.

The Board's decision states in pertinent part, at pages 11-12:

We partially sustain the order of the hearing officer to particularize the charge. We agree that the grievant's "friend and advisor" must be identified in a particularized charge; otherwise, it will not be possible to determine whether the grievant is being represented by an employee organization other than the exclusive representative. However, we do not sustain the portion of the particularization order requiring that the charge itself state "whether this individual is in any way associated or connected, either directly or indirectly, with any employee organization other than the [exclusive representative]." We view the relationship between the "friend and

advisor" and the exclusive representative, if any, as a matter requiring proof at a hearing, after the "friend and advisor" is identified in the charge. Government Code Section 3543 protects the right of an individual to present a grievance either alone or through a representative other than an employee organization that is not the exclusive representative. However, the "representative" may not be an agent of an employee organization other than the exclusive representative. In making this determination, common law principles of agency shall govern. The burden of proving that a disqualifying relationship exists shall be upon the party seeking the disqualification.

On the agency issue, this case and future cases must be decided on a case-by-case basis. However, we decide now that in resolving the agency issue, mere incidental membership in a rival employee organization, without proof that the representative of the grievant is acting for and in behalf of a rival employee organization, is insufficient to disqualify a grievant's representative from presenting a grievance.

Following the Board's decision, on January 11, 1978, the charging party filed the required particularization, as follows:

The above-named School District has discriminated against and restrained Mrs. Rhoda Lubnau by refusing to allow her to be represented by counsel of her choosing in several grievance matters and particularly in the employer-employee consultation matter before Dr. Harrison, Assistant Superintendent of the School District, on April 7, 1977. Mrs. Lubnau had designated a "friend and advisor", James Stevens, to be her representative in the grievance procedure. Said conduct of the School District is in violation of Sections 3543.5(a) and (d) of the Act.

As a remedy to the above listed unfair practices, the Charging Party requests that the School District be ordered to allow employees to select counsel of their choosing in grievance matters.

A hearing was held on February 28, 1978.

At the hearing, the charging party withdrew as a charging party the Federation of Associated Classifieds and Teachers and James Stevens. Thus, the only charging party is Rhoda Lubnau.

ISSUE

Was James Stevens acting for and in behalf of the Federation of Associated Classifieds and Teachers in representing Rhoda Lubnau in her grievance before the Santa Ana Unified School District?

FINDINGS OF FACT

The FACT, Local 2189, is an employee organization affiliated with the American Federation of Teachers. FACT admits to membership both classified and certificated employees, however, it is not the exclusive representative of any unit of employees in the Santa Ana Unified School District. Prior to the instant case, the organization had represented both certificated and classified employees in grievance proceedings. The organization has officers, maintains an office in Santa Ana and uses letterhead stationery.

James Stevens, at all times relevant to this case, was an officer of the FACT and occupied the position of "Executive Recorder." A part of Mr. Stevens' official duties as an officer of the FACT was "to take care of classified matters." Prior to the instant case, he had represented classified employees in grievances on many occasions.

Rhoda Lubnau is a certificated employee in the District and a member of the FACT. She is also a very close friend of James Stevens.

Sometime in October 1976, Ms. Lubnau received an evaluation memorandum critical of her work performance. She contacted Mr. Stevens regarding the evaluation and asked for his assistance in filing a grievance. On February 23, 1977, Mr. Stevens wrote a lengthy letter to Ms. Lubnau's principal regarding the evaluation memorandum. Mr. Stevens' letter was typed on FACT letterhead stationery and ended as follows:

A prompt reply to this letter will be most appreciated.

Sincerely yours,
Jim Stevens, Representative
of Federation of Associated
Classifieds and Teachers

The District believed Mr. Stevens to be a representative of the FACT. In its reply to the February 23, 1977 letter the District stated that the FACT could not represent Ms. Lubnau in employee relations matters since it was not the exclusive representative.

CONCLUSIONS OF LAW

The PERB has ruled in the instant case that "Government Code Section 3543.1(a) prevents employee organizations other than exclusive representatives from filing or presenting grievances for employees in the unit," however, "Government Code Section 3543 protects the right of an individual to present a grievance either alone or through a representative other than an employee organization that is not the exclusive representative." EERB Decision No. 44 at pages 6 and 12.

The Board's test is whether the "representative" is an "agent" of the non-exclusive employee organization. If the representative is determined to be an agent, then according to the Board, a "disqualifying relationship" exists between the representative and the non-exclusive employee organization and the representative/agent is barred from representing an employee in a grievance procedure.

Civil Code Section 2295 defines an agent as "one who represents another, called the principal, in dealings with third persons." "Agency is a relationship that results from the act of one person, called principal, who authorizes another, called agent, to conduct one or more transactions with one or more third persons and to exercise degree of discretion in effecting purpose of the principal." Workman v. San Diego, 267 Cal. App. 2d 36 (1968).

An agent can be either a special agent or a general agent. A special agent is an agent for a particular act or transaction. Civil Code Section 2997. An agency is "actual" when the agent is really employed by the principal and is

"ostensible" when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent. Civil Code Sections 2299 and 2300.

In the instant case, it is clear that Mr. Stevens is an agent of the FACT with respect to Ms. Lubnau's grievance. The letter Mr. Stevens wrote to the District wherein he used the FACT's stationery and identified himself as "Representative of Federation of Associated Classifieds and Teachers" is sufficient to establish the agency relationship. As the California Supreme Court noted in Sunset Mill and Grain Company v. Anderson, 39 Cal. 2d 773 (1952), "[d]esignations as 'representative' and as 'agent' are synonymous and may be used interchangeably." Thus, in this particular transaction involving Ms. Lubnau, Mr. Stevens did act as a special agent of the FACT.

The charging party attempts to carve out an exception to the "disqualifying relationship" between Mr. Stevens and the FACT. The charging party argues that the relationship between the representative and the grievant should be considered, and if the representative and the grievant are close friends and the grievant would not be satisfied with any other representative, then the agency is refuted.

The charging party offers no support for this argument. Inasmuch as the Board did not include such an exception in its decision, the charging party's argument is rejected.

It is found that a disqualifying relationship exists between Mr. James Stevens and the Federation of Associated Classified and Teachers in that Mr. James Stevens is an agent of FACT in the attempted grievance proceeding between Ms. Rhoda Lubnau and the Santa Ana Unified School District. Therefore, the District did not violate Government Code Sections 3543.5(a), (b) and (d) in refusing to allow Mrs. Lubnau to be represented in her grievance by Mr. Stevens, James P. Stevens, et al vs. Santa Ana Unified School District, EERB Decision No. 44 (12-30-77).

PROPOSED ORDER

It is the Proposed Decision that:

1. Mr. James Stevens was acting for and on behalf of the Federation of Associated Classifieds and Teachers in representing Mrs. Rhoda Lubnau in her grievance against the Santa Ana Unified School District.

2. The charge that the District violated Government Code Sections 3543.5(a), (b) and (d) is hereby DISMISSED.

The parties have twenty (20) calendar days after service of this Proposed Decision in which to file exceptions in accordance with California Administrative Code, Title 8, Part III, Section 32300. If no party files timely exceptions, this Proposed Decision will become final on April 17, 1978 and a Notice of Decision will issue from the Board.

Dated: March 23, 1978

Jeff Paule
Hearing Officer