

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE EMPLOYEES')
ASSOCIATION,)
)
Charging Party,)
)
v.) Case No. LA-CE-1-S
)
STATE OF CALIFORNIA,) PERB Decision No. 86-S
DEPARTMENT OF HEALTH,)
)
Respondent.)
)
_____)

Appearances; Bernard L. Allamano, Attorney, for California State Employees' Association, Chapter 43; and Barbara Stuart, Attorney, for Governor's Office of Employee Relations.

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

DECISION

This case is an appeal by the California State Employees' Association, Chapter 43 (hereafter CSEA) from a hearing officer's dismissal of an unfair practice charge without leave to amend. The charge alleges violations of sections 3522.3 and 3522.8 of the State Employer-Employee Relations Act (hereafter SEERA).¹

¹All references are to the Government Code unless otherwise noted. SEERA is codified at Government Code section 3512 et seq.

Sec. 3522.3 provides:

Supervisory 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 supervisory employee-employer relations as set forth in section 3522.6.

(cont.)

FACTS

On August 22, 1978, CSEA filed its charge² alleging violations of sections 3522.3 and 3522.8 in that a personnel officer at Camarillo State Hospital told designated supervisory employees that they could not hold office in employee organizations. The statement was reportedly made at a meeting on June 15, 1978 between representatives of CSEA and representatives of the California State Department of Health (hereafter Department of Health). Minutes of this meeting were then distributed to 180 designated supervisory employees. The precise language in the minutes was:

It will be each individual's responsibility to read the law and determine if he or she is in a position that should be considered supervisory. If a supervisor holds office in an employee organization the supervisor must decide whether to continue to hold office after July 1, or to request a downgrade to a nonsupervisory position.

(cont.)

Supervisory employees also shall 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 employer.

Sec. 3522.8 provides:

The state employer and employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against supervisory employees because of their exercise of their rights under this article.

²On July 11, 1978, CSEA initially alleged that California State Department of Health representatives had violated section 3522.6 (meet and confer provisions). On July 14, 1978, CSEA first amended its charge to allege violations of sections 3522.3, 3522.8 and 3519(a), (b), and (d) (unfair practice provisions). The hearing officer dismissed the amended charge of July 14 with leave to amend. Thereupon, CSEA filed its second amended charge of August 22, 1978.

According to CSEA, supervisory employees who either hold office currently or were contemplating running for office were intimidated from exercising their rights guaranteed by SEERA.

On September 1, 1978, a hearing officer of the Public Employment Relations Board (hereafter PERB or Board) dismissed the charge without leave to amend. He held that supervisors do not have a right under SEERA to allege as an unfair practice a violation of section 3522.8.

For purposes of considering this appeal, the Board assumes that the facts as alleged by the charging party are true.

DISCUSSION

We agree with the hearing officer's dismissal of the charge for lack of PERB jurisdiction. PERB's enforcement powers and duties under SEERA were not intended to apply in the same manner to supervisors as to nonsupervisors. Expressly restricting the rights and coverage of supervisors under SEERA, section 3522 states:

Except as provided by Sections 3522.1 to 3522.9, inclusive, supervisory employees shall not have the rights or be covered by any provision or definition established by this chapter. (Emphasis added.)

Thus, whereas nonsupervisory employees are covered by the unfair practice provisions of section 3519,³ supervisors are not.

³Sec. 3519 provides:

It shall be unlawful for the state 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.

(cont.)

CSEA suggests that PERB itself must enact rules to prevent employer interference with supervisors' rights under SEERA. The express language of SEERA, however, is contrary to this suggestion. Section 3513Cg), in pertinent part, states:

The powers and duties of the board described in section 3541.3 shall also apply, as appropriate, to this chapter. (Emphasis added.)

This provision is a reference to the broad administrative powers given to PERB under the Educational Employment Relations Act (hereafter EERA).⁴ In particular, section 3541.3(i)⁵ grants to PERB the power and duty of investigating unfair practice charges or alleged violations and taking remedial action.

(cont.)

(c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

(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.

(e) Refuse to participate in good faith in the mediation procedure set forth in Section 3518.

⁴The EERA is codified at Government Code section 3540 et seq.

⁵Sec. 3541.3(i) provides:

[The board shall have all of the following powers and duties]

(i) To investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect of such charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

Section 3541.3(n)⁶ is even broader in allowing PERB to take such other action deemed necessary to effectuate the purposes of the EERA. Both these sections of the EERA are, however, inapplicable to supervisors under SEERA since section 3513(g) precludes PERB from establishing greater rights and coverage for supervisors than were originally intended for them by the Legislature under section 3522. The PERB is confronted not merely with a matter of choosing whether to adopt administrative rules but rather with a lack of statutory authority to do so under SEERA.⁷

Prior to the enactment of SEERA, labor relations of supervisory and nonsupervisory employees in state civil service were governed by the George Brown Act.⁸ Under SEERA, however, the rights and coverage of supervisory employees

⁶Sec. 3541.3(n) provides:

[The board shall have all of the following powers and duties]

(n) To take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

⁷See also Gov. Code sec. 11374, which, in pertinent part, provides:

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

⁸The George Brown Act is codified at Government Code section 3523 et seq.

are not coextensive with the largely expanded rights and coverage of nonsupervisors. Provisions regarding supervisors are by comparison limited as seen, for example, in the absence of PERB unfair practice machinery and the absence of an exclusive representative in the meet and confer process.

CSEA argues that supervisors should not be left without an administrative remedy to implement section 3522.8. Since the statutory scheme indicates an intention to exclude supervisors from PERB jurisdiction, CSEA must look elsewhere to vindicate the rights granted supervisory employees.

For the foregoing reasons, we hold that PERB lacks jurisdiction to resolve CSEA's claim regarding supervisors through the unfair practice process under SEERA.

Although we dismiss the charge, we, for two reasons, disagree with the hearing officer's decision not to allow charging party leave to amend. First, charging party's appeal alleges an irregularity in the PERB process. It claims that the hearing officer suggested to the charging party the proper form and information required in making its charge. Since it allegedly was allowed to believe that PERB had jurisdiction over supervisory employees, CSEA urges that any blame for using the wrong form or vehicle for processing a violation of SEERA should lie with the board agent. We make no decision here as to whether CSEA's allegations are correct or whether it was misled. Because the appeal is framed in these terms, we now grant leave to amend the charge.

Second, it is not **altogether clear whether** the facts as alleged by CSEA reveal that nonsupervisory employees suffered a detrimental impact. An employer's conduct against supervisors is generally not grounds for an unfair practice charge. However, if there is a reasonable inference that the conduct had an adverse effect on nonsupervisory employees in the exercise of their rights, an unfair practice charge will be entertained vis a vis the nonsupervisory employees.⁹ In this case, if CSEA can show that the personnel officer's comments would have had the effect of restraining, **coercing** or interfering with nonsupervisors in the exercise of their SEERA rights, the unfair practice process is the proper vehicle for resolving the dispute. However, the charge, as it presently stands, is silent regarding whether nonsupervisors were adversely affected by the distribution of the minutes or whether they were aware of the minutes at all. We therefore allow CSEA an opportunity to amend its charge to allege, if possible, harm to nonsupervisory employees.

ORDER

The Public Employment Relations Board ORDERS that:

The unfair practice charge filed by California State Employees' Association, **Chapter 43 against the California**

⁹Vail Mfg. Co. (1945) 61 NLRB 181 [16 LRRM 85], enfd. (7th Cir., 1947) 158 F.2d 664 [19 LRRM 2177], cert, denied (1947) 331 U.S. 835 [20 LRRM 2185]; Better Monkey Grip Co. 115 NLRB 1170 [38 LRRM 1025], enfd (5th Cir., 1957) 243 F.2d 836 [40 LRRM 2027], cert, denied (1957) 355 U.S. 864 [41 LRRM 2007]; Talladegh Cotton Factory, Inc. (1954) 106 NLRB 295 [32 LRRM 1479], enfd. (5th Cir., 1954) 213 F.2d 208 [34 LRRM 2196].

State Department of Health, is hereby dismissed with leave to amend. Any amendment must be filed within twenty (20) calendar days following the date of service of this Decision,

By: Jerilou Cossack Twohey, Member Harry Gluck, Chairperson

Raymond J. Gonzales, Member

PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

CALIFORNIA STATE EMPLOYEES'
ASSOCIATION,

Charging Party,

v.

EDMUND G. BROWN, JR.,

Respondent.

Case No. LA-CE-1-S;78/79

ORDER DISMISSING UNFAIR
PRACTICE CHARGE WITHOUT
LEAVE TO AMEND

(9-1-78)

Upon the advice of the General Counsel, it is hereby ordered that the above-captioned unfair practice charge is dismissed without leave to amend pursuant to PERB Regulation 32630(a) for the reasons set forth herein.

PROCEDURAL HISTORY

On July 11, 1978, the California State Employees' Association (hereafter CSEA) filed an unfair practice charge against Edmund G. Brown, Jr., Governor of the State of California, and the California Department of Health alleging a violation of sections 3519 and 3522.6¹ in that on June 15, 1978 Joann Newton, Camarillo State Hospital Personnel Officer, stated to employee representatives at Camarillo State Hospital that after July 1, 1978 supervisors must decide whether to continue to hold office in

¹All statutory references are to the Government Code unless otherwise specified. For the purposes of this dismissal, the facts stated in the charge are deemed to be true. See San Juan Unified School District (3/10/77) EERB Decision No. 12, at p. 4.

employee organizations or request a downgrade to a non-supervisory position.

On July 14, 1978, CSEA filed a first amended unfair practice charge which realleged the facts as alleged in the original charge but which further alleged violation of sections 3522.3, 3522.8 and 3519(a), (b) and (d).

On August 2, 1978, the below-named hearing officer, upon the advice of the General Counsel, dismissed the first amended unfair practice charge with leave to amend within twenty (20) calendar days on the grounds that the charge failed to allege: (1) which specific rights guaranteed by the State Employer-Employee Relations Act (hereafter SEERA) employees exercised and because of which exercise, respondent interfered with, restrained and coerced employees; (2) which specific rights guaranteed to employee organizations pursuant to SEERA have been denied by employer; and (3) whether the employees to whom Joann Newton spoke on June 15, 1978 are "supervisors" pursuant to SEERA.

On August 22, 1978, CSEA filed a second amended unfair practice charge. Said charge alleges a violation of sections 3522.3 and 3522.8² in that on

²Sec. 3522.3 states:

Supervisory 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 or all matters of supervisory employee-employer relations as set forth in sec. 3522.6. Supervisory employees also shall 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 employer.

Sec. 3522.8 states:

The state employer and employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against supervisory employees because of their exercise of their rights under this article.

June 15, 1978 a statement was made by Joann Newton, Camarillo State Hospital Personnel Officer, at a meeting of employee organization representatives and representatives of the Department of Health, to the effect that supervisory employees could not hold office in employee organizations and that "the minutes of this meeting were distributed to approximately 180 supervisory employees at the hospital sometime after July 1, 1978."

Said charge further alleges that as a result of the publication of the July 15, 1978 meeting minutes, CSEA has received expressions of concern, fear and intimidation by members who are either currently holding office or are contemplating running for office. The charge then states in the second from the last paragraph in the charge:

CSEA is therefore filing this unfair practice charge on behalf of its members at Camarillo State Hospital who have been designated by the state as supervisory employees and who wish to freely exercise their rights under Government Code Section 3522.3 without interference, intimidation, restraint, coercion, or without the threat of discriminatory treatment.

DISCUSSION

Csea has clearly amended the above-captioned unfair practice charge to allege which specific rights guaranteed by SEERA employees have exercised and because of which exercise employer has interfered with, restrained and coerced said employees. CSEA has alleged that the distribution of the July 15 meeting minutes constitutes interference, intimidation, restraint and coercion with rights guaranteed to supervisory employees pursuant to section 3522.3 to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all

matters of supervisory employee-employer relations as set forth in section 3522.6.³

It is equally clear that CSEA has filed the instant unfair practice charge on behalf of its members who are designated by the state to be supervisory employees and does not specifically allege that any rights guaranteed to employee organizations pursuant to SEERA have been denied by employer.

It is therefore concluded that CSEA in alleging in the second amended unfair practice* charge that the respondent has violated section 3522.3 by taking actions which interfere with, intimidate, restrain, coerce or discriminate against supervisory employees pursuant to SEERA because of the supervisors exercise of rights pursuant to section 3522.3. A threshold issue to the charge, therefore, is whether "supervisory employees" have a right pursuant to SEERA to allege as an unfair practice before the Public Employment Relations Board (PERB) a violation of section 3522.8.

³Sec. 3522.6 states:

Upon request, the state shall meet and confer with employee organizations representing supervisory employees. "Meet and confer" means that they shall consider as fully as the employer deems reasonable such presentations as are made by the employee organization on behalf of its supervisory members prior to arriving at a determination of policy or course of action.

Section 3255 clearly states:

Except as provided by sections 3522.1 to 3522.9, inclusive, supervisory employees shall not have the right or be covered by any provision or definition established by this chapter. [Emphasis added.]

Therefore, section 3519, which makes it unlawful for the state to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter, not falling within sections 3522.1 to 3522.9, inclusive, is not applicable to supervisory employees.

Supervisory employees, however, have statutory rights parallel to those enumerated in section 3519(a). Section 3522.8 states:

The state employees and employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against supervisory employees because of their exercise of their rights under this article.

A similar issue pursuant to the Educational Employment Relations Act (EERA) was considered by the PERB itself quite recently in Quarrick and O'Brien v. Mt. Diablo Unified School District and Mt. Diablo Education Association, CTA/NEA.³

In considering the charging parties' allegation of respondent Mt. Diablo Education Association's breach of its duty to fair representation, the PERB itself asked: "Is an unfair practice charge an appropriate vehicle for processing this claim?"

In answering this question in the affirmative, the PERB itself, after first noting the broad powers granted it in section 3541.3(i),⁴ held that

³PERB Decision No. 68 (8/21/78).

⁴Sec. 3541.3(i), a part of the EERA reads:

The Board shall have all of the following powers and duties:

(i) To investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect to such charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

the acts prohibited by sections 3543.5 and 3543.6 EERA (identical in language to sections 3519 and 3519 of SEERA), while commonly perceived as unfair practices, are described by the EERA not as "unfair practices" but as "unlawful." The PERB then stated:

No definition of unfair practices appear in the chapter. It is possible, therefore, that the range of actions which may be deemed as unfair practices may have been left to PERB's own determination and might include statutory violations other than those in 3543.5 and 3543.6.

The PERB itself concluded by holding that section 3543.6(a) and (b) appear broad enough to shelter the allegations of a duty of fair representation charge.

Section 3522's clear exemption of the supervisory employees from the protections afforded employees pursuant to section 3519, however, would appear to preclude similarly sheltering the allegations of the instant charge within section 3519.

Where statutory violations other than those proscribed by sections 3543.5 and 3543.6 appear in the EERA the PERB itself, rather than incorporate them in the sections 3543.5 and 3543.6, has chosen to establish a separate vehicle for processing claims arising thereunder. For example, Article 8 of EERA contains detailed public notice procedures which allow considerable community involvement in all aspects of negotiations between a public school employer and exclusive representation of public school employees. Pursuant to section 3547 (e), the PERB itself adopted regulations implementing said procedures which are codified in PERB Regulations 37000-37100.⁵

⁵ It is noted that employees, employee organizations or employers as defined by EERA but not members of the public may file unfair practice charges. Pursuant to PERB Regulation 37010, however, a complaint alleging a violation of section 3547 may be filed by any individual who is a resident of the school district involved in the complaint or who is the parent or guardian of a student in the school district or is an adult student in the district.

ORDER

For the foregoing reasons the unfair practice charge filed by charging party in the above-captioned matter is DISMISSED without leave to amend.

The above action is taken pursuant to FERB Regulation 32630(a) Charging party may obtain review of the dismissal by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice. (PERB Regulation 32630(b)). Such appeal must be actually received by the Executive Assistant to the Board before the close of business (5:00 P.M.) on September 21, 1978 in order to be timely filed. (PERB Regulation 32135). Such appeal must be in writing, must be signed by the charging party or his agent, and must contain the facts and arguments upon which the appeal is based. (PERB Regulation 32630(b)). The appeal must be accompanied by proof of service upon all parties, (PERB Regulation 32135, 32142 and 32630(b)), as amended.

Dated: September 1, 1978

WILLIAM P. SMITH
GENERAL COUNSEL

Kenneth A. Perea
Hearing Officer

PROOF OF SERVICE BY MAIL - CCP. 1013a

I declare that I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 923 - 12th Street, Suite 201, Sacramento, CA 95814. On September 1, 1978, I served the attached Notice of Dismissal W/O Leave to Amend, IA-CE-1-S;78/79 on the below listed parties by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the U.S. Mail at Sacramento, California addressed as follows:

Mr. Dennis M. Hardaker
Southern Area Manager
California State Employees' Association
4929 Wilshire Boulevard, Suite 1030
Los Angeles, Ca. 90010

Mr. Marty Morgenstern Director
Office of Employee Relations
Governor's Office
State Capitol
Sacramento, Ca. 95814

California Department of Health
Attn: Edwin W. Beach, Interim Director
714/744 P Street
Sacramento, Ca. 95814

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on September 1, 1978 at Sacramento _____, California.

Marie S. Macaulay

(Type or print name)

(Signature)