STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SHARON S. FORSLUND, Charging Party,	)	Case No. LA-CO-507
v.	)	PERB Decision No. 828
SADDLEBACK VALLEY EDUCATORS ASSOCIATION, SOUTH ORANGE COUNTY EDUCATORS, Respondent.	)	July 19, 1990

Appearances: Sharon S. Forslund, on her own behalf; California Teachers Association by Robert Einar Lindquist, Attorney, for Saddleback Valley Educators Association, South Orange County Educators.

Before Hesse, Chairperson; Craib and Cunningham, Members.

DECISION AND ORDER

HESSE, Chairperson: This case is before the Public Employment Relations Board (Board) on appeal by Sharon S. Forslund of a Board agent's dismissal (attached hereto) of her charge that the Saddleback Valley Educators Association, South Orange County Educators violated section 3543.6(b) of the Educational Employment Relations Act. (Gov. Code, sec. 3540 et seq.) We have reviewed the dismissal and, finding it free of prejudicial error, adopt it as the decision of the Board itself.

The unfair practice charge in Case No. LA-CO-507 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Craib and Cunningham joined in this Decision.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
916) 322-3088

Office of the General Counsel
916/323-8015

April 9, 1990

Sharon Forslund (Daly)

Re: Forslund v. Saddleback Valley Educators Association. South Orange County Educators
Unfair Practice Charge No. LA-CO-507
DISMISSAL AND/OR REFUSAL TO ISSUE COMPLAINT

Dear Ms. Forslund:

The above-referenced charge alleges that the Saddleback Valley Educators Association, South Orange County Educators (Association) failed to properly represent Ms. Forslund in an arbitration involving a Saddleback Valley Unified School District (District). The duty of fair representation is contained in Section 3544.9 of the Educational Employment Relations Act (EERA) and violation of this duty is cognizable through Section 3543.6(b) of the EERA.

I indicated to you in my attached letter dated March 23, 1990, 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 that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were furthered advised that unless you amended that charge to state a prima facie case, or withdrew it, prior to March 30, 1990, the charge would be dismissed. On March 27, you requested and received an extension of time within which to file your amended charge. The amended charge was filed on April 5, 1990.

The amended charge makes essentially three allegations. First, that the Association did not implement an arbitrator's award in your behalf. Second, that the Association did not file grievances on your behalf when the District discriminated against you in making tentative assignments for the 89-90 school year. Third, the Association impeded your acquisition of documents and transcripts from the arbitration proceedings. These issues will be discussed in order.

The allegation that the Association failed to implement an arbitrator's award was raised in the original charge and discussed at length in my March 23, 1990, letter. You assert in the amended charge that Ms. Kirkland did not ask the Association Executive Board to purchase a transcript on December 12. However, a close reading of Ms. Kirland's memo of December 12 to the Association Executive Board members (attached to the original unfair practice charge) creates the clear impression that Ms. Kirkland was requesting that they purchase the transcript. This is especially true in light of the statement in this memo that she had previously recommended to the Executive Board not to purchase the transcript. If on December 12 she was of that same opinion, there would have been no need for the memo. Second, you indicate in the amended charge that the District did not create a third chemistry class for you but rather created a fifth chemistry class. The statement in my letter was a simple recitation of the fact that after the Association complained about your temporary schedule, a new schedule was issued which contained an additional chemistry class which had not previously been offered. Third, you assert that the Association was obligated to file a grievance over your temporary assignment.[1] As you are aware, Article 12 of the Collective Bargaining Agreement between the District and the Association provides that an employee without any assistance from the Association has a right to file a grievance with the District. In addition,

> [a]bsent arbitrary, discriminatory or bad faith conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. (Footnote and citations omitted.)
>
> A prima facie case alleging conduct violative of the duty of fair representation must, at a minimum, set forth sufficient facts from which it becomes apparent how or in what manner the exclusive representatives action or inaction, was arbitrary, discriminatory, or in bad faith. (Citations omitted.) Los Angeles City and County School Employees Union. Local 99, Service Employees International Union. AFLCIO (Scates) (1983) PERB Decision No. 341.

[1]As described in my March 23rd letter, after you complained to the Association regarding your assignment, the Association suspended negotiations with the District. Shortly thereafter you received a second schedule.

The information provided in the amended charge does not demonstrate sufficient conduct to find the Association's behavior violative of the EERA.

The amended charge also alleges that the District discriminated against you by providing you with a new assignment contrary to the contractual provisions of the agreement between the District and the Association. This allegation is presently contained in the complaint issued in a companion case, Forslund v. Saddleback Valley Unified School District, Unfair Practice Charge No. LA-CE-2923. These allegations do not additionally state a prima facie case of misbehavior by the Association and therefore must be dismissed.

Finally, the amended charge alleges that the Association's position concerning confidentiality of arbitration transcripts and/or documents was arbitrary, discriminatory, or in bad faith. For such behavior to violate the EERA, it must first be demonstrated that the Association owed Ms. Forslund a duty of fair representation with respect to providing documents and/or information to her regarding her lawsuit against the District. Although PERB has not addressed this identical question, it has addressed similar questions. In California Correctional Peace Officers Association (Pacillas) (1987) PERB Decision No. 657-S, the Board found that a union does not owe a duty of fair representation to a member of the bargaining unit with regard to extra-contractual matters. In that decision, the Board cited Hawkins v. Babcock and Wilcox Company (1980) (U.S.D.C., N. Ohio) 105 LRRM 3438 which held

> The National Labor Relations Act, authorizing unions to represent employees in the creation and administration of collective bargaining agreements with employers, together with a correlative duty of fair representation, however, is limited to the collective bargaining process. Outside of the employer-employee relationship, the union has no authority to represent union members, nor duty to advise those members of their extra-contractual legal rights. The union's duty of fair representation is restricted to the context of the collective bargaining agreement and does not extend to legal remedies available outside the employment context. (Citations omitted.)

When Ms. Forslund requested copies of the arbitration transcript and/or documents from the arbitration, the grievance and arbitration procedure had been exhausted by issuance of an arbitrator's ruling. It is clear that these documents were to be

used in a lawsuit which she had filed against the District regarding sexual discrimination. Such matters do not fall within the collective bargaining process but,rather constitute extra-contractual legal matters outside of the union's duty of fair representation. Accordingly, there is no special relationship which exists between the unit member and the employee organization which exclusively represents that bargaining unit with regard to providing of documents for these types of hearings. Thus, even if it could be demonstrated that the Association acted arbitrarily, capriciously, discriminatorily, or in bad faith, such conduct would not violate the duty of fair representation because no duty is owed with respect to these matters. Accordingly, this claim must be 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 (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 calendar days following the date of service of the appeal (California Administrative Code, title 8, section 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 California Administrative Code, title 8, section 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.

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 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 (California Administrative Code, title 8, section 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,

CHRISTINE A. BOLOGNA
General Counsel

By .
Robert Thompson
Deputy General Counsel

Attachment

cc: Robert E. Lindquist
Christine Kirkland

STATE Of CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
(916) 322 3086

Office of the General Counsel
916/323-8015

March 23, 1990

Sharon Forslund (Daly)

Re: Forslund v. Saddleback Valley Educators Association. South Orange County Educators
Unfair Practice Charge No. LA-CO-507
WARNING LETTER

Dear Ms. Forslund:

The above-referenced charge alleges that the Saddleback Valley Educators Association, South Orange County Educators (Association) failed to properly represent Ms. Forslund in an arbitration involving a Saddleback Valley Unified School District (District). The duty of fair representation is contained in Section 3544.9 of the Educational Employment Relations Act (EERA) and violation of this duty is cognizable through Section 3543.6(b) of the EERA.

My investigation revealed the following facts: Sharon Forslund (Daly) is a science teacher at the Saddleback Valley Unified School District. During 1987, Ms. Forslund became involved in a class scheduling dispute with the District at Mission Viejo High School. A grievance was filed by the Association, and, on October 27, 1987, the Association Executive Board directed that the grievance be taken to binding arbitration. The arbitration was initially scheduled for early 1988 but was postponed. It occurred in the summer and fall of 1988 and required six-and-one-half days of hearing spaced over three months. During this time a number of settlement offers were exchanged between the Association and the District; however, none proved fruitful. The executive director of the South Orange County Educators, Christine Kirkland, served as Ms. Forslund's Association representative at the arbitration.

On December 12, 1988, Ms. Kirkland, asked the Association's Executive Board to purchase transcripts from the arbitration hearing to be used in preparation of the brief to the arbitrator. The executive board decided not to purchase these transcripts. A copy of Ms. Kirkland's brief was sent to Ms. Forslund on January 31, 1989.

On March 9, 1989, Arbitrator Paul Rothchild ruled in favor of the grievant, Ms. Forslund, and ordered that she be reinstated to her former science position at Mission Viejo High School with full seniority and restoration of five chemistry classes to the extent that student enrollment allowed such classes to be offered. The arbitrator also wondered whether the grievant would be willing to place herself in the hostile environment of Mission Viejo High School, but that remained the grievant's decision. Finally, the arbitrator maintained jurisdiction over the matter for 120 days to assist the parties in interpretation and/or implementation of the award. On March 30, Ms. Kirkland wrote to Associate Superintendent Ken Anderson informing him that Ms. Forslund desired to remain at her present location, Trabuco Hills High School and that it was likely that five chemistry classes would be available the following September. It was Ms. Kirkland's intent to have those chemistry classes assigned to Ms. Forslund.

On May 17, 1989, Mr. Anderson responded to Ms. Kirkland, stating that it was not possible to give all five chemistry classes to Ms. Forslund, but that she could keep the three chemistry classes that she had been teaching in the school year 1988-89. On May 22, Ms. Kirkland wrote to Mr. Anderson indicating that Ms. Forslund should have five chemistry classes assigned to her at Trabuco Hills High School for the school year 1989-90. On the same day Ms. Kirkland wrote to the arbitrator requesting his services in the interpretation and implementation of the award. This request was based on the District's position that Ms. Forslund was not entitled to five chemistry classes at Trabuco Hills, but, rather, that the award would only apply to her teaching at Mission Viejo.

Under a tentative schedule issued by the District on May 26, Ms. Forslund was assigned to teach two chemistry classes and three physical science classes for the 1989-90 school year at Trabuco Hills. When Ms. Forslund complained to Assistant Principal Barry Blade, he said she would not receive a new assignment until after the contract negotiations with the Association were completed. Ms. Forslund immediately complained to the Association regarding the assignment. The Association informed the District that negotiations for a new contract would be suspended until Ms. Forslund's schedule was modified.

In early June a new schedule was issued which assigned Ms. Forslund to three chemistry classes and two earth science classes. Ms. Kirkland telephoned Ms. Forslund at this time and asked whether her schedule was satisfactory. Ms. Forslund replied that it was. The Association asserts that Ms. Kirkland also told Ms. Forslund that the arbitrator was awaiting a response on whether he would be involved further, read her a rough draft of a letter to the arbitrator (sent June 21), and asked if she was comfortable with Ms. Kirkland sending it. Ms. Forslund allegedly replied in the affirmative. Ms. Forslund denies awareness of the letter prior to it being sent. On the day school ended in June, a week after the District gave Ms. Forslund her new schedule, she learned that there were five chemistry classes (her three plus two taught by Ms. Fliegler) at Trabuco Hills. She had been under the impression that there were still only four, and that the additional chemistry class in her new schedule had come from Ms. Fliegler's schedule. In reality Ms. Fliegler maintained her two classes and an additional class was created and given to Ms. Forslund.

On June 21, Ms. Kirkland wrote to Arbitrator Rothchild indicating that neither the Association nor the District felt that an additional day of hearing was necessary to interpret the agreement. In addition, the letter states that the parties recently worked out an acceptable schedule[1] for Ms. Forslund at Trabuco Hills High School and that if the schedule is adhered to, she did not anticipate need for further services of the arbitrator on the matter.

On July 4, Ms. Forslund wrote to Arbitrator Rothchild indicating the events surrounding her initial assignment and then her reassignment. After an explanation of these facts, she also indicated that she was hoping that he would be able to say that her interpretation of his award was correct. The letter also indicates receipt of Ms. Kirkland's June 21 letter. On July 7, Ms. Forslund wrote to Ms. Kirkland indicating that her new assignment of three chemistry and two earth science classes did not change any one else's assignments. Originally, it appears that she believed that there were only four chemistry classes available and that they were being evenly split, two for her and two for Katty Fliegler. However, when she was reassigned, Ms. Fliegler did not lose her two chemistry classes but rather an additional chemistry class was created and given to Ms. Forslund.

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[1]This reference is to the change in the proposed schedule to allow Ms. Forslund to teach three chemistry classes as opposed to the previously scheduled two.

She goes on to state that it is her belief that the arbitrator's award is possible and that she is concerned that the arbitrator should still clarify his award.[2] On July 12, Eddy Hidalgo, the Tribunal Administrator for the American Arbitration Association wrote to Ms. Kirkland indicating that they had received Ms. Forslund's July 4 letter and requesting any comments or contentions before July 22, at which time all pertinent documents would be forwarded to the arbitrator for his determination.

On August 7, Ms. Kirkland wrote to Mr. Hidalgo concerning the distribution of transcripts as previously requested by Ms. Forslund's private attorney, Carrie McMillan, for use in Ms. Forslund's sexual discrimination law suit against the District. Ms. Kirkland agreed with Mr. Larson, the district's counsel in that case, that "the arbitration process is expected to provide the parties to the collective bargaining agreement a degree of confidentiality that would seem to preclude distribution by the arbitrator or by the AAA of any transcripts of the proceedings."

On September 7, Ms. Kirkland wrote to Ms. Forslund, responding to an August 31 letter, concerning several different issues. With respect to the Association's decision not to request an interpretation of the arbitration award by the arbitrator, Ms. Kirkland wrote the following:

> As I reminded you on August 23, I called when your adjusted assignment was confirmed (three chemistry and two earth science) to make sure that you were comfortable with the assignment, and to specifically notify you that the arbitrator was awaiting a response. I read to you a rough draft of the letter I had prepare and asked if you were comfortable with me sending it. You responded in the affirmative. The Association President Bonnie Frommelt wrote to Ms. Forslund on September 12 indicating that the Executive Board agreed with Ms. Kirkland's decision to not seek an additional hearing from the arbitrator and to hold the transcripts to be confidential.

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[2]Ms. Forslund received a copy of the arbitrator's award, dated March 9, 1989, which indicated he would maintain jurisdiction over the case for 120 days. She states that she was unsure of how to count the days.

Ms. Forslund has since received copies of the transcript.

Based on the facts described above, this charge does not state a prima facie violation of the EERA for the reasons which follow.

Section 3541.5(a) of the EERA states in pertinent part that:

> The Board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge:

This charge was filed on November 21, 1989, and therefore only Association behavior which occurred after May 21, 1989, can be considered actionable for purposes of finding a violation of the EERA.

Charging Party alleged that the exclusive representative, the Association, denied Ms. Forslund the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section EERA 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) (1983) PERB Decision No. 258. In order to state a prima facie violation of this section of the EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory, or in bad faith. In United Teachers of Los Angeles (Collins). Id.. the Public Employment Relations Board (PERB) 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.
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> . . . . . .
>
> A union may exercise its discretion to determine how far to pursue a grievance on 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. Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

Although the charging party is extremely unhappy that her present schedule is equivalent to that from the preceding school year, despite having won an arbitration against the district, this unhappiness does not translate into a violation of the EERA. Charging party's primary concern appears to be that Ms. Kirkland's June 21 letter, informing the arbitrator that his services were no longer needed to clarify the award, was Bent without her knowledge or permission.[3] Given that the parties agreed that Ms. Forslund had indicated to Ms. Kirkland that she was satisfied with her present schedule at Trabuco Hills, it was not unreasonable for the Association to have presumed that there was nothing further to be gained from discussions with the arbitrator. After Ms. Forslund discovered in mid-June the additional chemistry class in her new schedule had been created rather than transferred from Ms. Fliegler, she notified the Association by letter dated July 7, 1989, that she felt that the Arbitration award was possible. The arbitrator's jurisdiction over this matter expired on July 7. PERB has held that a union does not breach its duty of fair representation when it files a grievance bearing an employee's name without the employee's permission, fails to provide her with a copy of the grievance in a timely fashion, and denies her a right to provide input on the grievance. Fremont Teachers Association (King), supra. At page seven, the Board explained, "[b]y filing the grievance in this case, the Association was enforcing an agreement negotiated for the benefit of all members of the unit who went out on strike. Certainly, all members of the unit have a vital stake in the enforcement of agreements negotiated by their exclusive

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[3]The June 21st letter indicates that a copy was sent to Ms. Forslund. She refers to receipt of the letter in her July 4 correspondence to the arbitrator.

representative. In the face of such compelling interests of the majority of the employees, the competing right of an individual employee must be subordinated. [Citations omitted.] As the Supreme Court stated in NLRB v. Allis-Chalmers Mfg. Co. (1967), 388 U.S. 175 [65 LRRM 2449], at p. 180

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."

Accordingly, the Association's failure to notify Ms. Forslund of the June 21st letter prior to its mailing does not violate the EERA. Even if such a duty existed, Ms. Forslund may have lost her right to object to the letter by waiting until the expiration of the arbitrator's jurisdiction to raise the matter with the Association.

Forslund's secondary concern appears to be the Association's failure to assist her in obtaining a copy of the arbitration transcript from the arbitrator.[4] Again, the Association's actions do not appear to be arbitrary, capricious or in bad faith.

Although Ms. Forslund is clearly dissatisfied with the Association's behavior during the summer of 1989, there are no facts presented which make it appear that the Association acted in an arbitrary, capricious, or bad faith manner during this time. Without such facts there is no prima facie statement of violation.

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 any additional facts that would correct the deficiencies explained above, please amend the charge

[4]The Association did not purchase a copy of the transcript.

accordingly. 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 must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before March 30, 1990. I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Robert Thompson
Deputy General Counsel