STATE OP CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID W. IRVIN, Charging Party, v. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501, Respondent.	)	Case No. LA-CO-29-H PERB Decision No. 881-H May 22, 1991

Appearance: Daniel Dillon for David W. Irvin.

Before Shank, Camilli and Carlyle, Members.

DECISION AND ORDER

CAMILLI, Member: This case is before the Public Employment Relations Board (Board) on appeal by David W. Irvin (Irvin) of a Board agent's dismissal (attached hereto) of his charge that the International Union of Operating Engineers, Local 501 (IUOE) violated sections 3571.l(b) and (e) of the Higher Education Employer-Employee Relations Act (HEERA),[1] when it refused to proceed to arbitration or allow a third party to proceed to arbitration on Irvin's grievance. Irvin contends that the IUOE acted arbitrarily when it refused to proceed with an alleged meritorious grievance. We have reviewed the dismissal and, finding it free of prejudicial error, adopt it as the decision of the Board itself.

[1]HEERA is codified at Government Code section 3560 et seq.

The unfair practice charge in Case No. LA-CO-29-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shank and Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

March 8, 1991

Daniel Dillon

Re: David W. Irvin v. International Union of Operating Engineers. Local 501
Unfair Practice Charge No. LA-CO-29-H
DISMISSAL LETTER

Dear Mr. Dillon:

The above-referenced charge alleges that the International Union of Operating Engineers, Local 501, AFL-CIO (IUOE) refused to proceed to arbitration or allow a third party to proceed to arbitration on Mr. Irvin's grievance. This conduct is alleged to violate sections 3571.l(b) and (e) of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you in my attached letter dated February 14, 1991, 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 further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to February 25, 1991, the charge would be dismissed.

You requested and received an extension of time to file an amended charge. The second amended charge was filed on March 1, 1991, and essentially states: Mr. Irvin had a meritorious employment record and the IUOE failed to take his meritorious grievance to arbitration for reasons "we cannot figure out to this day."

Unions acting as exclusive representative, must not act arbitrarily, discriminatorily or in bad faith when processing a grievance. This standard of care does not require it to take any grievance, even a meritorious one, to arbitration. Without evidence demonstrating that the IUOE refused to take Mr. Irvin's grievance to arbitration arbitrarily, discriminatorily, or in bad faith, your charge does not state a prima facie violation of HEERA. It is dismissed based on the facts and arguments contained in this letter and my letter of February 14, 1991.

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 Code of Regulations, 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 Code of Regulations, 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 Code of Regulations, 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 Code of Regulations, 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,

JOHN W. SPITTLER
General Counsel

By Robert Thompson
Robert Thompson
Deputy General Counsel

Attachment

cc: R. H. Fox, Jr.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

February 14, 1991

Daniel Dillon

Re: David W. Irvin v. International Union of Operating Engineers. Local 501
Unfair Practice Charge No. LA-CO-29-H
WARNING LETTER

Dear Mr. Dillon:

The above-referenced charge alleges that the International Union of Operating Engineers, Local 501, AFL-CIO (IUOE) refused to proceed to arbitration or allow a third party to proceed to arbitration on Mr. Irvin's grievance. This conduct is alleged to violate sections 3571.l(b) and (e) of the Higher Education Employer-Employee Relations Act (HEERA).

This charge was originally filed on July 3, 1990 and was dismissed on August 14, 1990. An appeal containing an amended charge was filed with the Board itself on September 20, 1990. On December 20, 1990, the Board itself remanded this case to the undersigned for further investigation.

After reviewing the amended charge and the additional information provided, my findings are as follows.

Dave Irvin was hired by the University of California at Los Angeles (University) as a casual employee (plumber) on September 6, 1988. On March 6, 1989, he became a probationary career employee.[1] During January and February of 1989, Mr. Irvin was

[1] Article 6 of the collective bargaining agreement between IUOE and the University at that time (effective dates July 17, 1986 through April 30, 1989) read:

> All new career employees shall serve a probationary period of six (6) calendar months at one-half time or more without a break in service. Time on leave with or without pay is not qualifying service for the completion of the probationary period. Employees who are rehired following a break in service shall serve a new probationary period whether or not they previously completed a probationary period. Prior to the completion of the probationary period an employee may

exposed to a large amount of asbestos while performing a boiler room-type refitting job. On August 16, 1989, Mr. Irvin informed Bill Atkinson, the general supervisor at the University, about his concerns regarding the asbestos and provided him with photographs of the problem. On August 18, 1989, Mr. Irvin was released from employment, in accordance with Article 6 of the MOU, by Dave Hendry, Superintendent of Physical Plant for the University.[2]

On August 23, 1989, IUOE representative David Hamilton, wrote to University representative Gayle Cowling, indicating that Mr. Irvin had requested to meet to air a complaint pursuant to Article 28 of the MOU. Mr. Irvin contacted Mr. Hamilton shortly after being released but was told that nothing could be done to get him his job back. Mr. Irvin disputes that he requested a complaint meeting be held, indicating that he was unaware of the difference between a complaint and grievance at that time.

On September 14, a meeting was convened to discuss Mr. Irvin's complaint. Mr. Hamilton attended the meeting **but** arrived without notes, paperwork or a copy of the labor agreement. During a pre-meeting discussion Mr. Hamilton indicated to **yourself** and **Mr.** Irvin that the asbestos problem would be raised in the meeting. As the meeting broke up Mr. Irvin asked **Mr. Hamilton why the** asbestos issue had not been raised and Mr. Hamilton replied that it would be brought up in another meeting.

On September 18, 1989, Mr. Irvin filed a grievance against the University. The University objected to **Mr. Irvin** filing both a grievance and complaint over the same dismissal. In a letter

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be released at the discretion of the University and without recourse to the Grievance or Arbitration Procedure of this Agreement.

[2] Article 6 of the collective bargaining agreement between the University and IUOE at that time (effective dates: July 17, 1989 through June 30, 1992) read in pertinent part:

> B. Casual employees who are hired into career positions shall not serve a probationary period unless they are informed in writing by management to the contrary, provided they have served six (6) continuous months at fifty percent (50%) time or more in the same class, in the same shop and under the same supervisor.
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> C. Prior to the completion of the probationary period an employee may be released at the discretion of the University. Disputes arising from this Article are not subject to the Grievance or Arbitration Procedure of this Agreement.

dated September 26, 1989, Mr. Irvin indicated to the University that he was going to drop the complaint and he wished to have his problem heard as a grievance. Mr. Irvin filed the grievance without the assistance of the IUOE.

On September 29, Ms. Cowling responded to the complaint in a letter to Mr. Hamilton. In the response she summarized the arguments made by the IUOE during the September 14 meeting. They included: (1) that Mr. Irvin should have been considered career under the terms of the newly negotiated skills-crafts agreement because he had served previously as a casual employee, (2) that Mr. Irvin was being released in retaliation for his association with another unit member who had a prior conflict with David Henry, the plumbing supervisor, (3) that Mr. Irvin had been an exemplary employee with no prior criticisms of his work performance, and (4) that he believed he was being discriminated against because of his national origin (Scotland).

In addition, the Cowling letter reiterated the University position that Article 6 in the new contract did not apply to Mr. Irvin because there was no agreement to apply this provision retroactively. Accordingly, Mr. Irvin was still on probation at the time of his release. Finally, the University stated that Mr. Irvin had been previously apprised of his lack of productivity and that there was no evidence that he had been released for discriminatory reasons.

There then followed a series of letters between Mr. Irvin, IUOE representatives and University representatives concerning whether Mr. Irvin's grievance would be arbitrated. The University contended that Mr. Irvin had his case heard under the complaint procedure and that he could not have it reheard under the grievance procedure.[3] However, in correspondence dated January 3, 1990, from University Assistant Labor Relations Manager Sandra Rich to Mr. Hamilton, Ms. Rich indicated that the University would not deny IUOE's request that Mr. Irvin's grievance be arbitrated. This request for arbitration by Mr. Hamilton was preceded by "much argument" between Mr. Hamilton and Mr. Irvin's personal representatives. At no time prior to this did the IUOE attempt to get meetings with the University regarding the grievance.

By letter dated January 8, 1990, Mr. Hamilton informed Mr. Irvin that as a result of his investigation he was convinced the grievance lacked sufficient merit to enable the union to win at

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[3] The University also stated that if the case had originally been filed as a grievance it would have been denied because Article 6 states in pertinent part: "Disputes arising from this Article are not subject to the Grievance or Arbitration Procedure of the Agreement."

arbitration. He therefore recommended that the arbitration not be pursued further and informed Mr. Irvin of his rights to appeal that decision to the business manager. Mr. Irvin met with you, Mr. Hamilton, and the business manager, R.H. Fox, Jr. on January 31, 1990. By letter dated March 1, Mr. Fox informed Mr. Irvin that his appeal was denied because the grievance lacked sufficient merit to sustain a favorable decision in arbitration. He also informed Mr. Irvin of his right to appeal this decision to the local union executive board. The decision was appealed by letter of March 14. A meeting of the executive board was held on April 10 and the appeal was denied. On June 26, Mr. Dillon wrote to Mr. Fox requesting reconsideration of the union's decision not to pursue the grievance to arbitration. This request was also denied by Mr. Fox.

Based on the facts presented above, this charge fails to state a prima facie violation of the HEERA for the reasons which follow.

HEERA section 3563.2(a) states:

> Any employee, employee organization, or employer shall the right to file an unfair practice charge, except that the board shall not 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.

The decision by Mr. Hamilton to not proceed to arbitration was given to Mr. Irvin on January 8, 1990. This event fell within the six months preceding July 3 and thus is timely. However, any action or inaction prior to January 3, 1990, by the union cannot form the basis for an independent violation of the statute but rather only provides supporting evidence for a violation which would arise out of the IUOE's determination not to pursue the grievance to arbitration.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representative guaranteed by HEERA in violation of section 3571.l(b) and (e). 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 HEERA, Charging Party must show that the IUOE'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.

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 require to process a employee's grievance if the chances for success are minimal.

Although it is alleged that IUOE representative Hamilton was less than helpful in either presenting the complaint to the University or pursuing the grievance once it had been filed, there are no facts indicating that this conduct was more than negligent behavior on his part. Nor are there facts showing that the decision not to pursue arbitration which was upheld by several appellate levels in the union hierarchy was taken in an arbitrary, discriminatory or bad faith manner. Without evidence of such conduct on the part of IUOE, this charge fails to state a prima facie violation of the duty of fair representation.

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 accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled Second 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 February 25, 1991, I shall dismiss your charge. If you have any questions, please call me at (916) 323-8015.

Sincerely,

Robert Thompson
Deputy General Counsel