



The Board has reviewed the Board agent's warning and dismissal letters and, finding them to be free of prejudicial error, adopts them as the decision of the Board itself consistent with the following discussion.

#### DISCUSSION

On appeal, Clark contends that AFSCME's refusal to proceed to arbitration was the failure to perform a ministerial act and, as such, was a breach of the duty of fair representation. In support of this contention, Clark cites Dutrisac v. Caterpillar Tractor Company (9th Cir. 1983) 749 F.2d 1270, 1272. In that case, the union had determined to proceed with arbitration, but inadvertently filed the request for arbitration two weeks late. The court found that the union breached its duty of fair representation when it negligently failed to perform its ministerial duty of submitting the grievance to arbitration in a timely manner.

In the instant case, Clark states that AFSCME first agreed to take her case to arbitration, but later determined that they were not going to continue the matter to arbitration. Clark alleges no facts suggesting that the failure to proceed was purely inadvertent. Therefore, we cannot view AFSCME's conduct as the failure to perform a ministerial act. Further, the case before the Board does not present circumstances which would compel the Board to adopt a new standard for a violation of the duty of fair representation.

ORDER

The unfair practice charge in Case No. SF-CO-28-H is hereby  
DISMISSED WITHOUT LEAVE TO AMEND.

Members Caffrey and Carlyle joined in this Decision.

## PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office  
177 Post Street, 9th Floor  
San Francisco, CA 94108-4737  
(415) 557-1350



November 24, 1992

Peter Janiak  
675 N. First Street, #450  
San Jose, California 95112

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE  
COMPLAINT**

Linda E. Clark v. American Federation of State, County and  
Municipal Employees

Unfair Practice Charge No. SF-CO-28-H

Dear Mr. Janiak:

The above-referenced unfair practice charge, filed on September 23, 1992, alleges that the American Federation of State, County and Municipal Employees (AFSCME) breached its duty of fair representation to Linda E. Clark. This conduct is alleged to violate Government Code section 3571.1(e) of the Higher Education Employer-Employee Relations Act (HEERA).

I indicated to you, in my attached letter dated November 12, 1992, 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 which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to November 20, 1992, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my November 12, 1992 letter.

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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies

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of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 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 (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 of Regs., tit. 8, sec. 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 (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 of Regs., tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the

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dismissal will become final when the time limits have expired.

Sincerely,

ROBERT G. THOMPSON  
Deputy General Counsel

By   
\_\_\_\_\_  
DONN GINOZA  
Regional Attorney

Attachment

cc: Nadra F. Wilson

## PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office  
177 Post Street, Suite 900  
San Francisco, CA 94108-4737  
(415) 557-1350



November 12, 19 92

Peter Janiak  
675 N. First Street, #450  
San Jose, California 95112

Re: WARNING LETTER  
Linda E. Clark v. American Federation of State, County and  
Municipal Employees  
Unfair Practice Charge No. SF-CO-28-H

Dear Mr. Janiak:

The above-referenced unfair practice charge, filed on September 23, 1992, alleges that the American Federation of State, County and Municipal Employees (AFSCME) breached its duty of fair representation to Linda E. Clark. This conduct is alleged to violate Government Code section 3571.1(e) of the Higher Education Employer-Employee Relations Act (HEERA).

Investigation of the charge revealed the following facts. Linda E. Clark was employed by the University of California (University) in May 1989, when she reported to the campus internal auditor at Stevenson College that a fellow employee appeared to be embezzling University funds. Thereafter, the University began to harass Clark and to otherwise retaliate against her. In 1991, the University medically separated Clark from employment.

Clark filed a grievance on July 22, 1991, alleging that the medical separation was made in retaliation for her "whistleblowing" activities. Clark processed her grievance through Step 3 of the process and was denied by the University at each level. Step 4 of the process involves arbitration. Under the collective bargaining agreement, if AFSCME desires to proceed with arbitration it must initiate the request. Clark requested that AFSCME pursue her grievance in arbitration.

AFSCME initially indicated that it would pursue the grievance. At that time, Clark had obtained a private attorney to represent her in her Worker's Compensation case. AFSCME advised Clark that she could not utilize her private attorney in the arbitration.

After AFSCME filed its notice of intention to arbitrate the grievance, it advised Clark that it would not proceed. On

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June 3, 1992, the University notified AFSCME that the grievance had been dismissed. Clark asserts that while AFSCME deliberated over whether to proceed with the grievance, her time for scheduling an arbitration lapsed.

Clark has filed a civil suit against the University and the University has defended by asserting that Clark failed to exhaust her remedies through the grievance procedure. She claims that AFSCME's inaction has caused her to forfeit her civil suit.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the HEERA for the reasons that follow.

In order to state a prima facie case involving a breach of the duty of fair representation, facts must be alleged in the charge indicating how and in what manner the Association refused to process a meritorious grievance for arbitrary, discriminatory or bad faith reasons. In United Teachers of Los Angeles (Collins) (1982) PERB Dec. No. 258, the 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 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

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was without a rational basis or devoid of honest judgment.

(Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Dec. No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Dec. No. 124.)

In this case, the charge fails to demonstrate that the AFSCME's decision not to pursue Clark's grievance in arbitration was without a rational basis or devoid of honest judgment. AFSCME was entitled to exercise discretion in determining how far to proceed with the grievances, and, based on the facts alleged, did not ignore a meritorious grievance or handle it in a perfunctory manner. (United Teachers of Los Angeles (Collins), supra, PERB Dec. No. 258.)

The power to arbitrate under a collective bargaining agreement is held exclusively by the union. It may prohibit an employee from obtaining her own representative for such proceedings. (Chaffey Joint Union High School District (1982) PERB Dec. No. 202; Fremont Unified District Teachers Association. CTA/NEA (King) (1980) PERB Dec. No. 125; Lane v. I.U.O.E. Stationary Engineers (1989) 212 Cal.App.3d 164 [260 Cal.Rptr. 634].) Therefore, the fact that AFSCME refused to allow Clark to have her own attorney represent her in the arbitration does not amount to a violation of the HEERA.

The assertion that AFSCME, through its indecision over whether to proceed with arbitration, caused Clark to forfeit her civil law suit under the doctrine of exhaustion of administrative remedies is a dubious legal conclusion. Even assuming arguendo that a causal relation can be proven, a charging party claiming a breach of the duty of fair representation must establish more than negligence in the handling of a grievance to state a prima facie violation. (Los Angeles City and County School Employees Union (Scates) (1983) PERB Dec. No. 341.)

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 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

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not receive an amended charge or withdrawal from you before **November 20, 1992**, I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

A handwritten signature in black ink, appearing to read "Donngino Zia", written over a horizontal line.

DONNGINO ZIA  
Regional Attorney