

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ELISA MARIA LEPTICH,)
)
 Charging Party,) Case No. SF-CO-472
)
 v.) PERB Decision No. 1074
)
 AMERICAN FEDERATION OF TEACHERS,) December 8, 1994
 LOCAL 2121,)
)
 Respondent.)
 _____)

Appearance: Elisa Maria Leptich, on her own behalf.

Before Carlyle, Garcia and Johnson, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Elisa Maria Leptich (Leptich) of a Board agent's dismissal (attached) of the unfair practice charge. In the charge, Leptich alleged that the American Federation of Teachers, Local 2121 (AFT), breached the duty of fair representation in violation of section 3544.9 of the Educational Employment Relations Act (EERA)¹ and thereby violated section 3543.6(b)².

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3544.9 states:

The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

²Section 3543.6 states, in pertinent part:

It shall be unlawful for an employee organization to:

The Board has reviewed Leptich's appeal, the warning and dismissal letters and the entire record in this case. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself consistent with the following discussion.

DISCUSSION

Leptich appealed the Board agent's dismissal of her charge. She claims that her August 25, 1994 amended charge must be considered as part of her appeal. However, the warning letter specifically stated that the amended charge be received or withdrawn before August 12, 1994. The warning letter directed Leptich as follows:

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 August 12, 1994, I shall dismiss your charge. [Warning letter, p. 4.]

On August 9, 1994, an extension of time to file the first amended charge was granted to August 26, 1994.

The timeliness of an amended charge is governed by PERB Regulation 32135³, which reads:

All documents shall be considered "filed" when actually received by the appropriate

(b) 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.

³PERB regulations as codified at California Code of Regulations, title 8, section 31001 et seq.

PERB office before the close of business on the last date set for filing or when sent by telegraph or certified or Express United States mail postmarked not later than the last day set for filing and addressed to the proper PERB office. [Emphasis added.]

Although Leptich allegedly claims her first amended charge was served by mail on AFT and the Board on August 25, 1994, it was never received by the Board agent.

Leptich appealed the dismissal and nine days after all filings on the appeal should have been completed, she submitted a "request for remandment." No good cause has been shown to excuse the delay in filing the amended charge or to justify the request for remand. The charge was not timely amended and the request to remand this case to the Board agent is denied.

ORDER

The unfair practice charge in Case No. SF-CO-472 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Carlyle and Garcia joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



September 1, 1994

Elisa Maria Leptich, Ph.D.

Re: NOTICE OF DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
Elisa Maria Leptich v. AFT Local 2121
Unfair Practice Charge No. SF-CO-472

Dear Dr. Leptich:

I indicated to you, in my attached letter dated August 2, 1994, 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 August 12, 1994, the charge would be dismissed. Your subsequent request for an extension of time to respond was approved, and the deadline was extended to August 26, 1994.

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 August 2, 1994 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 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

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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 dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By _____
Les Chisholm
Regional Director

Attachment

cc: Robert J. Bezemek

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



August 2, 1994

Elisa Maria Leptich, Ph.D.

Re: WARNING LETTER
Elisa Maria Leptich v. AFT Local 2121
Unfair Practice Charge No. SF-CO-472

Dear Ms. Leptich:

The above-referenced charge, filed with the Public Employment Relations Board (PERB or Board) on July 12, 1994, alleges that AFT Local 2121 breached its duty of fair representation toward you in violation of Government Code sections 3544.9 and 3543.6(b).¹

The facts pertinent to an analysis of this charge are as follows. You were employed by the SFCCD for some 20 years but classified as a part-time, temporary teacher without tenure. Your position was included in a bargaining unit for which AFT Local 2121 (AFT) is the exclusive representative. For the five-years preceding the Spring 1992 semester your assignment was in the Recreation Center for the Handicapped. While so employed, you had initiated grievances and filed other complaints alleging illegal practices by the department. In December 1991 you filed a complaint with the SFCCD Affirmative Action Office alleging discrimination based on handicap, physical or mental disability. On January 7, 1992, AFT filed a grievance protesting your reassignment to a different program and alleging that the reassignment constituted reprisal in violation of the written agreement between SFCCD and AFT. That grievance was denied by SFCCD.

Following the Spring 1992 semester, you were not given an assignment for the Fall 1992 semester and were, in effect, terminated by SFCCD. AFT filed three additional appeals or grievances on your behalf regarding both personnel file issues

¹An identical charge (SF-CE-1725) has been filed against the San Francisco Community College District (SFCCD), also known as City College of San Francisco. Alleged violations of Government Code section 3543.5 are properly analyzed in that case rather than the instant charge. In addition, the facts alleged do not warrant analysis under the Higher Education Employer-Employee Relations Act (Government Code section 3560 et seq.) or the Ralph C. Dills Act (Government Code section 3512 et seq.) as no party to either case is under the jurisdiction of those provisions.

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and the termination itself, and you filed one "no reprisal" grievance yourself. Under the written agreement, only the "no reprisal" grievance over your termination could be taken to binding arbitration by AFT.

SFCCD denied all grievances and appeals.² By letter dated September 1, 1993, and with a two-plus pages explanation attached, AFT advised you of a recommendation being made to its executive board to not pursue the termination or "no reprisal" grievance to arbitration.³ The executive board approved the recommendation on September 14, 1993 and you were so advised.

You currently have pending before the Unemployment Insurance Appeals Board and Workers' Compensation Appeals Board (WCAB) matters pertaining to your former employment with SFCCD. A WCAB judge issued an order in February 1994 that the defendant in that action produce a complete copy of your personnel file and other information.

By letter dated May 6, 1994, AFT advised you that your membership had been terminated due to lack of eligibility. The letter explained that membership in the local is open only to SFCCD faculty and retired members and that, since all recourse to appeal your termination had been exhausted, you are no longer eligible. By letter dated May 17, 1994, AFT indicated that it does not believe the WCAB judge's order to require any production of records on their part.

Discussion

The Educational Employment Relations Act (EERA) specifies as a jurisdictional matter at Government Code section 3541.5(a)(1) that PERB shall not issue a complaint concerning "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge."

Your employment with the SFCCD was terminated in the Fall of 1992 and grieved by AFT in November 1992. The grievance procedure was exhausted with AFT's decision in September 1993 not to pursue the grievance to arbitration. Thus, even allowing tolling of all

²Copies of the SFCCD responses were provided to you by AFT.

³Earlier, an AFT attorney had written to you regarding an assessment of the likelihood, or lack thereof, of prevailing in an appeal such as yours.

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time prior to September 14, 1993,⁴ any unfair practice charge over the termination itself or AFT's discharge of its duty to represent you concerning the termination, would have had to be filed no later than March 1994. As noted, this charge was not filed until another four months had passed.

The duty of fair representation imposed on the exclusive representative extends to grievance handling.⁵ (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board 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.
[Citations.]

A union may exercise its discretion to determine how far to pursue a grievance in 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.

⁴EERA section 3541.5(a)(2) provides that the six-month limitation is tolled "during the time it took the charging party to exhaust the grievance machinery," referring specifically to any grievance machinery included in an agreement between a public school employer and exclusive representative.

⁵The duty of fair representation does not extend to a forum, such as workers' compensation appeals, that has no connection with collective bargaining, i.e., where an employee has individual rights unconnected with negotiating or administering a collective bargaining agreement. See, for example, Los Rios College Federation of Teachers, Local 2279, CFT/AFT, AFL-CIO (Deglow) (1993) PERB Decision No. 992 and California State Employees' Association (Parisi) (1989) PERB Decision No. 773-S.

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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. (Emphasis added.)" (Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.)

The facts alleged here, even if timely considered, would not support a finding that AFT's conduct was arbitrary, "without a rational basis or devoid of honest judgment."

The only allegation which does fall within the six-month period concerns the notice of your termination from membership from AFT which came in May 1994. EERA section 3543.1(a) provides in pertinent part that

Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

A policy which requires that a person be employed within the unit represented by an exclusive representative does not facially violate the concept of "reasonable restrictions" on membership and distinguishes the instant case from that considered by the Board in California Association of Psychiatric Technicians (Long) (1989) PERB Decision No. 745-S.

Summary

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 additional facts which would correct the deficiencies explained above, please amend the charge. 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 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 August 12, 1994, I

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shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, ext. 359.

Sincerely,


Les Chisholm
Regional Director