

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



GRAYSON L. HARE, JR.,)
)
Charging Party,) Case No. S-CO-310
)
v.) PERB Decision No. 1089
)
CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION AND ITS SAN JUAN) March 13, 1995
CHAPTER #127,)
)
Respondent.)
_____)

Appearances: Grayson L. Hare, Jr., on his own behalf; California School Employees Association and its San Juan Chapter #127 by Arnie R. Braafladt, Attorney.

Before Blair, Chair; Carlyle and Garcia, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Grayson L. Hare, Jr. (Hare) of a Board agent's partial dismissal (attached) of his unfair practice charge for failure to state a prima facie case. In his charge Hare alleged that the California School Employees Association and its San Juan Chapter #127 (CSEA) violated his right to fair representation guaranteed under the Educational Employment Relations Act (EERA) section 3544.9, thereby violating section 3543.6(b).¹

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 provides that:

The employee organization recognized or certified as the exclusive representative for

The Board has reviewed the original and amended charges, the warning and dismissal letters, Hare's appeal, and CSEA's opposition to the appeal. The Board finds the Board agent's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself, consistent with the following discussion.

JURISDICTION

PERB has jurisdiction over this case for the following reasons: Hare is an employee within the meaning of EERA section 3540.1(j); CSEA is an employee organization under EERA section 3540.1(d) and is the exclusive representative, within the meaning of EERA section 3540.1(e), of an appropriate unit of employees at the San Juan Unified School District; the unfair practice charge alleges a violation of EERA section 3543.6(b); it appears from the file that the unfair practice charge was timely filed; and

the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

EERA section 3543.6 provides, in part, that:

It shall be unlawful for an employee organization to:

(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.

the disputed conduct was not subject to a grievance agreement between CSEA and its members.²

HARE'S APPEAL

Hare filed a one-sentence appeal on January 5, 1995, which reads in full:

Now comes Grayson L. Hare Jr., charging party herein, and appeals the dismissal dated December 16, 1994, of allegations that demonstrate that respondent failed to perform its duty of fair representation by refusing to allow charging party to select an arbitrator to handle his grievance in accordance with provisions of the collective bargaining agreement.

CSEA'S OPPOSITION TO APPEAL

CSEA filed a brief statement in opposition to the appeal, stating that the rationale and legal authority for the dismissal are sound, and that "no purpose would be served by CSEA reiterating the analysis and opinion of the Deputy General Counsel."

DISCUSSION

PERB Regulation 32635³ governs appeals of a dismissal. It provides, in pertinent part, that:

²Chair Blair and Member Carlyle decline to join in the statement regarding PERB's jurisdiction. It is their view that the jurisdictional provisions of EERA section 3541.5(a)(2) do not apply to agreements between an employee and an employee organization.

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

(a) Within 20 days of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself. The original appeal and five copies shall be filed in writing with the Board itself in the headquarters office, and shall be signed by the charging party or its agent. Except as provided in section 32162, service and proof of service of the appeal on the respondent pursuant to section 32140 are required.

The appeal shall:

(1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;

(2) Identify the page or part of the dismissal to which each appeal is taken;

(3) State the grounds for each issue stated.

Hare's appeal does not comply with the requirements of PERB Regulation 32635. Hare is merely restating his argument regarding the collective bargaining agreement that was considered by the Board agent and discussed in the dismissal letter. Further, the appeal does not identify which portions of the dismissal are being challenged, nor does it state the grounds on which reversal would be justified.

Since this appeal is inadequate and the Board finds no error in the Board agent's analysis, the Board hereby affirms the partial dismissal.

ORDER

The partial dismissal of the unfair practice charge in Case No. S-CO-310 is hereby AFFIRMED.

Chair Blair and Member Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3198



December 16, 1994

Grayson L. Hare, Jr.

Re: Grayson Hare v. California School Employees Association and
its San Juan Chapter #127. Second Amended Charge
Unfair Practice Charge No. S-CO-310
DISMISSAL LETTER

Dear Mr. Hare:

The above-referenced amended charge asserts that the California School Employees Association and its San Juan Chapter #127 (Association) failed to comply with its duty of fair representation contained in Government Code section 3544.9 in violation of Government Code section 3543.6(b).

I indicated to you, in my attached letter dated December 5, 1994, that certain allegations contained in the 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 these allegations to state a prima facie case or withdrew them prior to December 12, 1994, the allegations would be dismissed.

I spoke with you on December 16, 1994 and you indicated that one statement in my December 5 letter was incorrect. Your argument was not that EERA section 3543 grants an individual employee the right to arbitrate his own grievance. Rather, you assert that the collective bargaining agreement between Respondent and the San Juan Unified School District gives an employee the right to arbitrate his own grievance. And, Respondent's failure to abide by the contract provisions is a violation of EERA.

The provisions of the collective bargaining agreement are in conflict with respect to whether an employee has the right to arbitrate his own grievance. However, even if the agreement provided such a right, the Respondent's refusal to allow the employee to exercise the right does not state a prima facie violation of EERA.

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EERA section 3541.5 (b) states that PERB shall not have the authority to enforce agreements between the parties, unless one party's violation of the agreement is also an unfair practice charge. Thus, the failure of the Respondent to abide by these provisions does not, of itself, constitute a violation of EERA. To demonstrate a prima facie unfair practice would require a showing that a provision of EERA was violated. The most likely EERA provision is section 3543. However, as explained in the December 5 letter, Respondent's conduct does not violate this section.

Since I have not received either an amended charge or a request for withdrawal, I am dismissing those allegations which fail to state a prima facie case based on the facts and reasons contained in my December 5, 1994 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of certain allegations contained in 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 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

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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 
Robert Thompson
Deputy General Counsel

Attachment

cc: Arnie Braafladt

PUBLIC EMPLOYMENT RELATIONS BOARD



Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
(916)322-3198



December 5, 1994

Grayson L. Hare, Jr.

Re: Grayson Hare v. California School Employees Association and
its San Juan Chapter #127. Second Amended Charge
Unfair Practice Charge No. S-CO-310
WASHING LETTER

Dear Mr. Hare:

The above-referenced amended charge asserts that the California School Employees Association and its San Juan Chapter #127 (Association) failed to comply with its duty of fair representation contained in Government Code section 3544.9 in violation of Government Code section 3543.6(b).

I understand the facts of your case to be as follows. On March 26, 1993 you filed a grievance with your supervisor alleging that a posted open bus route had been improperly awarded to an ineligible drive instead of yourself. In June 1993, after exhausting the grievance procedure, you requested the Association submit the issue to binding arbitration. In July 1993, the Association's executive board informed the state association that they wish to proceed to arbitration of your grievance.

On April 13, 1994 you sent a letter to Association attorney William Corman requesting a date and time to meet with San Juan Unified School District Employer-Employee Relations Director Michael Roberts to select an arbitrator. On the following day you received a letter from Association Labor Relations Representative Jack Metcalf, which was addressed to the District's attorney. The letter indicated that the parties needed to attempt to select a mutually agreeable arbitrator and suggested Mr. Norman Brand. On April 29, Mr. Metcalf wrote to you stating that he had met with Mike Roberts the previous day and selected Mr. David Concepcion as the arbitrator for your grievance. Mr. Metcalf's letter also informed you that he would not proceed further with the arbitration until you had withdrawn your unfair practice charge (Charge number S-CO-310).

On June 10th Mr. Metcalf entered into an agreement with the District which settled your grievance. Based on the settlement and a modification of the contract language in Section 12.3.9(a), Mr. Metcalf withdrew your grievance on July 1, 1994.

You assert that the Association failed to meet its duty of fair representation to you by, among other things, refusing to allow you to select the arbitrator for your grievance. Section 3543 of the Educational Employment Relations Act states in pertinent part:

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

You argue that this provision grants an individual employee the right to select an arbitrator for their own grievance. After selection of the arbitrator, the matter is then "in arbitration" and the Association then has full rights to represent the grievant from that point forward.

Based on the facts described above, the allegation that the Association failed to fulfill its duty of fair representation by refusing to allow you to select an arbitrator for your grievance does not state a prima facie violation of the EERA for the reasons which follow.

Section 3543 gives individual employees a right to pursue grievances and adjust them with their employer without intervention of the exclusive representative as long as such adjustment is completed before arbitration. Although no PERB case defines the actual point at which arbitration begins, it would seem logical that arbitration or the arbitration process begins when the individual employee grievant requests the union to pursue his/her grievance to arbitration. From that point on, pursuit of the grievance is within the sole discretion of the

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union. See discussion and cases cited in Chaffey Joint Union High School District (1982) PERB Decision No. 202.

If the union chooses not to pursue the grievance to arbitration the employee may not independently or, in conjunction with the employer, hire an arbitrator. In a similar way, if the union agrees to arbitrate a dispute, any processing of the grievance from that point forward should be solely in the hands of the union. This would include discussions with the employer over selection of an arbitrator and determination of dates for the arbitration. It also includes picking of appropriate witnesses, tactics for the arbitration hearing, and presentation of the case to the arbitrator. See United Teachers Los Angeles (Bracey) (1987) PERB Decision No. 616. Based on this interpretation of EERA section 3543, the Association's refusal to allow you to select an arbitrator for your grievance does not state a violation of the EERA and therefore must be dismissed.

For these reasons the allegation that the Association failed to perform its duty of fair representation by refusing to allow you to select the arbitrator for your grievance, 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 **December 12, 1994**, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at (916) 322-3198, extension 361.

Sincerely,

Robert Thompson
Deputy General Counsel