

before the State Personnel Board and failed to file a grievance or unfair practice charge against her employer.

The Board has reviewed the entire record in this case, including the warning and dismissal letters, Fox's unfair practice charge and her appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. S-CO-167-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Garcia and Caffrey joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



January 24, 1995

Joyce Fox

Re: Joyce Fox v. California State Employees Association
Unfair Practice Charge No. S-CO-167-S
DISMISSAL LETTER

Dear Ms. Fox:

On June 21, 1994 you filed the above-referenced charge alleging violations of Government Code section 3519.5 by the California State Employees Association (CSEA). Specifically you allege that you did not receive fair representation from CSEA, and were discriminated against by that organization.

I indicated to you in my attached letter dated September 21, 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 September 28, 1994, the charge would be dismissed.

You filed the First Amended Charge on October 12, 1994. On December 8, 1994, accompanied by Cathy Hackett, you met with me in my office to discuss this charge.

You contend in your amended charge that CSEA committed an unfair labor practice by not filing an unfair practice charge or a grievance against your employer. You allege that CSEA should have taken these actions because your employer improperly discriminated against you by refusing to honor a tentative agreement involving a job transfer.

According to your charge, CSEA representative Gerri Conway testified at a PERB unfair practice hearing that in June of 1993 she had secured a tentative agreement on an adverse action which

Dismissal Letter
January 24, 1995
Page 2

included your transfer, but that the transfer agreement was not honored because of employer reaction to the distribution of a leaflet at the building where you were employed. The leaflet was highly critical of your supervisor. Conway testified that you were aware of the leaflet and its distribution. Because of the leaflet, state management withdrew from the settlement of the adverse action which included said transfer.

You contend that CSEA's failure to file an unfair practice charge or grievance, based on the above facts, was a reprisal and a violation of CSEA's duty of fair representation because of your membership in the State Employee's Caucus for Democratic Union.

CSEA was under no obligation to file an unfair labor practice against your employer in this matter. As I explained in my dismissal of your charge against the employer in PERB Case No. S-CE-720-S, CSEA and the state employer are parties to a collective bargaining agreement which contains a reprisal clause and a grievance procedure which ends in binding arbitration. For the reasons stated in that dismissal, an unfair labor practice charge which would have been filed by CSEA would have been deferred to the collective bargaining agreement by PERB.

You have also not demonstrated that CSEA violated its duty of fair representation or taken an illegal reprisal against you by not filing a grievance. In order to demonstrate a violation of the union's duty of fair representation, the charging party must demonstrate that the union acted without a rational basis or for reasons that were* arbitrary or based on invidious discrimination. (Sacramento City Teachers Association (1984) PERB Dec. No. 428.) Even a grievance with arguable merit may be rejected by the union if the grievance could damage terms and conditions for the bargaining unit as a whole. (Castro Valley Unified School District (1980) PERB Dec. No. 149.) Because you have supplied no facts which demonstrate that the union acted without a rational basis or for reasons that were arbitrary when it did not file a grievance against the employer with whom it had worked out the tentative agreement, you have not demonstrated a violation of the union's duty of fair representation.

Additionally, you have not supplied sufficient facts to demonstrate that CSEA took an illegal reprisal against you. Membership in the State Employee Caucus for a Democratic Union may be protected activity, but you have supplied no facts that demonstrate such membership motivated CSEA to discriminate against you. Further, CSEA had been representing you in your adverse action and in the settlement negotiations even though the duty of fair representation is not applicable in a non-

Dismissal Letter
January 24, 1995
Page 3

contractual disciplinary proceedings. (Professional Engineers in California Government (Lopez) (1989) PERB Dec. No. 760-S.)

For the reasons given above, and in my September 21, 1994 letter, your charge 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. (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 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.

Dismissal Letter
January 24, 1995
Page 4

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

Bernard McMonigle
Regional Attorney

Attachment

cc: Mark DeBoer
Cathy Hackett

BMC:mmh

PUBLIC EMPLOYMENT RELATIONS BOARD



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



September 21, 1994

Joyce Fox

Re: Joyce Fox v. California State Employees Association
Unfair Practice Charge No. S-CO-167-S

WARNING LETTER

Dear Ms. Fox:

On June 21, 1994 you filed the above-referenced charge alleging violations of Government Code section 3519.5 by the California State Employees Association (CSEA). Specifically you allege that you did not receive fair representation from CSEA, and were discriminated against by that organization.

In May of 1993 you were given an adverse action by your employer, the State of California. A Skelly hearing was scheduled for June of 1993. You were represented in that Skelly hearing by a representative of CSEA. Shortly before the Skelly hearing, you distributed fliers at the Department of Consumer Affairs headquarters regarding working conditions of state employees at the Medical Quality Board. At the time of the hearing, on or about June 29th, the employer representative withdrew an offer for a settlement for the adverse action allegedly in response to your distribution of the fliers. After the Skelly hearing, you and your CSEA representative made preparations to appeal the employer's decision to the State Personnel Board (SPB). An SPB hearing was scheduled for November 2nd.

By letter of October 28, 1993, you informed Jerry Conway, a labor relations representative for CSEA that you were releasing that organization from assisting you with your appeal presentation. The letter expressed dissatisfaction in the manner with which you were being represented and informed CSEA that you would be seeking outside legal assistance and requesting financial assistance for that legal assistance. On January 6, 1994 you sent a letter to Bob Zenz, the general manager of CSEA. In that letter you expressed dissatisfaction with the way you had been represented by Jerry Conway at the Skelly hearing. You further informed him that you had a hearing date of January 19, 1994 for your SPB case, and asked for \$1,000.00 to hire your own representative.

Your charge alleges that CSEA has denied your request for funds to hire private legal counsel. You also indicate that you have

S-C0-167-S
September 21, 1994
Page 2

not had your case set for a hearing with the SPB because of delays in seeking representation.

In California State Employees Association (Parisi) (1989) PERB Dec. No. 733-S, the Board determined that the duty of fair representation does not extend to proceedings before the State Personnel Board. The right of an employee to appear before the SPB is an individual right and is not connected with negotiation or administration of the collective bargaining agreement. An employee may retain private counsel for representation in such an extra-contractual forum. Because CSEA is under no obligation to represent you before the State Personnel Board, a denial of financial assistance to hire private counsel would also be outside the duty of fair representation. Additionally, I am aware of no obligation of an employee organization to provide funds for outside legal counsel when an employee has rejected representation by that organization.

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 September 28, 1994, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198 extension 355.

Sincerely,

Bernard McMonigle
Regional Attorney

BMCrmh