

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



IRA WARDLAW,)
)
) Case No. LA-CO-738
 Charging Party,)
 v.) PERB Decision No. 1219
)
 SERVICE EMPLOYEES INTERNATIONAL) September 24, 1997
 UNION, LOCAL 99,)
)
 Respondent.)
 _____)

Appearance; Ira Wardlaw, on his own behalf.

Before Caffrey, Chairman; Johnson and Jackson, Members.

DECISION AND ORDER

JACKSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by Ira Wardlaw (Wardlaw) to a Board agent's dismissal (attached) of his unfair practice charge. Wardlaw alleges that the Service Employees International Union, Local 99, breached its duty of fair representation in violation of section 3544.9 of the Educational Employment Relations Act (EERA).¹

The Board has reviewed the entire record in this case, including the Board agent's warning and dismissal letters, the original and amended unfair practice charge and Wardlaw's appeal.

¹EERA is codified at Government Code section 3540 et seq. Section 3544.9 provides:

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.

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. LA-CO-738 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Johnson joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



July 14, 1997

Ira Wardlaw

Re: Ira Wardlaw v. Service Employees International Union.
Local 99

Unfair Practice Charge No. LA-CO-738

DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT

Dear Mr. Wardlaw:

In the above referenced amended charge, filed on April 14, 1997, you allege that the Los Angeles City and County School Employees Union, Local 99 (Union) breached its duty of fair representation to you in its handling of your Skelly hearing with the Los Angeles Unified School District (District) on March 27, 1997, and its refusal to file a grievance with the District on your behalf. This conduct is alleged to violate Government Code section 3544.9 of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated June 19, 1997, 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 June 27, 1997, the charge would be dismissed.

On June 24, 1997, you filed a first amended charge. The amended charge included further details of the Skelly meeting and the Union's refusal to process your grievance claim, as well as additional case law and statutory sources. You also included a letter stating that the Skelly meeting, not the Personnel Commission meeting, was held to discuss the issue of your involuntary transfer by the District. I considered the facts stated in your amended charge in making my decision.

Based on the facts contained in both the original and amended charges, the charge fails to state a prima facie violation of the duty of fair representation, and is therefore dismissed.

PERB decisions do not extend a union's duty of fair representation to extra-contractual forums, such as Skelly meetings. In Los Angeles Unified School District (1994) PERB Decision No. 1061, PERB held that "an EERA duty of fair representation does not apply to a union's representation in an

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extra-contractual forum because that forum is unconnected to any aspect of negotiation or administration of a collective bargaining agreement and the union does not exclusively control the means to the particular remedy." You stated you knew no reason for the Union to discriminate against you. The Union was not in breach of its duty. The Union also did not breach its duty of representation in declining to file your grievance. This decision is explained in the attached warning 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 Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number. 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 Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Attention: Appeals Assistant
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 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 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.

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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 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
RUSSELL NAYMARK
Board Agent

Attachment

cc: Hope Singer

PUBLIC EMPLOYMENT RELATIONS BOARD



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



June 19, 1997

Ira Wardlaw

Re: Ira Wardlaw v. Service Employees International Union,
Local 99

Unfair Practice Charge No. LA-CO-738

WARNING LETTER

Dear Mr. Wardlaw:

In the above referenced charge, filed on April 14, 1997, you allege that the Los Angeles City and County School Employees Union, Local 99 (Union) breached its duty of fair representation to you. This conduct is alleged to violate Government Code section 3544.9 of the Educational Employment Relations Act (EERA or Act). We discussed these issues by telephone on today's date.

My investigation of the charge reveals the following relevant facts.

You worked as a permanent Cafeteria Helper in the Los Angeles Unified School District (District) between March 1996 and May 1997. Your duties included preparing and serving meals to students and cleaning the cafeteria facilities.

Between March 1996 and March 1997, you made numerous complaints to the District about your working conditions, the physical strain your duties put on you, and the way other employees' treated you. On May 22, 1996, you filed a grievance with the District regarding your work schedule. The District refused to process the grievance on June 21, 1996, for failure to cite a violation of the Unit C bargaining agreement.

Beginning March 1996, your supervisors filed numerous complaints about your behavior, alleging that you acted discourteously or angrily towards your co-workers. The District suspended you from service for twenty working days from September 9, 1996 to October 4, 1996, on charges including inefficiency, inattention to or dereliction of duty, and discourteous or abusive treatment of employees.

The District again charged you with discourteous treatment of employees for incidents which allegedly occurred between December 11, 1996 and January 9, 1997, including disrupting a staff meeting, shaking a list of complaints at the cafeteria manager, insisting the complaints be discussed at that time, and trying to initiate a

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fight with another cafeteria helper. The District involuntarily transferred you to a different school in the District on January 15, 1997. The District claimed that your actions violated Section 9 of the Food Services Branch Guidelines on Rules That Must Be Enforced Constantly and a 1988 Board Resolution that reaffirmed the District's commitment to respectful treatment of all people. You claim that the District did not comply with the contract's requirement that it make a reasonable effort to notify you of the transfer at least five working days prior to the effective date of the involuntary transfer, but rather, that it only contacted you the day before the transfer.

You attempted to file a grievance with the Union on March 21, 1997. According to you, the Union's disciplinary representative, Floyd Lewis, declined to file the grievance.

On March 27, 1997, you attended a Skelly meeting, accompanied by Union representative Floyd Lewis, with District officials to discuss the District's disciplinary actions against you. You claim you asked Mr. Lewis to request copies of conferences memos which the District is contractually obliged to provide to a disciplined employee. According to the Unit C contract, the purpose of a conference memo is "to inform the employee in writing about perceived deficiencies, where appropriate to provide constructive assistance to the employee to improve, and to document the communication on a reasonably current basis." The contract provides that "a copy of the memo will be given to the employee." You wished to use the conference memos to help prepare your defense to the charges against you.

You claim that Mr. Lewis did not request the conference memos. You also claim that Mr. Lewis did not inform the District officials that they had violated the contract by failing to provide you with copies of the conference memos. You claim you gave Mr. Lewis a list of people to contact who could serve as witnesses on your behalf, but that Mr. Lewis did not contact people on the list. You allege that Mr. Lewis said at the meeting that you were not "perfect" and that you could have been angry during the incidents for which the District had charged you. You claim that Mr. Lewis did "absolutely nothing" on your behalf at the meeting. After discussing the alleged charges against you, the District recommended that you be dismissed permanently.

The District's personnel commission held a hearing on May 14, 1997, to hear your appeal of your involuntary transfer. You were assisted by private counsel at the hearing. The District dropped all but the inefficiency charge. In exchange, you promised to drop all further complaints against the District. The District dismissed you from your Cafeteria Helper position on June 4, 1997.

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You claim that the Union breached its duty to fairly represent you at the March 27, 1997 Skelly meeting. You claim that Union representative Floyd Lewis had a duty to request that the District provide you with the conference memos describing the basis for its disciplinary actions. If the Union had copies of the conference memos, you claim the Union had a duty to give you copies of the memos. You claim the Union further breached its duty when Mr. Lewis admitted to some of the District's charges. Based on the facts stated above, the charge does not state a prima facie violation of EERA, for the reasons that follow.

Government Code section 3544.9 of EERA states in relevant part that "(t)he 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."

The Public Employment Relations Board (PERB) has held that an exclusive representative violates its duty of fair representation when its conduct towards a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124, citing Vaca v. Sipes (1967) 386 U.S. 717 [64 LRRM 2369].) You stated you knew no reason for the Union to discriminate against you. You do not claim that the Union made any promises to you it did not keep. PERB decisions have required a strong showing of union insincerity, such as a pattern of false promises to an employee or explicit discrimination or retaliation against an employee, to hold the union breached its duty.

For instance, in San Francisco Classroom Teachers Association (Bramell) (1984) PERB Decision No. 430, PERB held that a pattern of union misrepresentations to one of its members amounted to a breach of its duty of fair representation under EERA. The decision states, however, that "any one of these actions, by itself, would not breach the Association's duty." The union had failed to honor the member's request to appeal his discharge to the second level of the grievance procedure. The union then failed to fulfill its promise to the member to request an extension of the deadline for the union to file an appeal. Allegedly in an effort to cover up its failure, the union then stated in a letter to the member that the grievance would not be pursued further because it lacked merit.

PERB held in that decision that a union's failure to assist a member does not breach its duty of fair representation. Although the union took no action on its member's request to take his grievance to the second step, "no breach of the duty of fair representation is described merely by declining to proceed or by

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negligently forgetting to file a timely appeal." Even if Mr. Lewis did not heed all of your requests, that would not constitute a breach of duty.

In California Faculty Association (MacDonald) (1994) PERB Decision No. 1046-H, PERB noted that a "perfunctory" handling of a grievance constituting "arbitrary" conduct "could result from a complete failure to investigate the facts underlying a grievance or an unexplained failure to perform a ministerial duty, typically resulting in a procedural default." You do not claim any procedural default, and you have not claimed that the Union completely failed to investigate the District's charges against you. As PERB stated in United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258, "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."

In United Teachers - Los Angeles (Farrar) (1990) PERB Decision No. 797, PERB stated that a union's "alleged failure to make the arguments and introduce the evidence deemed significant by (charging party) is insufficient to establish a breach of the duty of fair representation." Your claim that the Union did not heed your request that it ask for relevant conference memos from the District or call appropriate witnesses does not constitute a breach of duty.

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 June 27, 1997, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, extension 354.

Sincerely,

RUSSELL NAYMARK
Board Agent