STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELIZABETH KISZELY, Charging Party, v. UNITED FACULTY ASSOCIATION OF NORTH ORANGE COUNTY COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CO-714 PERB Decision No. 1269 June 18, 1998

Appearances: Elizabeth Kiszely, on her own behalf; California Teachers Association by Rosalind D. Wolf, Attorney, for United Faculty Association of North Orange County Community College District.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION AND ORDER

CAFFREY, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by Elizabeth Kiszely (Kiszely) of a Board agent's dismissal (attached) of her unfair practice charge. In the charge, Kiszely alleged that the United Faculty Association of North Orange County Community College District (Association) violated the Educational Employment Relations Act (EERA) section 3543.6(b)[1] by denying her right to

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.6 states, in pertinent part:

> 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

fair representation.

The Board has reviewed the entire record in this case, including Kiszely's original and amended unfair practice charge, the Board agent's warning and dismissal letters, Kiszely's appeal and the Association's response. 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-714 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.

---

guaranteed by this chapter.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

March 13, 199 8

Elizabeth Kiszely

Re: Elizabeth Kiszely v. United Faculty Association
Unfair Practice Charge No. LA-CO-714, Second Amended Charge
DISMISSAL AND REFUSAL TO ISSUE A COMPLAINT

Dear Ms. Kiszely:

In the above-referenced charge, Elizabeth Kiszely (Kiszely) alleges the United Faculty Association (Association) violated the Educational Employment Relations Act (EERA) § 3543.6(b) by denying her right to fair representation.

On February 14, 1998, I issued a warning letter indicating the charge must be withdrawn or amended by February 25, 1998. Following receipt of the warning letter, you called and requested an extension to this deadline. During that conversation, I agreed to extend the deadline to March 3, and then to March 9, 1998. On March 9, 1998, you called and requested a further extension. I denied that request. On March 9, 1998, you filed a second amended charge by certified mail.

The warning letter indicated the charge failed to state a prima facie violation of the duty of fair representation within the jurisdiction of PERB. The second amended charge failed to correct the deficiencies noted in that letter. Thus the charge is dismissed for the reasons stated in the warning letter, and those stated below.

The warning letter noted the allegation regarding United Faculty's handling of Kiszely's first grievance was untimely under EERA § 3541.5(a)(1). On or about December 11, 1995, United Faculty Staff Consultant Lisi told Kiszely that United Faculty was not going to pursue Kiszely's first grievance, and that Kiszely could pursue it on her own. Kiszely filed this charge on November 11, 1996, more than six months after she learned United Faculty was not going to pursue the grievance on her behalf. The second amended charge alleges this allegation is timely because, "the statute of limitations was tolled for the time it took the grievant to exhaust the in-house grievance procedures." However, the EERA does not provide for such tolling. (See Lake Elsinore School District (1987) PERB Decision No. 646.) Thus, the allegation that United Faculty's conduct regarding the first grievance violated its duty of fair representation is outside the jurisdiction of PERB and must be dismissed.

As stated in the warning letter, the duty of fair representation extends to grievance handling. The warning letter noted that United Faculty's conduct with regard to Kiszely's second grievance did not violate its duty of fair representation. A reasonable decision not to pursue a grievance, regardless of the merits of the grievance, is not a violation of the duty of fair representation. (California State Employees' Association (Calloway) (1985) PERB Decision No. 497-H.) Nor are case handling errors and simple negligence violations of the duty. (American Federation of State, County and Municipal Employees, Council 10 (Olson) (1988) PERB Decision No. 682-H.) The Board has held, however that, the exclusive representative must explain why it chose not to process an employee's grievance. (Oakland Education Association, CTA/NEA (Mingo) (1984) PERB Decision No. 447.)

The warning letter explained that the facts indicated United Faculty pursued the second grievance through all levels of the grievance procedure, but then denied Kiszely's request to take the grievance to binding arbitration. The warning letter also noted that on October 7, 1996, United Faculty President Tony Jones wrote to Kiszely and indicated the second grievance did not merit appeal to binding arbitration, thus satisfying United Faculty's obligation under Oakland Education Association. CTA/NEA (Mingo) (1984) PERB Decision No. 447.

The second amended charge alleges Jones' letter was an insufficient explanation. Jones' letter stated in its entirety:

> After careful discussion and consideration of your grievance and the information you presented to the United Faculty Board of Directors, it was decided the grievance did not merit appeal to binding arbitration.

The second amended charge alleges:

> Mr Jones' reply that the grievance lacked merit is not an adequate or reasonable response to Ms. Kiszely's inquiry. First, language presupposes an audience, and Mr. Jones was writing for a college educated faculty. To state the obvious disregards the faculty member's desire to understand the rational basis for the union's judgement. A statement (lacks merit) that restates the obvious (we decline to take the grievance to arbitration) is circular logic and therefore without a rational basis. The evasiveness of responding to a concern of importance to the

> grieving party is evidence of bad faith and, furthermore, the illogic of a circular response is evidence of arbitrary handling of the grievance. The union could effectively have any reason for saying something lacks merit. To invoke a logical fallacy is not to provide a rationale basis for one's decision, [emphasis in original.]

The above-quoted argument, however, is unpersuasive. The Board in Oakland Education Association, CTA/NEA (Mingo) (1984) PERB Decision No. 447, stated, in pertinent part:

> the exclusive representative has an obligation to explain its actions in refusing to process a grievance . . .

In the instant charge, United Faculty explains it did not take the grievance to arbitration because it lacked merit. The second amended charge's argument fails because it presupposes United Faculty would have taken the grievance to arbitration if it had merit. On the contrary, United Faculty may refuse to take a meritorious grievance to arbitration. (See Castro Valley Unified School District (1980) PERB Decision No. 149.) Thus, United Faculty's stated explanation is not illogical.

Even assuming Jones' statement was insufficient to meet the obligation announced in Mingo, supra, the facts indicate United Faculty provided Kiszely with a second more detailed response. On February 27, 1997, CTA Staff Counsel, Rosalind D. Wolf, wrote Kiszely a letter which states, in pertinent part:

> You have asked regarding "the specific legal technicality" explaining why United Faculty declined to take a grievance that you filed to arbitration.
>
> I am not aware of any specific legal technicality involved in the decision not to proceed to arbitration of your grievance. My understanding of the United Faculty decision and the events leading up to it are as follows: Representatives of United Faculty provided extensive assistance to you in investigation and preparation of the grievance and provided representation throughout the grievance process. You were give a full and fair opportunity to present your position to the Board of Directors. The Board gave the matter careful consideration

> and made a reasoned decision that, based on the contract language and the facts of the case, it was unlikely that the grievance would succeed on the merits, [emphasis added]
>
> . . . . . .
>
> As I am sure you are aware, arbitration is a costly and time consuming process and the Association cannot afford to, and is not required by law, to arbitrate every grievance regardless of merit. Such a requirement would be a disincentive to the aggressive filing of grievances in cases of questionable merit.

As United Faculty provided Kiszely with a detailed explanation, United Faculty's conduct regarding the second grievance did not violate its duty of fair representation, and that allegation must be dismissed.

The warning letter also indicated that the United Faculty's conduct with regard to the third grievance failed to present a prima facie violation. The warning letter noted that United Faculty provided Kiszely with the opportunity to meet with several representatives regarding the grievance, and that United Faculty representative Bob Simpson informed Kiszely the grievance was without merit because claims of academic freedom were not grievable. The second amended charge alleges the warning letter incorrectly indicated Simpson told Kiszely that academic freedom claims were not grievable and that Simpson actually said, he did not see a grievance in all of the information Kiszely gave him. The second amended charge also indicates Simpson failed to put his reasoning in writing for Kiszely.

The second amended charge does not, however, state a prima facie violation of the EERA. First, the duty of fair representation does not require Simpson to provide his evaluation of Kiszely's grievance in writing. Second, Simpson's evaluation of the grievance appears to meet United Faculty's obligation under the EERA. Even if it does not meet its obligation, Kiszely spoke with other United Faculty representatives, and was authorized to speak with a CTA attorney. As such, the second amended charge does not demonstrate United Faculty's assessment of Kiszely's case was arbitrary, discriminatory or in bad faith.
The charge's allegation regarding United Faculty's conduct in processing the fourth grievance similarly fails to demonstrate United Faculty acted in an arbitrary, discriminatory or bad faith manner. In the first amended charge Kiszely alleged United Faculty's failure to explain to her that "statutory notices" were

not grievable is tantamount to bad faith. United Faculty appealed the District's denial of this grievance to binding arbitration. The warning letter indicated that United Faculty's decision to pursue the grievance did not establish bad faith because it appeared that the statutory notice question was an unsettled legal question. In the second amended charge Kiszely alleges the statutory notice question was not an unsettled legal question and that the United Faculty knew it could not grieve the statutory notice prior to going to arbitration. Kiszely alleges Attorney Crost, "immediately recognized that the statutory notice could not be heard in arbitration." The second amended charge also alleges the only reason the arbitration was held was because Kiszely refused to withdraw the grievance from the arbitration.

The facts presented in the second amended charge do not demonstrate the United Faculty engaged in arbitrary, discriminatory or bad faith conduct. The United Faculty pursued Kiszely's fourth grievance through binding arbitration. The second amended charge states:

> The only reason the arbitration was held--and bifurcated--was that the grievant refused to withdraw the grievance from the arbitration.

Since it appears the Charging Party would not allow United Faculty to withdraw the grievance, it is unclear why she now alleges the United Faculty violated its duty of fair representation. It seems that United Faculty pursued this grievance in the only forum that its obligated to enter. The facts indicate the parties disagreed about the best course to pursue with regard to the fourth grievance. However, Kiszely's disagreement with United Faculty's judgment does not establish United Faculty violated its duty of fair representation. Nor does the fact that parties presented the grievance to an arbitrator from an association other than the one specified in the collective bargaining agreement demonstrate United Faculty violated the EERA. Thus, this allegation must be dismissed.

As stated in the warning letter, in American Federation of State, County and Municipal Employees, International, Council 57 (Dehler) (1996) PERB Decision No. 1152-H, the Board indicated isolated acts which did not alone establish a violation of the duty of fair representation, may present a pattern of conduct which when considered in its entirety demonstrated a prima facie violation. Kiszely's charge is factually distinguishable from that decision. The second amended charge alleges the pattern of unresponsiveness and the inadequacy of the representation is similar to that in Dehler, supra. However, as the warning letter stated, the facts demonstrate United Faculty was responsive to Kiszely regarding several grievances over the course of several

years. United Faculty's conduct, when considered in its entirety, does not demonstrate it acted in an arbitrary, discriminatory, or bad faith manner. Thus, this charge should 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. 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
Tammy L.Samsel
Regional Director

Attachment

cc: Rosalind D. Wolf

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

February 18, 1998

Elizabeth Kiszely

Re: Elizabeth Kiszely v. United Faculty Association
Unfair Practice Charge No. LA-CO-714
WARNING LETTER

Dear Ms. Kiszely:

In the above-referenced charge, Elizabeth Kiszely (Kiszely) alleges the United Faculty Association (Association) violated the Educational Employment Relations Act (EERA) § 3543.6(b) by denying her right to fair representation.

Elizabeth Kiszely is an English Professor at the North Orange County Community College District (District), and is represented by the United Faculty Association. During the 1995-1996 school year, Kiszely voiced concerns regarding faculty rights. She believed the District retaliated against her for those activities. As a result, she filed grievances and unfair labor practice charges against the District.[1] On November 12, 1996, Kiszely filed this charge against the Association.[2] The charge alleges, in part:

> United Faculty's representation was inadequate in that I was frequently not informed and/or misinformed of information pertinent to the processing of the grievance and arbitration and to protecting the violation of my rights. The representation was arbitrary, discriminatory, and lacking in good faith. Specifically, no rational basis was provided for much of the misinformation I received. A previous incident involving a unit member and a notice of unprofessional conduct received markedly different treatment. The meeting and conferring that took place in preparation for and during the

[1]See Unfair Labor Practice charge LA-CE-3699 and LA-CE-3837.

[2]This charge was in abeyance from November 15, 1996, until February 18, 1998.

> grievance and arbitration hearings was not in good faith because there was no genuine possibility for agreement. The district's issuance of a statutory notice preempted the grievance from being heard in any meaningful way in the forum of arbitration. A tenured faculty member's right to seek redress by means of the grievance procedure was rendered moot. A tenured faculty member's right to participate in shared governance was ignored in the proceedings.

During 1995 and 1996, Kiszely filed four grievances against the District. The first grievance, filed on or about October 10, 1995, alleged violations of the District's class scheduling policies. On or about December 11, 1995, United Faculty Staff Consultant Lisi told Kiszely that United Faculty was not going to pursue this grievance, and that Kiszely could pursue it on her own. United Faculty doubted the merits of the grievance because the contract's language regarding scheduling was permissive rather than mandatory. CTA Executive Director, Rocky Barilla, explained to Kiszely that a large percentage of grievances filed regarding permissive contract language lost.

On or about December 5, 1995, Kiszely asked Lisi about filing a second grievance about a negative evaluation that Kiszely received. The grievance was filed on or about January 23, 1996. The District denied the grievance at levels I, II and III. On August 28, 1996, Kiszely asked United Faculty to take the grievance to binding arbitration. United Faculty denied Kiszely's request. Beginning on September 9, 1996, through October 2, 1996, Kiszely asked United Faculty why they would not take the grievance to binding arbitration. Kiszely alleges the United Faculty failed to respond to this request. An October 7, 1996, letter from United Faculty President Tony Jones to Kiszely indicated the grievance did not merit appeal to binding arbitration.

On or about February 28, 1996, Kiszely filed a third grievance regarding violations of her academic freedom. United Faculty representative Bob Simpson met with Kiszely on February 28, 1996, to discuss the grievance. On March 22, 1996, Kiszely received approval for her request to speak with a CTA attorney. Kiszely met with the attorney the next day. On May 20, 1996, Simpson informed Kiszely that academic freedom claims are not grievable.

On or about July 3, 1996, Kiszely filed a fourth grievance regarding a notice of unprofessional conduct that she received. On December 4, 1996, United Faculty appealed the District's denial of this grievance to binding arbitration. On April 2,

1997, United Faculty explained to Kiszely that the arbitrator had decided that because the notice was issued pursuant to the Education Code, the grievance was inarbitrable.

The above-stated information fails to state a prima facie violation of the EERA for the reasons that follow.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (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.

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.]

In the instant charge Kiszely makes several allegations regarding how the United Faculty handled her grievances. As previously stated, the duty of fair representation extends to grievance handling. A reasonable decision not to pursue a grievance, regardless of the merits of the grievance, is not a violation of the duty of fair representation. (California State Employees' Association (Calloway) (1985) PERB Decision No. 497-H.) Nor are case handling errors and simple negligence violations of the duty. (American Federation of State. County and Municipal Employees, Council 10 (Olson) (1988) PERB Decision No. 682-H.) The Board has held, however that, the exclusive representative must explain why it chose not to process an employee's grievance. (Oakland Education Association. CTA/NEA (Mingo) (1984) PERB Decision No. 447.)

The first grievance was filed on or about October 10, 1995, and alleged violations of the District's class scheduling policies. On or about December 11, 1995, United Faculty Staff Consultant Lisi told Kiszely that United Faculty was not going to pursue the first grievance, and that Kiszely could pursue it on her own.

EERA § 3541.5(a)(1) provides the Public Employment Relations Board shall not, "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." It is your burden, as the charging party to demonstrate the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.)

Kiszely filed this charge on November 11, 1996, more than six months after she learned United Faculty was not going to pursue the first and second grievance on her behalf. United Faculty's conduct regarding the first grievance is outside the six-month statute of limitations period, and therefore outside the jurisdiction of PERB.

Even if this allegation were timely filed, the charge does not present facts demonstrating United Faculty acted in an arbitrary, discriminatory, bad faith manner. On or about December 11, 1995, United Faculty Staff Consultant Lisi told Kiszely United Faculty would not pursue the grievance. United Faculty doubted the merits of the grievance because the contract's language regarding scheduling was permissive rather than mandatory. Charging Party has not shown United Faculty's determination was without a rational basis. Thus, this allegation does not state a prima facie violation of the EERA.

Similarly, United Faculty's conduct with regard to the second grievance, does not violate its duty of fair representation. The facts indicate United Faculty pursued the second grievance

through all levels of the grievance procedure with the District. Moreover, an October 7, 1996, letter from United Faculty President Tony Jones to Kiszely indicated the grievance did not merit appeal to binding arbitration, thus satisfying United Faculty's obligation under (Oakland Education Association. CTA/NEA (Mingo) (1984) PERB Decision No. 447.) Thus, the allegations regarding the second grievance do not demonstrate a prima facie violation of the EERA.

Nor does United Faculty's conduct with regard to the third grievance present a prima facie violation. The facts indicate that United Faculty provided Kiszely with the opportunity to meet with several representatives regarding the grievance, including an attorney from the California Teachers' Association. On May 20, 1996, United Faculty representative Bob Simpson informed Kiszely the grievance was without merit because claims of academic freedom were not grievable. The charge does not include facts indicating United Faculty's judgment on this issue was arbitrary, discriminatory or in bad faith.

The charge's allegation regarding United Faculty's conduct in processing the fourth grievance similarly fails to demonstrate United Faculty acted in an arbitrary, discriminatory or bad faith manner. United Faculty appealed the District's denial of this grievance to binding arbitration. One of the issues in the fourth grievance was whether a notice of unprofessional conduct issued pursuant to the Education Code was arbitrable. Kiszely alleges United Faculty's failure to explain to her that "statutory notices" were not grievable is tantamount to bad faith. However, it appears that whether the union could grieve a "statutory notice" was then an unsettled legal question; a question which the arbitrator answered in the negative. In California School Employees Association (Dyer) (1984) PERB Decision No. 342a, the Board noted when the union took a calculated risk concerning an issue where there was emerging precedent it did not engage in arbitrary, discriminatory, or bad faith conduct. Thus, United Faculty's judgment in taking the statutory notice to arbitration does not establish United Faculty acted in an arbitrary, discriminatory or bad faith manner.

In American Federation of State, County and Municipal Employees. International. Council 57 (Dehler) (1996) PERB Decision No. 1152-H, the Board indicated isolated acts which did not alone establish a violation of the duty of fair representation, presented a pattern of conduct which when considered in its entirety demonstrated a prima facie violation. The Board noted the union failed to respond to the employer's inquiry after indicating that it would do so, failed to schedule a level 2 meeting, failed to notify the employee or explain its actions to her, and failed to respond to its specific written inquiries.

Kiszely alleges United Faculty engaged in a similar pattern of conduct.

However, Kiszely's charge is factually distinguishable. United Faculty's conduct, when considered in its entirety, does not demonstrate it acted in an arbitrary, discriminatory, or bad faith manner. Although United Faculty did not return every telephone call or answer every question posed over a three year period, the charge does not demonstrate United Faculty representatives were unresponsive to Kiszely. United Faculty advised Kiszely about four grievances in two years, taking one through to binding arbitration. With regard to the three grievances that did not go to binding arbitration, United Faculty informed Kiszely of their decisions not to pursue those grievances. The charge does not indicate United Faculty failed to respond to any inquiries from the employer, and demonstrates agents of United Faculty met personally with Kiszely on numerous occasions. Thus, under the analysis set forth in Dehler, supra, United Faculty's conduct, when considered in its entirety, does not demonstrate a prima facie violation of the EERA.

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 February 25. 1998.. I shall dismiss your charge. If you have any questions, please call me at (213) 736-3008.

Sincerely,

TAMMY L. SAMSEL
Regional Director