

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STEVE MURRAY, RICHARD NEVILLE,)
AND ROD ZIOLKOWSKI,)
)
Charging Parties,) Case No. LA-CO-747
)
v.) PERB Decision No. 1295
)
ABC FEDERATION OF TEACHERS, AFT)
LOCAL 2317,) October 22, 1998
)
Respondent.)
_____)

Appearance; Steve Murray and Rod Ziolkowski, on their own behalf.

Before Johnson, Amador and Jackson, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (Board) on appeal¹ by Steve Murray (Murray) and Rod Ziolkowski (Ziolkowski) of a Board agent's partial dismissal (attached) of their unfair practice charge. The Board agent dismissed the portion of the charge which alleged that the ABC Federation of Teachers, AFT Local 2317 violated section 3543.6(b) of the Educational Employment Relations Act (EERA)² by failing to properly determine the amount of agency

¹Richard Neville withdrew from the case.

²EERA 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

fees to be paid by nonunion members for the 1996-97 school year.

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

ORDER

The partial dismissal of the unfair practice charge in Case No. LA-CO-747 is hereby AFFIRMED.

Members Johnson and Jackson joined in this Decision.

to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



July 21, 1998

Steve Murray

Richard Neville

Rod Ziolkowski

Re: Steve Murray, Richard Neville, Rod Ziolkowski v. ABC
Federation of Teachers, AFT Local 2317
Unfair Practice Charge No. LA-CO-747
PARTIAL DISMISSAL LETTER

Dear Charging Parties:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board on August 6, 1997. The charge alleges that the ABC Federation of Teachers, AFT Local 2317 (Federation) violated the Educational Employment Relations Act (EERA), Government Code section 3543.6(b), by failing to properly determine the amount of agency fees to be paid by nonunion members for the 1996-97 school year. This letter addresses only the allegations concerning the method of identifying the Federation president's chargeable and nonchargeable activities and the error included in the budget of the Federation's national affiliate, the American Federation of Teachers (AFT).

I indicated in the attached letter, dated July 13, 1998, 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 July 22, 1998, the allegations would be dismissed.

On July 16, 1998, I spoke with Steve Murray concerning the attached letter. Mr. Murray stated that the charging parties did not intend to file an amended charge in response to the partial

warning letter.¹ Therefore, I am dismissing those allegations which fail to state a prima facie case based on the facts and reasons contained in the attached July 13, 1998 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 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.

¹Mr. Murray indicated that he was speaking on behalf of all three charging parties.

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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

Robin E. Wright
Regional Attorney

Attachment

cc: Lawrence Rosenzweig

PUBLIC EMPLOYMENT RELATIONS BOARD



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



July 13, 1998

Steve Murray

Richard Neville

Rod Ziolkowski

Re: Steve Murray, Richard Neville. Rod Ziolkowski v. ABC
Federation of Teachers, AFT Local 2317
Unfair Practice Charge No. LA-CO-747
PARTIAL WARNING LETTER

Dear Charging Parties:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board on August 6, 1997. The charge alleges that the ABC Federation of Teachers, AFT Local 2317 (Federation) violated the Educational Employment Relations Act (EERA), Government Code section 3543.6(b), by failing to properly determine the amount of agency fees to be paid by nonunion members for the 1996-97 school year. This letter addresses only the allegations concerning the method of identifying the Federation president's chargeable and nonchargeable activities and the error included in the budget of the Federation's national affiliate, the American Federation of Teachers (AFT).

Investigation of the charge revealed the following. In August 1996, the Federation notified nonunion members that it had calculated the agency fee for 1996-97 as 71 percent of the amount of the dues paid by union members. The charging parties responded to the notice by filing objections to the agency fee set by the Federation.

The matter was set for arbitration. An arbitrator's award was issued on July 9, 1997 in which the arbitrator denied the objectors' challenge. The arbitrator's award states:

1. The Agency Fee calculated by the Union at .7100% of the total fee payable by Union members is reasonable and is hereby upheld. The calculation of the non-chargeable costs at .2900% is reasonable and hereby upheld.

2. The challenges (objections) to the fees as calculated by the Union is denied.
3. The challenging (objecting) teachers have not established that the Union has failed to follow current statutory and decisional law in calculating its chargeable and non-chargeable costs, or that the agency fee as calculated is unfair and unreasonable.

The charging parties allege that the Federation failed to properly determine the amount of the 1996-97 agency fee. Charging parties assert that the arbitrator failed to fully and fairly address several issues in finding that the amount of the agency fee is reasonable.

First, charging parties challenge the method used by the Federation to determine the amount of chargeable time allocated to the president of the Federation. The president completes a weekly "Activity Report" by noting the number of hours she spends engaged in chargeable and nonchargeable activities. The chargeable percentage of the president's compensation is included in the agency fee calculation. Charging parties contend that this method of identifying the president's chargeable and nonchargeable time is flawed because it is not objectively verifiable and cannot be audited. Charging parties seek an order requiring the president's chargeable time to be determined by written public records, such as meeting minutes, written communications or phone records.

Second, charging parties contend that the method of determining the chargeable portion of the Federation's two staff members' compensation is also flawed. Charging parties allege that the staff members' chargeable time is determined by the Federation to be equal to that of the president's chargeable time. The two Federation staff members do not independently record their chargeable and nonchargeable activities. Absent an objectively verifiable method of identifying the amount of time the staff members' participate in chargeable and nonchargeable activities, charging parties contend that they cannot determine the accuracy of the agency fee.

Third, charging parties allege that the budget prepared by AFT, the Federation's national affiliate, may improperly include nonchargeable expenses in the "Publications" budget category. Specifically, charging parties note that AFT prepares a budget which identifies chargeable and nonchargeable expenses for its activities within California and a separate budget for AFT activities in other states. The chargeable expenses in the California budget are generally less in most categories than the

budget prepared for other states. However, the publications expenses in both AFT budgets, which specify expenses for eight separate AFT publications, are identical. Charging parties contend that it is reasonable to assume that some of the nonchargeable activities identified in the California budget were subjects of articles in AFT publications. Therefore, charging parties reason, the chargeable expenses in AFT's publications budget for California should also be lower.

Fourth, charging parties allege that the arbitrator failed to adjust the agency fee amount after AFT submitted a declaration at the arbitration hearing which stated that AFT's California budget contained a \$55,479 error in employee expenses. AFT reported in its declaration that in apportioning employee salary, severance and vacation pay between chargeable and nonchargeable expenses it erred by including an additional \$55,479 in chargeable expenses. Based on its total expenses of \$69,781,123, AFT concluded that the error represented less than one-tenth of one percent, and, therefore, the error was insignificant. The arbitrator informed the parties at the arbitration hearing that he considered the error to be "de minimis."

Finally, charging parties assert that the burden of proving the reasonableness of the 1996-97 agency fee was improperly shifted to the agency fee objectors. Charging parties contend that the Federation bears the burden of proving that its agency fee calculations are appropriate.

PERB Regulation 32994 requires an agency fee payer objecting to the amount of an agency fee to exhaust the union's agency fee appeal procedure before filing a charge with PERB. Regulation 32994 (a) provides:

If an agency fee payer disagrees with the exclusive representative's determination of the agency fee amount, that employee (hereinafter known as an "agency fee objector") may file an agency fee objection. Such agency fee objection shall be filed with the exclusive representative. An agency fee objector may file an unfair practice charge that challenges the amount of the agency fee; however, no complaint shall issue until the agency fee objector has first exhausted the exclusive representative's Agency Fee Appeal Procedure. No objector shall be required to exhaust the Agency Fee Appeal Procedure where it is insufficient on its face.

This charge presents a novel issue. PERB has not previously considered the applicable standard of review in post-arbitration cases involving agency fee objections. Where there is no case law directly on point, it is appropriate to seek guidance from case law derived from other arbitral settings.

In unfair practice cases, PERB has adopted the National Labor Relations Board's (NLRB) standard of deferral to an arbitrator's award. (Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a; San Diego County Office of Education (1991) PERB Decision No. 880; Yuba City Unified School District (1995) PERB Decision No. 1095.) In determining whether to defer to an arbitrator's award, the NLRB's post-arbitration review standard considers whether: (1) the arbitration proceedings were fair and regular; (2) all parties agreed to be bound; (3) the decision of the arbitrator is not clearly repugnant to the purposes of the Act; and (4) the arbitrator considered the unfair labor practice issue. (Spielberg Manufacturing Company (1955) 112 NLRB 1080 [36 LRRM 1152]; Olin Corporation (1984) 268 NLRB 573 [115 LRRM 1056] .) If these standards are met, PERB will defer to the arbitrator's award and dismiss the unfair practice charge.

A slightly modified version of this standard appears appropriate to review allegations concerning agency fee objections where the agency fee arbitration has already concluded. From the guidance provided by the cases noted above, PERB will defer to an arbitrator's award in an agency fee case and refuse to issue a complaint where: (1) the arbitration proceedings were fair and regular; and (2) the arbitrator's award is not clearly repugnant to the purposes of the Act.

In applying this standard of review, there are no facts alleged in the charge which demonstrate that the arbitral proceedings were unfair or procedurally defective.

Concerning the repugnancy claim, charging parties allege that the burden of establishing the reasonableness of the 1996-97 agency fee was improperly shifted to the agency fee objectors. In Railway Clerks v. Allen (1963) 373 US 113, 122 10 L Ed 2d 235, the U.S. Supreme Court held that the burden of proving the appropriate agency fee amount rests with the union. The Court stated:

Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden

of proving such proportion. [Id. at p. 122.]

The U.S. Supreme Court has repeatedly affirmed this ruling in later cases. (See Aboud v. Detroit Board of Education (1977) 431 US 209, 239, fn. 40, 52 L Ed 2d 261, 97 S Ct 1782 and Chicago Teachers Union v. Hudson 475 US 292, 306, 89 L Ed 2d 232, 106 S Ct 1066.) Furthermore, the California Supreme Court reached the same conclusion in an agency fee case originating with PERB. (Cumero v. Public Employment Relations Board (1989) 49 Cal.3d 575, 262 Cal.Rptr. 46.) Consistent with this holding, PERB Regulation 32994(b) requires an exclusive representative to prepare and administer an Agency Fee Appeal Procedure which meets certain criteria. PERB Regulation 32994(b)(6) specifically requires an exclusive representative to bear the burden of establishing the reasonableness of the amount of the agency fee.

In dismissing the agency fee objectors' challenge to the amount of the agency fee set by the Federation, the arbitrator concluded in his decision that, "The challenging (objecting) teachers have not established that the Union has failed to follow current statutory and decisional law in calculating its chargeable and non-chargeable costs, or that the agency fee as calculated is unfair and unreasonable." Based upon this determination and charging parties' allegations, it appears that the arbitrator improperly shifted the burden of proof to the agency fee objectors to determine the reasonableness of the Federation's agency fee. Accordingly, the arbitrator's award is contrary to PERB regulations and is, therefore, repugnant to the purposes of the EERA. Therefore, it is not appropriate to defer to the arbitrator's award.

We must now consider whether the charge alleges sufficient facts to demonstrate that the Federation violated EERA when it calculated the 1996-97 agency fee.

Charging parties allege that the method of identifying the time the Federation president spends engaged in chargeable and nonchargeable activities is flawed because it is not objectively verifiable and cannot be audited. The president completes a weekly "Activity Report" by noting the number of hours she spends engaged in chargeable and nonchargeable activities. The nonchargeable percentage of the president's compensation is included in the agency fee calculation.

While noting that unions bear the burden of proving the reasonableness of the agency fee imposed upon nonmembers, the U.S. Supreme Court has ruled that "absolute precision" is not required in the calculation of the agency fee. (Railway Clerks v. Allen (1963) 373 US 113, 122, 10 L Ed 2d 235, 83 S Ct 1158; Aboud v. Detroit Board of Education, supra, 431 US 209, 239, fn.

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40, 52 L Ed 2d 261, 97 S Ct 1782; Chicago Teachers Union v. Hudson, supra. 475 US 292, 307, fn. 18, 89 L Ed 2d 232, 106 S Ct 1066.)

The Federation president completes an "Activity Report" which tracks her activities each day of the week. The activity report specifies the number of hours the president engaged in activities specifically identified as chargeable and nonchargeable. The charging parties contend that the time spent engaged in chargeable activities must be verified by written documents such as phone records or meeting minutes. However, it would no doubt be impossible to verify with written documentation every hour engaged in chargeable activities. As the U.S. Supreme Court determined, the union is not required to calculate chargeable and nonchargeable activities with "absolute precision." Accordingly, this allegation fails to state a prima facie case.

Charging parties also allege that the arbitrator failed to adjust the agency fee amount after AFT admitted that its California budget contained a \$55,479 error in employee expenses. Based on total expenses of \$69,781,123, AFT concluded that the error represented less than one-tenth of one percent, and, therefore the error was insignificant.

As discussed above, an exclusive representative is not required to calculate an agency fee with "absolute precision." The error in AFT's California budget represents less than one-tenth of one percent of its total expenses. The insignificant level of this calculation error does not demonstrate a prima facie violation of the Federation's obligation in setting the amount of its agency fee. Therefore, this allegation is dismissed.

For these reasons, the allegations concerning the method of identifying the Federation president's chargeable and nonchargeable activities and the error included in AFT's budget, as presently written, do 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not

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receive an amended charge or withdrawal from you before July 22 1998. I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at (916) 322-3198, ext. 305.

Sincerely,

Robin E. Wright
Regional Attorney