STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RICKEY A. JONES, Charging Party, v. SEIU LOCAL 99, Respondent.	Case No. LA-CO-1192-E PERB Decision No. 1882 January 25, 2007

Appearances: Rickey A. Jones, on his own behalf; Rothner, Segall & Greenstone by Glenn Rothner, Attorney, for SEIU Local 99.

Before Duncan, Chairman; McKeag and Neuwald, Members.

DECISION

McKEAG, Member: This case is before the Public Employment Relations Board (Board) on appeal by Rickey A. Jones (Jones) of a proposed decision (attached) by an administrative law judge (ALJ) dismissing his unfair practice charge.[1] The charge alleged that SEIU Local 99 (SEIU) violated the Educational Employment Relations Act (EERA)[2] by denying Jones the right to fair representation. Jones alleged this conduct violated EERA section 3543.6(b).

The Board has reviewed the entire record in this case, including but not limited to, the unfair practice charge, the complaint, the answer to the complaint, Jones' brief, and SEIU's

[1]On November 15, 2005, the proposed decision was declared final automatically (PERB Decision No. HO-U-887), because no exceptions were received. In SEIU Local 99 (Jones') (2006) PERB Order No. Ad-352, the Board accepted late filed exceptions from Jones. Consistent with the Board's Order accepting the late-filed exceptions and the Board's consideration of Jones' exceptions on their merits, the automatic issuance of PERB Decision No. HO-U-887 is hereby rescinded.

[2]EERA is codified at Government Code section 3540, et seq.

post-hearing brief. Based on this review, the Board finds the ALJ's proposed decision to be free of prejudicial error and adopts it as a decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-1192-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neuwald joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

RICKEY A. JONES, Charging Party, v. SEIU LOCAL 99, Respondent.	UNFAIR PRACTICE CASE NO. LA-CO-1192-E PROPOSED DECISION (10/20/05)

Appearances: Rickey A. Jones, on his own behalf; Rothner, Segall & Greenstone by Glenn Rothner, Attorney, for SEIU Local 99.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, an employee alleges that his union violated its duty of fair representation. The union denies any violation.

Rickey A. Jones (Jones) filed an unfair practice charge against SEIU Local 99 (SEIU) on February 23, 2005. The General Counsel of the Public Employment Relations Board (PERB) issued a complaint on March 18, 2005, to which SEIU filed an answer on April 12, 2005.

PERB held an informal settlement conference on April 28, 2005, but the case was not settled. PERB held a formal hearing on July 7, 2005. With the receipt of the final post-hearing brief on October 3, 2005, the case was submitted for decision.

FINDINGS OF FACT

Jones is an employee under the Educational Employment Relations Act (EERA).[1] SEIU is an employee organization under EERA and is the exclusive representative of a unit of

[1]EERA is codified at Government Code section 3540 and following.

employees, including Jones, employed by the Los Angeles Community College District (District).

The PERB complaint alleges in relevant part:

> On or about November 5, 2004, the Charging Party [Jones] spoke with Respondent's [SEIU's] agent, Rosemary Bowman, about filing a grievance. Bowman indicated that the Charging Party should keep her posted regarding the grievance but did not conduct any investigation into the grievance. Bowman failed to attend a December 17, 2004 meeting with the Charging Party's employer regarding the grievance. Bowman indicated she was on vacation when Charging Party left her messages regarding the meeting, but failed to return his calls when she returned from vacation. On January 19, 2005, Respondent's agent Bill Lloyd decided not to take Charging Party's grievance to arbitration based solely on the District's response and without any investigation into the grievance. The Respondent failed to respond to the Charging Party's February 9, 2005 letter requesting a new representative and offering to pay for the arbitration himself.

The PERB complaint further alleges that this conduct was inconsistent with SEIU's duty of fair representation and therefore violated EERA section 3543.6 (b).

At the PERB hearing there were three witnesses: Jones himself and two SEIU officials, Bill Lloyd (Lloyd) and Tom Beatty (Beatty). The testimony of all three witnesses was credible and uncontradicted. SEIU official Rosemary Bowman, mentioned in the PERB complaint, was not a witness.

The facts of this case revolve around a grievance Jones filed on November 7, 2004. In that grievance, Jones alleged that the District violated its agreement with SEIU by failing "to protect me against discrimination of hostile acts...by a member of the L.A. County Sheriff

Dept, while working [on campus]."[2] As a remedy, Jones requested monetary compensation for fear, anxiety and distress and that "the offending officer [be] relieved of his duties" on campus.

On November 5, 2004, before filing the grievance, Jones spoke to Bowman by phone. According to Jones, Bowman told him that "she didn't think I had grounds for a grievance but if I think I had, file and keep her posted." Jones then started the grievance process and completed Steps One and Two without SEIU involvement.

On December 10 and 11, 2004, Jones left messages on Bowman's answering machine, informing her of an upcoming Step Three meeting with the college president and requesting her presence. Jones did not hear back from Bowman. On December 17, 2004, Jones attended the Step Three meeting without SEIU representation.

On January 13, 2005, the college president issued a memo to Jones in response to the Step Three grievance meeting. The memo stated in part:

> The college has taken several steps to resolve this matter. First, as stated in the Step Two response, the grievant's administrative supervisor, Tom Lopez, Facilities Manager, made arrangements for the ranking Sheriffs Deputy, Randy Tuinstra, to meet with the grievant and other members of the custodial staff to discuss their concerns. Second, the administration reported the grievance to the Sheriffs Office and requested a review through their process. As a result, until the investigation is completed, the work schedule for the officer in question has been changed so that the individual will not be on campus during the grievant's scheduled work day. The issue of completing the changing [of] the officer's work location is under review by the Sheriffs internal investigation process. Third, the college is pursuing an investigation of the allegations of discrimination which were formally filed by the grievant with the College Compliance Officer.
>
> At this point, I am not denying or granting the remedy of relocating the officer because the investigation is incomplete.

[2] Article 3, section D, of the agreement states in part that the District "shall insure that employees do not work in an environment which is unreasonable, intimidating or hostile." The section is grievable.

> Regarding the request for monetary compensation for the fear, anxiety and undue stress caused by the officer in question, I am denying this request because the investigation is incomplete and, further, because the college is not authorized to grant such a remedy.

There is no dispute that investigations were launched both by the Sheriffs Department and by the College Compliance Officer.

Jones spoke to Bowman again on January 17, 2005. When he asked her why she had not called him about the Step Three meeting, she replied that she was on vacation. There is no evidence that she was not on vacation or that anyone else was monitoring her answering machine.

Jones informed Bowman of the completion of Step Three and of his desire to proceed to Step Four, arbitration. According to Jones, she said she would have to "give the grievance to a higher authority for their decision on proceeding,"

On January 18, 2005, Jones delivered his grievance documents to SEIU, including a three-page account of the events giving rise to the grievance. Bowman gave the complete file to Lloyd, who was responsible for determining which grievances went to arbitration. Lloyd testified that he had concerns about the remedy Jones had requested in his grievance. Lloyd thought the request for monetary compensation for fear, anxiety and distress "might have really problems [sic] with the contract section."[3] He also thought "there might be problems with our grievance procedure having a person removed who was not on the payroll for the College District."

Lloyd described his decision about proceeding to arbitration as follows:

[3]Article 20, section E.4.h, of the agreement states in part, "If a monetary award, other than salary for services rendered, is made in excess of $2,500, the Board of Trustees shall review the arbitrator's decision and render a final decision as to the amount, in excess of $2,500, to be granted."

> My decision was since there were ongoing investigations to let the investigations proceed and then make an evaluation when the investigations had been finished.

Lloyd was still open to reviewing the matter once the investigations were over, and he believed that arbitration was still a possibility. Lloyd passed the grievance file on to Beatty for monitoring and follow-up.

On January 19, 2005, Bowman called Jones. According to Jones, she told him Lloyd "wanted to wait and see what was the outcome of the sheriff investigation." She also told Jones to "go ahead and file the grievance with the district as to not miss the 10 day deadline." On January 26, 2005, Jones filed the grievance at Step Four.

On February 9, 2005, Jones sent SEIU a certified letter, asking that Bowman be replaced as his representative and offering to pay the costs of arbitration himself. The letter was referred to Beatty, who determined that there was no need to replace Bowman while the grievance was being held in abeyance. Beatty also told Bowman to tell Jones that SEIU could not charge unit members for the costs of arbitration. Beatty felt that the grievance had potential merit but that the requested remedy was not attainable.

On February 23, 2005, Jones received a letter from the District stating that he had not provided documentation verifying the concurrence of SEIU in his Step Four filing. As a result, his request for arbitration was to remain in abeyance. On that same day, Jones filed his unfair practice charge against SEIU.

ISSUE

Did SEIU violate its duty of fair representation?

CONCLUSIONS OF LAW

The PERB complaint alleges that SEIU denied Jones the right to fair representation and thereby violated section EERA 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, a charging party must show that the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), PERB 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 omitted.]
>
> 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.]

With regard to when "mere negligence" might constitute arbitrary conduct, PERB observed, in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H, that under federal precedent a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270 [113 LRRM 3532], at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090].)

In the present case, it appears from the evidence that there was some failure of communication between Jones and SEIU, particularly with regard to the Step Three meeting. To the extent the failure of communication may be attributed to SEIU, it appears at worst to have been a matter of mere negligence. Nothing SEIU did or failed to do completely extinguished the right of Jones to pursue his claim On the contrary, Jones was able to represent himself at the Step Three meeting with some apparent success, and his Step Four grievance is only in abeyance.

It also appears from the evidence that SEIU's decision to allow the Step Four grievance to go into abeyance was not without a rational basis or devoid of honest judgment. Lloyd testified credibly and without contradiction that he made that decision because of the two investigations already under way of the facts underlying the grievance. This decision to "wait and see" was all the more reasonable given the perceived difficulties in obtaining through arbitration the remedy Jones sought.

Jones faults SEIU for not doing its own investigation of the facts. In the circumstances of his case, however, it seems reasonable for SEIU not to have launched an investigation of its own. At the time Lloyd made his decision, Jones had already provided SEIU with a three-page account of the relevant facts. There is no evidence that SEIU had any reason to doubt that account. Furthermore, as already noted, two investigations of the facts were already under way. SEIU could reasonably hope that those investigations might yield the same information as would its own investigation.

I conclude that Jones has not proved that SEIU violated its duty of fair representation and the case should therefore be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and the underlying unfair practice charge in Case No. LA-CO-1192-E, Rickey A. Jones v. SEIU Local 99Ricky A. Jones v. SEIU Local 99, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Thomas J. Allen
Administrative Law Judge