

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LINA ROSA,

Charging Party,

v.

CALIFORNIA NURSES ASSOCIATION,

Respondent.

Case No. SF-CO-232-M

PERB Decision No. 2182-M

May 26, 2011

Appearances: Lina Rosa, on her own behalf; Donald W. Nielsen, Attorney, for California Nurses Association.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Lina Rosa (Rosa) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the California Nurses Association (CNA) breached its duty of fair representation under the Meyers-Miliias-Brown Act (MMBA)¹ by failing to adequately represent Rosa in matters concerning her employment while she was employed by the Washington Hospital Healthcare System (Hospital). The Board agent found that the charge failed to state a prima facie violation of the duty of fair representation.

The Board has reviewed the dismissal and the record in light of Rosa's appeal, CNA's response thereto, and the relevant law. Based on this review, we find the dismissal and warning letters to be well-reasoned, adequately supported by the record, and in accordance

¹ The MMBA is codified at Government Code section 3500 et seq.

with applicable law. Accordingly, the Board adopts the dismissal and warning letters as the decision of the Board itself, supplemented by the discussion below.²

DISCUSSION

On appeal, Rosa asserts that the issues she raised concerning alleged workplace hostility and harassment “could have been the subject of a formal grievance, which inferentially could and should have been pursued” by CNA on her behalf. As noted in the dismissal letter, however, even if the issues were covered by the collective bargaining agreement and subject to the grievance procedure, the charge fails to allege facts to establish that CNA’s failure to file a grievance was arbitrary, discriminatory or in bad faith, or that its failure to pursue a grievance extinguished Rosa’s right to pursue any claim against the Hospital. (*United Teachers of Los Angeles (Adams)* (2009) PERB Decision No. 2012.) The charge fails to show that CNA’s actions were “without a rational basis or devoid of honest judgment.” (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M.) The limited information provided with the charge indicates that, after considering her complaints, CNA advised Rosa to pursue other remedies, such as attending internal meetings, filing a workers’ compensation claim and filing a discrimination complaint with the Department of Fair Employment and Housing. Moreover, although CNA concluded Rosa did not have a meritorious grievance, the charge alleges that it did pursue some sort of “grievance adjustment and arbitration” based upon her complaints. Therefore, the charge fails to establish a prima facie violation of the duty of fair representation.³

² Rosa does not appeal from the Board agent’s determination that the charge fails to state a prima facie case with regard to contacts she had with CNA after she resigned her position with the Hospital.

³ Rosa’s apparent assertion that inadequate representation by CNA could have caused her to resign her employment is not supported by any factual allegations in the charge. Instead, the charge alleges that she voluntarily resigned her position because she was offered a

ORDER

The unfair practice charge in Case No. SF-CO-232-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chair Martinez and Member McKeag joined in this Decision.

position at another hospital. Similarly, Rosa's assertion that the dismissal letter "overlooks the well settled doctrine of constructive discharge" does not support finding a prima facie violation of the duty of fair representation, and the charge does not allege that Rosa was constructively discharged. In addition, because we find that the charge failed to state a prima facie case, we do not find it necessary to address any other issues raised on appeal.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377



November 2, 2010

Lina Rosa

Re: *Lina Rosa v. California Nurses Association*
Unfair Practice Charge No. SF-CO-232-M
DISMISSAL LETTER

Dear Ms. Rosa:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 3, 2010.¹ Lina Rosa (Rosa or Charging Party) alleges that the California Nurses Association (CNA or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)² by failing to represent her while Rosa was employed by the Washington Hospital Healthcare System (Hospital).

Charging Party was informed in the attached Warning Letter dated October 14, 2010, 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 that 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 on or before October 25, 2010, the charge would be dismissed.

On October 22, 2010, Charging Party filed a Second Amended Charge using the on-line filing method authorized by PERB Regulation 32613, and the signed original of this Second Amended Charge was timely filed on October 29, 2010.³

¹ A signed copy of the charge was not filed with PERB until September 13, 2010. On September 27, 2010, a First Amended Charge was filed clarifying the theory of the alleged violation.

² The MMBA, which provides for collective bargaining rights for employees of California cities, counties and other local agencies, is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

³ The additional information contained in the Second Amended Charge is considered herein even though a signed, original proof of service confirming service of the amended charge on CNA has not been filed as of this date.

The Warning Letter

In the Warning Letter, Rosa was informed that her unfair practice charge was subject to dismissal for the following reasons:

The duty of fair representation is limited to contractually-based remedies under a union's exclusive control. (*Service Employees International Union, Local 1021 (Schmidt)* (2009) PERB Decision No. 2080-M.) Here, the charge does not contain facts clearly showing that issues of concern to Rosa were covered by the collective bargaining agreement between the Hospital and CNA. Thus, the charge fails to meet its burden of alleging sufficient facts on which to find prima facie evidence of a violation of the duty of fair representation. (*Ibid.*; [*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S].) Even if the duty of fair representation was applicable to her issues, Rosa has not established that CNA's conduct was arbitrary, discriminatory or in bad faith, or that CNA's conduct extinguished Rosa's right to pursue any claim against the Hospital. Instead, it appears that Rosa's decision to resign from the Hospital in order to accept a position at another facility was the event, if any, that extinguished her rights in this regard. Thus, because Rosa has not established that CNA's conduct extinguished her right to pursue a claim, the charge must be dismissed. (*United Teachers of Los Angeles (Adams)* (2009) PERB Decision No. 2012.)

Finally, with regard to the contacts Rosa had with CNA after she resigned from the position at another hospital, and was no longer in a bargaining unit represented by CNA, it is less than clear under what theory a violation could be found. An exclusive representative owes a duty of fair representation to those employees in the bargaining unit(s) it represents, but does not owe a duty to employees who are not represented. (*Capistrano Unified Education Association, CTA/NEA (La Marca)* (2001) PERB Decision No. 1422; *Los Rios College Federation of Teachers (Deglow)* (1996) PERB Decision No. 1133.)

Second Amended Charge

As discussed in the Warning Letter, Rosa resigned her employment with the Hospital on March 21, 2010 to accept employment at another facility. In her Second Amended Charge, Rosa's statement of the charge and the attachments to the charge primarily address her interaction with CNA and the Hospital after her employment voluntarily terminated at the Hospital and after she resigned her position at the other facility. The Second Amended Charge

does not provide any additional facts that would establish that the duty of fair representation attached to CNA after March 21, 2010. (*Capistrano Unified Education Association, CTA/NEA (La Marca)*, *supra*, PERB Decision No. 1422; *Los Rios College Federation of Teachers (Deglow)*, *supra*, PERB Decision No. 1133.) Thus, the Second Amended Charge does not cure this deficiency in the charge.

Rosa does provide additional information concerning her contacts with CNA Labor Representative Tim Jenkins and other CNA representatives while still employed at the Hospital. However, Rosa's Second Amended Charge does not allege facts that would demonstrate that CNA's actions—or inaction—extinguished her right to pursue any claim against the Hospital. The instant charge is also subject to dismissal on this basis. (*United Teachers of Los Angeles (Adams)*, *supra*, PERB Decision No. 2012.)

Responding to the question of whether the issues over which she sought assistance from CNA concerned matters under the union's exclusive control, Rosa alleges that "a grievance adjustment and arbitration was initiated based on the complaints [made] to [CNA representative] Cynthia Wardrobe," pursuant to the grievance procedure found in the memorandum of understanding negotiated by CNA and the Hospital. While Rosa does not provide any specifics regarding the "grievance adjustment and arbitration," it appears that these alleged facts would undercut—rather than support—the claim that CNA failed to represent Rosa.

Conclusion

Therefore, the charge is hereby dismissed based on the facts and reasons set forth above as well as in the October 14, 2010 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations, Charging Party 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, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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, § 32635, subd. (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, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

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, § 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,

TAMI R. BOGERT
General Counsel

By _____
Les Chisholm
Division Chief

Attachment

cc: Donald W. Nielsen

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377



October 14, 2010

Lina Rosa

Re: *Lina Rosa v. California Nurses Association*
Unfair Practice Charge No. SF-CO-232-M
WARNING LETTER

Dear Ms. Rosa:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 3, 2010.¹ Lina Rosa (Rosa or Charging Party) alleges that the California Nurses Association (CNA or Respondent) failed to represent her while Rosa was employed by the Washington Hospital Healthcare System (Hospital).

While Rosa does not allege a violation of any specific statute, the charge will be analyzed pursuant to provisions of the Meyers-Milias-Brown Act (MMBA or Act),² as the Hospital is an employer within the meaning of the MMBA. CNA is the exclusive representative of registered nurses employed by the Hospital.

Rosa was employed by the Hospital until her resignation from employment there on March 21, 2010. Rosa previously went on medical leave in mid-December 2009, "due to work related depression and post traumatic stress disorder." Rosa was scheduled to return to work from her leave on March 1, 2010. In January 2010, Rosa contacted CNA Labor Representative Tim Jenkins and informed Jenkins that she was having trouble on the unit where she worked. Jenkins provided her with contact information for two Nurse Representatives at the Hospital, Julie Tan and Cindy Wardrobe. According to the statement of the charge, Jenkins also agreed with Rosa that the unit where Rose worked, and the manager of the unit, were "abusive."

Rosa also contacted Tan and Wardrobe, and reported her concerns about harassment and her belief that she was discriminated against because of a medical condition. Tan and Wardrobe allegedly promised to speak with Rosa's manager and to attempt to obtain additional time off

¹ A signed copy of the charge was not filed with PERB until September 13, 2010.

² The MMBA, which provides for collective bargaining rights for employees of California cities, counties and other local agencies, is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

for Rosa. However, they also referred Rosa back to Jenkins for assistance because Rosa's issues were "complex."

Rosa alleges that she thereafter "tried several times" to contact Jenkins, both by e-mail and telephone, to obtain advice and information as to legal options. These attempts were, according to the charge, unsuccessful. The charge then states, verbatim:

Because I feared going back to work at the hospital and because I was lead to believe I had no legal options and representation from my union.³ I resigned from my position because I was offered a position in another hospital. Sadly, I only worked with this new employer for 3 weeks and had to resign since the stress of a new job was exacerbating my condition.

The statement of the charge continues with an account of Rosa's contacts with Jenkins and other CNA representatives following her resignation from the other hospital. The charge does not allege, however, that CNA was the representative of nurses at the other hospital, or that Rosa was employed after March 21, 2010 in any position exclusively represented by CNA.

Discussion

1. Burden of Charging Party

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice

³ The statement of the charge does not explain the basis for how Rosa was "lead to believe" that she had no legal options and would not receive representation. However, in addition to disputing the assertion that Jenkins did not communicate with Rosa, CNA alleges in its position statement that Jenkins informed Rosa by telephone on March 2, 2010, of his conclusion that filing a grievance was not a viable option but also recommending an alternate course of action with CNA's support in the workplace. CNA also asserts that Jenkins recommended that Rosa consider filing a worker's compensation claim.

occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

2. Duty of Fair Representation

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that “unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith.” (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.) In *Hussey*, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be “accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union’s power.”

In *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including *Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332 and *American Federation of State, County and Municipal Employees, Local 2620 (Moore)* (1988) PERB Decision No. 683-S, are consistent with the approach of both *Hussey* and federal precedent (*Vaca v. Sipes* (1967) 386 U.S. 171).

With regard to when “mere negligence” might constitute arbitrary conduct, the Board 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, at p. 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.)

3 Analysis

The duty of fair representation is limited to contractually-based remedies under a union’s exclusive control. (*Service Employees International Union, Local 1021 (Schmidt)* (2009)

PERB Decision No. 2080-M.) Here, the charge does not contain facts clearly showing that issues of concern to Rosa were covered by the collective bargaining agreement between the Hospital and CNA. Thus, the charge fails to meet its burden of alleging sufficient facts on which to find prima facie evidence of a violation of the duty of fair representation. (*Ibid.*; *State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1071-S.) Even if the duty of fair representation was applicable to her issues, Rosa has not established that CNA's conduct was arbitrary, discriminatory or in bad faith, or that CNA's conduct extinguished Rosa's right to pursue any claim against the Hospital. Instead, it appears that Rosa's decision to resign from the Hospital in order to accept a position at another facility was the event, if any, that extinguished her rights in this regard. Thus, because Rosa has not established that CNA's conduct extinguished her right to pursue a claim, the charge must be dismissed. (*United Teachers of Los Angeles (Adams)* (2009) PERB Decision No. 2012.)

Finally, with regard to the contacts Rosa had with CNA after she resigned from the position at another hospital, and was no longer in a bargaining unit represented by CNA, it is less than clear under what theory a violation could be found. An exclusive representative owes a duty of fair representation to those employees in the bargaining unit(s) it represents, but does not owe a duty to employees who are not represented. (*Capistrano Unified Education Association, CTA/NEA (La Marca)* (2001) PERB Decision No. 1422; *Los Rios College Federation of Teachers (Deglow)* (1996) PERB Decision No. 1133.)

Conclusion

For these reasons the charge, as presently written, does not state a prima facie case.⁴ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may 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 an authorized agent of 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

⁴ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

PERB. If an amended charge or withdrawal is not filed on or before October 25, 2010,⁵ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Division Chief

⁵ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)