

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ALFRED GUTIERREZ,

Charging Party,

v.

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1000,

Respondent.

Case No. SA-CO-446-S

PERB Decision No. 2191-S

July 19, 2011

Appearances: Law Firm of Joanne DeLong by Joanne DeLong, Attorney, for Alfred Gutierrez; Monica Ahuja, Attorney, for Service Employees International Union, Local 1000.

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

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Alfred Gutierrez (Gutierrez) of a dismissal (attached) of his unfair practice charge. The charge alleged that Service Employees International Union, Local 1000 (SEIU) violated the Ralph C. Dills Act (Dills Act)¹ when it denied Gutierrez of the right to fair representation. Gutierrez alleged that this conduct constituted a violation of Dills Act section 3515.7(g).

The Board agent found Gutierrez failed to plead sufficient facts to demonstrate that SEIU abused its discretion or that its conduct was without a rational basis or devoid of honest judgment. Accordingly, the Board agent dismissed the charge for failure to state a prima facie case.

¹ The Dills Act is codified at Government Code section 3512 et seq.

We have reviewed the entire record in this matter and find the warning and dismissal letters well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as a decision of the Board itself.²

ORDER

The unfair practice charge in Case No. SA-CO-446-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Dowdin Calvillo joined in this Decision.

² The Board notes an apparent typographical error which appears on the third sentence of the third paragraph on page 2 of the dismissal letter. This sentence should read, “The fact that the union representatives appeared “uninformed” does not change this analysis.” (Emphasis added.)

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



April 21, 2010

Joanne DeLong, Attorney

Re: *Alfred Gutierrez v. SEIU Local 1000*
Unfair Practice Charge No. SA-CO-446-S
DISMISSAL LETTER

Dear Ms. DeLong:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 29, 2010. Alfred Gutierrez (Mr. Gutierrez or Charging Party) alleges that SEIU Local 1000 (Union or Respondent) violated the Ralph C. Dills Act (Dills Act)¹ by breaching its duty of fair representation.

Charging Party was informed in the attached Warning Letter dated April 1, 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 prior to April 8, 2010, the charge would be dismissed.

On April 8, 2010, Charging Party filed a First Amended Charge.

In the amended charge, Charging Party restates the factual paragraph in the original charge. Charging Party maintains that the Union breached its duty to Mr. Gutierrez by sending three "uninformed" representatives to assist Mr. Gutierrez with his disputed adverse action, by ultimately refusing to represent Mr. Gutierrez in the appeal of his disputed adverse action, and by proposing a settlement whereby Mr. Gutierrez must waive his future legal rights against the State without "all adverse actions being expunged from his record."

In addition, Charging Party states that the names of the union representatives representing Mr. Gutierrez during meetings "without knowing anything about his case" are Cecilia Greenwald (Ms. Greenwald), Jacqueline Campbell (Ms. Campbell), and Rene Maxon (Ms. Maxon). Charging Party further states that these individuals did not ask for Mr. Gutierrez' account of events in question. According to the amended charge, "it did not appear that they cared to even understand what actually happened much less to adequately represent him."

¹ The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov.

In the April 1 Warning Letter, Charging Party was informed that in order to state a prima facie violation of this section of the Dills Act, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) With respect to the appeal of the adverse action, Charging Party was informed that a union may refuse to pursue an appeal if it makes a reasonable determination that the appeal lacks merit. (*Service Employees International Union, Local 715, AFL-CIO (Caviglia)* (1995) PERB Decision No. 1116.)

The charge, as amended, still fails to demonstrate that the Union abused its discretion or that the Union's actions were without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M; *United Teachers – Los Angeles (Wylar)*, *supra*, PERB Decision No. 970.) Citing *Service Employees International Union, Local 221 (Meredith)* (2008) PERB Decision No. 1982, Charging Party argues that the Board must look at all of the Union's activities during the appeal process, not only Ms. Campbell's letter.² However, it is unclear what Charging Party means by "all of the Union's activities."

To the extent that Charging Party is still asserting that the Union's denial of representation breaches the duty of fair representation, the Board has held that a union may refuse to pursue an appeal if it makes a reasonable determination that the appeal lacks merit. (*Service Employees International Union, Local 715, AFL-CIO (Caviglia)*, *supra*, PERB Decision No. 1116.) Nothing in the amended charge contradicts the above facts or establishes that the Union failed to investigate the matter. The fact that the union representatives appeared "uninformed" does change this analysis. (See *California School Employees Association & its Chapter 374 (Wyman)* (2007) PERB Decision No. 1903 [an allegation that the union stewards' assistance was flawed is not persuasive as the duty of fair representation does not contemplate the complete satisfaction for all represented and the allegation does not indicate that the union stewards' conduct was performed without good faith or honesty].)

To the extent that Charging Party is asserting that the Union's proposed settlement breaches the duty of fair representation, the Board has also held that a union settlement of a grievance contrary to a grievant's wishes does not necessarily demonstrate a breach of the duty of fair representation. (*United Teachers of Los Angeles (Seliga)* (1998) PERB Decision No. 1289). Charging Party has provided no additional Union "activities" to support its argument.

Charging Party's allegation that the Union breached its duty of fair representation by failing to pursue his appeal is hereby dismissed based on the facts and reasons set forth herein and in the April 1, 2010 Warning Letter.

² Ms. Campbell's letter stated that she had reviewed Mr. Gutierrez' facts and denied Mr. Gutierrez representation with respect to the pursuit of his appeal, determining that success would be unlikely.

Right to Appeal

Pursuant to PERB Regulations,³ 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).)

³ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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 _____
Katharine Nyman
Regional Attorney

Attachment

cc: Monica Ahuja, Staff Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377



April 1, 2010

Joanne DeLong, Attorney

Re: *Alfred Gutierrez v. SEIU Local 1000*
Unfair Practice Charge No. SA-CO-446-S
WARNING LETTER

Dear Ms. DeLong:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 29, 2010. Alfred Gutierrez (Mr. Gutierrez or Charging Party) alleges that SEIU Local 1000 (Union or Respondent) violated the Ralph C. Dills Act (Dills Act)¹ by breaching its duty of fair representation.

Factual Background as Alleged

The charge states in its entirety:

The [U]nion breached its duty to Mr. Gutierrez by acting arbitrarily: he appealed a suspension last year, and so far during the process, the [U]nion has sent three different representatives, each uninformed about his case. The [U]nion now refuses to represent him further. To settle his appeal, Mr. Gutierrez must waive ALL future legal rights against the State without ALL adverse actions being expunged from his record. The remedy is for the [U]nion to represent Mr. Gutierrez fairly and vigorously.

Attached to the charge is a letter dated November 4, 2009 from Union representative Jacqueline Campbell (Ms. Campbell). The letter states in part as follows:

I have again reviewed the notice of adverse action on your Twenty Days Suspension from your position as a Sheetfed Offset Press Operator II (SOPO II) at the Board of Equalization (BOE). As you recall, a Pre-Hearing Settlement Conference was held at the State Personnel Board on October 20, 2009. You and I were present at the conference before Administrative Law Judge,

¹ The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov.

Regina Brown; BOE was represented by Legal Counsel, Brian Branine and a settlement was proposed. The parties reached agreement but needed to return two (2) days later to read the agreement into the record. Thereafter, but prior to the meeting on October 22, 2009, you advised me that you would not accept any settlement on your case. The State Personnel Board then set your case for an evidentiary hearing in November, but the attorney for the BOE was unavailable for those dates; on his motion, the evidentiary hearing was taken off calendar and has not yet been rescheduled. Mr. Gutierrez, I understand that you feel that the State has treated you unfairly and I certainly sympathize with your situation.

However, I have reviewed the facts of your case numerous times, and, unfortunately, if your case went to hearing, you would not be able to convince an administrative law judge to revoke or modify your suspension.

...

While I am denying you further representation to pursue your appeal, SEIU Local 1000 would still be willing to represent you for the LIMITED purposes of settlement. As we have discussed in cases like this, a state agency is sometimes willing to reduce the penalty or agree to some other lesser discipline.

Discussion

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.)

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by Dills Act section 3515.7(g) and *California State Employees' Association (Norgard)* (1984) PERB Decision No. 451-S and thereby violated section 3519.5(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 the Dills Act, Charging Party must show that the Respondent'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 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.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

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.)

Charging Party alleges no facts demonstrating that the Union abused its discretion or that the Union's actions were without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M; *United Teachers – Los Angeles (Wylar)*, *supra*, PERB Decision No. 970.) Herein, Ms. Campbell reviewed the facts provided to her and the likelihood of success in this matter. After reviewing such information, Ms. Campbell decided to deny representation with respect to the pursuit of Mr. Gutierrez' appeal, asserting that success was unlikely. Ms. Campbell did, however, state that the Union would continue to represent Mr. Gutierrez should he choose to settle his case. No information provided by Charging Party demonstrates that the Union acted arbitrarily or in bad faith. A union may refuse to pursue an appeal if it makes a reasonable determination that the appeal lacks merit. (*Service Employees International Union, Local 715, AFL-CIO (Caviglia)* (1995) PERB Decision No. 1116.) Accordingly, the charge fails to provide sufficient information to conclude that the Union breached its duty to fairly represent Mr. Gutierrez.

For these reasons the charge, as presently written, does not state a prima facie case.² 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 PERB. If an amended charge or withdrawal is not filed on or before April 8, 2010,³ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Katharine Nylan
Regional Attorney

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² 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.*)

³ A document is “filed” on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)