

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KAY SELDE,)	CASE NO. 2282-U-79-327
)	
Complainant,)	DECISION NO. 1349 - EDUC
)	
vs.)	
)	
ELMA TEACHERS ORGANIZATION,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND ORDER
Respondent.)	
)	

Judith Lonquist, Attorney at Law, General Counsel, the Washington Education Association, appeared on behalf of the complainant.^{1/}

Cohen, Andrews & Keegan, P.S., by Robert H. Westinghouse, Attorney at Law, appeared on behalf of the respondent.

PROCEDURAL BACKGROUND:

The complainant, Kay Selde, filed an unfair labor practice complaint with the Public Employment Relations Commission (PERC) on August 31, 1979, alleging that the Elma Teachers Organization: (1) failed to adequately assist her in a grievance proceeding before her employer; (2) failed to provide adequate representation for her during the grievance proceeding; (3) showed an attitude of hostility toward complainant; (4) and discriminated against her on the grounds she was not a member of the Elma Teachers Organization. A formal hearing on the complaint was held before Examiner Katrina I. Boedecker on June 11 and 12, 1980.

FACTS:

Kay Selde was employed by the Elma School District as an elementary school teacher from 1969 through the end of the school year 1979. During that time, Selde was a member of the Elma Education Association (EEA) and its parent organization the Washington Education Association (WEA). After a teachers' strike in 1973, the Elma Teachers Organization (ETO) replaced the EEA as the

^{1/} Although at the hearing Lonquist emphasized that she was not appearing for the Washington Education Association and stated she was appearing in her individual capacity as an attorney for the complainant, the brief submitted for the complainant is signed referencing Judith Lonquist "counsel for complainant, Washington Education Association".

exclusive bargaining representative for all educational employees in the Elma School District. The ETO is a non-affiliated labor organization. At the time of Selde's first contact with the ETO, the organization had not represented any employee in a grievance proceeding or an arbitration hearing, nor had any member ever requested assistance in such proceedings. The ETO has a constitution and bylaws; neither contain provisions for legal assistance to members. These documents do establish a negotiating committee and do allow for a creation of ad hoc committees as the president needs. When the ETO began operating, it set up a grandfathering clause allowing any teacher who was a dues-paying member of another organization to automatically become a member of the ETO. Otherwise, ETO members were assessed four dollars a month for dues which, upon receipt of written permission, the school district automatically deducted from a teacher's paycheck. The money would be deposited in the ETO bank account by the district. Neither membership lists nor records of dues payers were kept by or for the ETO. Since the inception of the ETO, Selde has continued to pay her dues to the WEA; she never exercised the grandfather option to join the ETO.

On January 25, 1979 Dr. Dwayne Gower, Superintendent of the Elma Public Schools, sent Selde a certified letter notifying her that the school system pursuant to RCW 28A.67.065 (1979), was placing her on probation starting February 1, 1979 due to Selde's "teacher evaluation record" and the recommendations of the principal of the school where she taught, Gary Logan. Shortly after receiving the probation notice, Selde contacted the WEA seeking assistance in protesting her probationary status. The WEA informed her she would have to seek assistance from her exclusive bargaining representative, the ETO.

Presentation of Grievance

On Febraury 26, 1979, Selde sent her grievance by certified mail to Lyle Burbidge, ETO president for the 1978-79 school year. It stated in part:

"II. The nature of my grievance is:

I am protesting my evaluation of January 22, 1979. I feel it is discriminatory and not a true measure of my teaching abilities. Of the seven central evaluation areas I was rated unsatisfactory in only two. This cannot and should not be grounds for putting me on probation. The majority of comments deal with 'complaints' which should have been brought up to my attention immediately."

Within two days after receiving the grievance, Burbidge met with Selde to discuss her grievance and the grievance procedure. Burbidge consistently testified that when Selde asked about having an attorney, he said he would have to check with one. At one point on redirect examination, Selde changed her previous testimony and stated that at this meeting Burbidge denied any

obligation on the ETO's part to provide her with legal counsel during the grievance procedure. During this meeting, Burbidge reviewed each point in Selde's grievance with her. He also testified he went over her evaluation and advised her on how to comply with the recommendations for improvement. Burbidge counseled her not to seek, as she requested, a "consensus of the ETO" since he felt it would be better for her professional integrity to have fewer knowing about her poor evaluations. Burbidge told her that in order to comply with the grievance procedure she must make a written request to Logan for a meeting. Burbidge assured Selde he would attend the meeting with her. Selde did not express any dissatisfaction.

Step 1 Meeting - March 2

Burbidge did go with Selde to the grievance meeting and the ETO arranged for minutes to be taken and a transcript made. Others present were Logan, Don Taylor, a high school principal, and Mick Patton, the head teacher at the elementary school. The testimony of both parties agrees that Burbidge did not take an active role in representing the complainant at the grievance hearing. The transcript of the hearing shows that Selde was given the opportunity to explain her grievance herself.

Five days after the grievance hearing, the principal informed Burbidge that the school's position was unchanged. Burbidge immediately review Logan's response with Selde. The next day Burbidge notified Selde by letter that she could proceed to step 2 of the grievance procedure and at the same time informed her she had a choice for the second grievance hearing of appearing before either a committee of peers or the district superintendent. Selde elected to have her grievance considered by the former, a Professional Rights and Responsibilities Committee (PR&R). At Burbidge's direction, Selde made a written demand for such a hearing on March 12, 1979.

PR&R Committee Meeting - March 15

In his capacity as ETO president, Burbidge selected the members of the ad hoc PR&R committee: himself, Clarence Pearson, Bill Shadduck, Jennifer Rosbach and Russell Taylor. Burbidge reviewed the committee makeup with Selde and explained that the two fourth grade teachers, Rosbach and Taylor, were chosen since they would have received Selde's students and would be aware of favorable points shown by their progression. Selde did not voice objections to the composition of the committee. Arrangements were made for a transcript of the hearing to be prepared.

Prior to the committee meeting, Selde gave Burbidge oral permission to review her personnel file. Among the documents were three written complaints from parents, two memos of reprimand from the superintendent, five teacher evaluation records and letters from her fellow team teachers. The letters from Selde's team teachers included the following excerpts:

* * *

February 17, 1978

We have come to the "end of our rope" with the lack of control going on in your area of the module. We find it extremely difficult to teach our classes due to this problem. In the past we have had many meetings with you on this matter, but success has yet to come.

* * *

May 5, 1978

* * *

We find your chronic negative attitude both with the children and with us to be a real burden. We feel that it is important to maintain a reasonably cheerful, positive classroom atmosphere in order to do our best in helping the students to do their best. We try to make school a positive rewarding experience for everyone (including ourselves), and find your constant complaining very depressing.

* * *

May 5, 1978

* * *

It all boils down to the fact that your negative attitude affects the students, other module teachers and yourself. Love and warmth is absent in your teaching area. Hearing your continuous complaining of student's materials and school operations has greatly affected your teammates. This turns the start of a happy day into one of frustration. The student's behavior in your area is reflective of your own attitude's and feelings.

* * *

January 14, 1979

* * *

Ms. Selde has a very depressing effect on the students and the other third grade teachers. ALL of her comments are negative. She has nothing good to say about students, school, the administration or other matters. If Ms. Selde is to stay in the Elma School District, it will be requested formally (by all three teachers) that she'll leave the third grade module and be with another group. After two years of problems and negativeness it is time for others to share her companionship and talents. Ms. Selde has made the "joy of teaching" an everyday displeasure. Her sour attitude and unprofessional manner has made the module unpleasant for all.

* * *

Before March 15, Burbidge spoke with the teachers who wrote the letters, soliciting their further explanations.

Selde testified that she was given notice of the PR&R meeting at 2:00 p.m. March 15th. Burbidge testified he told her either March 14th or around 8:00 a.m. March 15th that the meeting would be that afternoon at 2:30 p.m..

At the commencement of the meeting, Burbidge announced that the committee was not to judge Selde as a teacher but instead they were to weigh the merits of her grievance. He also stated that he personally did not think the grievance had merit. The committee studied the personnel file for over an hour and then called in Logan and Selde separately for further information. After approximately two and a half hours, they voted unanimously that the grievance had no merit.

Notification of PR&R Findings - March 22

Burbidge delivered the committee's findings personally to Selde at her residence March 22nd and said the ETO could be of no further help to her. Selde asked if the ETO would provide her with an attorney to fight her probation. Burbidge testified that after the PR&R committee meeting he found out that Selde was not an ETO member and after her request, he told Selde that she had "a lot of gaul" to ask for an attorney from the ETO when she was not even a member. Selde's testimony contradicts itself by placing that statement at various times in the grievance process. Burbidge advised Selde to resign and have her personnel file purged.

Non Renewal Proceedings

During the time the grievance was being processed, Logan and Selde met approximately five times regarding her probation. Burbidge told Selde he would attend any meeting she wanted him to in order to act as her witness or "to back her up". Selde had Burbidge go to one meeting.

Selde did not complete the recommended program for improvement as listed on the evaluation.

Between May 11 and May 17, Selde received notice that she would not have her teaching contract renewed for the following year. She again requested of Burbidge that he have the ETO provide her with an attorney and financial support. Burbidge said he would "have to see". He testified that shortly thereafter he contacted an attorney and upon his advice again told her that the ETO could not help her further. He did help her copy her personnel file to send to Bob Graf, the WEA UniServ representative for the Elma Education Association. Burbidge also wrote Selde regarding the procedures involved in any non-renewal hearings. Selde testified that she was in contact with Graf periodically throughout the grievance and probation period. Her testimony reflects that Graf advised her to take the same steps that Burbidge recommended. The record establishes that at the end of the school year, with

the help of the WEA, Selde was provided with a WEA network attorney upon whose advice Selde resigned from Elma School District and had her personnel file purged.

POSITIONS OF THE PARTIES:

The complainant argues that the president of the ETO knew that Selde was not an ETO member and because of that sole reason discriminated against her when she requested a grievance be filed. She avers that she was treated hostilely and that the investigation of her grievance was not conducted in good faith, but rather the grievance was pre-judged as non-meritorious. She claims that Burbidge denied her financial and legal assistance because she was not a member of the ETO. Finally, she argues that the ETO breached its duty of fair representation by its failure to act as an advocate for her and by providing only perfunctory representation.

The ETO responds that Selde's non-membership was not a determining factor in evaluating the merits of her grievance. It further emphasizes that the facts of this case do not show any discrimination occurred nor that there was a lack of good faith when the ETO dealt with the complainant.

DISCUSSION:

The complainant's charge is the first breach of duty of fair representation allegation to be brought under the Educational Employment Relations Act (EERA) Chapter 41.59 RCW.^{2/}

The source of the duty of fair representation in the Educational Employment Relations Act is RCW 41.59.090, which states:

"The employee organization which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent all the employees within the unit without regard to membership in that bargaining representative". . .

* * *

The U.S. Supreme Court has held that proof of a breach of duty depends on a showing that "a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith". Vaca v. Sipes, 386 U.S. 171 at 190 (1967). This three-prong test has been interpreted by federal courts:

^{2/} The theory has been examined under the Public Employees Collective Bargaining Act, Chapter 41.56 RCW. See: Hartman v. City of Redmond and Redmond Employees Association, Decision No. 886 (PECB, 1980).

"A union must conform its behavior to each of these three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action." Griffin v International Union of United Automobile Workers, 469 F.2d 181 at 183 (4th Cir. 1974). Ruzicka v. General Motors, 523 F.2d 306 at 309 (6th Cir. 1975).

The Supreme Court further stated in Vaca that a union must not process a grievance in a perfunctory manner:

"In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a non-arbitrary manner, make decisions as to the merits of the particular grievance." 386 U.S. at 191.

Therefore, the facts presented above must be studied to see if the ETO wrongfully refused to process Selde's grievance or treated her in an arbitrary, discriminatory or bad faith manner.

The recitation of the facts in this case was very detailed because pivotal points of this decision depend on awarding credibility to one witness over another. It is also important to look at the merits of Selde's grievance to make sure the PR&R committee did not "act in reckless disregard for the rights of the individual employee". Robesky v. Quantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978). I credit the testimony of Burbidge and that part of Selde's testimony which establishes that Burbidge did not know that Selde was not a member of the ETO until after the step 2 hearing. At that time, Burbidge's comment that Selde had a lot of gall to ask for an attorney when she was not even an ETO member did not show the hostility of the type that swayed the National Labor Relations Board (NLRB) in Glass Bottle Blowers Association (Owens-Illinois Inc.), 240 NLRB No. 29 (1979), which the complainant cites to support her case. In Glass Bottle Blowers, there was an extensive background of animosity by the union toward the individual complainant and contemporaneous expressions of hostility by union officials when the complainant first tried to file a grievance. The grievance was never examined on its merits. Burbidge's comment to Selde was made after the PR&R committee had considered substantial evidence and made a good faith determination to reject her grievance on its merits. Also, Burbidge continued to help Selde prepare for the non-renewal hearing as late as two months after his comment. Selde could not testify as to specific hostile acts by other ETO members. Her general statements regarding a "feeling of hostility" from other teachers are not enough to sustain her complaint on

this point nor does her citation to Robesky sustain her point. In Robesky the union did not inform the grievant that it had found no merit to her grievance and would not take it to arbitration. Thinking that she would have an arbitration hearing, Robesky turned down a settlement offer by the employer. The Court of Appeals wrote upon remanding it to a lower court:

"If the union intentionally withheld from the appellate the fact that her grievance would not be arbitrated the trier of fact could determine that such a course of conduct had no rational basis and was therefore arbitrary. If the union withheld the critical information unintentionally, the trier of fact could conclude that the union's omission was so egregious as to be arbitrary." 573 F.2d at 1088.

The ETO withheld no information from Selde. Burbidge kept her informed of all the actions along the way of the process.

Similarly, Burbidge's conduct does not amount to the egregiousness displayed in Brown Transport, 239 NLRB No. 91 (1978) cited by the complainant. In Brown Transport the union never investigated the grievance before finding it was without merit and it called for a decision before allowing the grievant to present his complete defense. The complainant's citation of Truckdriver's, Oildriver's and Filling Station and Platform Worker's Local No. 705, 209 NLRB 292 (1974) is distinguishable also, since in Truckdriver's the Board held that once the union undertook to present the grievance to the joint grievance board of employer representatives and union representatives it became obligated to represent the grievant fully and fairly which included the duty to act as an advocate for the grievant. The Board wrote the union business agent did not act as an advocate when he openly stated at the meeting he believed that the grievant did not have a valid grievance. The Board stated that the union business agent, in effect, abdicated his duty to present the grievance in the light most favorable to the grievant. However, the joint grievance board was made up of people whose sole review of the grievance was the business agent's statement. Burbidge's statement at the beginning of the PR&R committee meeting indicating that he did not think Selde's grievance had any merit is not conclusive evidence of bad faith. At the time he made that statement, he had reviewed Selde's entire personnel file, he had interviewed her fellow team teachers who had written letters to her and he had talked with Selde about her grievance. The PR&R committee was composed of educators who will not be presumed to be easily swayed. The transcript of the PR&R meeting which was put into evidence, establishes that the individual committee members had also reviewed the file and called witnesses in their efforts to see the complete picture. There is no evidence that the committee members were aligned in interest against Selde. The audience for Burbidge's comment was private in that no employer representatives were present.

The complainant points to Ruzicka to show her grievance was processed in a perfunctory manner. However, in Ruzicka, the grievant's union had sought and

been granted two extensions of time to file the statement of the grievant and at no time had decided that appellate's claim was without merit. The union allowed the final deadline to pass without filing the statement or requesting a further extension. At this time, the union did not inform either the grievant or the employer that it had decided to continue or to stop processing the grievance. The court wrote "such negligent handling of the grievance unrelated as it was to the merits of appellate's case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance." (Emphasis added). Although Selde's notice of the meeting was short, the transcript of the PR&R session shows that Selde was asked if she had anything further to add several times and she stated she did not.

This case matches more closely to Whitzell v. Merrymeeting Educator's Association, MLRB 42, 0198 (1980). There the Maine Labor Relations Board held that a union decision not to proceed to arbitration with an employee's grievance did not constitute a breach of duty of fair representation since the decision was reached through a procedure that was not arbitrary and after a proper consideration of all relevant circumstances. In Findley v. Jones Motor Freight, 639 F.2d 953 (CA3, 1981) the U.S. Court of Appeals ruled that a truck driver who alleged that his union had committed a variety of derelictions (much more egregious than Selde's complaints about the ETO) did not establish a breach of duty. The driver claimed the union failed to present certain witnesses before the arbitration committee that upheld his discharge, failed to investigate the possibility of presenting other witnesses, failed to brief him before the hearings, failed to rebutt the employer's evidence, and failed to notify him of the grievance panel membership. According to the court, the examination of the union's alleged derelictions did not demonstrate any prejudice and "establishes at best no more than arguably negligent conduct". The record revealed no animosity between the driver and the union, no slighting of the driver's interests, no complete disregard in assessing the merits of his grievance or any other showing of bad faith or arbitrary conduct.

Selde did not prove she was treated differently by the ETO than any other teacher member or non-member would have been who had a similar personnel record. Burbidge continued to advise Selde step by step through the district's policy manual grievance procedures. She never expressed any dissatisfaction with what he was doing for her or that he should do more for her until after the grievance was found to be without merit. Through her attorney, Selde agreed to the same settlement that Burbidge had counceled her to take.

FINDINGS OF FACT

1. The Elma School District is an employer within the meaning of RCW 41.59.020(5).
2. The Elma Teacher's Organization is a labor organization within the meaning of RCW 41.59.020(1) whose president during the 1978-79 school year was Lyle Burbidge.
3. Kay Selde taught in the Elma School District during the 1978-79 school year. She was a member of the Washington Education Association. She never exercised her rights to become a member of the Elma Teacher's Organization.
4. She received a notice that she was being placed on probation on January 25, 1979. On February 26, 1979, Selde sent her grievance by certified mail to Burbidge. Burbidge fully investigated the grievance and its basis during the next few weeks.
5. Burbidge accompanied Selde to the step 1 grievance meeting where she was given the opportunity to explain her grievance fully herself. Burbidge notified Selde of the details of the next step of the grievance procedure.
6. At the Professional Rights and Responsibilities committee meeting on March 15, 1979, Burbidge and the other committee members reviewed Selde's file and called in Logan and Selde for further questioning. The committee made a good faith determination that her grievance was without merit.
7. Burbidge learned that Selde was not a member of the Elma Teachers' Organization after the Professional Rights and Responsibilities committee meeting.
8. After finding her grievance to be without merit, the ETO did not offer financial or legal advice to Selde in her non-renewal procedures.

CONCLUSIONS OF LAW

1. The Elma Teachers Organization did not violate RCW 41.59.140(2)(a) or (c) since it did not breach its duty of fair representation imposed by RCW 41.59.090 because it did not act in an arbitrary, discriminatory or bad faith manner in dealing with Kay Selde nor did it handle her grievance in a perfunctory manner.
2. The Elma Teachers Organization did not violate RCW 41.59.140(2)(a) by restraining or coercing Kay Selde in the exercise of her rights under RCW 41.59.060.

ORDER

The complaint of unfair labor practice is dismissed.

DATED at Olympia, Washington this 22nd day of January, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


KATRINA I. BOEDECKER, Examiner