OVERRULED by Oxnard School District (Gorcey and Tripp) (1988) PERB Decision No. 667

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL J. MARTIN, Charging Party, v. SOUTH SAN FRANCISCO UNIFIED SCHOOL DISTRICT Respondent.	No. SF-CE-180-77/78 PERB Decision No. 112 January 15, 1980

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Michael J. Martin; Lillian Lee Port, Deputy District Attorney, County of San Mateo, for South San Francisco Unified School District.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

Michael J. Martin (hereafter Charging Party) appeals the attached hearing officer's recommended decision dismissing unfair practice charges he filed against the South San Francisco Unified School District (hereafter District). For the reasons discussed below, the Board reverses the hearing officer in part and orders that the matter be remanded to the General Counsel for hearing.

FACTS

For the purposes of this appeal, the facts alleged in the charging party's amended charge are deemed to be true. (San Juan Unified School District (3/10/77) EERB Decision No. 12.)

The charging party had been the baseball coach at South San Francisco High School for three years prior to selection of another coach at the beginning of the 1977-78 school year. Martin was informed that this decision was based on a District policy to hire, whenever possible, coaches from the faculty of the school at which the coaching job was held. Martin, however, had been a full-time teacher at a different District school for his entire coaching tenure. The South San Francisco High School principal gave several reasons for the use of the policy as a general rule. Nevertheless, the charging party filed a grievance on the matter, claiming the principal's action was arbitrary, and pursued his case through various steps to the school board. After denial of the grievance, Martin filed his unfair practice charge with the Public Employment Relations Board on March 6, 1978. There is no indication that Martin's exclusive representative, the California Teachers Association, was requested to, or did, participate in the grievance or unfair practice proceedings.

Martin charged the District with violation of sections 3543.5(a) and 3543.5(c) of the Educational Employment Relations Act (hereafter EERA.)[1] The hearing officer ordered Martin to

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[1]EERA is codified at Government Code section 3540 et seq. Sections 3543.5(a) and 3543.5(c) provide:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on

particularize the facts of his original charge, prior to ultimately ruling on September 7, 1978, that Martin's second amended unfair practice charge should be dismissed. Although Martin was given the opportunity to state relevant facts, the hearing officer concluded that the allegations did not present a prima facie case of 3543.5(a) violation because there was no showing of any interference with or discrimination against Martin on the basis of conduct protected by EERA.

The hearing officer also dismissed Martin's claim that under section 3543.5(c) the application of the coaching policy was a unilateral change by the employer of a matter within the scope of representation and was improperly implemented because there was no notice to or negotiations with his exclusive employee representative. The hearing officer found, as a matter of law, that Martin did not have standing to challenge the District's unilateral change and failure to negotiate, and that such challenge could only be filed by the exclusive representative. The hearing officer, therefore, did not find it necessary to reach the District's ultimate arguments that

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(Footnote 1 cont.)

> employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
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> . . .
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> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

the policy in question was consistent with the employer's past practice, was authorized by statute, was beyond the scope of negotiations, or, in any event, was subject to a waiver by the employee representative.

DISCUSSION

The Board has determined that Martin has standing to raise a section 3543.5(c) refusal to negotiate charge, and that such refusal, if shown, may also violate section 3543.5(a).[2]

The hearing officer reasoned that section 3543.1(a) of EERA gives the exclusive representative the sole right to represent an employee once the exclusive representative has been selected,[3] relying on the Board's decision in Hanford Joint

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[2]In his original charge Martin also claimed a violation of section 3543.5(d), prohibiting employer domination or interference with an employee organization, but he apparently abandoned this charge by failing to expressly include it in his subsequent amended charge, even though said amendment incorporates by reference the prior record in the proceeding. Regardless, we affirm the hearing officer's conclusion that charging party offers no factual allegations that would, if proven, substantiate a claimed 3543.5(d) violation and for that reason the charge, if properly raised at all, should have been dismissed.

[3] Section 3543.1 provides:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to section 3544.1 or 3544.7, respectively, only that employee

Union High School District Board of Trustees (6/27/78) PERB Decision No. 58. In Hanford the Board dismissed an unfair practice charge filed by a non-exclusive representative seeking to consult with the employer about a school calendar adopted prior to recognition of a rival employee group as the exclusive representative in the District. The Board held that any representation-related rights of the non-exclusive representative, arising under section 3543.1(a) of EERA, were no longer viable once an exclusive representative was selected, even if the selection occurred after the alleged violation. This conclusion was based on a reconciliation of section 3543.1(a), establishing rights for non-exclusive and exclusive representatives, with section 3541.5(a), which provides that "any employee, employee organization, or employer shall have the right to file an unfair practice charge. . .." In Hanford, therefore, the non-exclusive representative's right to file unfair practice charges was expressly narrowed by another, limiting provision of the statute. The majority concluded that to hold otherwise would undermine stable labor-management

(Footnote 3 cont.)

> organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. (Emphasis added.)

relations by encouraging non-exclusive organization involvement in negotiations, disruptive rivalry between competing employee organizations, and potential employer inferference with employee groups by by-passing the negotiations process with an exclusive representative.

However, Hanford can be distinguished from this proceeding. First, there is no conflicting statutory provision, as in Hanford, that would preclude an individual from raising a claim that an employer has unlawfully failed to negotiate with the exclusive representative. Although only an exclusive representative possesses a negotiating right,[4] an

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[4]Section 3543 states:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
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> Any employee may at any time present grievances to his employer, and have such

individual as well as an exclusive representative may properly file the charge pursuant to section 3541.5(a) in order to show a violation of law and seek its correction. The Board established a similar principle in Mount Diablo Unified School District (12/30/77) EERB Decision No. 44, in which it was held that section 3543 protects the right of an individual to:

> . . . present a grievance either alone or through a representative other than an employee organization that is not the exclusive representative. However, the "representative" may not be an agent of an employee organization other than the exclusive representative. In making this determination, common law principles of agency shall govern. The burden of proving that a disqualifying relationship exists shall be upon the party seeking disqualification.
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> . . .[however] . . . mere incidental membership in a rival employee organization, without proof that the representative of the grievant is acting for and in behalf of a rival employee organization, is insufficient

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(Footnote 4 con't)

> grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response. (Emphasis added.)

> to disqualify a grievant's representative from presenting a grievance. (Id. at 12)

A second basis to distinguish Hanford may be drawn from experience of the National Labor Relations Board (hereafter NLRB). The rules and regulations of the NLRB provide that "a charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person." (NLRB Rules and Regulations, section 102.9. Emphasis added.) In one action, quite similar to this case, the NLRB and the Ninth Circuit affirmed the right of an individual employee to file an unfair practice charge challenging an employer's unilateral change of production standards. Alfred M. Lewis, Inc. (1977) 229 NLRB 757 [95 LRRM 1216], enf. in part (9th Cir. 1978) 587 F2d 403 [99 LRRM 2841]. The Board found merit in the employee's claim and ordered the employer to cease and desist from the unilateral action, to bargain, upon request, with the union, and to reinstate those employees out of work or disciplined as a result of the changes made. As the Ninth Circuit commented:

> The employees in this action have not sought to inject themselves into the bargaining process. The company unilaterally established the production standards and disciplinary system without providing the union an opportunity to bargain. Confronted with a fait accompli, the employees neither interfered with the union's bargaining position nor sought to bargain directly with the company. Rather, the complaining employees attempted to require the company to fulfill its statutory duty to bargain

> with the union before instituting the contested changes in the terms and conditions of employment. The union remains free to adopt whatever bargaining posture it chooses.

(Id., 99 LRRM at 2844. Also see Kansas Meat Packers (1972) 198 NLRB 543. [80 LRRM 1743].)

Here, as in Lewis, there is no showing on the face of the charge that the employee is attempting to insert either himself or a rival, non-exclusive employee organization into the bargaining process. If the employer can demonstrate at a hearing such an attempt to by-pass lawful negotiating procedures, or, if the employer can demonstrate a valid defense on the merits of the charge, then the individual employee claim may be dismissed. To deny Martin a forum now, however, would be contrary to his statutory right to file a charge. Moreover, protection of the integrity of the negotiating process will be insured through affirmative defenses that may be presented at a hearing or by a remedial order, if Martin is successful, which conditions the District's duty to negotiate on a request by the exclusive representative.

Our view of the negotiations process and the rights of individual employees is not altered by the hearing officer's argument that giving employees the right to file a charge on these facts may interfere with an understanding already arrived at by the exclusive representative not to challenge the employer's action, thereby interfering with negotiating tactics

and strategies. As noted, if the employee group has waived, or agreed to the changes made by the employer, such a defense on the merits is available at a hearing. Nor is our view altered by the District's suggestion that the employee, to have standing, should be required to join his exclusive representative as a respondent, on a theory that the employer's liability can only be reached by a concurrent showing that the employee organization violated the duty of fair representation owed to employees in the negotiating unit. (See section 3544.9.[5]) If the exclusive representative's conduct fully or partially justified the employer's action, the employer is free to present such evidence at a hearing on the merits. However, we need not put in issue a breach of the duty of fair representation prior to a hearing on the merits. The facts which emerge at the hearing may provide a defense to the employer without also constituting a violation of section 3544.9. Therefore, we will not require the charging party to join the exclusive representative in this action or to specifically allege a violation of the duty of fair representation as a prerequisite to the further processing of his charge.

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[5]Section 3544.9 states:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

For the reasons stated above Martin has demonstrated a prima facie case of a violation of section 3543.5(c) and the hearing officer's dismissal of that portion of the charge is reversed.

The Board also finds that the prima facie allegations of a refusal to negotiate also set forth potential interference with employee exercise of representational rights, in violation of section 3543.5(a). As we stated in San Francisco Community College District (10/12/79) PERB Decision No. 105:

> ...employees have the right to select an exclusive representative to meet and negotiate with the employer on their behalf. (Sec. 3543.) An employer's unilateral change of matters within the scope of representation is in derogation of its duty to negotiate with the exclusive representative and necessarily interferes with employees in their exercise of protected rights.

For these reasons Martin's alleged violation of sec. 3543.5(a) should also be subject to a hearing.

ORDER

The Public Employment Relations Board ORDERS that the hearing officer's dismissal of the unfair practice charge of a violation of sections 3543.5(a) and 3543.(c) is reversed; and, affirms dismissal of the other charge filed herein. The unfair practice charge is remanded to the General Counsel for hearing.

By: Harry Gluck, Chairperson

Barbara D. Moore, Member

Raymond J. Gonzales, Member, dissenting:

I dissent. I would uphold the hearing officer's dismissal on the ground that Martin lacks standing to bring a charge against the District that it has failed to negotiate with the exclusive representative. The majority decision is troublesome

for two main reasons. First, it undercuts our decision in Hanford Joint Union High School District, supra, opening the door to mischievous interference in the collective negotiating relationship by those dissatisfied with the performance of the exclusive representative. In that decision, we broke new ground by extending the principle of exclusivity to the filing of unfair practice charges. It was recognized that the exclusivity of the chosen employee organization in representing unit employees was crucial to its ability to negotiate effectively and to stable employment relations generally. At the same time, the EERA provides that an exclusive representative owes a duty of fair representation to each and every unit employee because the statute deprives individual employees of most self-representation rights and grants representation exclusivity to the chosen employee organizations. Second, the majority distorts the overall design of the EERA by failing to require that the proper vehicle for a unit employee to raise doubts about adequate representation of his interests is the allegation of a denial of fair representation by the exclusive representative.

The majority affirms the Board's holding in Hanford that the (sec. 3541.5(a)) right to file an unfair practice charge is not an unlimited right. Specifically, it acknowledges the limitation imposed by the prerogatives of the exclusive

representative regarding matters of representation. In Hanford we explained:

> To hold that the Federation in this instance could pursue a representation-oriented charge after the establishment of the Association as the exclusive representative would tend to undermine the right of employees to negotiate collectively through a representative of their own choice. Furthermore, the need for stability in employee organizations precludes encouraging rivalry among various employee organizations that would be the inevitable consequence of a requirement that the employer deal with an organization other than the exclusive representative." (Citations omitted.)

Thus, it seems clear that the underlying principle motivating the Hanford decision was the exclusivity of the chosen employee organization and the desirability of stable labor relations. That decision held that a nonexclusive employee organization could not pursue an unfair practice charge relating to representation matters because this was now the exclusive province of the exclusive representative.

This same principle of exclusivity applies equally to individuals as to minority organizations in that both lose rights once a majority of the employees have chosen one employee organization to represent them in their employment relations with their employer. (The one exception is where an individual retains some rights to present grievances to his employer. PERB has held, however, that even this individual right is limited, as the individual does not have the right to

represent himself at the arbitration stage of a grievance. Mt. Diablo Unified School District, (8/21/78) PERB Decision No. 68.)

Indeed, the federal labor law cases cited in Hanford for guidance in applying the exclusivity principle are ones which dealt with employers bypassing the exclusive representative and did not involve rival employee organizations. In J. I. Case v. NLRB (1944) 321 U.S. 332, the U.S. Supreme Court explained that the collective bargaining contract superseded separate contracts with individual employees. In Medo Photo Supply Corporation v. NLRB (1944) 321 U.S. 678, an employer was found to have committed an unfair practice by negotiating with a committee of employees instead of the exclusive representative, even though the employees had indicated dissatisfaction with the exclusive representative; because the individual employees had not acted to withdraw recognition from the union, the employer was still obligated to negotiate only with that organization. Citing Medo Photo Supply, this Board explained in Hanford "as the United States Supreme Court has said, the obligation of dealing with the exclusive representative 'exacts the negative duty to treat with no other'."

The majority stretches to find a distinction between the Hanford case and this one. It is a distinction without a difference. The explanation is offered that although under section 3543.1(a) the selection of an exclusive representative

would cut off the (section 3541.5(a)) right of a nonexclusive employee organization to press "failure to negotiate" charges against an employer, there is no comparable EERA provision that would preclude an individual employee from doing so. However, it is obvious that section 3543--in directly parallel statutory language--establishes the exclusivity principle vis-a-vis individual employees just as does section 3543.1(a) establish the exclusivity principle vis-a-vis nonexclusive employee organizations. Section 3543, which begins with a grant of rights to individual employees states, in pertinent part:

> Public school employees . . . shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to section 3544.1 or certified pursuant to section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

The parallel language in section 3543.1(a), which begins with a grant of rights to employee organizations, states, in pertinent part:

> Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer.

A comparison of this parallel language shows that the only difference other than form is that under section 3543.1(a), the selection of an exclusive representative takes from nonexclusive employee organizations the ability to represent the units in their employment relations with the employer, while section 3543 takes from individual employees their ability to negotiate individually with the public school employer. The difference is that under exclusive representation, minority employee organizations lose the right to represent, which seems broader than the ability to negotiate individually lost by individual employees. However, this is explained by the remaining portion of section 3543, which retains for individual employees limited rights to present grievances to the employer without the intervention of the exclusive representative, and because section 3543.1(a) does not contain a comparable provision. In any event, the majority strains common sense statutory construction by interpreting the difference in language to mean that minority organizations lose the right to file "failure to negotiate" charges, while an individual employee does not. The irony of the majority's construction in this case is that, even assuming the exclusivity principle takes away fewer (nongrievance) rights from individuals than it does from minority organizations, the particular prerogative of the exclusive representative at issue in this case, the right to meet and negotiate with the

employer, is the one area of representation which the EERA specifically grants to the exclusive representative.

To summarize, the majority decision effectively erodes Hanford and tends to undermine the prerogative of the exclusive representative in negotiating matters. It holds that, apart from grievances, the exclusivity of the chosen employee organization is somehow less important in relation to individual employees than in relation to employee organizations. The practical effect of this retreat from the exclusivity principle will be to signal those who wish to interfere in the collective negotiations relationship that they may do so by taking care to file the charge on behalf of an individual employee rather than on behalf of a rival employee organization. Indeed, there is some indication that Martin has ties with a minority employee organization in this case, although the unfair charge itself purports to be filed on behalf of Mike Martin as an individual employee.[1]

I am also concerned that the majority decision detracts from the proper statutory significance and function of

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[1]In support of his original charge, Martin submitted a letter he wrote to the South San Francisco High School principal informing him that Martin was filing a formal grievance about the coaching position. In the letter, Martin indicates that on September 23 and 26, 1977, a president of the American Federation of Teachers "spoke on my behalf...."

section 3544.9, which imposes on the exclusive representative a duty to represent each and every employee in the unit fairly.

The circumstances of this case indicate that Martin, as a unit employee who believes himself to be aggrieved about a matter within the exclusive negotiating relationship between the employer and the chosen representative, should properly be pursuing a duty of fair representation action against the exclusive representative instead of a refusal to negotiate charge against the District. Martin is complaining that the District took away his job without first giving the exclusive representative an opportunity to negotiate on it. Assuming, without deciding, that the matter is within the scope of representation, Martin is unable to negotiate himself with the District on this matter because the majority of the employees have selected one employee organization to have exclusive negotiating rights with the employer. Thus, if the District acts on a matter within the scope of negotiations, the exclusive representative has a duty to fairly represent the interests of Martin. Under the EERA, if the exclusive representative fails to negotiate this hiring matter, then it could be in breach of the duty it owes the employee, in violation of section 3544.9. By contrast, the duty of the employer to meet and negotiate is owed to the exclusive representative rather than directly to individual employees.

In this case, Martin has not indicated he even requested the exclusive representative to negotiate in his behalf regarding his former coaching position, although his appeal states that "as a matter of fact, the CTA was well aware of (Martin's) charge." Clearly, Martin is attempting to bypass the exclusive representative, preferring a forum which allows him to directly press his negotiating complaint against the District.

The majority has optimistically suggested that no harm will result, since at a hearing the exclusive representative would be able to waive negotiating on this item, and that could be the end of Martin's "failure to negotiate" case. However, harm may be done to the negotiating relationship by allowing Martin to interject himself, and by forcing the District to bear the burden of defending itself. Recognizing this potential harm in the Hanford case, the Board wrote ". . . permitting the intercession of a minority organization raises not only the possibility of (other) mischief, but could very well interfere with the right of the exclusive representative to determine, in its own best judgment, those matters on which it decides to negotiate." The majority has failed to explain why the same potential for mischief does not exist when an individual employee intercedes in the negotiating relationship, irrespective of whether that individual is acting as a stalking horse for a minority, rival organization or is genuinely acting only in his own behalf.

The majority indicates that a second basis for allowing an individual to file a "refusal to negotiate charge" is the practice of the NLRB to allow this. I believe such reliance is unjustified for two reasons. First, the reliance is selective and self-serving, since the NLRB allows the filing of unfair labor practice charges virtually without restriction and would almost certainly allow a minority organization to file this charge also, which we ruled in Hanford could not be done under the EERA. Surely the language of the NLRB rule "any person" does not indicate a preference for charges by individual persons rather than by other entities. Indeed, under the NLRA refusal to bargain charges are customarily filed by unions rather than individual "persons."

Second, I do not believe it is appropriate or wise in this case to borrow on NLRB policy in interpreting the EERA. To begin with, the NLRA is silent on who may file an unfair labor practice charge, while the EERA specifies who may do so (section 3541.5(a)). By judicial interpretation and NLRB rule, any person, including strangers to the employment relationship may file a charge under the NLRA.[2] However, the drafters of

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[2]In NLRB v. Indiana and Michigan Electric Company (1943) 318 U.S. 9, 17-18, the Supreme Court explained:

> The (NLRA) requires a charge before the Board may issue a complaint, but omits any requirement that the charge be filed by a labor organization or an employee. In the

the EERA did not choose to adopt this language but instead preferred the more restrictive filing eligibility provision.

I believe the most logical interpretation of this section is that eligibility to file an unfair practice charge corresponds to certain rights that the particular unfair practice is designed to protect. For example, only employee organizations should be eligible to file a charge alleging a violation of employee organization rights (section 3543.5(b)), only an exclusive representative should be able to file a refusal to negotiate charge (section 3543.5(c)), etc. Similarly, an employer should not be permitted to pursue against the exclusive representative a charge of denial of fair representation of a unit employee.

My contention is that unlike the NLRA, the EERA was neither designed for, nor requires, us to allow any person, employee,

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> legislative hearings Senator Wagner, sponsor of the Bill, strongly objected to a limitation on the classes of persons who could lodge complaints with the Board. He said it often was not prudent for the workman himself to make a complaint against his employer, and that strangers to the labor contract were therefore permitted to make the charge. The charge is not a proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading.

See also Bagley Produces, Inc. and Freedom Through Equality (1973) 208 NLRB 20.

employee organization, or employer to file each and every type of unfair practice charge. We acknowledged this in our Hanford decision, stating that the right to file a charge is not an unlimited right.

There is a sound reason for PERB not to have virtually unlimited eligibility to file charges as under the NLRB. This reason relates to the structural and procedural differences between the NLRB and the PERB. When a charge is filed with the NLRB, that agency investigates the charge and declines to issue a complaint unless the results of the investigation indicate that prosecution is warranted. Thus, frivolous or weak charges are screened out, and there is no real burden of defense placed upon the charged party unless and until the NLRB General Counsel has investigated and determined the charge is meritorious. The corresponding PERB procedure, by contrast, provides for no investigation and no evaluation of the charge. PERB does not prosecute, but only functions as a neutral between the charging party and the charged party. Thus, PERB has no way of preventing a charging party who is able to state a prima facie case from forcing a charged party to bear the burden of defending itself at a hearing, no matter how frivolous the charge may be. The only controls PERB may exercise are to dismiss the charge if the filer lacks standing, or if the charge fails to state a prima facie case. In order to prevent harassment of the collective negotiations process by

dissatisfied and litigious persons, we should favor strict interpretation of filing eligibility requirements. The circumstances of this case illustrate the need for such a strict interpretation.

The foregoing dissent does not relate to the standing of an individual to file a charge against the public school employer alleging a violation of EERA section 3543.5(a) (interference with employee rights), except where such a violation is found only as a derivative of a 3543.5(c) violation (refusal to negotiate), as the majority has held in this case.

Raymond J. Gonzales, Member

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL J. MARTIN, Charging Party, v. SOUTH SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-180-77/78

NOTICE OF DISMISSAL
WITHOUT LEAVE TO AMEND

NOTICE IS HEREBY GIVEN that the above captioned charge is dismissed without leave to amend.

BACKGROUND

The charge was originally filed on March 6, 1978. It was dismissed with leave to amend and was subsequently amended twice. This dismissal without leave to amend is based on the second amended charge which claims violations of Government Code sections 3543.5(a) and 3543.5(c)[1] and incorporates all of the allegations previously dismissed.

The charging party is a full-time, tenured business skills teacher at Parkway Junior High School in the respondent school district. In the three immediately preceding school years he has

[1]All statutory references are to the California Government Code unless otherwise noted.

held the paid, extra duty position of sophomore baseball coach at South San Francisco High School, another school in the same South San Francisco Unified School District (hereafter District).

On September 14, 1977, the charging party, Mr. Martin, was notified by letter by the principal at South San Francisco High School that his services as sophomore baseball coach would no longer be required. Mr. Martin was informed that the decision not to renew his year-to-year contract as a coach was based upon a policy that, whenever possible, coaches should be drawn from the staff at the school where the duty will be performed and that, as of the 1977-1978 year, that possibility could be fulfilled by hiring a teacher who was on the staff at the high school itself.

The letter indicated that the reasons for his nonrenewal were as follows:

> As principal, I have experience many difficulties over the past three years with coaches who do not teach on this campus. These difficulties have arisen because of conflicting school schedules, last minute revised schedules, transportation problems, lack of communication and the fact that the coach is not readily available to the athletes and to me.

Mr. Martin subsequently filed a grievance, alleging that the termination of his services as a baseball coach "was done in an arbitrary manner based on faulty and capricious reasoning." He categorically rejected the rationale offered by the principal, above. Mr. Martin exhausted all levels of the grievance procedure contained in the certificated employees' negotiated agreement with the District, but he did not prevail at any of the four levels.

Mr. Martin then filed an unfair practice charge with the Public Employment Relations Board (PERB). The charge, as amended, alleges in substance that the school principal adopted a new[2] school policy which related directly to the wages and hours of unit members without notifying or negotiating with the exclusive representative, the California Teachers Association (hereafter CTA). He argues that the failure to notify the exclusive representative of the policy change before its implementation constitutes an unfair practice under Government Code section 3543.5(a), (c), and (d).

An informal conference was conducted on June 23, 1978 in the San Francisco Regional Office of the PERB. At that conference, the respondent District moved for the dismissal of the charge on the grounds that the allegations made are unintelligible, uncertain and ambiguous and that the charging party has failed to

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[2]It is not at all clear from the multiplicity of documents submitted by the charging party that the policy in question is new. While he specifically alleges in his amended charge that the complained of "condition of employment" was newly established on September 14, 1977, he attaches a letter of nonrenewal of that same date indicating only that the policy was being followed on that date. The document, originally submitted in support of his grievance, reads in pertinent part as follows:

> Though a member of the Parkway Junior High School Faculty, I was offered the Sophomore Baseball coaching job in the fall of 1974. There was no indication that the job had been opened to members of the South San Francisco Faculty, none desired the job. I accepted the position and served the 1975, 1976, and 1977 seasons.

While this apparent discrepancy raises serious doubts about the merits of Mr. Martin's charge, it is not, of course, dispositive absent further information.

state a prima facie case. The motion was taken under advisement. Briefs were subsequently filed. This dismissal is in response to that motion.

DISCUSSION

The original charge and its amendments all allege violations of sections 3543.5(a) and 3543.5(d).[3]

No violation under section 3543.5(a)

The Public Employment Relations Board (PERB, formerly the Educational Employment Relations Board) has ruled in San Dieguito Faculty Association v. San Dieguito Union High School District (9/22/77) EERB Decision No. 22, that a section 3543.5(a) charge must contain allegations which would support a conclusion that the employer's actions either were carried out with the intent to impose or threaten to impose reprisals on the charging party, to discriminate or threaten to discriminate against the charging party, or to otherwise interfere with, restrain or coerce the charging party because of his exercise of rights guaranteed by

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[3]Section 3543.5(a) reads as follows:
[It shall be unlawful for a public school employer to]
. . . Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Section 3543.5(d) reads as follows:
[It shall be unlawful for a public school employer to]
. . . Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

Government Code section 3540 et seq., or that the natural and probable consequences of the employer's actions were to interfere with the charging party's exercise of rights guaranteed by Government Code section 3540 et seq.

Despite an Order to Particularize and two attempts at amending the charge, Mr. Martin has failed to offer the slightest indication of how he believes the complained of actions meet the San Dieguito test. Therefore, the motion to dismiss the charge, insofar as the charge fails to state a prima facie case with respect to section 3543.5(a), is granted.

No violation under section 3543.5(d)

The hearing officer's Order to Particularize asked the charging party to specify which sections are alleged to have been violated. The response was section 3543.5(a) and (c). Nonetheless, the second amended charge incorporated the original charge by reference and the original charge included an allegation of a violation of section 3543.5(d). No allegation of a section 3543.5(d) violation is specifically made in the second amended charge nor is the subject addressed in the charging party's brief in opposition to the motion to dismiss. On the basis of this ambiguity and on the basis of the total lack of supporting facts in the charge, the portion of the charge alleging a section 3543.5(d) violation is also dismissed.

No violation under section 3543.5(c)

The charging party also alleges a violation of section 3543.5(c), claiming that the failure to provide notice to an exclusive representative of a change subject to negotiations

prior to implementation of that change is a per se violation, citing the leading case of NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177] and alleging that the policy at issue was implemented without such notice. The District argues this subject is outside the scope of negotiations.

It is not necessary to determine the question of whether a policy of the District requiring that coaches be drawn where possible from the schools where the duties will be performed is a matter subject to negotiations because the respondent District argues in support of its motion to dismiss that Mr. Martin lacks standing to pursue a refusal to negotiate charge. This argument is found to have merit.

Section 3543.1(a) provides in part:

> Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative . . . only that employee organization may represent that unit in their employment relations with the public school employer . . . .
> (Emphasis added)

In Hanford Joint Union High School District (6/27/78) PERB Decision No. 58, the PERB held that once an exclusive representative is selected, a minority employee organization has no right to file an unfair practice charge over matters involving wages, hours and other terms and conditions of employment. The Board reasoned that to hold otherwise would tend to undermine the employees' choice of an exclusive representative and promote instability in employment relations.

Similar policy considerations regarding stability and the role of an exclusive representative apply with respect to filing of section 3543.5(c) charges by individuals.

There is no authority under the Labor Management Relations Act, as amended,[4] to support the conclusion that a minority organization has standing to file a refusal to bargain unfair practice charge. It has been held that a union must represent a majority of employees in the unit in order to file a refusal to bargain charge. NLRB v. Brasher Freight Lines, Inc. (8th Cir. 1941) 119 F.2d 379 [8 LRRM 814, 815]; United States Stamping Co. (1938) 5 NLRB 171, 175 [1A LRRM 491]. The charging party cites case authority to show that unfair practice charges can be filed by other than an exclusive representative, but none of the cases upon which he relies deal with a refusal to bargain charge. Since bargaining is the unique province of the exclusive representative it is not surprising that refusal to bargain charges should be distinguished in this manner.

Allowing Mr. Martin to carry the banner on behalf of an exclusive representative not a party to this action could produce rather anomalous results, such as an order requiring a potentially reluctant organization to negotiate with a clearly reluctant employer over an issue both may well have rightly chosen to ignore at the table.

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[4] 29 U.S.C. section 151 et seq. The Labor Management Relations Act (hereinafter LMRA) amended the National Labor Relations Act.

If the charging party chooses to appeal the dismissal, he may do so by filing an original and four copies of an appeal to the Board itself within twenty (20) calendar days after service of this Notice of Dismissal. Such appeal must be in writing, signed by the party or his agent, and contain facts and argument upon which the appeal is based. California Administrative Code, title 8, section 32630(b). The appeal must be actually received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on September 27, 1978, in order to be timely filed. The appeal must be accompanied by proof of service upon all parties. See California Administrative Code, title 8, sections 32135, 32142 and 32630(b), as amended.

Dated: September 7, 1978

WILLIAM P. SMITH
General Counsel

MICHAEL J. TONSING
Hearing Officer