STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DON HAGOPIAN, Charging Party, v. SAN FRANCISCO FEDERATION OF TEACHERS, LOCAL 61, CFT/AFL-CIO, Respondent.	)	Case No. SF-CO-70 PERB Decision No. 222 June 30, 1982

Appearances: Kirsten L. Zerger, Attorney for Don Hagopian; Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg and Roger) for San Francisco Federation of Teachers, Local 61, CFT/CIO.

Before Gluck, Chairperson; Jaeger and Tovar, Members.

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the charging party to a hearing officer's proposed decision dismissing the unfair practice charge against the San Francisco Federation of Teachers, Local 61, CFT/AFL-CIO (Federation or Local 61). The charge alleged that the Federation illegally refused to represent the charging party in an arbitration proceeding, thereby denying him rights guaranteed under Government Code sections 3543 and 3544.9 in violation of subsection 3545.6(b) of the Educational Employment Relations Act (EERA or Act).[1]

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[1]The EERA is codified at Government Code section 3540. Subsection 3543.6(b) states that it shall be unlawful

After a review of the record and the arguments on appeal, the Board reverses the hearing officer's proposed decision.

PROCEDURAL HISTORY

On October 6, 1978, Mr. Hagopian (Charging Party) filed this unfair practice charge against the Federation. The Federation filed its answer on October 19, 1978.

On November 6, 1978, an informal conference was held and the parties agreed to hold the charge in abeyance.

On March 16, 1979, Charging Party amended the charge. The Federation answered the amended charge on April 4, 1979. A formal hearing was held on June 4, 1979.

FACTS

At the formal hearing, the parties entered into a stipulation of facts, which is summarized as follows:

The Federation is the exclusive representative for a unit of certificated employees in the San Francisco Unified School District (District). The Charging Party is a member of this unit, but is not a member of the Federation. The collective agreement negotiated by the Federation and the District

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for an employee organization to:

> (b) 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.

contains a provision covering involuntary transfers, provides for binding arbitration of grievances, and gives the Federation the exclusive right to appeal a grievance to arbitration. The agreement does not include an agency fee provision. The Federation filed a class action grievance challenging several involuntary transfers and represented the entire class, including the Charging Party, at the lower steps of the grievance procedure. Julie Koppich, a Federation representative, made arguments on behalf of individual members of the class and specifically on behalf of Mr. Hagopian. At the arbitration stage of the grievance procedure the Federation invoked the policy which gives rise to the instant proceeding. In accordance with that policy, the Federation agreed to represent its members in the arbitration, but refused to represent the Charging Party unless he agreed to pay his pro-rata share of arbitration costs or the equivalent of annual Federation dues, whichever was less. The Charging Party refused to comply with this policy. The basis of the Federation's refusal to represent the Charging Party is not that he is a nonmember. Rather, the Federation refused to represent Mr. Hagopian at the arbitration because he would not agree to this policy. If Charging Party had agreed to pay his pro-rata share of arbitration costs or the equivalent of annual Federation dues, whichever was less, the Federation would have

represented him at the arbitration. On February 13, 1979, the Federation appealed the grievance involving the involuntary transfers to arbitration. The appeal consisted of a class of 21 teachers, including other nonmembers who complied with the Federation's policy. Mr. Hagopian was not included in the appeal and his individual grievance was not arbitrated. The record does not reflect the outcome of the arbitration for the other teachers nor what, if any, job related or monetary harm Charging Party has suffered.

Mr. James Ballard, Federation president and executive officer, testified that the Federation incurs costs in processing grievances through steps one and two of the grievance procedure, including costs stemming from staff time, preparation and paperwork. Despite these costs, the Federation represents all bargaining unit employees at the first two steps of the grievance procedure. It is only at step three, the arbitration stage, that the policy to which Charging Party objects is applied.

Mr. Ballard further testified that the high costs associated with arbitration prompted the Federation's executive board to adopt the policy. Costs cited by Mr. Ballard include staff time for preparation, attorney fees, Xeroxing fees, arbitrator fees, court reporter and transcript fees, and possibly room rental fees.

DISCUSSION

In this case we are faced with the issue of whether an exclusive representative may charge nonmembers for representation in arbitration proceedings. The Charging Party excepts to the hearing officer's conclusion that such a charge does not violate either the duty of fair representation or discriminates against an employee for the exercise of the right to refuse to participate in the activities of an employee organization.

We conclude, for the reasons stated below, that the Federation's policy breached the duty of fair representation and the charging party's rights under section 3543[2] in

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[2]Section 3543 states that:

> 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

violation of the unfair practice subsection 3543.6(b). (See, King v. Fremont Unified District Teachers Association, CTA/NEA, (4/21/80) PERB Decision No. 125.)

By authorizing the negotiation of service fee arrangements[3], the Legislature has recognized the financial burden of the duty of fair representation placed upon exclusive representatives. By requiring the employer's agreement to such arrangements and, under given circumstances, the approval of unit employees expressed through the authorization election, the Legislature has also indicated its refusal to impose an absolute obligation on nonmembers. By its action here, the union goes beyond the Legislature's concession to its 'free-rider' concerns.

> 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.

[3]Subsection 3546(a) states that:

> (a) An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the

The Federation's policy, in effect, creates a distinction between members and nonmembers which impinges on the Charging Party's right not to join or participate in the activities of the Federation. The Federation requires the charging party to first agree to pay a specified sum of money in order to take his grievance to arbitration. Members of the local are not required to make such a payment.

Section 3543 guarantees employees the right to refuse to join or participate in the activities of an employee organization.[4] Conditioning representation of nonmembers upon payment of costs unlawfully discriminates, interferes with, restrains and coerces such members in the exercise of rights guaranteed by section 3543. Article 18 of the agreement between the Federation and the District details the grievance

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> public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not be deemed to either ratify or defeat the remaining provisions of the proposed agreement.

[4]Of course, the right not to participate is not absolute. The service fee provision in the Act constitutes an exception to such a right.

procedure covering the employees in the bargaining unit and states that the union has the exclusive right to appeal to arbitration the decision of the superintendent or designee. Thus, under the agreement, the union is the only one to decide when to appeal to arbitration. The charging party can't appeal on his own. He is faced with either paying the fee or not being able to have his grievance processed through arbitration. The right to have a meritorious grievance processed is a fundamental right. Machinist, Local 697, (1976) 91 LRRM 1529, 1531. Once an agreement provides for a grievance procedure as in the instant case, it must apply equally and fully to all the employees in the unit, whether members or non-members.

The Federation's Policy Violates the Duty of Fair Representation

EERA, unlike the National Labor Relations Act (NLRA), has a statutory duty of fair representation.

Government Code 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. (Emphasis added.)

In the Wallace Corporation v. NLRB, 323 U.S. 248, 255-256, 15 LRRM 697 (1944) the Supreme Court stated:

> "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as

> bargaining representative it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially."

Similarly, the National Labor Relations Board (NLRB) has long held that an exclusive bargaining agent has taken on the responsibility to act as a genuine representative of all the employees in the bargaining unit, "irrespective of union membership . . . ." Peerless Tool and Engineering Co., 111 NLRB 853, 858, 35 LRRM 1598 (1955) enfd. sub nom. NLRB v. Die and Tool Makers Lodge No. 113, International Association of Machinists, AFL, 231 F2d 298 37 LRRM 2673 (CA 7, 1956) cert. denied 352 U.S. 833 38 LRRM 2717.

In Machinist, Local 697, supra, the NLRB explained that what is involved is a quid pro quo -- in exchange for the protection of the Act, the bargaining representative must represent all unit employees.[5]

Under EERA the duty of fair representation is breached when the exclusive representative's conduct towards a members of the bargaining unit is arbitrary, discriminatory or in bad faith.

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[5]Although Machinists Local 697 expressly stated that resolution of its proceeding did not turn upon the duty of fair representation under the NLRA, but focused on whether respondent's discrimination against nonmembers is such that it restrains and coerces them in the exercise of Section 7 rights; we nonetheless find the rationale expressed in the above cases to be persuasive to support not only a finding that the Federation's policy interfered and coerced the Charging Party in his exercise of section 3543 rights, but also to support a finding that the Federation breached the duty of fair representation it owes to the Charging Party.

Mt. Diablo Unified District, (8/21/78) PERB Decision No. 68; and Redlands Teachers Association, (9/25/78) PERB Decision No. 72. See also Rocklin Teachers Professional Association (3/26/80) PERB Decision No. 124. We do find that the Federation's policy is discriminatory. Since the Federation does not condition the processing of arbitration by dues-paying members on their paying a specific fee for arbitration, the Federation has drawn a distinction between members and nonmembers, and to this extent discriminated against the Charging Party.[6]

REMEDY

Under the NLRB the traditional remedy for this kind of violation is to order the labor organization to fairly process the grievance. See, Local 12, United Rubber Workers (1964) 150 NLRB 312, at 322. However, taking official notice of our

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[6]This case is distinguishable from one of the leading private sector cases Vaca v. Sipes 386 U.S. 171, 64 LRRM 2369 (1967) because in that case the labor organization based its decision of whether or not to take the case to arbitration on its good faith assessment on the merits of the case given the conflicting medical opinions it had received regarding the grievant's capacity to work. The labor organization exercised its discretion based on legitimate criteria. In the instant case, the refusal to take the Charging Party's case to arbitration was based on his refusal to tender payment for the cost of arbitration. This is not a legitimate criteria because it results in a failure to fairly represent every member of that unit without regard to membership.

Our holding should not be read to imply we are intruding into the area of union discretion in the processing of employee grievances, as long as that discretion is not exercised in an arbitrary, discriminatory or bad faith manner.

certification records we note that the Federation is no longer the exclusive representative of the certificated employees. Absent evidence that the grievance is still subject to arbitration our remedial order is limited to directing the Federation to mail a copy of the enclosed Appendix to each and every Federation member in the certificated unit of the San Francisco Unified School District as well as mail a copy to the nonmember grievants who complied with the policy.

We also direct the Federation to post the Appendix at a centrally located place at their offices. (See, Carpenters Local 1400 (1956) (Clarence A. Dowdall), 115 NLRB 126, 132, 37 LRRM 1255.)

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the San Francisco Federation of Teachers, Local 61, CFT/AFL-CIO has violated subsection 3545.6(b) of the Educational Employment Relations Act. It is hereby ORDERED that the Federation and its representatives shall:

1. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

(a) Within five (5) working days of service of this Decision issues, mail a copy of the enclosed Appendix to each and every Federation member in the certificated unit of the

San Francisco Unified School District as well as the nonmember grievants who complied with the policy.

(b) Within five (5) working days of date of service of this Decision, post copies of the Appendix attached hereto for thirty (30) working days at its headquarters office.

(c) At the end of the posting period, notify in writing the San Francisco regional director of the Public Employment Relations Board of the actions the Federation has taken to comply with this Order.

By: _____
Irene Tovar, Member

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Harry Gluck, Chairperson

John W. Jaeger, Member

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CO-70 Don Hagopian v. San Francisco Federation of Teachers, Local 61, CFT/AFL-CIO, in which all parties had the right to participate, it has been found that the San Francisco Federation of Teachers, Local 61, CFT/AFL-CIO, has violated subsection 3545.6(b) of the Educational Employment Relations Act (EERA) by its breach of its duty of fair representation to Mr. Hagopian and for its interference with his rights under section 3543 of EERA.

As a result of this conduct, we have been ordered to post this Notice, and we will abide by the following:

1. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

(a) We will mail a copy of this Appendix to each and every Federation member in the certificated unit of the San Francisco Unified School District as well as the nonmember grievants who complied with the Federation's policy of charging a fee to take a grievance to arbitration.

(b) Within five (5) working days of date of service of this Decision, post copies of the Appendix attached hereto for thirty (30) working days at its headquarters office.

(c) At the end of the posting period, notify in writing the San Francisco Regional Director of the Public Employment Relations Board of the actions the District has taken to comply with this Order.

Dated:

SAN FRANCISCO FEDERATION OF
TEACHERS, LOCAL 61, CFT/AFL-CIO

BY _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORK DAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.