



the San Jose/Evergreen Community College District.

The Board has reviewed the entire record in this case, including the Board agent's warning and dismissal letters, the original and amended unfair practice charge, Maestas-Flores' appeal,<sup>2</sup> and the Association's response. The Board finds the warning and dismissal letters to be free of prejudicial error and therefore adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SF-CO-513 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

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Section 3543.6 states, in part:

It shall be unlawful 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.

<sup>2</sup>On appeal, we note that Maestas-Flores apparently read San Marcos Educators Association. CTA/NEA (Duran-Chugon) (1988) PERB Decision No. 711 as conferring a three-month grace period from the statute of limitations, and she argues that her charge was timely filed. We disagree. In that case, the Board held that three months is more than reasonable to discover that the exclusive representative had failed to respond. The six-month statute of limitations begins to run as soon as any reasonable person would have known that further assistance from the union was unlikely. (Id. at p. 4.)

## PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office  
177 Post Street, 9th Floor  
San Francisco, CA 94108-4737  
(415) 557-1350



December 23, 1996

Margarita Maestas-Flores

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE  
COMPLAINT**

Margarita Maestas-Flores v. San Jose Community College  
Faculty Association  
Unfair Practice Charge No. SF-CO-513

Dear Ms. Maestas-Flores:

The above-referenced unfair practice charge, filed on August 5, and amended on December 9, 1996, alleges that the San Jose Community College Faculty Association (Association) failed to fairly represent Margarita Maestas-Flores with regard to certain employment disputes with her employer, the San Jose/Evergreen Community College District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated December 3, 1996, 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 which 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 December 12, 1996, the charge would be dismissed.

On December 9, 1996, an amended charge was filed. The amended charge contains the following new allegations: (1) Gee's meetings with Kong in July 1995, concerning Maestas-Flores's grievance, occurred despite Gee's conflict of interest in representing Maestas-Flores, and Gee misrepresented the facts when he told Kong that no other Association representative was available to represent Maestas-Flores at that time; (2) the Association failed to protect Maestas-Flores against discrimination by the District because of her advocacy on behalf of minority women and students in the Business Division; (3) the District colluded with the Association in denying Maestas-Flores's 1995 grievance and failed to address the issue of adequate breaks necessary due to Maestas-Flores's work-related injury; (4) Linda Carbajal was unfair in assigning classes to her for the fall 1996 and in one case gave

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preference to the same faculty members Gee solicited to oppose her 1995 grievance; and (5) Carbajal denied a class assignment to Maestas-Flores for the spring 1997 semester. In addition, the amended charge contains the legal arguments that the doctrine of futility applies with respect to the issue of exhaustion of the grievance procedure and that the charged conduct comes within the doctrine of continuing violations.

The amended charge fails to cure the deficiencies noted in the December 3, 1996 letter. The conduct alleged in the original charge with respect to the Association's failure to pursue the 1995 grievance is untimely. The conduct alleged in this case does not demonstrate the existence of a continuing violation. The Association's refusal to process the 1995 grievance is the only conduct alleged in this case which implicates a breach of the duty of fair representation. However, the Association's subsequent conduct, referenced in the amended charge, does not revive the earlier alleged violation. (See San Francisco Classroom Teachers Association (Chestangue) (1985) PERB Dec. No. 544 ["intensification" of conduct on part of union].)

The allegations with respect to scheduling for the 1996-97 year, although not stating specific dates, fail to state a prima facie violation involving a breach of the duty of fair representation on the part of the Association. There is no threshold showing that Maestas-Flores requested representation from the Association with respect to these matters and that the Association refused. Even if requests had been made and refused, no continuing violation would exist because in duty-of-fair-representation cases each request for grievance representation and attendant refusal must typically be analyzed on their own merits. There is no claim that the Association has asserted that it will never again represent Maestas-Flores in a grievance.

Futility is irrelevant to this case because deferral to arbitration is not in issue.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons set forth above and those contained in my December 3, 1996 letter.

#### Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days

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after service of this dismissal. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board  
1031 18th Street  
Sacramento, CA 95814

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 of Regs., tit. 8, sec. 32635(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 of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed.

#### 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 of Regs., tit. 8, sec. 32132.)

#### Final Date

If no appeal is filed within the specified time limits, the

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dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON  
Deputy General Counsel

By  
DONN GINOZA  
Regional Attorney

Attachment

cc: Marco E. Lopez  
Adam Birnhak

## PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office  
177 Post Street, 9th Floor  
San Francisco, CA 94108-4737  
(415) 557-1350



December 3, 1996

Margarita Maestas-Flores

Re: **WARNING LETTER**

Margarita Maestas-Flores v. San Jose Community College  
Faculty Association  
Unfair Practice Charge No. SF-CO-513

Dear Ms. Maestas-Flores:

The above-referenced unfair practice charge, filed on August 5, 1996, alleges that the San Jose Community College Faculty Association (Association) failed to fairly represent Margarita Maestas-Flores with regard to certain employment disputes with her employer, the San Jose/Evergreen Community College District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following. Maestas-Flores is employed as a full-time teacher with the District. She teaches classes in the Division of Business and Arts at the Evergreen Valley College. Her supervisor is Linda Carbajal, Dean of the Division. Henry Gee has been the president of the Association. Phillip Crawford has been a grievance officer for the Association.

In March 1995, Maestas-Flores left a telephone message with Gee requesting a meeting to discuss a potential grievance against Carbajal. Gee did not respond to the call. Maestas-Flores then wrote a memorandum to Gee. Gee informed her to contact Crawford.

On or about May 25, Crawford filed a grievance on Maestas-Flores's behalf. Maestas-Flores's grievance alleged that Carbajal (1) failed to assign the Business 7A class to her for the fall of 1995 and assigned it instead to a part-time instructor, (2) permitted irregularities in her evaluation and failed to acknowledge her contributions to the community, college, and division's Hispanic population and (3) assigned her to two consecutive classes that allowed for only a 10 minute break between classes, when she required a longer break due to the effects of a work-related, back injury.

The grievance requested the following remedies: (1) reassignment for fall 1995 to include Business 7A and the elimination of more

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than two consecutive classes in the fall of 1995, (2) prior notice to Maestas-Flores and peer team member, Leonard Washington, of dates for evaluation team conferences, and (3) destruction of evaluation documents leaked to the District president and commencement of the new evaluation process void of these prejudicial documents.

The grievance was rejected by Carbajal at the first level on or about June 12. Crawford submitted the grievance to the second level on or about June 29. However, on or about July 8, the Association Executive Board voted to place grievance officer duties in the hands of Gee. Because Gee reported to Carbajal for instructional assignments, Gee indicated that he would designate another representative for the grievance due to his potential conflict of interest.

Gee met with Ron Kong, Chancellor of the District, on two occasions in July. He indicated to Kong that he was having difficulty obtaining another representative for the grievance. These meetings resulted in an agreement to extend the deadline to July 28 for the second step meeting. Gee notified Maestas-Flores on July 24 that he was designating Leonard Washington to be the representative. Gee attended the second step meeting on July 28. Kong rejected the grievance on the grounds that it was not filed within 30 days as required by the grievance procedure. Maestas-Flores complains that Gee met with Kong without consulting her or presenting supportive documentation she had shared with Crawford.

During this period of time, Maestas-Flores hired a private attorney, Daniel Cornell, to provide representation in the grievance. On or about July 28, Cornell requested that the grievance be elevated to arbitration. Kong informed Gee that he believed the request to be premature.

On or about August 26, Maestas-Flores requested that Crawford submit her grievance to arbitration. On or about September 7, Maestas-Flores requested a meeting with the Association's Executive Board. During the meeting, Gee acknowledged that he did not have a copy of the grievance with him when he met with Kong. Maestas-Flores also alleges that Gee acknowledged that he did not follow the Board's directive to seek another representative. The Board directed Gee and Maestas-Flores to meet to prepare a summary of the grievance. Maestas-Flores maintained her position that Gee's continued handling of her grievance constituted a conflict of interest.

On September 28, Maestas-Flores met with Gee and Crawford. Gee announced that he would oppose continued prosecution of Maestas-Flores' grievance. Gee also indicated that he had solicited

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certain Business Division faculty to state their reasons for opposing the grievance at the Executive Board meeting scheduled the next day. Gee indicated that the faculty presentation would be held in a closed session with the Board and he refused to divulge their identities. He also refused to disclose information he presented to Kong during his meetings on the grievance.

At the Board meetings on September 29 and October 6, Maestas-Flores was supported by 23 faculty members and other community members. Maestas-Flores again protested Gee's continued participation in the grievance due to his conflict of interest. The faculty members solicited by Gee met with the Board in closed session. At the October 6 meeting, Gee transferred the Maestas-Flores grievance to another Board member. The Board heard complaints about the harassment and inequitable treatment of minority women at the District and about Carbajal's refusal to acknowledge Maestas-Flores's contributions to the minority community in her evaluation.

By letter dated October 3, Cornell insisted that Gee remove himself from the grievance process.

During the fall of 1995, Gee began a campaign for reelection as president of the Association. He was opposed by Crawford. In an October flyer to bargaining unit members Gee responded to a flyer by Crawford accusing him of being all "talk and no action." In a subsequent flyer, Gee referred to the Maestas-Flores grievance. He asserted that he had handled the grievance by addressing only those violations specifically alleged. He acknowledged that there were other issues involved that were not stated in the grievance and which were not covered by specific language in the contract. He described these matters as ones involving affirmative action issues. He indicated that the Board had passed a resolution that the grievance continue with respect to the matters raised therein.

By memorandum dated November 13, 1995, Maestas-Flores wrote to Gee demanding an explanation of the status of the grievance. Gee failed to respond.

On May 13, 1996, Carbajal denied Maestas-Flores' request for scheduling of her lab class for the fall of 1996. Preferences were given to part-time faculty members, who were solicited by Gee to voice their opposition to Maestas-Flores's grievance in the fall of 1995.

On July 8, 1996, Maestas-Flores again requested a status report from Gee on her grievance, but received no response.

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The Association responded to the charge by asserting that the issues raised by the Maestas-Flores grievance have been partially resolved. In a May 15, 1995 memorandum, Carbajal gave Maestas-Flores and Leonard Washington prior notice of the team meeting. On or about September 26, Ken Fawson, Vice-President of Instruction, granted Maestas-Flores's request for accommodation with respect to break time. He limited her teaching load to four class hours per day and granted her a 20-minute break after two hours of classroom/laboratory activity for the fall of 1995. Maestas-Flores was assigned to teach the Business 7A class beginning with the Spring of 1996.

By letter dated November 15, 1996, the undersigned requested that Charging Party provide additional information to supplement the charge, including a copy of the original grievance, the provisions of the collective bargaining agreement alleged to have been violated, and evidence that the grievance was timely filed within the terms of the agreement's grievance procedure. No response has been received.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the EERA for the reasons that follow.

Government Code section 3541.5(a) states that the Public Employment Relations Board (PERB) "shall not . . . issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge."

PERB has held that the six month period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Dec. No. 359-H.)

The charge was filed on August 5, 1996. Therefore, only those acts or omissions by the Association on or after February 5, 1996 are timely. The subject of the charge is the Association's alleged failure to pursue the May 25, 1995 grievance to arbitration. The crucial date is November 13, 1995, when Maestas-Flores requested a report from Gee on the status of her grievance. The charge alleges that Gee did not respond. The charge does not indicate that Maestas-Flores inquired of any other Association representatives regarding the status of her

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grievance at that time or followed up with her November 13 correspondence to Gee.<sup>1</sup>

From the allegations in the charge it must be concluded that if the Association abandoned Maestas-Flores' grievance, Maestas-Flores should have reasonably known of this fact within a short period of time following her November 13, 1995 letter of inquiry. Based on the pattern of events alleged in the charge it may also be concluded that a reasonable person would not have had to wait until February 5, 1996 to conclude that the Association did not intend to respond to her request. (See San Marcos Educators Association (Duran-Chugon) (1988) PERB Dec. No. 711 [three months more than a reasonable amount of time to discover that exclusive representative has failed to respond].) Therefore, the charge is not timely filed.<sup>2</sup>

The events alleged to have occurred during the limitations period do not cure the lack of timeliness. On May 13, 1996, Carbajal subjected Maestas-Flores to further inequitable treatment with respect to scheduling for the fall of 1996. However, nothing on this date involved conduct on the part of the Association. On July 8, 1996, Maestas-Flores repeated her request to Gee for a status report on her grievance, referring to her November 13, 1995 memorandum to him. This request does not revive an otherwise untimely unfair practice. (U.C.L.A. Labor Relations Division (1989) PERB Dec. No. 735-H [conduct within limitations period must constitute unfair practice independent of original conduct]; El Dorado Union High School District (1984) PERB Dec. No. 382) [same analysis with respect to claim of continuing violation].)

Furthermore, even assuming that the charge was timely filed, it fails to state a prima facie violation. PERB has held that breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. (Rocklin Teachers Professional Association (1980) PERB Dec. No. 124.)

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<sup>1</sup>The charge does allege that Gee's last action on the grievance at the October 6 meeting of the Board was to transfer the grievance to another Board member.

<sup>2</sup>To the extent that the charge is to be read as complaining about Gee's participation in grievance on conflict of interest grounds, this allegation preceded the refusal to arbitrate the grievance and is untimely for the same reasons.

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In the context of grievance handling, PERB has defined the scope of the duty as follows:

. . . 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. [Citations omitted.]  
(United Teachers - Los Angeles (Collins)  
(1982) PERB Dec. No. 258.)

Stated differently, in order to show a prima facie violation involving a breach of the duty of fair representation, the charging party must present facts which would justify a finding that the union acted without a rational basis or in a way that is devoid of honest judgment. (Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Dec. No. 332.)

In the present case, there are insufficient facts to demonstrate that the Association caused Maestas-Flores to forfeit a meritorious grievance. The charge does not demonstrate that the Association acted in an arbitrary, discriminatory, or bad faith manner by failing to pursue Maestas-Flores's grievance to arbitration. The evidence suggests that her grievance may not have been timely filed, and as a result may not have been meritorious. Maestas-Flores has not provided any evidence establishing that it was timely filed. The charge also fails to establish that language in the collective bargaining agreement expressly prohibited the District's conduct which formed the basis for Maestas-Flores's grievance. Therefore, it is not clear that the Association caused Maestas-Flores to forfeit a meritorious grievance.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please 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

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be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before **December 12, 1996**. I shall dismiss your charge. If you have any questions, please call me at (415) 439-6940.

Sincerely,

DONN GINOZA  
Regional Attorney