STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELIZABETH KISZELY, Charging Party, v. NORTH ORANGE COUNTY COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CE-4120 PERB Decision No. 1376 February 28, 2000

Appearances; Elizabeth Kiszely, on her own behalf; Parker, Covert & Chidester by Cathie L. Fields, Attorney, for North Orange County Community College District.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

DYER, Member: This case is before the Public Employment Relations Board (Board) on appeal by Elizabeth Kiszely (Kiszely) of a Board agent's dismissal (attached) of her unfair practice charge. In her charge, Kiszely alleged that the North Orange County Community College District violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by retaliating

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

against her for her participation in protected activities.

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters and Kiszely's appeal. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-4120 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Amador joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

December 23, 1999

Elizabeth Kiszely

RE: Elizabeth Kiszely v. North Orange County Community College District
Unfair Practice Charge No. LA-CE-4120, First Amended Charge
DISMISSAL AND REFUSAL TO ISSUE A COMPLAINT, DEFERRAL TO ARBITRATION

Dear Ms. Kiszely:

I indicated to you, in my attached letter dated October 1, 1999, that the above-referenced charge was subject to deferral to arbitration. On November 3, 1999, you filed a first amended charge. My investigation revealed the following information.

Elizabeth Kiszely is a faculty member at the District. The faculty are exclusively represented by the United Faculty Association (Association). The District's and the Association's 1998-2001 collective bargaining agreement includes a grievance procedure that ends in binding arbitration. Article 4.4.2 of the parties' 1998-2001 Agreement provides:

> No Unit Member shall be in any way discriminated against, intimidated, restrained or coerced because of affiliation with or participation in the Association, or the exercise of rights guaranteed by Chapter 10.7, Sections 3540-3549 of the Government Code.

On August 19, 1998, Dean Janet Portolan sent a memorandum to the faculty indicating she would be conducting evaluations in the spring semester. On January 22, 1999, Portolan scheduled Kiszely's evaluation for March 10, 1999. On February 2, 1999, Kiszely wrote to Chancellor Harris and the Board of Trustees requesting that an alternate evaluator conduct her evaluation. Kiszely explained that Portolan would not be able to conduct an objective evaluation because Kiszely was suing Portolan's housemate. The District did not respond to Kiszely's letter. On February 16, 1999, Kiszely reiterated her request. On February 24, 1999, Vice Chancellor, Human Resources, Jeff Horsely, denied Kiszely's request. On March 10, 1999, Portolan conducted Kiszely's evaluation. On April 8, 1999, Kiszely received the evaluation which indicated her performance was competent.

With regard to a faculty member's right to choose an alternate evaluator, the charge indicated that under certain circumstances alternate evaluators could be provided.

The District and the Association have agreed that faculty evaluations will be performed by a peer review system. However, due to difficulties, the District and Association agreed not to implement the peer review procedures and instead are using the "old" evaluation process. Under this process the Dean conducts the faculty evaluations.

On October 1, 1999, I issued a Warning Letter regarding the original charge. The Warning Letter indicated that the above-referenced information failed to state a prima facie violation of the EERA within the jurisdiction of PERB. The Warning Letter indicated: (1) the charge met the requirements for deferring the charge to binding arbitration; (2) the charge did not demonstrate exhaustion of the grievance procedure was futile; and (3) that even if the charge was within the jurisdiction of PERB that it did not state a prima facie retaliation violation.

Review of the first amended charge reveals the following information.

The Charging Party alleges that eight facts establish that "the union would have denied a good faith pursuit of a grievance on this matter to arbitration . . ." The Charging Party's eight facts are summarized as follows: (1) issues deferred to binding arbitration on January 24, 1997, were not presented to an arbitrator; (2) the union did not respond to her February 20, 1999 request for help; (3) there is "ample evidence" in the materials on file with PERB that the Association ignored her rights every time she mentioned them; (4) the deadline for filing a grievance is past; (5) the National Education Association (NEA) wrote her a letter on March 18, 1998 indicating that it did not assist members when they have legal actions pending against the NEA or its state or local affiliates; (6) the union did not dispute the Charging Party's June 7, 1999 claim that the grievance process was futile when she wrote to them regarding another grievance; (7) the union was not adequately prepared to pursue a grievance because the grievance representative for the Fullerton College was on sabbatical; and (8) the Association's past practices in handling the Charging Party's grievances convinced the Charging Party that "the union would not have agreed to pursue a grievance in good faith to arbitration."

On December 16, 1999 I spoke with the Charging Party regarding this charge. After I asked the Charging Party a few questions she indicated that she did not feel comfortable answering my questions and indicated she wanted me to send her the questions

in writing. I asked whether another day might be better for us to continue talking and agreed to call her on December 21, 1999. On December 21, 1999, the Charging Party and I spoke regarding this charge. However, no new facts were added as the result of our discussions.

The above-stated information does not establish that exhaustion of the grievance process was futile for the reasons that follow.

As previously noted in the warning letter, EERA § 3541. (a) (2) does not require exhaustion of the grievance procedure when resort to that procedure would be futile. Futility may be found when the arbitration process itself is at issue or when the association is unwilling to take the grievance to arbitration. (State of California (Department of Parks and Recreation) (1995) PERB Decision No. 1125.) However, mere animosity between the grievant and the union is insufficient, the grievant must demonstrate the union's unwillingness to pursue the matter. (State of California (Department of Corrections) (1986) PERB Decision No. 561-S.) In State of California (Department of Developmental Services (1985) PERB Decision No. Ad-145-S, the Board deferred a charge to arbitration when the charging party failed to provide "evidence that the union has acted in furtherance of, or even condones, the employer's action . . ." The Board noted that there was *no* indication that the charging party had requested the union's assistance or that the union had refused to represent him. The Board cited with approval federal caselaw indicating that futility required a direct showing that the union had committed itself to a position in conflict with the interests of the grievants. (State of California (Department of Developmental Services), supra.)

Here, the Charging Party presented information indicating that it was her belief that the Association would not have pursued a grievance on her behalf. However, speculation that a union would not be supportive of a grievance does not demonstrate that resort to the grievance process would be futile. (State of California (Office of Emergency Services) (1995) PERB Decision No. 1122.) The facts indicate that the Charging Party did not ask the Association to file a grievance on her behalf. Nor did the Charging Party file a grievance on her own behalf, and then request the Association's help with the grievance. Thus, the charge's allegation that the Association would not have pursued a grievance on the Charging Party's behalf is not based any position taken by the Association with regard to the issue raised by this unfair practice charge.

In support of her argument that arbitration would be futile, the Charging Party cited a Warning Letter in Unfair Practice Charge LA-CE-3965, and alleged that the issues deferred to binding

arbitration on January 24, 1997 were not presented to an arbitrator. In other words, the Charging Party argues that because the issues in that charge were not arbitrated the allegations in the instant charge would not have been arbitrated. However, as explained in the Warning Letter and subsequent Dismissal Letter in that charge, the reason that the issues were not arbitrated was because the grievance was technically deficient.[1] The charge does not demonstrate that a properly filed grievance would not have been appropriately processed through the grievance procedure.

The Charging Party also argues that there is "ample evidence" in the materials on file with PERB that the Association ignored her rights every time she mentioned them. However, facts presented in United Faculty Association of North Orange County Community College District (1998) PERB Decision No. 1269 indicate that the Association had helped the Charging Party in the past. Facts presented in United Faculty Association of North Orange County (1999) PERB Decision 1343 also indicate that the Association has helped the Charging Party in the past. That decision indicates that the Association took a grievance to binding arbitration *on* the Charging Party's behalf.

The Charging Party alleges the deadline for filing a grievance has past and therefore arbitration would be futile. However, the Board has held that a charging party's failure to use the grievance process in accordance with the terms of the agreement, even if that precludes further pursuit of the grievance, and arbitration, does not create futility. (State of California (Office of Emergency Services (1995) PERB Decision No. 1122; Desert Sands Unified School District (1995) PERB Decision No. 1102; Eureka City School District (1988) PERB Decision No. 702.)

With regard to the March 18, 1998 letter from the NEA, the first amended charge alleges the letter shows the union would have denied a request to pursue a grievance in good faith.[2] The first amended charge included the following quote:

> You are currently involved in a Duty of Fair Representation action filed with the Public Relations Employment Board [sic] against

---

[1]The Warning Letter and subsequent Dismissal Letter in LA-CE-3695, were upheld in North Orange County Community College District (1999) PERB Decision No. 1342.)

[2]NEA's feelings regarding grievances are nevertheless tangential to the issue at hand since the duty of fair representation is owed by the exclusive representative, not NEA.

> CTA...As a matter of policy, NEA does not assist members when they have legal actions pending against NEA or its state or local affiliates. I regret that there is no assistance that NEA can provide you. [omission in original]

The March 18, 1999 letter was in response to two requests by the Charging Party: (1) for the NEA to help her pursue her employment dispute against her employer; and (2) for the NEA to help her pursue her duty of fair representation unfair practice charge against the Association. The letter indicates that the NEA will not help her with the claim against the employer because:

> Your local affiliate and CTA are responsible for determining the best manner in which to pursue grievances under the labor agreement between the NOCCD and the United Faculty/CCA/CTA.

The quoted portion of the letter in the first amended charge refers to the Charging Party's second request, i.e., whether the NEA would help her pursue her unfair practice charge against the Association. The letter actually states:

> You are currently involved in a Duty of Fair Representation action filed with the Public Relations Employment Board against CTA <u>and you have requested NEA's assistance in pursuing this action</u>. As a matter of policy, NEA does not assist members when they have formal legal action pending against NEA or its state or local affiliates. [emphasis added.]

Thus, with the omitted portion of the letter included, it is clear that the NEA was simply indicating that it would not help the Charging Party pursue its unfair practice charge against the United Faculty. The letter does not indicate that the United Faculty would fail to fairly represent her in a grievance against her employer. Moreover, the March 18, 1998 letter predates the Charging Party' receipt of her evaluation on April 8, 1999.

The Charging Party's other arguments similarly fail. The mere fact that the Association did not challenge the Charging Party's June 7, 1999 claim that the grievance process was futile is not dispositive of the issue. Futility is similarly not established by a grievance representative's Spring sabbatical. The September 1, 1999 Association memorandum naming the grievance representative named eleven other individuals, and indicated the

faculty could "contact any member of the negotiating team or the Board of Directors." As discussed previously, the Charging Party sent a single letter on February 20, 1999, and did not attempt to contact any of the named representatives. The absence of one representative does not establish that the entire grievance and arbitration process is futile.

Finally, the Charging Party believes that the Association's past practice in handling her grievances was convincing evidence that the "the union would not have agreed to pursue a grievance in good faith to arbitration." As discussed previously, Board decisions indicate that the Association has helped the Charging Party in the past and that Charging Party did not request that the Association pursue a grievance on her behalf regarding the issue raised in this unfair practice charge. The charge does not establish that the Association committed itself to a position in conflict with the Charging Party's interests. Thus, the charge fails to demonstrate that exhaustion of the arbitration process is futile, and the charge must be deferred to binding arbitration.

Even if the charge was within the jurisdiction of PERB, it does not state a prima facie retaliation violation. As noted in the Warning Letter, to demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210.)

The original charge alleged Kiszely engaged in the following protected activities: (1) advocating faculty opinions contrary to those of an immediate supervisor, (2) filing a civil lawsuit against the Dean's housemate, and (3) questioning of the dean's role in coercing faculty voting rights in 1995.

The Warning Letter indicated that:

> PERB has held that the right to self-representation under EERA includes the right of an individual to complain to her employer about her unsafe working conditions. (Pleasant Valley School District (1988) PERB Decision No. 708.) The instant charge does not include information indicating the nature of the faculty opinions Kiszely alleges she advocated. Nor does the charge explain the nature of the lawsuit against the Dean's

> housemate. Nor does the charge include facts explaining the questions Kiszely posed to the Dean in 1995. Thus, without additional information it cannot be determined whether these activities are protected under EERA.

Rather than providing specific information regarding the protected activities raised in the original charge, the first amended charge alleged that the Charging Party engaged in the following protected activities: (1) pursuit of a grievance against a statutory notice of just cause; and (2) pursuit of Unfair Practice Charge No. LA-CE-3695.

The first amended charge fails to demonstrate the requisite nexus between the Charging Party's protected activities and the alleged adverse action. The charge fails to indicate when the Charging Party filed a grievance against a statutory notice of just cause. Thus, timing cannot be established. The Charging Party filed LA-CE-3695 on July 22, 1998, more than seven months before the alleged adverse action. Thus, the charge does not demonstrate timing. Even if the charge demonstrated timing, that factor alone is insufficient. (Moreland Elementary School District (1982) PERB Decision No. 227.)

The first amended charge alleges that the District engaged in disparate treatment because other employees who had filed civil suits against their supervisor's housemate had not been evaluated by their supervisors. However, the charge does not include facts indicating that any other employees had filed civil suits against their supervisor's housemate. Nor does the charge provide facts supporting its allegation that the Charging Party's request for an exception was handled in a manner different than other employees' requests. While the District's policy indicates exceptions are a possibility, it does not require the District to make an exception in every instance. Here, the District determined the supervisor could make an impartial evaluation and included this information in the denial of the Charging Party's request. Thus, the charge fails to demonstrate the requisite nexus, and must be dismissed.

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 after service of this dismissal. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, 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 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the

Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

Tammy L. Samsel
Regional Director

Attachment

cc: Cathie Fields

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 439-6940

October 1, 1999

Elizabeth Kiszely

RE: Elizabeth Kiszely v. North Orange County Community College District
Unfair Practice Charge No. LA-CE-4120
WARNING LETTER, DEFERRAL TO ARBITRATION

Dear Ms. Kiszely:

In the above-referenced unfair practice charge you allege the North Orange County Community College District (District) violated the Educational Employment Relations Act (EERA or Act) § 3543.5(a) by retaliating against you for your participation in protected activities. My investigation revealed the following information.

Elizabeth Kiszely is a faculty member at the District. The faculty are exclusively represented by the United Faculty Association (Association). The District's and the Association's 1998-2001 collective bargaining agreement includes a grievance procedure that ends in binding arbitration. Article 4.4.2 of the parties' 1998-2001 Agreement provides:

> No Unit Member shall be in any way discriminated against, intimidated, restrained or coerced because of affiliation with or participation in the Association, or the exercise of rights guaranteed by Chapter 10.7, Sections 3540-3549 of the Government Code.

On August 19, 1998, Dean Janet Portolan sent a memorandum to the faculty indicating she would be conducting evaluations in the spring semester. On January 22, 1999, Portolan scheduled Kiszely's evaluation for March 10, 1999. On February 2, 1999, Kiszely wrote to Chancellor Harris and the Board of Trustees requesting that an alternate evaluator conduct her evaluation. Kiszely explained that Portolan would not be able to conduct an objective evaluation because Kiszely was suing Portolan's housemate. The District did not respond to Kiszely's letter. On February 16, 1999, Kiszely reiterated her request. On February 24, 1999, Vice Chancellor, Human Resources, Jeff Horsely, denied Kiszely's request. On March 10, 1999, Portolan conducted Kiszely's evaluation. The evaluation indicated Kiszely's performance was competent.

With regard to a faculty member's right to choose an alternate evaluator, the above-referenced unfair practice charge indicated that under certain circumstances alternate evaluators could be provided.

The District and the Association have agreed that faculty evaluations will be performed by a peer review system. However, due to difficulties, the District and Association agreed not to implement the peer review procedures and instead are using the "old" evaluation process. Under this process the Dean conducts the faculty evaluations.

The above-referenced information fails to state a prima facie violation of the EERA within the jurisdiction of PERB for the reasons that follow.

Section 3541.5(a) of the Educational Employment Relations Act states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that this section established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Regulation 32620(b)(5) (Cal. Code of Regs., tit. 8, sec. 32620(b)(5)) also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to this case. First, the grievance machinery of the agreement covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge that the District retaliated against Kiszely for her participation in protected activities is arguably prohibited by Article 4.4.2 of the 1998-2001 CBA. Accordingly this charge must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See PERB Reg. 32661 [Cal. Code of Regs., tit. 8, sec. 32661]; Los Angeles Unified School District

(1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-8la.)

The Charging Party alleges the charge should not be deferred to arbitration because exhaustion of the grievance procedure would be futile. The charge alleges it is futile for three reasons: (1) the Association will not help a faculty member who has filed an unfair practice charge against them; (2) the Association failed to respond to Kiszely's February 20, 1999 letter voicing concern about the evaluation and requesting that the Association help in preventing another grievance; and (3) the Association's conduct in handling previous grievances.

EERA § 3541. (a) (2) does not require exhaustion of the grievance procedure when resort to that procedure would be futile. Futility may be found when the arbitration process itself is at issue or when the association is unwilling to take the grievance to arbitration. (State of California (Department of Parks and Recreation) (1995) PERB Decision No. 1125.) However, mere animosity between the grievant and the union is insufficient, the grievant must demonstrate the union's unwillingness to pursue the matter. (State of California (Department of Corrections) (1986) PERB Decision No. 561-S.)

In the instant charge, the Charging Party does not present facts demonstrating that PERB should bypass the statutory deferral requirement. The District and the Association negotiated a grievance and binding arbitration procedure incorporating discrimination allegations arising under the EERA. The facts of the instant charge do not demonstrate that the Charging Party should be able to opt out of this contractual mechanism without any evidence that it has been invoked at all.

The charge does not allege facts establishing Kiszely attempted to pursue a grievance on this issue to arbitration. The charge does not indicate Kiszely asked the Association to file a grievance. Nor does the charge demonstrate Kiszely filed a grievance on her own behalf, and then requested the Association to pursue it into arbitration. The charge indicates, only that Kiszely contacted the Association before the District took the adverse actions alleged herein and requested they help take preventive measures. The charge presents no facts establishing that the Association denied, or would have denied if asked, a request to pursue a grievance on this matter to arbitration. Thus, the charge fails to demonstrate futility and must be dismissed and deferred to arbitration.

Even if the charge was within the jurisdiction of PERB, it does not state a prima facie retaliation violation. To demonstrate a violation of EERA section 3543.5(a), the charging party must show

that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 2 64.)

The instant charge alleges Kiszely engaged in the following protected activities: (1) advocating faculty opinions contrary to those of an immediate supervisor, (2) filing a civil lawsuit against the Dean's housemate, and (3) questioning of the dean's role in coercing faculty voting rights in 1995.

PERB has held that the right to self-representation under EERA includes the right of an individual to complain to her employer about her unsafe working conditions. (Pleasant Valley School District (1988) PERB Decision No. 708.) The instant charge does not include information indicating the nature of the faculty opinions Kiszely alleges she advocated. Nor does the charge explain the nature of the lawsuit against the Dean's housemate. Nor does the charge include facts explaining the questions Kiszely posed to the Dean in 1995. Thus, without additional information it cannot be determined whether these activities are protected under EERA.

The charge names two adverse actions: (1) the denial of Kiszely's request for an alternate evaluator; (2) the subsequent

evaluation. A review of the evaluation itself does not reveal any negative statements. However, even if Kiszely's activities are protected and the actions are adverse, the charge does not demonstrate nexus. The charge does not indicate when the first two activities occurred, and the third occurred in 1995. The alleged adverse actions occurred in February and March 1999, four years later. Thus, the charge does not establish that the District took adverse action close in time to these activities. For the above-stated reasons the charge fails to demonstrate a prima facie violation within the jurisdiction of PERB and must be dismissed.

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 be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before October 8, 1999, I shall dismiss your charge. If you have any questions, please call me at (415) 439-6944.

Sincerely,

TAMMY L. SAMSEL
Regional Director