**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| ANNETTE (BARUDONI) DEGLOW,<br><br>Charging Party,<br><br>v.<br><br>LOS RIOS COLLEGE FEDERATION OF TEACHERS, LOCAL 2279,<br><br>Respondent. | Case No. SA-CO-452-E<br><br>PERB Decision No. 1515<br><br>April 3, 2003 |

Appearance: Annette (Barudoni) Deglow, on her own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Annette (Barudoni) Deglow (Deglow) to a Board agent's dismissal (attached) of her unfair practice charge. Deglow filed an unfair practice charge alleging that the Los Rios College Federation of Teachers, Local 2279 (Federation) violated the Educational Employment Relations Act (EERA)[1] by refusing to reopen Grievance 5-S94 or file a new grievance against Los Rios Community College District (District) for its reference to a 1994 "needs improvement" evaluation in a letter to the Department of Fair Employment and Housing (DFEH). She alleged that the Federation's failure to represent her in the grievance violated EERA sections 3543.6(a) and (b), and 3544.9[2] for breach of the duty of fair representation, discrimination for engaging in protected conduct, and causing the District to

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2]Section 3543.6 provides, in pertinent part:

discriminate against Deglow. After her investigation, the Board agent dismissed the charge for failure to state a prima facie case. The Board has reviewed the entire record in this case, including the original and amended charge, the Board agent's warning and dismissal letters, and Deglow's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and affirms the decision of the Board agent consistent with the following discussion.

## DISCUSSION

The charge specifically alleged that in the spring of 1994, Deglow received a "needs improvement" performance evaluation from the District. She grieved the evaluation with the assistance of the Federation. The District later reevaluated Deglow in the fall of 1994, gave her a "meets standards" rating, and in its response to Deglow's grievance, stated that the latter evaluation would preclude use of the spring 1994 evaluation in any disciplinary process. By letter dated April 14, 2000, the District referred to the spring 1994 evaluation in its response to a complaint filed by Deglow against the District with DFEH. Deglow further alleges that in the letter, the District acknowledged that it considered the spring 1994 evaluation in its decision to reassign Deglow from teaching geometry to algebra in fall 1998. This

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It shall be unlawful for an employee organization to:

> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (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.

Section 3544.9 states:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and

reassignment also terminated the disability accommodation program that Deglow had developed to teach geometry. She alleges that the District's reference to the poor evaluation and its acknowledgment of its use in the decision to reassign Deglow breached the terms of the 1994 grievance settlement. Deglow thereafter requested the Federation to represent her and the Federation refused. The Federation reasoned that neither the citation of the spring 1994 evaluation in the April 2000 letter nor the District's use of the evaluation in its decision to reassign Deglow was a form of discipline. The Federation further interpreted the April 2000 letter to state that the District's decision to reassign Deglow was based upon more recent evaluations.

The real crux of this matter is the Federation's failure to grieve the 1998 reassignment of Deglow's classes and the termination of Deglow's disability accommodation program on Deglow's behalf. These issues were the subject of a previous grievance and unfair practice charge timely filed in August 1998. (See Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Deglow) (1999) PERB Decision No. 1348 (Los Rios CFT).) The allegations in this charge involve a new spin on outdated facts from a previous charge dismissed by the Board. In that case, Deglow charged that the Federation failed to represent her in a grievance against the District for reassigning her from teaching geometry to algebra in fall 1998 and for the resulting termination of her disability accommodation program.

The heart of the instant matter is that the Federation is failing to represent Deglow in a grievance against the District for essentially the same issues. Deglow's grievance claims that the District acknowledged, in a letter to DFEH, that it used the negative spring 1994 performance evaluation as a basis for reassigning her from teaching geometry to algebra in fall

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negotiating shall fairly represent each and every employee in the appropriate unit.

1998 in violation of the resolution of Grievance 5-S94. What this charge alleges is that Deglow has found new evidence to support challenges to her reassignment, which occurred almost three years before she filed the charge in this matter. Those same issues were previously addressed and dismissed by the Board.

Also in this matter, Deglow has provided voluminous irrelevant documents and reiterates countless allegations of wrongs imposed by the District and the Federation alleged in other unfair practice charges occurring over a 10 year period before the filing of the instant charge. PERB's decision index lists 15 Board decisions involving Deglow's charges against the Federation, the majority of which affirm dismissals by Board agents. In several of these decisions, the Board has advised Deglow that her repeated filings of the same charges over the same circumstances constitute an abuse of process. (See e.g., Los Rios College Federation of Teachers (Deglow) (1996) PERB Decision No. 1133; Los Rios College Federation of Teachers, CFT/AFT Local 2279 (Deglow) (1996) PERB Decision No. 1137; Los Rios College Federation of Teachers, CFT/AFT Local 2279 (Deglow) (1996) PERB Decision No. 1140; Los Rios College Federation of Teachers, CFT/AFT Local 2279 (Deglow) (1996) PERB Decision No. 1137; Los Rios College Federation of Teachers/CFT/AFT Local 2279 (Deglow) (1998) PERB Decision No. 1275.) Deglow has been warned in these decisions that her continued filing of frivolous charges over the same subject matter may result in the imposition of sanctions. PERB has jurisdiction to order a party to pay the other party's reasonable expenses, including attorney's fees, for the offending party's bad faith actions or frivolous tactics. (Sec. 3541.3(i) and (n); Government Code sec. 11455.30.)

Under Los Angeles Unified School District (Watts) (1982) PERB Decision No. 181a (Watts), the Board may order sanctions only after it has ordered the party to cease and desist from filing frivolous charges over the same factual and legal issues previously addressed by

the Board. (See also, Government Code sec. 11455.10(e).) The Board has issued such warnings to Deglow in other matters in the past. Deglow, by filing repetitive charges over similar issues of fact and law, wastes the resources and money of the responding party and the Board, the concern addressed in Watts. This is the second charge filed by Deglow addressing the same issues in Los Rios CFT. The Board on its own motion[3] may order Deglow to cease and desist from filing cases over the same factual and legal issues previously addressed by the Board and advises her that future filings of this kind may result in sanctions.

## ORDER

The unfair practice charge in Case No. SA-CO-452-E is hereby DISMISSED WITHOUT LEAVE TO AMEND. In addition, the Board hereby orders Deglow to cease and desist from filing cases over the same factual and legal issues previously addressed by the Board, and advises her that future filings of this kind may result in sanctions.

Member Neima joined in this Decision.

Member Baker's concurrence begins on page 6.

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[3]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32320 states, in pertinent part:

> (a) The Board itself may:
>
> (2) Affirm, modify or reverse the proposed decision, order the record re-opened for the taking of further evidence, or take such other action as it considers proper.

BAKER, Member, concurring: I agree with the majority that the unfair practice charge filed by Annette (Barudoni) Deglow (Deglow) must be dismissed. It is a well-settled principle of law that a single cause of action cannot be split into successive claims. (See Crowley v. Katleman (1994) 8 Cal.4th 666, 681 [34 Cal.Rptr. 386]; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, sec. 35.) The legal theories raised by Deglow in this matter should have been raised in Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Deglow) (1999) PERB Decision No. 1348.

I write separately only to note that a party's pro per status should be taken into account by the Board when considering the imposition of sanctions. I therefore agree with the majority's decision not to impose sanctions on Deglow at this time. This does not mean, however, that Deglow's pro per status immunizes her from sanctions. All parties must comply with the orders of the Public Employment Relations Board. I agree with the majority that repeated violations of the Board's orders will subject a party, in pro per or otherwise, to sanctions.

STATE OF CALIFORNIA GRAY DAVIS, Governor

# PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 322-3198
Fax: (916) 327-6377

November 2, 2001

Annette Deglow

Re: Annette (Barudoni) Deglow v. Los Rios College Federation of Teachers, Local 2279
Unfair Practice Charge No. SA-CO-452-E
**DISMISSAL LETTER**

Dear Ms. Deglow:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 22, 2001. Your charge alleges that the Los Rios College Federation of Teachers, Local 2279 violated the Educational Employment Relations Act (EERA),[1] Government Code section 3543.6(a) and (b), when the Federation refused to represent you by filing a grievance on your behalf challenging your employer's breach of a prior grievance settlement.

I indicated to you in the attached letter dated August 2, 2001, 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, the charge should be amended. You were further advised that unless the charge was amended to state a prima facie case or was withdrawn prior to August 20, 2001, the charge would be dismissed. Your request for an extension of time to file an amended charge was granted. You timely filed an amended charge on September 18, 2001.

Your charge alleges that your employer, the Los Rios Community College District, conducted a performance evaluation in Spring 1994 which rated you as "needs improvement." The Federation agreed to assist you in challenging the evaluation by filing Grievance 5-S94 on May 26, 1994. Before the grievance was resolved, a follow-up evaluation was issued in December 1994, which rated you as "meets standards" in all categories.

In response to the grievance challenging the original evaluation, the District stated that the December 1994 evaluation superseded the Spring 1994 evaluation and, thus, precluded the Spring 1994 evaluation "being used in any disciplinary process."

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[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Although you continued to insist that the Spring 1994 be evaluation removed from your personnel records, the Federation refused to take Grievance 5-S94 to arbitration. The Federation assured you in a letter dated January 3, 1995 that "the District has agreed, in writing, not to use the original evaluation in any disciplinary process."

Subsequently, the District issued you two additional unsatisfactory evaluations covering the Fall 1997 and Spring 1998 semesters.

In or about March 1998, the District notified you that you were being reassigned from Geometry, a course for which you had prepared teaching materials to accommodate an injury to your voice, to teach Algebra during the Fall 1998 semester. You were opposed to the reassignment because you had been assured that you would continue to teach Geometry to accommodate your voice disorder and because you did not have a voice accommodation program prepared for the new course.

In December 1999, you filed a complaint with the Department of Fair Employment and Housing (DFEH) alleging that the reassignment from Geometry to Algebra was in retaliation for filing prior DFEH complaints.

On January 2, 2001, the DFEH provided you with a copy of a letter dated April 14, 2000, which was written by Lily Cervantes, District Interim Director for Employee Relations, to the DFEH in response to your complaint. Ms. Cervantes stated that the reason for your reassignment was based, in part, on your "recent" unsatisfactory evaluations.

The charge states that Ms. Cervantes' letter demonstrates that the District used the Spring 1994 evaluation, in part, as the basis for removing you from the Geometry course. The charge asserts that this conduct is contrary to the resolution of Grievance 5-S94, in which the District stated it would not use the Spring 1994 evaluation "in any disciplinary process."

The basis of your charge against the Federation is that the Federation refused to assist you in either reopening the original grievance or filing a new grievance to challenge the District's violation of the terms of the settlement of Grievance 5-S94.

In a January 16, 2001 letter to the Federation, you requested that the Federation take steps necessary to obtain the District's compliance with the terms of the resolution of Grievance 5-S94. The Federation responded on January 23, 2001, stating, "It is our firm belief that there is no reason for the Federation to revisit grievance 5-S94 because you have suffered no injury from the District's actions."

You made several additional requests for the Federation's assistance. On March 6, 2001, the Federation informed you that it would have its legal counsel review the matter. In a letter dated April 6, 2001, the Federation stated:

> We have considered your request that the LRCFT either file a new grievance concerning Lily Cervantes' April 14, 2000 letter to

> the Department of Fair Employment and Housing, or seek to reopen grievance 5-S94, in light of Ms. Cervantes' letter. After consulting with the LRCFT's attorney and researching this issue, we have concluded that there is not a sound factual or legal basis to follow either of these two possible courses, and that to do so would be an unwise use of Union resources.
>
> The District wrote in its December 1994 denial of your earlier grievance that it would not use the April 1994 evaluation in any future disciplinary action. Ms. Cervantes' reference in her April 14, 2000 letter to the April 1994 evaluation is not a form of discipline, nor was the decision to assign you to teach Algebra classes in 1998-1999 a form of discipline. The Cervantes letter of April 2000 makes it clear that the 1998-99 class assignment decision was based on 1997 and 1998 evaluations.
>
> In light of these facts, there is no basis for the Union to take any additional action in this matter.

The amended charge provides a lengthy discussion of circumstances concerning your work relations and disputes with the District, beginning with your voice injury in 1981. The amended charge also discusses your disagreements with the District and Federation over negotiated provisions of the CBA, which you assert violated your rights. Finally, the amended charge describes your numerous requests for assistance from the Federation in filing grievances against the District. In some cases, the Federation agreed to assist you, in other cases the Federation declined to represent you in your grievances. You challenged several of the Federation's refusals to represent you by filing unfair practice charges against the Federation. The record shows that PERB issued several complaints against the Federation. The charge also asserts that the Federation's "long-standing hostility" against you is demonstrated by articles in the Federation newsletter which disparage you, threatening letters received from the Federation's attorney and derogatory statements made about you by Federation representatives.

You contend that that the Federation's decision not to represent you in reopening Grievance 5-S94 you was arbitrary because the Federation initially stated it would not represent you because you had not suffered an injury from the District's actions. You dispute the Federation's view that you did not suffer an injury when the District reassigned you from Geometry to Algebra. You contend that you were injured as a result of the substantial cost of purchasing equipment to develop a new voice accommodation program to teach Algebra; the extensive time to develop new program; and the physical injury you suffered as a result of the reassignment.

As you are aware, an exclusive representative does not violate the duty of fair representation if the union makes an honest, reasonable determination that a grievance lacks merit. In determining whether this standard has been met, PERB does not decide whether the union's

decision was correct but whether it had a rational basis or was devoid of honest judgment. (Sacramento City Teachers Association (Fanning, et al.) (1984) PERB Decision No. 428.)

Although the Federation initially concluded that you had suffered no injury as result of Ms. Cervantes' letter, the Federation did conduct further research and consulted with its legal counsel. As stated in the Federation's April 6, 2001 letter, the Federation reached the following conclusions concerning the merits of your grievance: (1) that Ms. Cervantes' reference to the Spring 1994 evaluation was not a form of discipline; (2) the District's decision to reassign you from Geometry to teach Algebra was also not a form of discipline; and (3) although the Spring 1994 evaluation was referenced in Ms. Cervantes' letter, the reassignment was based on the Fall 1997 and Spring 1998 evaluations.

While, as you suggest, the Federation's conclusions may be incorrect, these facts do not demonstrate that the Federation's decision was without a rational basis or devoid of honest judgment. Although reasonable individuals may disagree about what constitutes discipline, the fact that the Federation considered the merits of your grievance and provided you with an explanation why it believed the grievance did not have merit does not demonstrate a violation of the duty of fair representation.

You also contend in your amended charge that all the prior conduct by the Federation against your interests, some of which was the subject of PERB complaints, demonstrates that the Federation holds animus towards you. You suggest that this animus or hostility by the Federation taints every decision the Federation makes regarding your requests for assistance.

PERB has held that in cases where a union may not be "kindly disposed" toward a grievant, the union retains "a wide range of reasonableness within which to represent them." (United Teachers of Los Angeles (Valadez, et al.) (2001) PERB Decision No. 1453.)

The fact that the Federation may have breached its duty of fair representation towards you in the past, is not sufficient to establish that the Federation's current conduct violates its duty to represent you fairly. As discussed above, although you disagree with the Federation's conclusions, the Federation has stated a rational basis for its decision not to pursue your grievance. Accordingly this allegation does not state a prima facie case and is dismissed.

Your charge also alleges that the Federation failed or refused to file an unfair practice charge with PERB on your behalf over the same conduct.

As you are aware, under EERA an exclusive representative is given the exclusive right to represent employees before the employer in matters involving contract negotiations, administration of the contract and grievance handling. Since the union has the exclusive authority to deal with the employer over these matters, EERA imposes upon the exclusive representative a duty to fairly represent all bargaining unit members in these areas.

However, an exclusive representative does not owe a duty of fair representation to a unit member in a forum where the union has not been granted exclusive representation. (California

State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) Since PERB is a forum outside the contract, the Federation does not owe members a duty of fair representation in proceedings involving PERB. Thus, the Federation's refusal to file an unfair practice charge with PERB on your behalf does not violate the duty of fair representation. Therefore, this allegation is dismissed.

Your charge also alleges that the Federation discriminated against you by refusing to assist you in obtaining the District's compliance with Grievance 5-S94. You contend that the Federation "has a long history of treating [your] needs and rights within the CBA different from that of other instructors." You also assert that the Federation's animus and hostility toward you establish the nexus between your protected activity and the Federation's refusal to assist you.

These allegations were raised in your original charge and are addressed in the attached letter. Since the amended charge does not provide new allegations in support of this theory, the discrimination allegation is dismissed for the reasons discussed in the attached letter.

Finally, your charge alleges that the Federation violated EERA 3543.6(a) by causing or attempting to cause the District to discriminate against you. As in the discussion above, you similarly contend that the Federation's long history of refusing to represent you when it knew the District was violating the contract demonstrates that the Federation, by its inaction, was assisting the District in discriminating against you. The amended charge states that "'intentional misconduct' or 'inaction without rational basis' can be cited as 'affirmative-action' when that inaction is intended to facilitate or cause an employer to violate EERA section 3543.5." You do not cite any case law in support of this theory.

As previously discussed in the attached letter, a charging party must demonstrate that a union took affirmative action in its attempt to cause the employer to violate EERA. (American Federation of State, County and Municipal Employees (Waters) (1988) PERB Decision No. 697-H; California School Employees Association (Kotch) (1992) PERB Decision No. 953.)

You contend that the Federation's refusal to represent you caused the District to discriminate against you because the District knew the Federation would not challenge its actions. However, the case law does not support this view. A union's inaction in representing past grievances does not demonstrate that it caused the employer to discriminate against the employee in future actions. Thus, this allegation does not state a prima facie case and must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,[2] 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

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

dismissal. (Regulation 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. (Regulations 32135(a) and 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 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. (Regulation 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 Regulation 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. (Regulation 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. (Regulation 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

By
Robin W. Wesley
Regional Attorney

Attachment

cc: Robert Perrone

STATE OF CALIFORNIA GRAY DAVIS, Governor

# PUBLIC EMPLOYMENT RELATIONS BOARD

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August 2, 2001

Annette Deglow

Re: Annette (Barudoni) Deglow v. Los Rios College Federation of Teachers, Local 2279
Unfair Practice Charge No. SA-CO-452-E
**WARNING LETTER**

Dear Ms. Deglow:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 22, 2001. Your charge alleges that the Los Rios College Federation of Teachers, Local 2279 violated the Educational Employment Relations Act (EERA),[1] Government Code section 3543.6(a) and (b), when the Federation refused to represent you by filing a grievance on your behalf challenging your employer's breach of a prior grievance settlement.

The charge makes the following factual allegations. You have been employed by the Los Rios Community College District since 1962. You are currently an instructor in the Mathematics Department at the Sacramento City College. For several years you have been active in a rival employee organization. In addition, you have filed several unfair practice charges against the Federation. The Federation is well aware of these activities.

In the Spring of 1994, you received a performance evaluation which included a "needs improvement" rating in three of four categories. At your request, on May 26, 1994, the Federation filed a grievance on your behalf challenging the evaluation.

In December 1994, you received a follow-up evaluation with a "meets standards" rating in all categories.

The charge alleges that, "During the grievance process it was determined that the 'needs improvement' ratings were the result of Department and Campus Administrative error and the evaluation was superceded by a new evaluation which contained satisfactory ratings in all seventeen categories." On December 19, 1994, the District provided a District Level response to your Grievance 5-S94, which stated:

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[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

> The results of the follow-up classroom visit recommended by the peer review committee indicates that Ms. Deglow's performance is now overall meets standards. Since this overall meets standards rating precludes the initial needs improvement rating for the Spring, 1994, evaluation being used in any disciplinary process, the District does not believe that there is any need to destroy the original evaluation. [Emphasis in original.]

In a letter to Ms. Deglow dated January 3, 1995, the Federation declined to appeal the grievance to the Board of Review. The Federation stated:

> In addition, the District has agreed, in writing, not to use the original evaluation in any disciplinary process.

Following that date, you received two more performance evaluations. The first evaluation covered the period August 1997 through December 1997. This evaluation included a "needs improvement" rating in 8 of 17 categories. This evaluation also recommended that you be assigned to teach a Mathematics course lower than Geometry. The second evaluation covered the period January 1998 through May 1998. This evaluation included a "needs improvement" rating in 6 of 17 categories.

In or about August 1999, the District reassigned you from teaching Math 52 Elementary Geometry to Algebra, despite your opposition to the reassignment.

In or about September and October 1999, you filed two disability discrimination complaints with the Department of Fair Employment and Housing (DFEH). In December 1999, you filed another complaint with the DFEH alleging that the reassignment from Geometry to Algebra was in retaliation for filing the prior DFEH complaints.

On January 2, 2001, the DFEH provided you with a copy of a letter dated April 14, 2000, which was written by Lily Cervantes, District Interim Director for Employee Relations, to the DFEH in response to your December 1999 complaint. Ms. Cervantes reviewed the four performance evaluations and indicated to the DFEH that your performance was the reason for your teaching reassignment. Ms. Cervantes stated:

> Here, Ms. Deglow was reassigned because recent evaluations conducted by The Review Team did in fact disclose that she was not performing at the level expected of a Geometry Instructor. The Dean considered these evaluations in making class assignments for faculty.

On January 16, 2001, in a letter to Federation Executive Director Robert Perrone, you informed the Federation that you had recently discovered that the District had used the Spring 1994 evaluation contrary to "the terms of the settlement for Grievance 5-S94." The District's grievance response stated that the Spring 1994 evaluation would not be "used in any

disciplinary process." You asserted that the evaluation was used by the District, in part, as the basis for your reassignment from Geometry to Algebra, a use which you claimed breached the grievance settlement. You requested that the Federation take the steps necessary to obtain the District's compliance with the terms of Grievance 5-S94, which precluded the evaluation being used in any disciplinary process.

On January 23, 2001, the Federation advised you that they saw no reason to revisit Grievance 5-S94.

In a letter dated January 29, 2001, you submitted a second request to the Federation asking them to seek compliance with Grievance 5-S94. The Federation responded on February 1, 2001, advising you it was standing by its original analysis of your request.

You submitted a third request to the Federation on February 11, 2001. You also asked if the grievance process was the appropriate means to obtain compliance of a grievance settlement. The Federation responded on February 15, 2001, advising you that the grievance process was the appropriate avenue for enforcing grievance settlements. The letter stated that Mr. Perrone could not recall in his ten years with the Federation a grievance remedy that had not been fully implemented or that had been violated.

On February 18, 2001, you again asked the Federation to reopen Grievance 5-S94. You provided a draft request to reopen Grievance 5-S94 asking the Federation to review the draft and take the appropriate action on your request. You asked the Federation to respond by February 20, 2001.

When you did not receive a response from the Federation, on February 20, 2001, you filed with the District a request to reopen Grievance 5-S94. You provided the Federation with a copy of your request to the District and asked the Federation to represent you in this matter.

On February 22, 2001, the Federation informed you that it would not represent you.

In a letter dated March 1, 2001, Jimmy Mraule, Director of Human Resources, informed you that there was no process in the contract to reopen a grievance that was presented six years ago. The letter further stated that your grievance request had not been filed within contractual timelines.

On March 6, 2001, Mr. Perrone called you. The charge alleges that Mr. Perrone stated that a violation of your rights had occurred. Mr. Perrone asked you not to take any action until he could review the matter with the Federation's legal counsel.

In a letter dated March 29, 2001, you advised the Federation of a possible second violation of the grievance settlement. You also expressed concern with grievance timelines since you had not heard from the Federation.

On April 6, 2001, the Federation informed you that it would not be taking any action in this matter. In a subsequent letter dated April 16, 2001, the Federation advised you that it was standing by its analysis as reflected in its April 6, 2001 letter. The Federation also indicated it would not be filing an unfair practice charge against the District concerning this matter.

The charge alleges that the Federation breached its duty of fair representation and discriminated against you when it refused to represent you by seeking the District's compliance with Grievance 5-S94. The charge also alleges that the Federation caused or attempted to cause the District to violate EERA by discriminating against you in violation of EERA section 3543.6(a).

Based on the facts stated above, the charge fails to state a prima facie case.

You have alleged that the exclusive representative denied you the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). As you know, the duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, a charging party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Board stated:

> 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. [Emphasis added.]

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a charging party:

> ". . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)" [Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

The charge alleges that the Federation breached its duty of fair representation when it refused to file a grievance over the District's failure to comply with the settlement of Grievance 5-S94. The charge states:

> The Federation's leadership is aware that a breach of the settlement has occurred. The Federation has a clear and well-defined duty to demand compliance by the District regarding Grievance 5-S94 and failure to do so equals "failing to represent bargaining unit members fairly in their employment relationship with the employer" which is a violation of the EERA. [p. 5.]

First of all, it is not apparent that the resolution of Grievance 5-S94 is a settlement agreement. The "settlement" language cited in the charge derives from a District level response to the grievance. It is not clear that the employer's grievance response is binding on the parties in the same manner as a settlement agreement.

However, assuming the District's grievance response is a binding settlement, the charge contends that since the Federation represented you in the original grievance, it has a "duty to demand compliance by the District" and that the failure to do so demonstrates a breach of the duty of fair representation. I am not aware of any case law which supports this theory.

Rather, this matter involves a union's duty of fair representation in grievance handling. As you are aware, an exclusive representative is granted the discretion to determine whether to pursue a grievance, as long as the decision is not arbitrary. (United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) A charging party must allege facts which demonstrate that a union's decision not to pursue a grievance was without a rational basis or was devoid of honest judgment. (Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332.)

The charge alleges that you requested that the Federation represent you by filing a grievance challenging the District's failure to comply with Grievance 5-S94. On January 23, 2001, the Federation advised you that they saw no reason to revisit Grievance 5-S94. In a letter dated February 1, 2001, the Federation responded to your second request advising you that it was standing by its original analysis of your request. In addition, on March 6, 2001, the Federation informed you that the matter would be reviewed by the Federation's legal counsel. Finally, the charge alleges that the Federation's April 16, 2001 letter states that it is standing by the analysis it provided you in its April 6, 2001 letter. These facts tend to show that the Federation conducted a review and analysis of your request. Such behavior does not demonstrate arbitrary conduct which "was without a rational basis or devoid of honest judgment."

The charge also alleges that a union violates the duty of fair representation:

> . . . when the exclusive bargaining representative knowingly refuses to represent an employee in order to please the employer

> at the expense of that employee. Such an action is appropriately identified as "arbitrary behavior". [p. 8.]

Assuming you are alleging that the Federation refused to represent you in this matter to assist the District, the charge does not provide any facts which demonstrate that the Federation refused to represent you at the request of the District. Accordingly, the allegation that the Federation breached its duty of fair representation fails to state a prima facie case and must be dismissed.

The charge also alleges that the Federation discriminated against you in retaliation for your protected activity.

In order to state a prima facie case of discrimination, the charging party must show that: (1) the charging party engaged in protected activity; (2) the respondent knew of the activity; (3) the respondent took action adverse to the charging party's interest; and (4) there was an unlawful motivation for the respondent's action. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89; State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S; California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S.)

In support of the nexus element, the charge alleges that the Federation "has a history of treating [your] needs and rights within the CBA different from that of other instructors." The charge alleges that the Federation refused to consider your request to compel compliance until it feared that the District's conduct concerning your grievance might impact others. When the Federation determined the District's actions would not affect the rights of other bargaining unit members, it withdrew its support from your request. This allegation fails as the charge does not provide any facts which describe how or in what manner the Federation considered the impact on other unit members. Mere legal conclusions are insufficient to demonstrate a prima facie case. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S; United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944; Charter Oak Unified School District (1991) PERB Decision No. 873, fn. 6.)

The charge also alleges that the Federation "has a long history of advocating interest based communication and resolve of issues through the conflict resolution process." The charge contends that the Federation's refusal to "comply with a settlement agreement is a clear departure from established procedures and standards." First, the Federation has no obligation to comply with this grievance settlement agreement. Second, as stated above, the Federation has the discretion to determine whether to pursue a grievance. Thus, this allegation also fails to demonstrate nexus.

The charge alleges that the actions of the Federation are inconsistent or contradictory because the Federation agreed to represent you in processing Grievance 5-S94, but refused to represent you when the grievance settlement was breached. Again, as stated above, absent facts demonstrating arbitrary conduct, the Federation has the discretion to decide whether to pursue a grievance.

The charge alleges that the Federation refused to investigate the breach of the settlement agreement and its impact on your reassignment. However, the charge provides facts which demonstrate that the Federation reviewed and provided you with its analysis of your request in letters dated February 1 and April 6, 2001. There are no other facts provided which demonstrate a failure to investigate by the Federation. This allegation also fails.

The charge alleges that, "The Federation agrees that there has been a breach of the settlement terms for Grievance 5-S94." However, the Federation is refusing to represent you in seeking enforcement of the settlement agreement and the contract precludes a unit member from having any outside representation. The Federation can decide not to pursue a meritless grievance unless evidence of arbitrary conduct is produced.

Finally, the charge alleges that the refusal to file a grievance demonstrates a pattern of discriminatory conduct by the Federation. Charging Party cites two prior unfair practice charges in which complaints were issued concerning the Federation's failure to advance your grievance.[2] The prior charges allege that the Federation treated similar grievances in a different manner. The facts in the present charge do not demonstrate similar conduct. Accordingly, the charge does not demonstrate the required nexus to establish a prima facie case of discrimination.

The charge also alleges that the Federation caused or attempted to cause the District to violate EERA by discriminating against you in violation of EERA section 3543.6 (a). The charge alleges that by the Federation's refusal to compel the District's compliance with the grievance settlement, the Federation is encouraging the District to violate your rights.

To state a violation of EERA section 3543.6 (a), it must be clear how and in what manner the Federation caused or attempted to cause the District to violate EERA. (American Federation of State, County and Municipal Employees (Waters) (1988) PERB Decision No. 697-H; California School Employees Association (Kotch) (1992) PERB Decision No. 953.)

The charge alleges that the Federation's failure to represent you in pursuing compliance of the grievance settlement caused the District to discriminate against you by using the Spring 1994 evaluation in a disciplinary process. The Board has held that a union must engage in affirmative action in its attempt to cause an employer to violate EERA. (Ibid.) The charge fails to allege facts which demonstrate that the Federation affirmatively acted to cause or attempt to cause the District to discriminate against you. Accordingly, this allegation fails to state a prima facie case 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 that 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

[2] Unfair Practice Charge Nos. SA-CO-424-E and SA-CO-426-E.

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 August 20, 2001, I shall dismiss your charge. If you have any questions, please call me at (916) 327-8385.

Sincerely,

Robin W. Wesley
Regional Attorney