STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JENNIFER MARION FRANZ, Charging Party, v. SACRAMENTO CITY TEACHERS ASSOCIATION, Respondent.	Case No. SA-CO-492-E PERB Decision No. 1959 May 30, 2008

Appearances: Jennifer Marion Franz, on her own behalf, and Linda Roberts, Paralegal, for Jennifer Marion Franz; Ballinger G. Kemp and Diane Ross, Staff Attorneys, for Sacramento City Teachers Association.

Before Neuwald, Chair; Rystrom and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Jennifer Marion Franz (Franz) to an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge alleged that the Sacramento City Teachers Association (SCTA) breached its duty of fair representation under section 3544.9 of the Educational Employment Relations Act (EERA),[1] and thereby violated Section 3543.6(b) by: (1) failing to return Franz's phone calls inquiring about the status of her grievances; (2) failing to return Franz's phone calls inquiring about a grievance hearing; (3) failing to inform Franz that a grievance hearing had been scheduled; (4) failing to inform Franz that SCTA had failed to move a grievance to the next step; and (5) misrepresenting that a state mediator had been present at Franz's November 21, 2003, grievance hearing.

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

The ALJ dismissed the allegations that SCTA failed to return phone calls, failed to inform Franz about the grievance hearing and failed to inform her of its failure to move a grievance forward on the ground that the allegations were untimely because the conduct occurred outside the six-month statute of limitations period. The ALJ also concluded that SCTA did not breach its duty of fair representation because the state mediator was in fact present at Franz's grievance hearing and therefore, SCTA did not misrepresent the state mediator's attendance.

The Board reviewed the entire record in this case, including but not limited to the original and amended unfair practice charges, SCTA's position statement, the complaint and SCTA's answer, the hearing transcripts and exhibits, the parties' post-hearing briefs, the ALJ's proposed decision, Franz's exceptions, and SCTA's response thereto.[2] Based upon this review, the Board adopts the ALJ's proposed decision as the decision of the Board itself. Also part of the Board's decision is the following discussion of Franz's exception that her allegations are not barred by the statute of limitations because SCTA continued to violate EERA at the PERB hearing. The Board does not address the remainder of Franz's exceptions because they were also raised before the ALJ and are adequately and correctly addressed in the proposed decision.

DISCUSSION

On appeal, Franz excepts to the ALJ's conclusion that her allegations of SCTA's failure to return phone calls; failure to inform her of a scheduled grievance hearing; and failure to inform her of its failure to advance a grievance are barred by the six-month statute of limitations. She argues this conclusion was incorrect because SCTA's "violation of EERA was

[2]Franz requested oral argument in this matter. The Board has historically denied requests for oral argument where an adequate record has been prepared, and the parties had an ample opportunity to brief and did, and the issue before the Board is sufficiently clear to make oral argument unnecessary. (United Teachers of Los Angeles (Valadez, et al.) (2001) PERB Decision No. 1453; Monterey County Office of Education (1991) PERB Decision No. 913.) These criteria are met in this case. Thus, we denied the request for oral argument.

ongoing." Franz further states: "This continuing practice was clearly demonstrated during the hearing when SCTA made management's arguments against Ms. Franz on several occasions." (Underline in original.) Consistent with her allegations of collusion in the original unfair practice charge, Franz seems to be arguing that SCTA and the Sacramento City Unified School District (District) continued to collude against her in the PERB proceedings. According to Franz, this continuing course of conduct allows PERB to consider all of her allegations regardless of when the conduct occurred.

Generally, PERB cannot consider conduct that occurred outside of the six-month statute of limitations period. (Empire Union School District (2004) PERB Decision No. 1650.) However, under the "continuing violation" doctrine, a violation within the statute of limitations period may "revive" an earlier violation of the same type that occurred outside of the limitations period. (Compton Community College District (1991) PERB Decision No. 915.) The violation within the limitations period must constitute an independent unfair practice without reference to the prior violation. (North Orange County Community College District (1999) PERB Decision No. 1342.) If these conditions are satisfied, PERB may consider the prior violation even though it occurred outside the statute of limitations period.

For the continuing violation doctrine to apply in this case, SCTA's conduct at the PERB hearing must be of the same type as that alleged in the charge and must stand on its own as an independent unfair practice. In her exceptions, Franz asserts that the District and SCTA continued to collude against her at the PERB hearing. However, neither the original or amended charge alleged any conduct that could constitute collusion between the District and SCTA nor did the complaint contain any allegations of collusion. Accordingly, even if the District and SCTA did collude at the PERB hearing, this conduct cannot form the basis of a continuing violation because no such conduct was alleged in the charge. In regard to the

allegations in the complaint, there was no evidence that SCTA failed at the hearing to return Franz's phone calls, or to notify Franz of the status of her grievances or of upcoming grievance hearings. Thus, the continuing violation doctrine does not overcome the untimeliness of those allegations.

This leaves the allegation that SCTA Executive Director, Manuel Villareal (Villareal), twice misrepresented the state mediator's presence at Franz's November 21, 2003, Level II grievance hearing. But even if, as Franz claims, Villareal again lied about this at the PERB hearing, the continuing violation doctrine would not apply because there is already another alleged instance of misrepresentation by Villareal within the six-month limitations period, namely at the August 19, 2004 meeting with the District's adult education teachers. For these reasons, the ALJ properly dismissed all but the misrepresentation allegation as untimely.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CO-492-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Neuwald and Member Rystrom joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JENNIFER MARION FRANZ, Charging party, v. SACRAMENTO CITY TEACHERS ASSOCIATION, Respondent.	UNFAIR PRACTICE CASE NO. SA-CO-492-E PROPOSED DECISION (December 13, 2006)

Appearances: Jennifer Marion Franz, in pro per, and by Linda "LR" Roberts, Paralegal, Las Abuelas Legal Services, for Jennifer Marion Franz; Diane Ross, Staff Attorney, for Sacramento City Teachers Association, CTA/NEA

Before Christine A. Bologna, Administrative Law Judge (ALJ or judge).

PROCEDURAL HISTORY

This case alleges that the union violated its duty of fair representation to a bargaining unit member. The union denies any violation and asserts that the charge and complaint are time-barred.

On July 20, 2004, Charging party Jennifer Marion Franz (Franz) filed an unfair practice charge (charge or UPC) against the Sacramento City Teachers Association (Association or SCTA).[1] On September 30, 2004, the PERB General Counsel issued a complaint[2] alleging that

[1]The conduct alleged in the UPC was that SCTA did not protect Franz and other Adult education teachers of the Sacramento City Unified School District (District or Sacramento City USD) from retaliation by corrupt the District officials, and colluded with those officials to retain false claims on charging party's teaching record; attached to the charge were 15 documents authored by Franz and others. On July 27, 2004, respondent Association filed its position statement that the UPC was conclusory rather than a statement of detailed facts. The Public Employment Relations Board (PERB) General Counsel's Office issued a warning letter to charging party on September 17, 2004. Franz filed a first amended charge on September 26, 2004.

SCTA breached its duty of fair representation to Franz by: (1) not responding to her "numerous" telephone (phone) calls inquiring about the scheduling of a Level Two grievance hearing from May 4 until October 20, 2003; (2) not returning her phone calls regarding a Level Two grievance hearing after November 21, 2003 until February 2004; (3) not informing her about a February 5, 2004 Level Two grievance hearing; (4) twice misrepresenting that a mediator was present at a November 21, 2003 Level Two grievance hearing in a March 23, 2004 letter to her and at a August 19, 2004 union meeting attended by her and other teachers; and (5) not informing her that her evaluation grievance was not moved to Level Two until March 23, 2004. The complaint alleged that the Association's conduct was inconsistent with its duty to fairly represent employees under Government Code sections 3543.1 (a) and 3544.9, and therefore violated section 3543.6 (b) of the Educational Employment Relations Act (EERA).[3]

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[2]The amended charge was a nine-page, single-spaced written statement. Respondent Association was not given an opportunity to respond to the amended charge before the complaint issued.

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

Section 3543.1 (a) states:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

Section 3544.9 states:

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

On October 12, 2004, respondent SCTA answered the complaint, denying all substantive allegations and asserting affirmative defenses, including a statute of limitations bar. On January 20 and March 1, 2005, informal settlement conferences were conducted but the dispute was not resolved.

On October 26, and December 12 and 20, 2005, and February 1 and 2, 2006, formal hearing was held in Sacramento.[4] On May 31, 2006, the case was submitted for decision following receipt of the parties' post-hearing briefs.

FINDINGS OF FACT

Respondent SCTA admitted in its answer that it is an exclusive representative and Franz is an employee employed in a classification and bargaining unit exclusively represented by it within the meaning of EERA.

The Parties

Charging Party: Franz was first employed by Sacramento City USD in the 1994-95 school year. She was a part-time hourly adult education teacher/English as a Second Language at Old Marshall Adult Education Center (Old Marshall) until the end of the 2002-03 school year.[5] At the beginning of the school year, charging party worked 12 hours a week, Monday

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Section 3543.6 (b) states:

> 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.

[4]Respondent Association raised the statute of limitations issue in its opening statement on the first day of hearing. On December 12 and 20, 2005, Linda Roberts (Roberts) was present as an observer and to provide moral support to charging party. On February 1, 2006, Roberts filed a notice of appearance to represent Franz at the February 1 and 2, 2006 hearings.

[5]In the 2003-04 school year, charging party worked for the District as a substitute adult education teacher at Fremont Adult School.

through Friday. Her work hours were reduced to nine hours a week in December 2002. During the 2002-03 school year, Franz also worked as a substitute teacher in grades K-12 in the Elk Grove and Natomas Unified School Districts. As of the hearing, charging party was in her second year of a permanent full-time position as a kindergarten teacher with Natomas Unified School Districts.

Other Bargaining Unit Employees: Alex Vellanoweth (Vellanoweth) is a program specialist with the District. Laura Leek/Rowley (Leek) and Regina Brooks (Brooks) are adult education teachers who worked at Old Marshall and/or Fremont Adult Schools. There are 150 to 200 full-time and part-time adult education teachers within 3500 District bargaining unit employees represented by SCTA.

Old Marshall and District Administrators/Staff: Mary Prather (Prather) has been the principal at Old Marshall since July 2000. Jacqueline Matranga (Matranga) is the vice-principal of Old Marshall. Joan Polster (Polster) was the assistant superintendent of adult education in the District, and became a district associate superintendent in August 2004. Brad Louie (Louie) is the district director of employee relations. Rhonda Pacheco/Calabrese (Pacheco) is an employee relations officer.

SCTA and CTA Staff: Manuel Villareal (Villareal) has served as a co-executive director of the Association since 1995, and has negotiated each contract between SCTA and the District since 1986. Lori Easterling (Easterling) was the other co-executive director in 2003, leaving in April to work for CTA in governmental relations. In June 2003, Ward Rountree (Rountree) was hired as co-executive director, and served until January 2006 when he became executive director of the Oakland Teachers Association Dori Estes (Estes) has been the grievance secretary in the SCTA office since 2002.

Tom Rogers (Rogers) was the SCTA president from July 1999 through June 2003. Marcie Launey (Launey) is the current SCTA president, succeeding Rogers. Cris Johnson is the adult education teacher representative on the Association Board of Directors.

Marlene Bell (Bell) and Joe Nunez (Nunez) are CTA regional directors in the Sacramento area.

Mediator: David Gilb (Gilb) was a mediator with the California State Mediation and Conciliation Service. Gilb served as a mediator for certain Level Two grievance hearings between SCTA and the District under the parties' contract. Gilb is now the director of the Department of Personnel Administration.[6]

Contract Language

The SCTA-District contracts are available to bargaining unit employees by hard copy and through posting on-line.

Article IV of the 2002-04 contract describes **Grievance Procedures**. A grievance must be presented at the appropriate level within 30 days of the act or conduct complained of. Evaluations of bargaining unit members, except for alleged violations of procedural matters, cannot be grieved.

The grievant and the principal or unit administrator may address the grievance informally or formally after a formal grievance is filed; the informal process may include SCTA. Level One grievance hearings are conducted with the grievant, personally or with a designated SCTA representative, and principal or site administrator. Within ten working days

[6]On December 13, 2005, California State Mediation and Conciliation Service filed a motion to quash charging party's subpoena of Gilb on the grounds of privileged communications (Cal. Lab. Code sec. 65; Cal. Evid. Code 1119; 51 Ops. Atty. Gen. 201). The motion was granted.

of the Level One hearing, the principal or administrator must respond in writing to the grievant and Association settlement agreements reached at the Level One step are not precedential.

The Association may request a Level Two hearing and written decision by the district superintendent within ten working days of receipt of the Level One decision; the request is filed with the Sacramento City USD Office of Employee Relations, which tries to schedule mediations twice a month. There are two Level Two tracks: Mediation and Interest-Based; SCTA has the right to choose either. Level Two mediation is informal and no record of the proceeding is made; note takers cannot be present. If settlement is not possible, the mediator can give a bench opinion to the parties which is advisory only. If the parties agree to be bound by the mediator's recommendation, a settlement agreement is written and signed. If the grievance is not resolved within 20 working days of the last Level Two mediation, the Association may appeal to Level Three, Arbitration.

Article V concerns **Hours of Employment**. Section 5.12.10 addresses hourly adult education teachers hired after April 1987. Adult education teachers obtain permanency only if they work 18 hours a week or more.

Article VI discusses **Evaluations**. Evaluations are conducted annually for probationary or temporary employees, and every other year for employees with permanent status. Pre-evaluation conferences between the site administrator and evaluatee must be completed by November 1. The use of publisher's norms established by standardized tests cannot be used in evaluations. Specific recommendations to improve performance deficiencies must be made. Evaluations must be completed by April 1. Teachers whose summary rating is

less than 3 (satisfactory)[7] must be provided with a written improvement plan. Substitute teachers are rated once by the Principal unless there is a need to change the rating.

Article X addresses **Personnel Files**. Documents are not filed in employee official personnel files for 14 calendar days to allow the employee an opportunity to review and comment. Erroneous or invalid material in the official personnel files must be sealed.

Article XIV summarizes personal and academic freedoms. Teachers are entitled to full citizenship rights and may not be disciplined for their exercise of such rights.

Evaluation Grievance

On April 1, 2003, charging party received a performance evaluation as a temporary teacher from Old Marshall Vice Principal Matranga. She was rated 4-needs improvement in seven categories, 3-satisfactory in 12 criteria, and 3-satisfactory overall. Specific recommendations for improvement were listed, as well as comments on areas of outstanding performance.

On April 3, 2003, SCTA President Rogers and Franz filed a grievance challenging the evaluation, citing violations of Article VI; asserting a lack of notice of deficiencies or recommendations for improvement; and claiming that publisher's norms established by standardized tests were used; the grievance requested removal of the evaluation, or changing it to satisfactory.

A Level One grievance hearing was held in late April or early May 2003 at Old Marshall attended by the charging party, Rogers, Principal Prather, and Matranga. At the hearing, Franz claimed that the cited violations of the contract were moot and the entire evaluation was invalid because she was a substitute teacher and could not be evaluated more

[7]The ratings are: 1-outstanding; 2-commendable; 3-satisfactory; 4-needs to improve; and 5-unacceptable. The categories of employees on the evaluation form are: temporary; 1st, 2nd, and 3rd year probationary; and permanent.

than once. She also complained about benchmark fraud and other illegal activities by the site administrators. Rogers did not understand charging party's argument that she was a substitute teacher because she was not a substitute; he tried to focus on the items cited in the grievance. Rogers believed that the evaluation could be changed if standardized test data was used in it, but there were no grounds under the contract to remove the evaluation from the official personnel files.

Rogers, Prather, and Matranga participated in another Level One grievance hearing at Old Marshall on April 29, 2003 with Leek, who had also filed a grievance claiming that standardized test scores were used in her evaluation. That grievance settled by removing the objectionable portions of the evaluation and rewriting it. Rogers proposed the same resolution to Franz, who rejected it because she wanted the evaluation removed from her official personnel files. Rogers did not believe this result was possible under the contract.

After the Level One hearing, Rogers and charging party spoke in the parking lot for about a half-hour. Franz complained about mistreatment of teachers as Old Marshall and test score manipulation. Rogers did not remember charging party requesting him to move her grievance to Level Two, or stating that "she would see him at the Level Two hearing" during their conversation.

On May 6, 2003, Matranga responded to the Level One grievance, explaining why the contract sections were not violated or inapplicable to Franz. On May 11, 2003, charging party wrote to Matranga, "summarizing points" from the Level One grievance hearing, and listing three reasons why the performance evaluation "must be removed" from her official personnel files. Copies of the letter were sent to Prather, Polster, Rogers, the Sacramento City USD Board of Trustees, the District Superintendent, and the District Personnel Director.

Respondent SCTA stipulated that Franz' evaluation grievance was not moved to Level Two. Rogers testified that he could not recall why the grievance was not elevated.

On May 29, 2003, charging party called Rogers at the SCTA office to check on the status of the grievance; Estes gave the message to him. On June 5 and 11, 2003, Franz again called Rogers; Estes gave him the messages. On June 30, 2003, charging party wrote to Rogers complaining about "bullying" by Old Marshall administrators in using the evaluation form for permanent full-time teachers to evaluate part-time hourly teachers; the letter did not mention her evaluation grievance. On July 21, 2003, Franz called Rountree; Estes gave him the message There is no evidence that Rogers or Rountree responded to charging party's calls. Other than the May 29, 2003 phone call, there is no evidence that Franz further inquired about her evaluation grievance or requested that it proceed to Level Two.

SCTA Co-Executive Director Villareal was unaware of charging party's April 2003 evaluation grievance until he received a letter from her dated February 27, 2004. He researched the SCTA grievance files and located it. Nothing could be done because the timeframes for moving the grievance to Level Two expired in May 2003.

Letter of Reprimand Grievance

On December 9, 2002, Franz received a letter of reprimand from Vice Principal Matranga for insubordination and disobedience in failing to meet with her on November 13, for a pre-observation conference, despite prior written notice of the meeting on November 1.[8]

[8]The memorandum (memo) given to charging party on November 1, 2002 set forth three dates for conferences or observations on November 13, 14, and 15. The memo further advised Franz to contact Matranga if the dates conflicted with her schedule so the appointments could be rescheduled in November. charging party did not request rescheduling because she believed the evaluations were inappropriate. Franz admitted that Matranga told her to attend the conference and she did not attend.

The letter of reprimand included suggestions for correcting her conduct, and directed charging party not to make negative comments about Old Marshall administrators to other staff.

On January 8, 2003, SCTA Co-Executive Director Easterling and Franz filed a grievance appealing the letter of reprimand, citing violations of Articles X and XIV, complaining the letter of reprimand provided only ten days to respond rather than 14, and asserting the letter of reprimand was untrue; the requested remedy was removal of the letter of reprimand from charging party's official personnel files. Franz admitted that Easterling told her that the contract allowed her to be evaluated.

The grievance was settled by revising letter of reprimand to remove the language about not making negative comments. A revised letter of reprimand issued on April 1, 2003 and was placed in Franz' official personnel files. On April 25, 2003, a second grievance was filed by Rogers and charging party challenging the revised letter of reprimand, citing violations of Article X, and claiming that the letter of reprimand contained "untrughts;" the requested remedy was removal of the letter of reprimand from the official personnel files. The grievance requested a Level One hearing.[9]

Co-Executive Director Villareal first learned about the revised letter of reprimand grievance in October 2003 when he saw it on a list of grievances pending with the District.[10] Villareal requested a Level Two hearing which was scheduled on November 21, 2003.

First Level Two Grievance Hearing on Revised Letter of Reprimand

At 3:00 p.m. on November 21, 2003, a Level Two hearing on the revised letter of reprimand grievance was conducted at the SCTA office. In attendance were Franz, Co-

[9]A Level One grievance hearing was held on May 4, 2003.

[10]Villareal had never before seen a grievance filed, settled, and refiled, raising the same issue.

Executive Directors Villareal and Rountree, Associate Superintendent Polster, Principal Prather, Employee Relations Officer Pacheco, and Mediator Gilb. Charging party wanted the letter of reprimand removed from her official personnel files. She also discussed benchmark fraud and other alleged illegal activities at Old Marshall.[11]

Franz testified that Mediator Gilb was not present at the November 21, 2003 Level Two grievance hearing. Vellanoweth testified that at the end of his own Level Two grievance that day, which started at 1:30 p.m. and lasted a half-hour, the mediator walked out with him to the parking lot, got into his car, and drove away. Villareal did not remember the mediator leaving at any point during the three Level Two grievances scheduled that day. Villareal testified that the mediator was present at the November 21, 2003 hearing. His testimony was corroborated by Polster and Prather.

On November 24, 2003, Franz wrote to Villareal and Rountree thanking them for their representation at the Level Two grievance hearing on November 21. Her letter did not complain about or otherwise mention the lack of a mediator at the grievance hearing.

Second Level Two Hearing on Revised Letter of Reprimand Grievance

On January 13, 2004, Franz called the SCTA office to complain about the Level Two hearing. Estes informed her than another date, February 5, 2004, had been set, and asked which time(s) she and Leek wanted that day. Charging party handed the phone to Leek who

[11]Franz claimed that she brought up her evaluation grievance at the November 21, 2003 Level Two hearing on the revised letter of reprimand, and Employee Relations Officer Pacheco was not present at the hearing. Villareal testified that the evaluation grievance was not mentioned and he did not know of its existence at the time. Polster testified that the evaluation grievance was not discussed at the November 21, 2003 hearing, and that if the mediator was present, so was the employee relations officer.

selected the later hearing time. Rountree directed Estes to send confirming letters of the Level Two hearings to Franz and Leek, which she did.[12]

On February 5, 2004, a second Level Two hearing on Franz' revised letter of reprimand was held at SCTA. Attending were Co-Executive Director Villareal, Louie and Pacheco from the District Employee Relations Office, Vice Principal Matranga, Principal Prather, Assistant Superintendent Polster, and Mediator Gilb. Charging party was not present. The parties reached a tentative settlement to remove the revised letter of reprimand from Franz' official personnel files, change it to a letter of concern, and place that letter in the principal's correspondence file; the settlement required review and approval by Franz and the SCTA Board of Directors.

On February 13, 2004, Villareal sent a memo and the proposed settlement to Franz. The memo stated that the settlement achieved the grievance's goal of removing the letter of reprimand from her official personnel files; once the letter of reprimand was out of the official personnel files, it could not be used against her under the contract. The memo further advised that the proposed settlement was consistent with past grievance settlements, and would be recommended to the SCTA Board.

On February 27, 2004, Franz wrote to Villareal and Rountree that she was disappointed with the results of the proposed Level Two grievance settlement because she was not invited to the Level Two grievance hearing or informed of it, despite repeated phone calls.[13] The letter further stated that charging party should have been at the Level Two hearing, and requested a

[12]In the letter, Franz was informed that her Level Two hearing was at 2:00 p.m. on February 5, 2004 at SCTA. In a July 17, 2004 letter sent to SCTA President Launey after obtaining copies of her grievance files, charging party contended that the January 13, 2004 letter was recently manufactured.

[13]Franz testified that she "apparently" was invited to the second Level Two hearing but had "no record" of it.

new Level Two hearing to address a second issue – removal of an "illegal negative performance review" from her official personnel files.

Villareal researched the SCTA grievance files and found Franz' evaluation grievance. On March 23, 2004, Villareal responded to charging party's February 27, 2004 letter. He invited Franz to address the SCTA Board on one of two dates in April 2004.[14] The memo further stated that in the revised letter of reprimand grievance, there were two Level Two hearings; charging party attended the first hearing; Estes talked to Franz about the second hearing; and the mediator reiterated his preliminary "advisory" that the letter of reprimand should be removed from the official personnel files and placed in the principal's correspondence file. As for the evaluation grievance, the memo advised that the evaluation should remain in Franz' official personnel files because the grievance was not moved to Level Two, and the evaluation was satisfactory so no harm was done.

Returning Phone Calls

The amended charge alleges that Co-Executive Director Villareal did not respond to Franz' "numerous" phone calls between October 2002 and November 2003. The complaint alleges that Villareal did not return charging party's phone calls between May 4 and October 20, 2003 until she "complained" to CTA Regional Manager Nunez. The complaint further asserts that Villareal did not return Franz' "numerous" phone calls from November 21, 2003 until February 2004.

[14]Franz addressed the SCTA Board on April 27, 2004, and expressed her concerns about representation by SCTA. On April 30, 2004, SCTA President Launey advised charging party that the Board had accepted the tentative settlement in her letter of reprimand grievance. The settlement was signed by Villareal and Louie on May 18 and 20, 2004, respectively. On August 19, 2004, Franz, Leek, Brooks, and Vellanoweth met with CTA Regional Director Bell, Villareal, and Launey to discuss adult education teachers' concerns.

On April 6, 2004, Franz wrote to Villareal and Rountree in reply to the March 23, 2004 memo. The letter stated that Villareal did not return phone calls until "we" asked for help in Fall 2003. The letter further admitted that since the Fall of 2003, Villareal or the SCTA secretary has returned our calls and SCTA President Launey "has also been very helpful in this regard." Charging party testified that the timeframe for SCTA's failure to return calls was October 2002 through November 2003.

On July 12, 2004, Franz sent a letter to Launey stating that she was disappointed to receive her April 30, 2004 letter. The letter further stated that Villareal refused to return any phone calls from October 2002 until November 2003, and only started returning calls after help was sought from CTA Regional Director Nunez.[15]

Estes prepared a "contact timeline" of communications between Franz and the SCTA office. This log reflects phone calls from charging party to Rogers on May 29, and June 5 and 11, 2003, and from Franz to Rountree on July 21, 2003 and January 13, 2004. There is no record of any phone call from charging party to Villareal until February 20, 2004.

Credibility Determinations

A credibility determination must be made in deciding whether Mediator Gilb was present at the first Level Two grievance hearing on November 21, 2003 over Franz' revised letter of reprimand since the complaint alleges that Gilb was not there and Co-Executive Director Villareal twice misrepresented the mediator's attendance. Charging party insisted that the mediator was not present, and the reason there was no resolution. Vellanoweth testified that the mediator left the SCTA premises after his own Level Two hearing which started at 1:30 p.m. and took 30 minutes. Villareal testified that Mediator Gilb was present for the Level

[15]Franz testified that after she called Nunez on October 22, 2003 to see if he received her October 20, 2003 letter, she received a phone call from Villareal within 30 minutes.

Two hearing and he did not recall the mediator leaving. Prather and Polster testified that the mediator was present at the Level Two hearing.

Using the standards of credibility set forth in Evidence Code section 780,[16] it is concluded that Mediator Gilb was present at the November 21, 2003 Level Two grievance hearing for the following reasons. Even accepting Vellanoweth's testimony that the mediator departed at 2:00 p.m., Gilb could have returned in time for Franz' 3:00 p.m. Level Two hearing which Vellanoweth admittedly did not attend. More importantly, charging party's November 24, 2003 contemporaneous letter did not mention the lack of a mediator, but instead "thanked" Villareal and Rountree for their representation at the November 21, 2003 grievance hearing. Finally, Villareal's testimony is corroborated by two independent witnesses without any stake in the outcome of this proceeding. There is no credible reason for these witnesses to fabricate their testimony to Franz' detriment.

By contrast, charging party has a motive to alter her testimony since she has a direct stake in the outcome of this case. Franz' demeanor in taking notes while testifying, refusal to give direct answers during cross-examination, and continuous attempts to ask questions or provide answers to areas outside the scope of the complaint and hearing, despite repeated admonitions by the judge, undermined her credibility.

A credibility determination must also be made to decide if Franz has proven that Villareal did not return her "numerous" phone calls about her grievances from October 2002 until Fall or November 2003, as alleged in the complaint. Charging party received the letter of reprimand on December 9, 2002; the letter of reprimand was grieved on January 8, 2003. The grievance was settled and a revised letter of reprimand issued on April 1, 2003; the revised

[16]The standards are demeanor; character of testimony; capacity to perceive/recollect/communicate; bias/interest/motive; prior consistent/inconsistent statements; attitude; admissions of untruthfulness; and existence or nonexistence of facts testified to.

letter of reprimand was grieved on April 25, 2003. Franz received the performance evaluation on April 1, 2003; the evaluation was grieved on April 3, 2003. These undisputed facts demonstrate that charging party had no reason to contact Villareal or anyone else at SCTA about grievances which were non-existent until early April 2003. The evidence reflects that Franz called SCTA and left three messages for Rogers in May and June 2003, and two messages for Rountree in July 2003 and January 2004. The testimony of Estes, a credible witness without a stake in the outcome of this proceeding whose verbal assertions are corroborated by a contemporaneously prepared written contact log and correspondence to charging party, is credited over Franz' uncorroborated assertions to the contrary. Evid. Code sec. 780, supra.

Finally, a credibility determination must be made in deciding whether SCTA notified Franz of the second February 5, 2004 Level Two grievance hearing, since the complaint alleged that charging party was not informed about the hearing and did not learn about it until May 2004 when she reviewed her grievance files. Based on the findings of fact (Second Level Two Hearing on Revised Letter of Reprimand Grievance), supra, the credible testimony of Estes for the reasons set forth in the previous paragraph, and the admission of Franz that she was "apparently invited" to the hearing, it is concluded that SCTA provided advance notice of the scheduled Level Two February 5, 2004 grievance hearing in its January 13, 2004 letter to charging party. Franz' uncorroborated assertions to the contrary, and her claim that the SCTA letter was fabricated, are not credited. Evid. Code sec. 780, supra.

ISSUE

1. Are the allegations of the complaint time-barred?
2. If not, did SCTA violate its duty of fair representation to Franz?

CONCLUSIONS OF LAW

Statute of Limitations

This charge was filed on July 20, 2004. Therefore, allegations before January 2004 are barred by the EERA statute of limitations. The first amended UPC was filed on September 26, 2004. Thus, if the amended charge does not "relate back" to the original UPC, events prior to March 27, 2004 are time-barred.

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The statutory limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by respondent SCTA in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

In discharging this burden, Franz asserts that she first learned Villareal claimed the mediator was at the November 21, 2003 Level Two grievance hearing when she received his February 13, 2004 memo. Charging party also states that the amended charge "relates back" to "whistleblower reprisals, collusion, failure to return phone calls, failed representation, and missed timelines mentioned in the charge."

The "relation back" doctrine allows for exception to the limitations period if the amended charge is sufficiently connected to the original charge. The Board has found amendments to relate back when they clarified existing or added a new legal theory based on the same set of facts in the original charge. Temple City Unified School District (1989) PERB Decision No. Ad-190; Gonzales Union High School District (1984) PERB Decision No. 410. The relation back doctrine does not apply, however, when the amended charge raises new factual allegations, separate conduct or acts not sufficiently related to or raised by the initial charge. University of California Regents (Lawrence Livermore Laboratory) (1997) PERB Decision No. 1221-H; Los Angeles Unified School District (APSSE) (1992) PERB Decision No. 918; University of California (1990) PERB Decision No. 826-H; Burbank Unified School District (1986) PERB Decision No. 589; Monrovia Unified School District (1984) PERB Decision No. 460 (Monrovia).

PERB regulation 32615 (a) (5) requires a charge to contain "a clear and concise statement of facts and conduct alleged to constitute an unfair practice." This July 20, 2004 charge alleged SCTA's failure to protect Franz and other adult education teachers from retaliation by corrupt the District officials and the Association's collusion with those same individuals to retain false claims on charging party's teaching record. This statement does not contain any facts. Because there are no factual allegations in the initial charge to "relate back" to, the amended charge cannot relate back to the original charge.

In Monrovia, supra, the Board denied an amendment under the relation back doctrine, concluding that "the issue was not raised by the initial charge, notwithstanding that some mention of it was buried in the attachments. . . . the District's mention of this issue in its Answer does not cure the fact that this violation was never charged." Thus PERB found that the amendment was not sufficiently related to the original charge. Here, the "statement of

facts" contained no facts and was accompanied only by 15 attached documents. Based on Monrovia, the amended charge cannot relate back to extend the statute of limitations.

The charge that SCTA/Villareal failed to return charging party's phone calls between October 2002 and Fall/November 2003 (first amended charge and testimony), and between May 4 and October 20, 2003 (complaint) are barred as outside the six month EERA statute of limitations, as these claims occurred prior to both January 20 and March 27, 2004.[17]

The allegation that Franz was not informed until March 23, 2004 about SCTA's failure the evaluation grievance to Level Two is also barred by the statute of limitations as falling outside March 27, 2004. In addition, the record evidence, charging party's testimony and letters, demonstrates that the Association's representatives responded to her general inquiries after October 20, 2003. Franz' only inquiries about the evaluation grievance were her May 29, 2003 phone call to Rogers and her February 27, 2004 letter to Villareal, who responded with the March 23 memo.[18]

The allegation that Franz was not informed by SCTA about the second February 5, 2004 Level Two grievance on the revised letter of reprimand is similarly time-barred as outside March 27, 2004. Furthermore, charging party's February 27, 2004 letter to Villareal complained about the proposed settlement[19] and "not being invited" to the Level Two hearing. Thus, this correspondence reflects that Franz knew the Level Two hearing was held and she

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[17]The allegation in the complaint that SCTA did not respond to Franz' phone calls from November 21, 2003 until February 2004 is not supported by the evidence. Findings of Fact (Returning Phone Calls).

[18]The complaint did not allege that SCTA's failure to move the evaluation grievance to Level Two violated its duty of fair representation to Franz.

[19]The complaint did not allege that SCTA violated its duty of fair representation to Franz by settling the revised letter of reprimand grievance without her approval.

did not attend the hearing as of February 27, 2004, rather than in May 2004 upon reviewing her grievance files as alleged in the complaint.

The sole allegations in the complaint not time-barred by the EERA statute of limitations are that the mediator was not at the first November 21, 2003 Level Two grievance hearing on the revised letter of reprimand, and Villareal twice misrepresented that the mediator was present at that Level Two hearing by his March 23, 2004 letter and at a union meeting on August 19, 2004.

Duty of Fair Representation

Franz has alleged that exclusive representative SCTA denied her the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). 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, charging party must show that respondent Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), supra, the Board stated:

> . . . Whether a union has met its duty of fair representation in [grievance processing] depends not upon the merits of the grievance but rather upon the union's conduct in processing or failing to process the grievance. 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.

PERB has also held that "a union's honest, reasonable determination not to pursue a grievance

does not breach the duty of fair representation, regardless of the merits of the grievance." California State Employees' Association (Calloway) (1985) PERB Decision No. 497-H.

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.]

With regard to when "mere negligence/unintentional omissions," as opposed to a "reckless disregard" for employee rights, might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270 [113 LRRM 3532], at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090].)

Mediator's Presence at November 21, 2003 Level Two Grievance Hearing

The record evidence establishes that Mediator Gilb did attend the first Level Two grievance hearing on the revised letter of reprimand. Findings of Fact (Credibility Determinations). Therefore, SCTA and Villareal made no misrepresentations about his presence at that Level Two grievance hearing, contrary to the allegations in the complaint.

Accordingly, no violation of SCTA's duty of fair representation to Franz has been established by the evidence.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CO-492-E, Jennifer Marion Franz v. Sacramento City Teachers Association, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130; see also Government Code sec. 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 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, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Christine Bologna
Administrative Law Judge