STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN BUSSMAN, Charging Party, v. ALVORD EDUCATOR'S ASSOCIATION, Respondent.	Case No. LA-CO-1378-E PERB Decision No. 2189 June 29, 2011

Appearances: John Bussman, on his own behalf; California Teachers Association by John F. Kohn, Attorney, for Alvord Educator's Association.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by John Bussman (Bussman) of a dismissal (attached) of his unfair practice charge by a Board agent. The charge alleged that the Alvord Educator's Association (Association) violated the Educational Employment Relations Act (EERA)[1] by failing to represent him, retaliating against him, and defaming him. Bussman alleged that this conduct constituted a violation of EERA sections 3543.3, 3543.5, 3543.6, 3544.9, and 3571.1.

The parties, facts, and issues in the present charge are identical to the parties, facts, and issues in *Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046 (*Bussman I*), with one exception: the present charge also alleges that the Association failed to respond to Bussman's December 2008 re-request for representation in litigation with the

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

Alvord Unified School District regarding the legality of certain contract provisions. Thus, except for this single issue, the present charge is identical to the unfair practice charge filed by Bussman against the Association in January 2008 and later dismissed by the Board in *Bussman I.*

The Board agent, relying on *City of Porterville* (2007) PERB Decision No. 1905-M (*Porterville*), dismissed the previously adjudicated issues based on the doctrines of collateral estoppel and res judicata. The Board agent also dismissed the remaining allegation as both untimely and lacking merit. It is noteworthy, however, that subsequent to the dismissal of this case, the Board issued *Grossmont Union High School District* (2010) PERB Decision No. 2126 (*Grossmont*), in which the Board overturned *Porterville* to the extent it granted preclusive effect to a dismissal of an unfair practice charge based solely on a Board agent's charge investigation.

We have reviewed the entire record, and except for the application of the doctrines of collateral estoppel and res judicata as set forth in *Porterville*, we find the warning and dismissal letters well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself, subject to the following discussion regarding reversal of *Porterville* and its impact on this case.

DISCUSSION

A. The Doctrines Of Res Judicata And Collateral Estoppel Do Not Apply In This Case

As indicated above, the Board agent dismissed the previously adjudicated issues in this case based on the doctrines of collateral estoppel and res judicata as set forth in *Porterville*. Collateral estoppel is an aspect of the doctrine of res judicata. Under collateral estoppel, a

prior judgment between the same parties operates as an estoppel or conclusive adjudication with respect to those issues that were actually litigated and necessarily determined in the prior action. (*State of California, Department of Personnel Administration* (1991) PERB Decision No. 871-S.)

In *Grossmont*, the Board explained that to be "actually litigated" for purposes of collateral estoppel, an issue must have been decided based on the presentation of evidence at a hearing. Since a Board agent's review of a charge to determine whether it establishes a prima facie case is not based on such a presentation of evidence, the Board concluded that a Board agent's review of a charge, to determine whether it establishes a prima facie case of an unfair practice, does not meet the "actually litigated" requirement for collateral estoppel. Accordingly, the Board overruled *Porterville* to the extent it granted preclusive effect to a dismissal of an unfair practice charge based solely on a Board agent's charge investigation.

The instant dismissal, however, was based, in part, on the preclusive effect of a Board agent's dismissal in *Bussman I.* In light of the *Grossmont* case, the doctrines of res judicata and collateral estoppel no longer apply in this case. Accordingly, the portions of the warning and dismissal letters that rely on these doctrines are hereby struck and are not incorporated into the Board's decision in this matter.

B. Timeliness

Notwithstanding the reversal of *Porterville*, however, the previously adjudicated issues must be dismissed. As explained in the warning letter, in cases alleging a breach of the duty of fair representation, the six-month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*United Teachers of Los Angeles (Hopper)*

(2001) PERB Decision No. 1441; *Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889.) Relative to this case, repeated union refusals to process a grievance over a recurring issue do not start the limitations period anew. (*California State Employees' Association (Calloway)* (1985) PERB Decision No. 497-S.)

In his timeliness analysis, the Board agent relied on *Bussman I* for the proposition that the statute of limitations for the previously adjudicated issues began to run on January 30, 2007. As explained by the Board in *Bussman I*:

> The Board also rejects Bussman's argument on appeal that a September 17, 2007, email from the California Teachers Association (CTA) indicates a renewed promise of representation with respect to the alleged illegal contract terms so as to bring a duty of fair representation claim against AEA within the six month statute of limitations. . . . However, nothing in the email, or any other evidence presented by Bussman, demonstrates a valid legal argument that CTA's statements or actions can be imputed to AEA. Furthermore, the September 17 email does not, as Bussman claims, demonstrate that he was being provided representation by either CTA or AEA as of that date, in that it specifically rebukes Bussman for any assumption that his individual needs should dictate further action, and indicates that any action CTA was taking to resolve problems regarding the disputed contract terms was done on behalf of all affected bargaining unit members, not Bussman individually. Therefore, the January 30, 2007, letter from AEA denying Bussman representation regarding the disputed contract terms, starts the statute of limitations on that issue. Since this date is approximately one year prior to the filing of the unfair practice charge, dismissal is proper.

Based on our review, we find Board's timeliness analysis in *Bussman I* is directly applicable to the instant case and find nothing in the record to warrant consideration of an alternative date. We, therefore, conclude that January 30, 2007, continues to be the date on which the statute of limitations began to run for the previously adjudicated issues.

Accordingly, we find the Board agent's utilization of this date in his statute of limitation analysis was appropriate and that the previously adjudicated issues were properly dismissed as untimely.

ORDER

The unfair practice charge in Case No. LA-CO-1378-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Dowdin Calvillo joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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November 19, 2009

John Bussman

Re: *John Bussman v. Alvord Educator's Association*
Unfair Practice Charge No. LA-CO-1378-E
DISMISSAL LETTER

Dear Mr. Bussman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 2, 2009 (original charge) and was amended on August 4 and November 16, 2009. John Bussman alleges that the Alvord Educator's Association (Association or AEA) violated sections 3543.3, 3543.5, 3543.6, 3544.9, and 3571.1 of the Educational Employment Relations Act (EERA or Act).[1] Mr. Bussman also alleges that the Association violated section 45028 of the California Education Code.

Mr. Bussman was informed in the attached Warning Letter dated November 5, 2009, that the above-referenced charge did not state a prima facie case. Mr. Bussman was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in the November 5 Warning Letter, he should amend the charge. Mr. Bussman was further advised that, unless he amended the charge to state a prima facie case or withdrew it prior to November 16, 2009, the charge would be dismissed.

On November 16, 2009, PERB received an amended charge from Mr. Bussman. The November 16 amended charge begins by correcting factual statements in the November 5 Warning Letter. The November 16 amended charge provides in relevant part:

> December 21, 2006 – "President Kerr informed Mr. Bussman" should read ["]Ms. Kyne informed Mr. Bussman.["]
>
> August, 2006 – AEA President Gary Hardgrave along with Karen Bost met with her 2 times (according to Hardgrave) or 3 times (according to Bost) with [Alvord Unified School District (District)] officials on behalf of Bussman and other impacted AEA members in response to Bussman's letter filed with the

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

> [D]istrict by attorney Marianne Reinhold. These facts are supported by the enclosed documentation.
>
> September 17, 2007 – "Ms. Bost informed Mr. Bussman that [the California Teachers Association (CTA)] was working with the [D]istrict" should read ["]Ms. Bost informed Mr. Bussman that AEA and CTA were working with the [D]istrict.["] Please reference the letter dated September 17, 2007 sent to Bussman by Ms. Bost. Ms. Bost claims that AEA President Hardgrave is an active participant in representing impacted AEA members including Bussman. "We" and "us" are the pronouns of choice.
>
> "In the Fall of 2008, Mr. Bussman did not receive teaching materials should read ["]in the fall of 2007.["] Although Mr. Bussman's job assignment was changed in both the fall of 2007 and then again in the fall of 2008, it was only in the fall of 2007 that [the District] failed to provide as much as a Teacher's Edition text for Bussman's newly assigned class.
>
> August 1, 2008 – AEA attorney John Kohn makes the fraudulent claim to PERB that AEA "continues to bargain the issue with the [District]" has been completely omitted. August 1, 2008 should read ["]AEA makes a fraudulent claim to PERB stating that they are continuing to represent impacted members including Mr. Bussman.["]

In the November 16 amended charge, Mr. Bussman also argues at length that the rationale in the November 5 Warning Letter and the rationale in *Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046 is flawed. Nevertheless, as stated in the November 5 Warning Letter, with the exception of Mr. Bussman's allegation that the Association failed to respond to his December 2008 request that it represent him in litigation with the District regarding the legality of certain contract provisions, the above-titled charge consists of allegations previously litigated and decided on their merits by the Board in *Alvord Educator's Association (Bussman)*, *supra*, PERB Decision No. 2046.

A charging party is barred by the doctrines of collateral estoppel and res judicata from filing an unfair practice charge that merely re-raises the same cause(s) of action and issue(s) previously addressed and decided on the merits by PERB. (*City of Porterville* (2007) PERB Decision No. 1905-M.) Mr. Bussman's opinion that the Board in *Alvord Educator's Association (Bussman)*, *supra*, PERB Decision No. 2046 did not decide the case on its merits and that the Board's reasoning in *Alvord Educator's Association (Bussman)*, *supra*, PERB Decision No. 2046 is erroneous does not preclude the doctrine of collateral estoppel from barring the re-litigation of issues raised in the above-titled charge that were previously raised and decided on their merits by the Board in *Alvord Educator's Association (Bussman)*, *supra*, PERB Decision No. 2046. Accordingly, for the reasons stated above and in the November 5 Warning Letter,

all of the allegations in the above-titled charge are barred by the doctrine of collateral estoppel, except for the allegation that the Association failed to respond to Mr. Bussman's December 2008 request that it represent him in litigation with the District regarding the legality of certain contract provisions.

As stated in the November 5 Warning Letter, however, Mr. Bussman has not demonstrated the allegation that the Association failed to respond to his December 2008 request for representation in litigation with the District regarding the legality of certain contract provisions is within EERA's six-month statute of limitations. The Board in *Alvord Educator's Association (Bussman)*, *supra*, PERB Decision No. 2046, held that the statute of limitations began to run on the issue of whether the Association violated EERA by failing to represent him in litigation against the District challenging the legality of certain contract provisions on January 30, 2007. Repeated union refusals to process a grievance over a recurring issue do not start the limitations period anew. (*California State Employees Association* (1985) PERB Decision No. 497-S.) Thus, Mr. Bussman's re-request for representation on that issue in December 2008 does not start the statute of limitations period anew. (*Ibid.*)[2]

Further, as explained in the November 5 Warning Letter, even if this allegation was within EERA's six-month statute of limitations, the duty of fair representation does not apply to extra-contractual forums. (*California Teachers Association (Radford)* (2005) PERB Decision No. 1763.) Mr. Bussman asserts that the Association breached the duty of fair representation by not representing him in litigation over whether specific contract provisions violate the California Education Code. Pursuits of alleged violations of the California Education Code involve extra-contractual forums that are outside the Association's exclusive control; i.e., do not involve the Agreement's grievance procedure. Thus, Mr. Bussman has not established that the Association breached the duty of fair representation by failing to respond to his requests to represent him in litigation against the District over perceived violations of the California Education Code. (*Ibid.*)

In the November 16 amended charge, Mr. Bussman does not provide any facts or argument regarding the allegations in the original charge that the Association violated Government Code sections 3543.3, 3543.5, and 3571.1. Accordingly, Mr. Bussman's allegation that these Government Code sections were violated are dismissed for the reasons stated in the November 5 Warning Letter.

In the November 16 amended charge, Mr. Bussman alleges for the first time that the Association violated California Education Code section 45028. Allegations regarding alleged violations of the California Education Code fall outside of PERB's jurisdiction. (*Los Angeles Unified School District* (2009) PERB Decision No. 2011.) Accordingly, Mr. Bussman's allegation that the Association violated the California Education Code is dismissed.

[2] Mr. Bussman's assertion that the Board erred in holding that the statute of limitations began to run on that issue on January 30, 2007 is inconsequential at this time. The undersigned is obligated to follow Board precedent.

Furthermore, the above-titled charge is hereby dismissed in its entirety based on the reasons stated above and for the reasons stated in the November 5 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[3] Mr. Bussman may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (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 during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (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 PERB 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. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If Mr. Bussman files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document

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

may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

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

TAMI R. BOGERT
General Counsel

By _____
Sean McKee
Regional Attorney

Attachment

cc: John F. Kohn, Attorney

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

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November 5, 2009

John Bussman

Re: *John Bussman v. Alvord Educator's Association*
Unfair Practice Charge No. LA-CO-1378-E
WARNING LETTER

Dear Mr. Bussman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 2, 2009, and was amended on August 4, 2009. John Bussman alleges that the Alvord Educator's Association (Association) violated sections 3543.3, 3543.5, 3543.6, 3544.9, and 3571.1 of the Educational Employment Relations Act (EERA or Act).[1]

Background

In January 2008, Mr. Bussman filed an unfair practice charge against the Association (LA-CO-1329-E), alleging that the Association violated EERA by failing to represent him, retaliating against him, and defaming him. PERB's General Counsel's Office dismissed Mr. Bussman's charge for failure to state a prima facie case.[2] Mr. Bussman appealed the dismissal of his charge to PERB's Board. In *Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046, the Board affirmed the dismissal of Mr. Bussman's charge in LA-CO-1329-E for failure to state a prima facie case.

In Mr. Bussman's August 4 amended charge, Mr. Bussman alleges in relevant part:

> [I] would like to reiterate that [the Association] put forth both misleading and blatantly false information in the following case:

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

[2] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

> LA-CO-1329-E. Although fully explained and documented, the PERB decision failed to recognize all the facts involved. This information is relevant to the charges filed in Case number LA-CO-1378-E.
>
> In addition, I would like to reiterate that in defense of the charges filed in case number LA-CO-1329-E, [the Association] renewed claims of representation which have proven to be false. I also request that you take judicial notice of *Adair v. Stockton USD* in your analysis of the events contained in case number LA-CO-1378-E.

Facts as Alleged

Mr. Bussman is employed by the Alvord Unified School District (District) and is a member of a bargaining unit exclusively represented by the Association. In the 2005-2006 school year, the Association and the District reached a tentative collective bargaining agreement (CBA or Agreement), but the Association did not provide the details of the tentative CBA to its members. Later, some bargaining unit members, including Mr. Bussman, discovered that the terms of the tentative CBA provided that bargaining unit members "with between three (3) and fourteen (14) years of service would be 'shifted numerically back two steps' on the new proposed salary schedule. [Association] members with nineteen (19) years of service or more would not suffer the same fate. [Association] members with two (2) years of service would be shifted back to year one."

On October 11, 2006, Mr. Bussman and two other bargaining unit members confronted Association site representative Meg Decker about the tentative Agreement's salary schedule. Ms. Decker responded by informing Mr. Bussman and the two other bargaining unit members that the tentative CBA was "a good deal."

On October 13, 2006, a ratification vote on the tentative CBA was held. The tentative CBA was "overwhelmingly passed" by unit members. In a letter dated October 23, 2006, Mr. Bussman informed Association President Craig Adams and Ms. Decker that he was not pleased with the CBA and the ratification process. Specifically, Mr. Bussman advised President Adams and Ms. Decker that he believed the salary schedule was not equitable. Neither President Adams nor Ms. Decker responded to Mr. Bussman's October 23 letter.

On November 7, 2006, Mr. Bussman contacted the Association's affiliate, the California Teachers Association (CTA), and spoke with Karen Kyne and Bruce Matlock. Mr. Bussman also sent Ms. Kyne a copy of his October 23 letter.

On November 10, 2006, Ms. Kyne contacted Mr. Bussman and informed him that he could challenge the ratification vote. Ms. Kyne also provided Mr. Bussman with the e-mail address of CTA President Barbara Kerr. On November 10, 2006, Mr. Bussman sent an e-mail message to President Kerr but she did not reply.

On November 14, 2006, Mr. Bussman sent another e-mail message to President Kerr advising her of the facts surrounding the CBA between the Association and the District and the ratification vote. President Kerr responded to Mr. Bussman's November 14 e-mail message and stated that she would "look into it."

On December 7, 2006, President Kerr informed Mr. Bussman that "CTA had no jurisdiction over elections." Mr. Bussman responded by informing President Kerr that he was disappointed with her decision and re-requested that CTA intervene. On December 17, 2006, President Kerr advised Mr. Bussman that "CTA had appointed an intervention team to look into the matter."

On December 21, 2006, Mr. Bussman and others presented their concerns to the intervention team. On January 15, 2007, President Kerr informed Mr. Bussman that the CBA between the Association and the District violated the California Education Code. President Kerr then advised Mr. Bussman that he "needed to point this out to [his] local representation before CTA could represent [his] interests."

On January 30, 2007, Mr. Bussman presented Ms. Decker with a written request to "represent [his] interests concerning the ed. Code violation." Ms. Decker refused to represent Mr. Bussman and informed him that "nothing needed to be 'rectified' in terms of the [CBA]." Ms. Decker then stated that the District "had made a mistake in 'overpaying' new employees." Mr. Bussman informed Ms. Decker that "on the day the [CBA] was ratified she had explained to a room full of people that new hires would be paid in respect to their actual years of experience. That was the explained agreement between [the Association and the District]." On February 5, 2007, Ms. Decker again informed Mr. Bussman that the CBA did not violate the California Education Code and that the Association "would not be representing [his] claim."

In early March 2007, President Adams "notifies members via *The Podium* that the total compensation package for members was 5.28% for the 2005-2006 contract[.]" On March 11, 2007, the Association notified its members that a "new contract agreement had been reached for the current year." Shortly thereafter, the District informed "new hires" that "they will be paid at a rate of one additional year of service for the current school year, but will be frozen at that level the following school year, thus, equalizing their rate of pay with teachers who had been shifted back two years under the existing [CBA]."

During a town hall meeting on March 16, 2007, Mr. Bussman "pointed out that the majority of members had not received a 5.28% compensation increase for the 2005-2006 contract." President Adams responded by explaining that "everything has been 'fixed' with the new proposed schedule." On March 21, 2007, during a "site-rep" meeting, President Adams reiterated that the CBA did not violate the California Education Code.

On March 26, 2007, Ms. Decker informed the "new hires" that "they will need to 'pay back' a portion of their current salary." That same day a ratification vote was held on "the current year's contract." The above-titled charge continues in relevant part:

> [On March 27, 2007,] [Mr. Bussman's coworker] David Drake informed [Mr. Bussman] that Ken Batdrof, a Norte Vista H.S. teacher had called [President] Adams to inquire about this agreement. Ken reported that [President] Adams blamed [Mr. Bussman] numerous times in a disparaging manner as the person responsible for the new hires having to return a portion of their salaries. . . .

On April 20, 2007, Mr. Bussman's coworker Sharon Lazzarini informed Mr. Bussman that President Adams and Ms. Decker "had made numerous disparaging remarks about [him] to [District] representatives during the course of this year's bargaining sessions including [Mr. Bussman's] Principal, Santos Campos."

On May 1, 2007, Mr. Bussman met with CTA representative Marianne Reinhold. Ms. Reinhold informed Mr. Bussman that "legal infractions had taken place." Ms. Reinhold also advised Mr. Bussman that "she needed to interview more members before moving forward with litigation." In the end of May, Mr. Bussman requested a status update from Ms. Reinhold. In response, Ms. Reinhold informed Mr. Bussman that "a suit would be filed soon against [the District], probably by the end of June."

Mr. Bussman made several attempts to contact Ms. Reinhold in the months of June and July without success. On July 31, 2007, Mr. Bussman sent "an irate email to CTA officials about the complete lack of representation that [he was] receiving. [Mr. Bussman] receive[d] a phone call from Marianne Reinhold promising to notify [the District] of pending legal action by August 10th, 2007. She promises [to] provide a time frame of action, giving the [D]istrict until the end of August or the middle of September to rectify the situation." On August 10, 2007, Mr. Bussman received a copy of a letter sent by Ms. Reinhold to the District informing the District that its demand that newly hired teachers "repay the District what the District improperly characterizes as an 'overpayment' of their salary" violates the law.

On August 19, 2007, Mr. Bussman sent an e-mail message to "CTA Officials" to document the events of the summer." CTA did not respond to Mr. Bussman's August 19 e-mail message. On August 23, 2007, Ms. Decker informed Mr. Bussman that his job assignment was changed. On August 26, 2007, Mr. Bussman requested "CTA to file suit on [his] behalf concerning the labor contract(s) as was promised." CTA did not respond to Mr. Bussman's request. On August 27, 2007, Mr. Bussman requested that CTA provide him with legal assistance "in filing the appropriate documentation in regards to retaliation in the workplace." CTA did not respond to Mr. Bussman's August 27 request for legal assistance.

On August 28, 2007, Mr. Bussman spoke "to [Association President] Gary Hardgrave concerning his meeting with Santos Campos and [Mr. Bussman's] schedule." During their conversation, President Hardgrave informed Mr. Bussman that his schedule was not going to change. Mr. Bussman then asked President Hardgrave if the Association would assist him file "retaliation charges" against the District. On August 30, 2007, President Hardgrave informed Mr. Bussman that he was not a victim of retaliation.

On September 12, 2007, Mr. Bussman sent a facsimile message to Ms. Reinhold demanding that CTA take legal action on his behalf. In a facsimile message dated September 14, 2007, Ms. Reinhold implied that Mr. Bussman is "a liar." On September 16, 2007, Mr. Bussman replied to Ms. Reinhold's September 14 facsimile message and "also ask[ed] CTA officials for clarification on their position via email." On September 17, 2007, Ms. Bost informed Mr. Bussman that CTA was "working with the [D]istrict in order to fix this problem."

In the Fall of 2008, Mr. Bussman did not receive teaching materials for "the new prep that [he] was given." On October 30, 2008, Mr. Bussman sent a facsimile message to District Superintendent Kathy Wright informing her that he had not received his teaching materials. "Within three hours, Principal Santos Campus deliver[ed] a teacher's edition of the course text book [to me]."

In April 2008, Mr. Bussman advised Ms. Decker of his preference to teach "five sections of American Government." On August 14, 2008, Mr. Bussman was notified that his teaching schedule was different than the one that he had requested. On August 19 and 22, 2008, Mr. Bussman sent e-mail messages to Ms. Decker and Principal Santos inquiring into why his teaching schedule had changed. Neither Ms. Decker nor Principal Santos responded to Mr. Bussman's e-mail messages. On August 25, 2008, Mr. Bussman requested that District Superintendent Wendel Tucker explain to him why his teaching schedule had changed. The following day, Principal Santos advised Mr. Bussman why his teaching schedule had changed.

On November 13, 2008, Mr. Bussman attended a town hall meeting where he was informed that the current CBA between the Association and the District "does nothing to rectify past contract problems. [Mr. Bussman] [was] also informed that the issue had never been bargained." On November 15, 2008, Mr. Bussman sent President Hardgrave an e-mail message "in an effort to clarify the information given at the Nov. 13th town hall meeting." President Hardgrave never responded to Mr. Bussman's inquiry.

On December 15, 2008, Mr. Bussman sent "documentation of the whole series of events, including [CTA attorney John Kohn's] recent claim made to PERB, to every member [of] the [Association's] Executive Board." Mr. Bussman also asked for assistance. To date, the Association has not responded to Mr. Bussman's December 15 request for assistance.

The above-titled charge concludes in relevant part:

> 1. On August 1st, 2008, [CTA] attorney, John Kohn, submitted to PERB that "the [A]ssociation continues to bargain the issue with the employer." Thus, [the Association] asserts that they are indeed representing members in an effort to rectify violation of Ed. Code 45028. Mr. Kohn, [CTA] attorney, acknowledges the clear violation in light of the recent *Adair vs. Stockton USD* decision.

2. On November 13, 2008, [Association] President Gary Hardgrave, contradicts Mr. Kohn's claim. [Mr.] Bussman emails [President] Hardgrave in an effort to clarify [the Association's] position, and [President] Hardgrave fails to respond to [Mr.] Bussman.

3. [Mr.] Bussman waits one month for [President] Hardgrave to respond, and then asks for assistance and representation from [the Association's] full Executive Board. [Mr.] Bussman's request contains full documented proof of his claim. (NOTE: Please see enclosed copy of the letter and documentation sent to [the Association] Executive Board members dated December 15, 2008).

4. [Mr.] Bussman has patiently waited for a response and representation from [the Association] for five and a half months and has received neither. Due to the six month statute of limitations about to expire, this Unfair Practice Charge is being filed.

Discussion

1. Collateral Estoppel

Collateral estoppel is a legal doctrine that bars the relitigation of an issue if: (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding. (*Cook v. State* (2005) 921 So.2d. 631.) In *Los Rios College Federation of Teachers (Deglow)* (1996) PERB Decision No. 1133, PERB held that the doctrine of collateral estoppel prohibited a charging party from re-alleging that his exclusive representative had breached the duty of fair representation to him when the same issue had been previously litigated and was the subject of a final decision.

As previously stated, in *Alvord Educator's Association (Bussman)*, *supra*, PERB Decision No. 2046, Mr. Bussman alleged that the Association violated the Act by failing to represent him "in a challenge to the legality of certain contract provisions, and by failing to represent him regarding a change in teaching assignments." In *Alvord Educator's Association (Bussman)*, *supra*, PERB Decision No. 2046, Mr. Bussman also alleged that the Association had violated the Act by retaliating against him and defaming him.

The parties, facts, and issues in the present charge are identical to the parties, facts, and issues in *Alvord Educator's Association (Bussman)*, *supra*, PERB Decision No. 2046, with one exception: in the above-titled charge Mr. Bussman alleges that the Association failed to respond to his December 2008 request that it represent him in litigation with the District

regarding the legality of certain contract provisions. Thus, except for this single issue, the above-titled charge is identical to the unfair practice charge filed by Mr. Bussman against the Association in January 2008 (LA-CO-1329-E), which was decided on its merits by the Board in *Alvord Educator's Association (Bussman), supra*, PERB Decision No. 2046. Accordingly, other than Mr. Bussman's allegation that the Association ignored his December 2008 request for representation, the doctrine of collateral estoppel prohibits Mr. Bussman from re-litigating the issues decided by the Board in *Alvord Educator's Association (Bussman), supra*, PERB Decision No. 2046.

2. EERA's Six-Month Statute of Limitations

PERB Regulation 32615(a)(5)[3] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited 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. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The 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.)

In cases alleging a breach of the duty of fair representation, the six-month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*United Teachers of Los Angeles* (2001) PERB Decision No. 1441; *Los Rios College Federation of Teachers, CFT/AFT* (1991) PERB Decision No. 889.) Repeated union refusals to process a grievance over a recurring issue do not start the limitations period anew. (*California State Employees Association* (1985) PERB Decision No. 497-S.)

In regards to Mr. Bussman's allegation that the Association failed to represent him in litigation against the District challenging the legality of certain contract provisions, the Board in *Alvord Educator's Association (Bussman), supra*, PERB Decision No. 2046, held that the statute of

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

limitations began to run on that issue on January 30, 2007. Mr. Bussman's re-request for representation on that issue in December 2008 does not start the statute of limitations period anew. (*California State Employees Association, supra*, PERB Decision No. 497-S.) Since the statute of limitations began to run on Mr. Bussman's allegation that the Association breached the duty of fair representation by refusing to represent him in litigation challenging the legality of certain contract provisions on January 30, 2007, Mr. Bussman had until on or before July 30, 2007 to file an unfair practice charge against the Association. (*Ibid.*) As stated above, the present charge was not filed by Mr. Bussman with PERB against the Association until June 2, 2009. Thus, PERB is prohibited from issuing a complaint against the Association alleging that it breached the duty of fair representation by not representing Mr. Bussman in litigation to challenge to the legality of certain contract provisions. Even if the above-titled charge was filed within EERA's six-month statute of limitations, Mr. Bussman has failed to demonstrate that the Association violated the duty of fair representation for the following reasons.

3. The Duty of Fair Representation

The Board has held that there is no obligation on the part of the exclusive representative to provide representation for a member of the bargaining unit in extra-contractual matters not under its exclusive control. (*California School Employees Association (Mrvichin)* (1988) PERB Decision No. 661; *California State Employees' Association (Darzins)* (1985) PERB Decision No. 546-S; *San Francisco Classroom Teachers' Association (Chestangue)* (1985) PERB Decision No. 544.) In *California Teachers Association (Radford)* (2005) PERB Decision No. 1763, the Board specifically held that an exclusive representative does not breach the duty of fair representation by refusing to assist a bargaining unit member enforce the California Education Code. Further, an exclusive representative does not breach the duty of fair representation even if the exclusive representative undertakes representation in an extra-contractual forum and the exclusive representative's representation is inadequate. (*Service Employees International Union, Local 99 (Wardlaw)* (1997) PERB Decision No. 1219.)

Mr. Bussman alleges that the Association breached its duty to fairly represent him by ignoring his requests that it pursue a claim against the District over perceived violations of the California Education Code. Pursuits of alleged violations of the California Education Code involve extra-contractual forums that are outside the Association's exclusive control, i.e., do not involve the Agreement's grievance procedure. Thus, Mr. Bussman has not established that the Association violated the Act by failing to respond to his requests to represent him in litigation against the District over perceived violations of the California Education Code. (*California Teachers Association (Radford), supra*, PERB Decision No. 1763.)

4. Remaining Allegations

Mr. Bussman also alleges that the Association violated Government Code sections 3543.3, 3543.5, and 3571.1. However, Mr. Bussman provides no facts, theories, or arguments regarding why he believes EERA sections 3543.3 or 3543.5 were violated by the Association. Further, the current record does not demonstrate that the Association violated these sections of EERA.

Government Code section 3571.1 only applies to employees employed by the CSU System, the UC System, and Hastings College of Law. (Gov. Code, § 3560 et seq.) The current record shows that Mr. Bussman is employed by the District. Thus, Mr. Bussman's rights stem from Government Code section 3540 et seq., not Government Code section 3560 et seq. Accordingly, Mr. Bussman does not have standing in this case to allege a violation of Government Code section 3571.1.

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, Mr. Bussman may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second Amended Charge, contain all the facts and allegations Mr. Bussman wishes to make, and be signed under penalty of perjury by Mr. Bussman or an authorized agent of Mr. Bussman. 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 Association's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before November 16, 2009,[4] PERB will dismiss the above-titled charge. Questions concerning this matter should be directed to me at the above telephone number.

Sincerely,

Sean McKee
Regional Attorney

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[4] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)