STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MARY ANN LAVERY, Charging Party, v. MENDOCINO COUNTY FEDERATION OF SCHOOL EMPLOYEES, Respondent.	Case Nos. SF-CO-780-E SF-CO-781-E PERB Decision No. 2327 October 3, 2013

Appearances: Mary Ann Lavery, on her own behalf; Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Mendocino County Federation of School Employees.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION[1]

HUGUENIN, Member: These cases are before the Public Employment Relations Board (PERB or Board) on appeal by Mary Ann Lavery (Lavery), from dismissal (attached) of her unfair practice charges. Lavery's charges, as amended, allege that the Mendocino County Federation of School Employees (MCFSE) breached its duty of fair representation in violation of sections 3544.9 and 3543.6(b) of the Educational Employment Relations Act (EERA).[2]

We have reviewed the unfair practice charges, the amended charge, the warning and dismissal letters, the appeal and the entire record in light of relevant law. Based on this

[1] PERB Regulation 32320(d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

[2] EERA is codified at Government Code section 3450 et seq.

review, we affirm the dismissals and adopt the Board agent's warning and dismissal letters as the decision of the Board itself supplemented by our discussion below.

PROCEDURAL HISTORY

On November 11, 2012, Lavery filed two unfair practice charges (SF-CO-780-E and SF-CO-781-E). The first charge (SF-CO-780-E) alleged that MCFSE had violated its duty of fair representation when it deprived Lavery of the opportunity to defend herself in a grievance against her employer, the Mendocino County Office of Education (MCOE), and had entered into an agreement resolving the grievance without her knowledge or consent. The second charge (SF-CO-781-E) filed on November 13, 2012, also alleged that MCFSE violated its duty of fair representation when an MCFSE agent threatened to end a meeting with Lavery discussing the resolution of the grievance, because he objected to the manner in which Lavery was speaking.

On December 12, 2012, MCFSE filed position statements for both charges. On December 28, 2012, Lavery amended her second charge (SF-CO-781-E). Lavery's first charge (SF-CO-780-E) was never amended. Lavery's first amended charge contained a new allegation that MCFSE had violated its duty of fair representation when it failed to exercise due diligence by allowing MCOE to violate the terms of the parties' labor agreement in filling a vacant position within the bargaining unit.

On January 8, 2013, PERB's Board agent sent Lavery a warning letter for each charge. On January 29, 2013, Lavery filed a second amended charge for her second charge (SF-CO-781-E). This second amended charge contained no new allegations, but Lavery did provide a series of emails between herself, MCFSE and MCOE and a portion of the parties' labor agreement pertaining to "Position Announcements and Transfers."

On February 4, 2013, the Board agent sent Lavery dismissal letters for both charges. On February 25, 2013, Lavery requested and on March 1, 2013, was granted an extension of time to file an appeal. On March 18, 2013, Lavery timely filed appeals for both charges. On March 22, 2013, MCFSE filed responses to both appeals. On March 25, 2013, the parties were informed that the filings were complete in both cases.

FACTS[3]

Lavery is a certificated employee of MCOE. On some unspecified date prior to May 14, 2012, Lavery was evaluated by Merry Catron (Catron), a principal of Alternative Education with MCOE. Lavery was unhappy with her evaluation and sought MCFSE's assistance. MCFSE filed a grievance in its own name alleging a violation of the parties' labor agreement. Lavery learned that a meeting regarding the grievance was scheduled for May 14, 2012. On May 11, 2012, she emailed the Co-Presidents of MCFSE, Cherie Malnati (Malnati) and Annette Morrison (Morrison), indicating that she wanted to file a separate grievance even if MCOE admitted that it conducted her evaluation improperly. No evidence regarding MCFSE's response, if any, to Lavery's May 11, 2012, email was provided.

On May 14, 2012, MCFSE representatives (including Malnati) met with Catron and Richard Lamken, MCOE's executive director of human resources. An agreement was reached between MCFSE and MCOE regarding the grievance. No evidence regarding the content of this agreement was provided. On May 15, 2012, Lavery sent Malnati an email expressing displeasure with the agreement and asking Malnati how to contact Terry Elverum (Elverum), an employee of MCFSE's state affiliate, the California Federation of Teachers (CFT).

[3] At this stage of the proceedings, we assume, as we must, that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.)

On June 26, 2012, Lavery met with Malnati, Morrison and Elverum to discuss the grievance settlement. At some point during the meeting, Lavery spoke angrily and pounded her fist on the table. Lavery maintains that she was not angry at any individual at the meeting but became angry over the contents of her evaluation. Nevertheless, Elverum objected to her manner of speaking and told her that the meeting "will be over in a minute" if she did not change her demeanor. In addition, Elverum told Malnati and Morrison, "we don't have to listen to this."

On or about June 30, 2012, a position opened up within the bargaining unit.[4] Article IX of the parties' labor agreement specifies a procedure for filling vacant positions and making transfers and reassignments. The labor agreement calls for announcements for open positions to be posted for at least fourteen (14) days on the District's website and also by emails sent to employees. Article IX also specifies that in lieu of a new announcement and recruiting process, vacant positions will be filled either by voluntary transfer or from a list of applicants developed from a prior announcement and recruitment. Article IX lists six criteria that MCOE may consider when filling a vacancy through voluntary transfer.

The position in question had originally opened after the 2010-2011 school year when the incumbent retired. It was temporarily filled with a one-year appointment. Lavery had previously tried to apply for the vacant position when it initially became open in July 2011.

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[4] Lavery's appeal from the Board agent's dismissal includes a "Rationale" for her allegations. Her Rationale, in fact, contains new factual allegations which were not presented to the Board agent in the two original or two amended charges. As PERB Regulation 32635(b) makes clear, "unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.) In this case, the new allegations appear to have been available to Lavery prior to the Board agent's dismissal. Lavery has not alleged that the information was previously unavailable to her. Therefore, we do not find good cause to consider these new allegations.

Lavery alleges that the position was "not opened up to the rank and file as an in-house transfer position, it was assigned to a teacher whose Teacher on Special Assignment position had lapsed." According to Lavery, this violated Article IX of the parties' agreement and MCFSE did not exercise due diligence in holding the District to this contract provision. In doing so, Lavery maintains, MCFSE breached its duty of fair representation.

DISCUSSION

Standard of Review

PERB Regulation 32635 et seq., specifies the requirements for the Board to review a Board agent's dismissal of an unfair practice charge. Among those requirements, the charging party must: (1) state the specific issues of procedure, fact, law or rationale to which the appeal is taken; (2) identify the page or part of the dismissal to which each appeal is taken; and (3) state the grounds for each issue stated.

Case No. SF-CO-780-E

On appeal, Lavery does not state the specific issue of procedure, fact, law or rationale in the Board agent's dismissal that forms the basis of her appeal. On that basis alone, her appeal lacks merit. The Board agent's warning letter of January 8, 2013, properly stated the law with regard to a union's duty of fair representation to its members and properly found that Lavery's charges failed to state a prima facie case against MCFSE. Lavery neither amended nor withdrew this charge and it was therefore properly dismissed by the Board agent. We affirm the Board agent's dismissal of this charge.

Case No. SF-CO-781-E

On appeal, Lavery, once again, does not state the specific issue of procedure, fact, law or rationale in the Board agent's dismissal that forms the basis of her appeal. She does not contend that the Board agent erred in dismissing her case because she failed to provide proof

of service. She does not provide evidence demonstrating that proof of service was, in fact, timely made upon MCFSE. On that basis alone, her appeal lacks merit.

Proof of Service

PERB Regulation 32621 requires that a charging party serve an amended charge on the respondent and provide proof of service pursuant to PERB Regulation 32140. As stated in the Board agent's dismissal letter, a charging party's complete failure to respond to repeated inquiries regarding a valid proof of service is sufficient grounds for dismissal of the charges. (*Los Angeles Superior Court* (2012) PERB Decision No. 2301-C.) The record shows that Lavery never provided proof of service for her second amended charge on MCFSE. Her charge was, therefore, properly dismissed on this ground.

Duty of Fair Representation

Nevertheless, since the Board agent addressed Lavery's allegations that MCFSE breached its duty of fair representation, we shall also address that issue. Exclusive representatives "owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213, 1219.) In addition, "[a]bsent 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." (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In order to state a prima facie case of the duty of fair representation, the charging party must, at minimum, include an assertion of facts from which it becomes apparent in what manner the union's action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M.) In addition, unions are accorded "wide latitude" in the representation of their members. (*Inlandboatmans Union of the Pacific*

(2012) PERB Decision No. 2297-M.) The latitude afforded to unions includes discretion in pursuing grievances and enforcing articles in the labor contract. (*United Teachers of Los Angeles (Thomas)* (2010) PERB Decision No. 2150; *American Federation of State, County and Municipal Employees (Waters)* (1988) PERB Decision No. 697-H.) Lastly, provided it has a rational basis or exercises honest judgment in doing so, a union is permitted to settle grievances without notice to or consultation with the person who is the subject of that grievance. (*Hart District Teachers Association (Mercado and Bloch)* (2001) PERB Decision No. 1456.)

In neither of her charges did Lavery allege facts demonstrating that MCFSE acted in bad faith, arbitrarily or in a manner that discriminated against her. The email evidence Lavery provided makes clear that MCFSE chose to grieve the matter of Lavery's evaluation in its own name as an issue affecting the entire bargaining unit. While neither party provided PERB with a copy of the entire labor agreement, the emails suggest that MCFSE has the right to grieve issues in its own name. Thus, MCFSE acted properly in filing a grievance in its own name to uphold the rights of the bargaining unit. While Lavery was apparently unhappy with the resolution of the grievance, she did not allege how she was adversely affected by the resolution of the grievance, or how MCFSE handled the grievance in a perfunctory manner, or how MCFSE otherwise acted arbitrarily, discriminatorily or in bad faith. Nor did Lavery allege how the union agent's objection to her conduct at the meeting impacted MCFSE's duty to fairly represent her. The burden was on Lavery to allege how MCFSE's decisions were devoid of a rational basis or honest judgment, and she failed to do so.

ORDER

The unfair practice charges in Case Nos. SF-CO-780-E and SF-CO-781-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Winslow joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1023
Fax: (510) 622-1027

February 4, 2013

Mary Ann Lavery

Re: *Mary Ann Lavery v. Mendocino Co. Fed. of School Employees*
Unfair Practice Charge No. SF-CO-780-E
DISMISSAL LETTER

Dear Ms. Lavery:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 13, 2012. Mary Ann Lavery (Lavery or Charging Party) alleges that the Mendocino Co. Fed. of School Employees (Union or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation.

Charging Party was informed in the attached Warning Letter dated January 8, 2013, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn on or before January 25, 2013, the charge would be dismissed.

PERB has not received either an amended charge or a request for withdrawal. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the January 8, 2013 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] Charging Party 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.

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

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

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

M. SUZANNE MURPHY
General Counsel

By _____
Alicia Clement
Regional Attorney

Attachment

cc: Stewart Weinberg, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1023
Fax: (510) 622-1027

January 8, 2013

Mary Ann Lavery

Re: *Mary Ann Lavery v. Mendocino County Federation of School Employees*
Unfair Practice Charge No. SF-CO-780-E
WARNING LETTER

Dear Ms. Lavery:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 13, 2012. Mary Ann Lavery (Lavery or Charging Party) alleges that the Mendocino County Federation of School Employees (Union or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation.

PERB's investigation revealed the following relevant facts.[2] Charging Party is a teacher for the Mendocino County Office of Education (Mendocino COE), and is in a bargaining unit that is exclusively represented by the Union.

On an unspecified date prior to May 14, 2012, Lavery received an annual performance evaluation that she was dissatisfied with. As a result of this evaluation, she sought the Union's assistance. The Union filed a grievance alleging that the Mendocino COE's administration of Lavery's performance evaluation violated the terms of the labor agreement between the Union and Mendocino COE.

On May 14, 2012, two Union representatives and two Mendocino COE representatives met and negotiated a settlement of the grievance. Lavery was not invited to attend this meeting, and only learned of the settlement agreement after-the-fact. PERB was not provided with a copy of the grievance or the settlement agreement, and it is not clear what allegations or issues were addressed in either document.

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

[2] Also on November 13, 2012, Lavery filed unfair practice charge number SF-CO-781-E. Facts alleged in charge number SF-CO-781-E were included in PERB's consideration of the merits of this charge.

On June 26, 2012, Lavery met with Union officials again to pursue additional remedies arising from unspecified harm she suffered due to the earlier performance evaluation. During this meeting, Lavery became agitated and admits that she spoke angrily and thumped the table with her fist. The Union's area representative, who was present at this meeting, told Lavery that he would end the meeting if she did not compose herself.

As a result of these two separate, but related incidents, Lavery seeks to have her evaluation grievance "reopened," and another Union advocate assigned to represent her with respect to that issue.

On December 12, 2012, the Union provided a response to both of the charges. In its response, the Union states only that the charges contain insufficient facts to establish the prima facie elements of a breach of the duty of fair representation.

On December 28, 2012, Lavery filed an amended charge. The amended charge does not reference either of the earlier unfair practice charges and the incident described in the amended charge does not relate more particulary to either of the charges. In the amended charge, Lavery describes what she alleges to be a breach of the labor agreement between the Union and Mendocino COE. Apparently, a teacher announced in June 2011 that she would be retiring at the end of the 2011/2012 school year. In June 2012, rather than posting a vacant teaching position and permitting staff to bid for the position, the Union and Mendocino COE agreed to fill the position with a teacher whose "Teacher on Special Assignment" position had lapsed. Lavery does not state that she was harmed by this conduct. Rather, Lavery claims that the Union should not have permitted Mendocino COE to violate the labor agreement in this fashion, and its failure to investigate the matter and enforce the contract is a breach of its duty of fair representation.

As a result of this incident, Lavery seeks unspecified sanctions against the Union.

In a telephone conversation with the Union's representative, the Union elected not to respond to the additional allegations in the amended charge.

Discussion

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b).

The duty of fair representation exists because

> It is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative.

(*DelCostello v. Teamsters* (1983) 462 U.S. 151, 164, fn. 14.) Because the individual is deprived of the power of self-representation as a result of the union's certified exclusivity, "a corresponding duty is imposed on the union. The union must treat all of its members fairly and without discrimination, exercise its discretion in good faith, and not act arbitrarily toward them." (*Lane v. I.U.O.E. Stationary Engineers, Local 39* (1989) 212 Cal.App.3d 164, 169.)

In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citations omitted.]

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.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) However, a union's failure to enforce a particular contract provision, alone, does not demonstrate a breach of the duty of fair representation. (*American Federation of State, County and Municipal Employees (Waters)* (1988) PERB Decision No. 697-H.)

> It is . . . essential that labor organizations have some freedom and discretion in handling employee disputes with employers. The union and the employer must be able to develop a consistent interpretation of the terms of the collective bargaining agreement, rather than being compelled to follow the desires of every

> individual union member. In order to prevent the settlement mechanism from being clogged by meritless complaints, the union must be permitted to sort out the substantial grievanes from the unjustified ones. If the union did not have the power to settle or discard groundless complaints, the employer would have little motivation to participate in a dispute resolution mechanism. [Citation omitted.] The union's resources could also be depleted as a result of being forced to pursue meritless complaints. Further, important public interests are served by preserving unions as viable entities and preventing their financial depletion as a result of extended legal liability.

(*Lane v. I.U.O.E. Stationary Engineers, Local 39, supra,* 212 Cal.App.3d 164, 169-170.)

To the extent that it is possible to discern the nature of Lavery's concerns, it appears that she is alleging that the Union failed to properly handle ing her evaluation grievance and the Unionfailed to oppose the manner in which Mendocino COE filled a vacant bargaining unit position. As noted above, the Union has wide discretion to resolve grievances in a manner that best serves the interest of the entire bargaining unit, which includes the authority to exercise its discretion not to enforce a particular contract provision, provided that its decision to do so was not arbitrary, discriminatory, or in bad faith. None of the facts provided by Lavery demonstrate any arbitrary, discriminatory or in bad faith conduct on the part of the Union.

For these reasons the charge, as presently written, does not state a prima facie case.[3] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB.

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[3] 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.*)

If an amended charge or withdrawal is not filed on or before January 25, 2013,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia Clement
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.)

PUBLIC EMPLOYMENT RELATIONS BOARD

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1330 Broadway, Suite 1532
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February 4, 2013

Mary Ann Lavery

Re: *Mary Ann Lavery v. Mendocino County Federation of School Employees*
Unfair Practice Charge No. SF-CO-781-E
DISMISSAL LETTER

Dear Ms. Lavery:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 13, 2012. Mary Ann Lavery (Lavery or Charging Party) alleges that the Mendocino County Federation of School Employees (Union or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation. Charging Party is a teacher for the Mendocino County Office of Education (Mendocino COE), and is in a bargaining unit that is exclusively represented by the Union.

An amended charge was received on December 28, 2012. In a telephone conversation with the Union's representative, the Union elected not to respond to the additional allegations in the first amended charge.

Charging Party was informed in the attached Warning Letter dated January 8, 2013, that the above-referenced charge and amended charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended further. Charging Party was also advised that, unless the charge was amended to state a prima facie case or withdrawn on or before January 25, 2013, the charge would be dismissed.

On January 25, 2013, PERB received a second amended charge. The second amended charge was received by facsimile on January 25, 2012. The proof of service attached to this facsimile copy of the charge demonstrates that the charge was served on PERB's San Francisco Regional Office rather than the Respondent. An original second amended unfair practice charge was received on January 29, 2012. However, the proof of service attached to the original differs from the proof of service that was sent by facsimile. Neither proof of service demonstrates service on the Respondent. A voice message was left at the telephone number provided by Charging Party, but to date, these procedural deficiencies have not been corrected.

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

The undersigned left a voicemail message for Respondent's attorney informing him that a second amended charge had been filed and seeking to determine whether Respondent wished to respond to the second amended charge. To date, Respondent has not contacted the Board agent, and has not provided a response to the January 25, 2013 second amended charge.

In the amended charge, Charging Party renews her earlier arguments and provides additional evidence in the form of e-mail messages between herself, Union representatives, and Mendocino COE. Neither party provided a copy of the collective bargaining agreement (CBA) between the Union and Mendocino COE, but one was found on-line at www.mcoe.us. In the CBA, there is an appeal process for employees who disagree with their performance evaluations. Individuals also have the right to file a grievance in their own name under the CBA, subject to intervention by the Union in the event that an adjustment is made to an employee's working conditions because of the grievance.

Charging Party alleges that the Union breached its duty of fair representation when it filed a grievance against Mendocino COE alleging that it breached the evaluation procedure in the manner in which it conducted Charging Party's performance evaluation. The Union filed this grievance in its own name, and although it named Charging Party, it apparently only filed the grievance for the purpose of challenging the manner in which the evaluation was conducted and administered. Charging Party's argument is that the Union informed her that it would file a grievance in its own name, and that it would not use her name in the grievance process. Because of this, Charging Party did not attend various grievance meetings and was not consulted with regard to the content of the settlement of the grievance. However, Charging Party learned that the Union had used her name in the filing of the grievance, and that the settlement of the grievance included some terms that she would not have agreed to, if she had been informed of them.

In an e-mail message dated May 11, 2012, Charging Party informed Union Representatives that, regardless of the outcome of the grievance that had been filed by the Union, she wanted to file a separate grievance in her own name arising from the same circumstances of her performance evaluation. In an e-mail message dated May 15, 2012, Charging Party informed Union Representatives that she did not consider herself bound by the Union's settlement agreement with Mendocino COE over the grievance, which apparently included removing a paragraph from her performance evaluation. Instead of this solution, Charging Party proposed the following: "If they [Mendocino COE] think they haven't done anything wrong, let them stand by the evaluation, if the[y] are in error let them admit it."

Separately, Charging Party argues that the Union ignored various unspecified contract violations when Mendocino COE filled a vacant position without first posting the vacancy.

Discussion

Burden

PERB Regulation 32615(a)(5) 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." A charging party should allege sufficient facts to establish 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 Board has historically taken the approach that the proof of service requirement is directional rather than jurisdictional and has permitted charging parties to demonstrate late service of process, provided there has not been prejudice to the respondent. (*San Diego Community College District* (1988) PERB Decision No. 662.) However, a charging party's complete failure to respond to a Board agent's repeated inquiries regarding a valid proof of service is sufficient grounds for dismissal of the charge for failure to comply with PERB regulations governing proof of service. (*Los Angeles Superior Court* (2012) PERB Decision No. 2301-C.)

In this case, there are no facts demonstrating that the second amended charge was actually received by Respondent and it is unclear whether Respondent received a copy of the second amended charge. Under the circumstances, Charging Party's failure to meet her burden of establishing that the second amended charge was properly served upon Respondent is sufficient to warrant dismissal of the charge.

Even assuming Charging Party had met her burden and properly served Respondent with a copy of the second amended charge, the deficiencies described in the January 8, 2013 Warning Letter were not cured and the charge should be dismissed for the following reasons.

The Duty of Fair Representation

As noted in the January 8, 2013 Warning Letter, in order to establish the prima facie elements of a breach of the duty of fair representation, the Charging Party must allege facts demonstrating that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In this case, the facts establish that the Union filed a grievance in its own name, to address a contract violation that occurred in relation to Lavery's performance evaluation, then resolved the grievance through settlement without consulting Lavery. As was explained in the January 8, 2013 Warning Letter, these facts do not establish that the Union engaged in arbitrary, discriminatory or bad faith conduct. Accordingly, the allegation that the Union breached its duty of fair representation must be dismissed.

Charging Party also asserts that the manner in which the District filled a vacant position violated the CBA. She further asserts that the Union's failure to challenge the employer's conduct establishes a breach of its duty of fair representation. Even assuming Charging Party had provided facts establishing that the Union was aware that Mendocino COE's conduct was in violation of the CBA and that it knowingly acquiesced to conduct that was violative of the CBA, these facts, alone, do not establish that the Union breached its duty of fair representation. As explained in the January 8, 2013 Warning Letter, a union's failure to enforce a particular contract provision does not demonstrate a breach of the duty of fair representation. (*American Federation of State, County and Municipal Employees (Waters)* (1988) PERB Decision No. 697-H.) Rather, unions are permitted a certain amount of leeway in determining which contract violations to pursue, provided it does not exercise this discretion in a manner that is arbitrary, discriminatory or in bad faith. (*Lane v. I.U.O.E. Stationary Engineers, Local 39, supra*, 212 Cal.App.3d 164.) At present, there are no facts from which PERB could find that the Union's failure to enforce an unspecified contract provision was arbitrary, discriminatory or in bad faith.

Therefore, the charge is hereby dismissed based on the facts and reasons set forth in this letter and the January 8, 2013 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] Charging Party 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.)

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

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

M. SUZANNE MURPHY
General Counsel

By _____
Alicia Clement
Regional Attorney

Attachment

cc: Stewart Weinberg, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1023
Fax: (510) 622-1027

January 8, 2013

Marv Ann Lavery

Re: *Mary Ann Lavery v. Mendocino Co. Fed. of School Employees*
Unfair Practice Charge No. SF-CO-781-E
WARNING LETTER

Dear Ms. Lavery:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 13, 2012. Mary Ann Lavery (Lavery or Charging Party) alleges that the Mendocino County Federation of School Employees (Union or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation.

PERB's investigation revealed the following relevant facts.[2] Charging Party is a teacher for the Mendocino County Office of Education (Mendocino COE), and is in a bargaining unit that is exclusively represented by the Union.

On an unspecified date prior to May 14, 2012, Lavery received an annual performance evaluation that she was dissatisfied with. As a result of this evaluation, she sought the Union's assistance. The Union filed a grievance alleging that the Mendocino COE's administration of Lavery's performance evaluation violated the terms of the labor agreement between the Union and Mendocino COE.

On May 14, 2012, two Union representatives and two Mendocino COE representatives met and negotiated a settlement of the grievance. Lavery was not invited to attend this meeting, and only learned of the settlement agreement after-the-fact. PERB was not provided with a copy of the grievance or the settlement agreement, and it is not clear what allegations or issues were addressed in either document.

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

[2] Also on November 13, 2012, Lavery filed unfair practice charge number SF-CO-780-E. Facts alleged in charge number SF-CO-780-E were included in PERB's consideration of the merits of this charge.

On June 26, 2012, Lavery met with Union officials again to pursue additional remedies arising from unspecified harm she suffered due to the earlier performance evaluation. During this meeting, Lavery became agitated and admits that she spoke angrily and thumped the table with her fist. The Union's area representative, who was present at this meeting, told Lavery that he would end the meeting if she did not compose herself.

As a result of these two separate, but related incidents, Lavery seeks to have her evaluation grievance "reopened," and another Union advocate assigned to represent her with respect to that issue.

On December 12, 2012, the Union provided a response to both of the charges. In its response, the Union states only that the charges contain insufficient facts to establish the prima facie elements of a breach of the duty of fair representation.

On December 28, 2012, Lavery filed an amended charge. The amended charge does not reference either of the earlier unfair practice charges and the incident described in the amended charge does not relate more particulary to either of the charges. In the amended charge, Lavery describes what she alleges to be a breach of the labor agreement between the Union and Mendocino COE. Apparently, a teacher announced in June 2011 that she would be retiring at the end of the 2011/2012 school year. In June 2012, rather than posting a vacant teaching position and permitting staff to bid for the position, the Union and Mendocino COE agreed to fill the position with a teacher whose "Teacher on Special Assignment" position had lapsed. Lavery does not state that she was harmed by this conduct. Rather, Lavery claims that the Union should not have permitted Mendocino COE to violate the labor agreement in this fashion, and its failure to investigate the matter and enforce the contract is a breach of its duty of fair representation.

As a result of this incident, Lavery seeks unspecified sanctions against the Union.

In a telephone conversation with the Union's representative, the Union elected not to respond to the additional allegations in the amended charge.

Discussion

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b).

The duty of fair representation exists because

> It is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative.

(*DelCostello v. Teamsters* (1983) 462 U.S. 151, 164, fn. 14.) Because the individual is deprived of the power of self-representation as a result of the union's certified exclusivity, "a corresponding duty is imposed on the union. The union must treat all of its members fairly and without discrimination, exercise its discretion in good faith, and not act arbitrarily toward them." (*Lane v. I.U.O.E. Stationary Engineers, Local 39* (1989) 212 Cal.App.3d 164, 169.)

In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citations omitted.]

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.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) However, a union's failure to enforce a particular contract provision, alone, does not demonstrate a breach of the duty of fair representation. (*American Federation of State, County and Municipal Employees (Waters)* (1988) PERB Decision No. 697-H.)

> It is . . . essential that labor organizations have some freedom and discretion in handling employee disputes with employers. The union and the employer must be able to develop a consistent interpretation of the terms of the collective bargaining agreement, rather than being compelled to follow the desires of every

> individual union member. In order to prevent the settlement mechanism from being clogged by meritless complaints, the union must be permitted to sort out the substantial grievanes from the unjustified ones. If the union did not have the power to settle or discard groundless complaints, the employer would have little motivation to participate in a dispute resolution mechanism. [Citation omitted.] The union's resources could also be depleted as a result of being forced to pursue meritless complaints. Further, important public interests are served by preserving unions as viable entities and preventing their financial depletion as a result of extended legal liability.

(*Lane v. I.U.O.E. Stationary Engineers, Local 39, supra,* 212 Cal.App.3d 164, 169-170.)

To the extent that it is possible to discern the nature of Lavery's concerns, it appears that she is alleging that the Union failed to properly handle ing her evaluation grievance and the Unionfailed to oppose the manner in which Mendocino COE filled a vacant bargaining unit position. As noted above, the Union has wide discretion to resolve grievances in a manner that best serves the interest of the entire bargaining unit, which includes the authority to exercise its discretion not to enforce a particular contract provision, provided that its decision to do so was not arbitrary, discriminatory, or in bad faith. None of the facts provided by Lavery demonstrate any arbitrary, discriminatory or in bad faith conduct on the part of the Union.

For these reasons the charge, as presently written, does not state a prima facie case.[3] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB.

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[3] 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.*)

If an amended charge or withdrawal is not filed on or before January 25, 2013,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia Clement
Regional Attorney

AC

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