

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CONSTANTINO GABRIE,

Charging Party,

v.

LOS ANGELES COLLEGE FACULTY GUILD,
LOCAL 1521,

Respondent.

Case No. LA-CO-1598-E

PERB Decision No. 2369

April 16, 2014

Appearances: Felahy Law Group by Jennifer Yanni, Attorney, for Constantino Gabriele;
Lawrence Rosenzweig, Attorney, for Los Angeles College Faculty Guild, Local 1521.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION¹

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Constantino Gabriele (Gabrie) of a Board agent's dismissal (attached) of his unfair practice charge. Gabriele's charge, as amended, alleges that the Los Angeles College Faculty Guild, Local 1521 (Guild) breached its duty of fair representation in violation of the Educational Employment Relations Act (EERA).²

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 of Regs., tit. 8, § 31001 et seq.)

² EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code. Although not specified as the section that was violated in the original or amended charges, EERA section 3544.9 states:

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

We have reviewed the unfair practice charge, the amended charge, the appeal, the Guild's responses thereto, the warning and dismissal letters and the entire record in light of relevant law. Based on this review, we affirm the dismissal and adopt the Board agent's warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-1598-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

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

In addition, EERA section 3543.6 states, in pertinent part:

It shall be unlawful for an employee organization to:

¶

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Taken together, EERA sections 3544.9 and 3543.6(b) impose a duty of fair representation on employee organizations. (*Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124, p. 3.)

PUBLIC EMPLOYMENT RELATIONS BOARD



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February 11, 2014

Jennifer Yanni, Attorney
Felahy Law Group
4000 Cover Street, Suite 100
Long Beach, CA 90808

Re: *Constantino Gabriele v. Los Angeles College Faculty Guild, Local 1521*
Unfair Practice Charge No. LA-CO-1598-E
DISMISSAL LETTER

Dear Ms. Yanni:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 18, 2013 (original charge) and amended on January 24, 2014 (First Amended Charge). Constantino Gabriele (Charging Party) alleges that the Los Angeles College Faculty Guild, Local 1521 (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 December 31, 2013 (Warning Letter), 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, he should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it on or before January 10, 2014, the charge would be dismissed. At Charging Party's request, the deadline to file an amended charge was extended to January 24, 2014. On January 24, 2014, this office received a First Amended Charge.

Facts as Amended

In December 2010, the Los Angeles Community College District (District) and Mr. Gabriele—with the assistance of his Union—reached a Settlement Agreement in which Mr. Gabriele would be placed on paid administrative leave through January 31, 2012. The agreement provided that Mr. Gabriele would resign from his position on February 1, 2012, after which he could apply for retirement benefits under the California State Teachers Retirement System (CalSTRS). In or around May 2011, Mr. Gabriele inquired whether he could take on part-time employment while he was on administrative leave. Mr. Gabriele's Union representative advised him that he could take on part-time employment and doing so would not affect his benefits. Based on this

¹ EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

advice, Mr. Gabriele took part-time employment with the Pasadena City College (PCC) between August 2011 and June 2012.

After Charging Party's February 1, 2012, retirement from the District, a dispute arose regarding whether the Settlement Agreement required Charging Party to retire through the CalSTRS within 120 days in order to obtain his health insurance benefits. In a March 29, 2012 letter, the Union requested that the District comply with the terms of the parties Settlement Agreement that entitled Mr. Gabriele to receive health insurance upon retiring.

In June 2012, after his employment ended with PCC, Mr. Gabriele learned that "the hours he worked were being used as the basis upon which his benefits were denied."

Between March 8, 2012 and August 23, 2012, Mr. Gabriele submitted more than 50 inquiries to the Union, CalSTRS, and the District for assistance in finalizing his retirement benefits. Mr. Gabriele was "afforded no answers, training, or assistance in completing the process."

Discussion

I. Duty of Fair Representation

As noted in the Warning Letter, to demonstrate the Union did not meet its duty of fair representation, the Charging Party must allege facts demonstrating the Union's conduct was arbitrary, discriminatory, or in bad faith or that the Union'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.) The amended charge does not provide such facts.

Charging Party alleges that the Union breached its duty of fair representation by advising him in May 2011 that he could continue to take on part-time employment without affecting his eligibility for benefits. The Union representative's advice concerns a matter outside of the collective bargaining agreement (CBA). Since such matters are extra-contractual, the duty of fair representation does not attach. (*East Side Teachers Association, CTA/NEA (Hernandez)* (1997) PERB Decision No. 1223.)

Charging Party asserts that the advice given to Mr. Gabriele was "discriminatory in nature" because it ultimately deprived him of his right to his retiree health benefits. However, there is no merit to this assertion. There is no dispute the Union assisted Mr. Gabriele in a statutory matter under the Education Code by retaining an attorney to represent Charging Party in an extra-contractual matter (e.g., the Office of Administrative Hearings and Declaratory Relief court matter) and obtaining a settlement offer in the amount of \$70,000, which Charging Party refused to accept. Even if the present matter was not extra-contractual, Charging Party has failed to allege facts showing that Mr. Gabriele was treated differently from other employees in a similar situation. Additionally, there are no facts to show that the denial of Mr. Gabriele's retiree health benefits was motivated by his exercise of protected rights under the EERA.

Thus, Charging Party does not allege any facts to support this conclusory statement that the Union discriminated against him, nor does he allege the basis for any such discrimination. Factually unsupported legal conclusions in the charge need not be accepted as true. (*Charter Oak Unified School District* (1991) PERB Decision No. 873.)

Although not clear from the charge, it appears the amended charge is also asserting that the Union breached its duty of fair representation by the Union's failure to respond to the inquiries Mr. Gabrie made to finalize his retirement benefits. As previously discussed, since the instant dispute concerns a matter outside the contract grievance process, the Union does not owe a duty of fair representation to Charging Party. (*California State Employees Association (Parisi)* (1989) PERB Decision No. 733-S; *California Teachers Association (Radford)* (2005) PERB Decision No. 1763.) For example, in *Alvord Educators Association (Bussman)* (2011) PERB Decision No. 2189, the Board similarly held that the charging party cannot establish that the exclusive representative breaches the duty of fair representation by failing to respond to the charging party's requests for legal representation against the employer over perceived violations of the California Education Code. Accordingly, a duty does not attach to the Union to ensure that the District complies with the terms of the Settlement Agreement concerning his retiree health benefits.

Moreover, as explained in the Warning Letter, the charge does not allege a pattern of overall conduct showing that the Union breached its duty of fair representation. To the contrary, as explained in the Warning Letter, it appears that the overall pattern of the Union's conduct in this matter was one of assistance to Charging Party. (*Service Employees International Union, Local 221 (Meredith)* (2008) PERB Decision No. 1982.) Regardless, as previously stated, nothing in the charge demonstrates how the Union's alleged conduct was arbitrary, discriminatory, or in bad faith, and thus Charging Party does not allege sufficient facts to establish a prima facie case that the Union breached its duty to fairly represent him or violated the EERA.

II. Statute of Limitations

A charging party must allege 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. (*Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889.) Charging Party has failed to show that the allegations raised in the

amended charge were timely filed. The original charge was filed on November 18, 2013 and thus, any allegations concerning conduct occurring prior to May 18, 2013, are untimely filed. Charging Party admits that in June 2012, he learned that his reliance on the Union's advice to take on part time employment was detrimental since it allegedly deprived him of receiving retiree benefits. Charging Party also admits that from March 8, 2012 and August 23, 2012, he inquired of the Union about finalizing his retiree benefits, but received no assistance.² No unfair practice charge was filed for such conduct until approximately a year later.³ Thus, it appears these allegations were filed outside the six-month statute of limitations and PERB is prohibited from issuing a complaint in this matter.

Conclusion

Accordingly, for the reasons set forth above, and those applicable in the Warning Letter, this charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations, 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

² In the case of a union's failure to process a grievance in which there is no definitive action upon which to base the limitations period, PERB has upheld the dismissal of a charge alleging violation of the duty of fair representation where the union failed to respond to the employee's letter and telephone messages for several weeks, finding that employee should have known that the union was not processing an employee's grievance prior to the expiration of the statutory limitations period. (*California State Employees Association (Chen)* (2005) PERB Decision No. 1736-S; see also *Oakland Education Association (Freeman)* (1994) PERB Decision No. 1057 [employee knew or should have known that union was failing to process his grievance when it failed to return his telephone calls or reply to his correspondence].)

³ A charging party's belated discovery of the legal significance of the underlying conduct does not excuse an otherwise untimely filing. (*Empire Union School District* (2004) PERB Decision No. 1650.)

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 _____
Yaron Parlovi
Regional Attorney

Attachment

cc: Lawrence Rosenzweig

PUBLIC EMPLOYMENT RELATIONS BOARD



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December 31, 2013

Constantino Gabriele

Re: *Constantino Gabriele v. Los Angeles College Faculty Guild, Local 1521*
Unfair Practice Charge No. LA-CO-1598-E
WARNING LETTER

Dear Mr. Gabriele:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 18, 2013. Constantino Gabriele (Charging Party) alleges that the Los Angeles College Faculty Guild, Local 1521 (Union or Respondent) violated the Educational Employment Relations Act (EERA or Act)¹ by breaching its duty of fair representation.

Investigation of the charge revealed the following relevant information. The Union is the exclusive representative of the certificated faculty unit at Los Angeles City College (LACC), a part of the Los Angeles Community College District (District). The Union and LACC are parties to a collective bargaining agreement (CBA) that is set to expire on June 30, 2014. CBA, Article 16, Section G provides, in relevant part:

6. An adjunct rate faculty member may be dismissed from employment and removed from a seniority list for one or more of the causes listed in Education Code Section 87732. Before an employee is dismissed pursuant to this section, the college president or designee shall give the employee:
 - a. written notice of the cause for dismissal, including a statement of the events upon which the cause is based;
 - b. an opportunity to inspect the documents or other materials that are relevant to the matter, if any;
 - c. an opportunity to meet with the college president or designee to discuss the matter and present any reasons why the dismissal should not occur; and
 - d. if the adjunct rate faculty member being dismissed pursuant to this section has seniority, the action of the college president

¹ EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

shall be subject to review pursuant to the grievance procedure contained in Article 28. If the adjunct rate faculty member does not have seniority, the action of the college president shall be final and shall not be subject to review pursuant to the grievance procedure contained in Article 28.

Facts as Alleged²

In September 2010, the District instituted dismissal proceedings against Charging Party, who taught Dental Technology courses at LACC. An administrative hearing on Charging Party's appeal of his termination was scheduled before the Office of Administrative Hearings (OAH), which was outside of the collective bargaining arbitration process. The Union assigned legal counsel Lawrence Rosenzweig to represent Charging Party.

In December 2010, the OAH administrative law judge conducted a pre-trial settlement conference attended by the District, Charging Party, and their representatives. A Settlement Agreement was reached between the parties and the OAH case was dismissed. Pursuant to the Settlement Agreement, dated January 26, 2011, Charging Party agreed to resign from the District and waive his right to a hearing. In return, the District agreed to continue paying Charging Party's salary through January 31, 2012. The Settlement Agreement also provided in relevant part, "Upon the effective date of his retirement, [Charging Party] shall be entitled to the health insurance benefits provided to retirees." The District's offer was premised on the fact that Charging Party would become 55 years old shortly before his resignation from service on February 1, 2012. Both Charging Party and Mr. Rosenzweig believed that the settlement required the District to pay Mr. Gabriele the same health benefits as it did to other District retirees.

After Charging Party's February 1, 2012, retirement, a dispute arose regarding whether the Settlement Agreement required Charging Party to retire through the California State Teachers Retirement System within 120 days in order to obtain his health insurance benefits. Charging Party alleged that he felt "deceived" by the District. In April 2012, the District filed a Declaratory Relief Action in the matter of *Los Angeles Community College District v. Constantino Gabriele*, Los Angeles County Superior Court, Case No. BC483225 to resolve such dispute. The Union retained Mr. Rosenzweig to represent Charging Party in the lawsuit.

During an April 30, 2013, Superior Court Settlement Conference, the District offered Charging Party \$70,000 to settle the dispute; however, Charging Party—against his counsel's advice—rejected the offer. On May 9, 2013, the Superior Court case went to trial, and on May 14, 2013, the Court issued a "Tentative Decision & Statement of Decision Following Trial" (Tentative Decision), finding in favor of the District.

² The Board agent may rely on a respondent's factual allegations that are undisputed or not refuted by the charging party. (*Chula Vista Elementary School District (2003) PERB Decision No. 1557.*)

On June 19, 2013, Mr. Rosenzweig advised Charging Party not to appeal the Tentative Decision and that the Union has spent “lots of money on this case and it was over.” When Charging Party informed him that it “was not fair,” Mr. Rosenzweig responded, “listen this case was not nor ever was about fair or being unfair . . . , it was all about monies and numbers and there was nothing [Charging Party] could do to change that.” Charging Party asserts that he was “miss informed” [sic] by Mr. Rosenzweig. Charging Party subsequently filed an appeal of the Tentative Decision through a private attorney. The appeal is currently pending.

Charging Party further asserts that the Dental Technology lab at LACC is “run” by a “husband and wife,” and that now that he is no longer employed at LACC, the LACC saved money to operate the lab and to retain their (husband and wife) jobs.

Discussion

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.” The charging party may do so by alleging sufficient facts showing 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.)

Charging Party has alleged that the exclusive representative denied him the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b).³ 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.) 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

³ The Board has held that, where—as here—a charging party fails to allege that any specific section of the Government Code has been violated, the Board agent, upon a review of the charge, may determine under what section the charge should be analyzed. (See *Los Banos Unified School District* (2007) PERB Decision No. 1935; *Los Angeles County Office of Education* (1999) PERB Decision No. 1360.) Accordingly, this charge is being analyzed under section 3544.9(b) of the EERA.

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 (*Rocklin*); emphasis in original.)

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

The union's duty of fair representation extends only to contractually-based remedies under the union's exclusive control. (*Service Employees International Union, Local 1021 (Horan)* (2011) PERB Decision No. 2204-M.) There is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such member can obtain a particular remedy. (*Ibid.*) In *Lane v. I.O.U.E. Stationary Engineers* (1989) 212 Cal.App.3d 164, the court held that a duty "akin" to a duty of fair representation may arise where a union chooses to undertake representation in a non-contractual forum. PERB has interpreted this decision as implicating a cause of action in state court (outside of PERB's jurisdiction) and has never adopted this theory as a basis for an unfair practice charge. (*Service Employees International Union, Local 1021 (Horan)*, *supra*, PERB Decision No. 2204-M, at fn. 7.) However, if Charging Party were attempting to pursue a contractual, not a statutory, remedy, then the charge must, at a minimum, show that Respondent "lacked a rational basis" when it refused to take "any further steps" on his behalf, or that its refusal was "devoid of honest judgment." (*Reed District Teachers Association, CTA/NEA (Reyes)* *supra*, PERB Decision No. 332, p. 9, quoting *Rocklin*, *supra*, PERB Decision No. 124.) In applying this standard, PERB does not focus on whether a union took the "correct" action; rather, the proper inquiry is whether the union acted arbitrarily, discriminatorily, or in bad faith. (*Sacramento City Teachers Association (Fanning, et al.)* (1984) PERB Decision No. 428, p. 7.)

Here, it appears that Charging Party, with assistance of Respondent, pursued a statutory right under the Education Code (to challenge his dismissal), not a grievance under a collective bargaining agreement. The OAH hearing process was thus “extra-contractual.” (*California State Employees Association (Parisi)* (1989) PERB Decision No. 733-S; *California Teachers Association (Radford)* (2005) PERB Decision No. 1763.) Similarly, the Declaratory Relief sought by the District was also extra-contractual and not based on a contract grievance. (*Ibid.*) The Union’s representation of Charging Party at settlement conferences was also extra-contractual. (See *American Federation of State, County, and Municipal Employees, Local 2620 (McGuire)* (2012) PERB Decision No. 2286-S [State Personnel Board settlement conference].) Accordingly, the Union had no duty of representation with respect to the OAH dismissal hearings or Superior Court matter.

Notwithstanding, the Union voluntarily provided a representative—Mr. Rosenzweig—for the preparation and presentation of both hearings and to represent Charging Party in settlement negotiations with the District. With Mr. Rosenzweig’s representation, the parties reached a settlement agreement that resulted in a dismissal of the termination proceedings at OAH. Additionally, the Union provided further legal representation at settlement discussions with the District after the District refused to pay Charging Party retiree health benefits. At settlement, the Union was able to obtain Charging Party a District-tendered offer of \$70,000 despite that Charging Party was the defendant in that matter. Thus, it appears that the Union provided Charging Party assistance with respect to the extra-contractual dismissal proceedings. The facts do not establish that the Union’s conduct, in that regard, was arbitrary, discriminatory, done in bad faith, lacked a rational basis, or was devoid of honest judgment. (See e.g., *American Federation of State, County, and Municipal Employees, Local 2620 (McGuire)*, *supra*, PERB Decision No. 2286-S [no breach of the representational duty by the union’s voluntary representation in extra-contractual hearing and settlement conferences].) Charging Party does not, therefore, establish a prima facie case that the Union breached its duty of fair representation.

Further, unions do not owe a duty of fair representation to provide attorneys for members in extra-contractual proceedings or to pay for the cost of a private attorney.⁴ (*SEIU Local 1021 (DeLarge)* (2009) PERB Decision No. 2068; *California State Employees Association (Fox)* (1995) PERB Decision No. 1099-S [no duty to provide financial assistance for a private attorney].) Accordingly, the Union was not obligated to provide Charging Party with an attorney to assist him with the appeal of the Tentative Decision, nor was it obligated to pay for the private attorney Charging Party retained.

Lastly, Charging Party’s alleges that Mr. Rosenzweig misinformed him because he advised that the appeal of the Tentative Decision was not worth pursuing. The Board has rejected

⁴ Where the union does have a duty to represent an employee, the union does not breach that duty by failing to provide the employee with the representative of his or her choice. (*SEIU-United Healthcare Workers West Local 2005 (Hayes)* (2011) PERB Decision No. 2168-M.)

similar claims as failing to demonstrate a breach of the representational duty. In *California State Employees Association (Finch)* (1992) PERB Decision No. 959-S, the Board found that a union's decision to deny representation to a unit member before the State Personnel Board, was not arbitrary, discriminatory or done in bad faith. The charge fails to provide a clear and concise statement showing how Mr. Rosenzweig's advice raises an inference that the Union engaged in conduct that was arbitrary, discriminatory, or in bad faith, especially considering that the Union successfully obtained a settlement offer from the District (i.e., \$70,000) to resolve the dispute presented in the Declaratory Relief action.

For these reasons the charge, as presently written, does not state a prima facie case.⁵ 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. If an amended charge or withdrawal is not filed on or before January 10, 2014,⁶ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Yaron Partovi
Regional Attorney

YP

⁵ 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.*)

⁶ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)