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

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| EMMANUIL E. VASSERMAN,<br><br>Charging Party,<br><br>v.<br><br>UNITED TEACHERS LOS ANGELES,<br><br>Respondent. | Case No. LA-CO-1605-E<br><br>PERB Decision No. 2382<br><br>June 27, 2014 |

Appearance: Emmanuil E. Vasserman, on his own behalf.

Before Huguenin, Winslow and Banks, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Emmanuil E. Vasserman (Vasserman) from the dismissal (attached) of Vasserman's unfair practice charge by PERB's Office of the General Counsel. The charge, as amended, alleged that the United Teachers Los Angeles (UTLA) violated the Educational Employment Relations Act (EERA)[2] and breached its duty of fair representation, by using inaccurate and/or fraudulent documents to deliberately mislead Vasserman about a grievance filed by UTLA on behalf of Vasserman. The Office of the General Counsel determined that Vasserman's charge did not allege sufficient facts to indicate that any errors or omissions in UTLA's communications with Vasserman were arbitrary or discriminatory or the result of bad

[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, sec. 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.

faith on the part of UTLA and, accordingly dismissed the charge for failure to state a prima facie case.

The Board has reviewed the entire case file and has fully considered the relevant issues and contentions raised by Vasserman's appeal. Except as noted below, the Board concludes that the Office of the General Counsel's warning and dismissal letters are supported by the factual allegations included in the unfair practice charge, as amended. The Board also concludes that, except as noted below, the warning and dismissal letters are well-reasoned and in accordance with applicable law, and that Vasserman's appeal raises no issues warranting further consideration from the Board. Accordingly, the Board adopts the warning and dismissal letters as a decision of the Board itself, subject to the discussion below.

## PROCEDURAL HISTORY

On January 31, 2014, Vasserman filed his initial charge and supporting materials, which alleged, among other things, that UTLA had breached its duty of fair representation under EERA.[3]

On February 24, 2014, UTLA filed a position statement and supporting materials in response to Vasserman's charge.[4]

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[3] The form and statement included as part of Vasserman's initial charge alleged that UTLA had violated the Ralph C. Dills Act (Dills Act), sections 3518 and 3519.5, subdivision (d), which make it unlawful for an exclusive representative of *state* employees to fail or refuse to participate in good faith in mediation procedures. (The Dills Act is codified at sec. 3512 et seq.) Because Vasserman is not a state employee subject to the Dills Act, but a "public school employee" within the meaning of EERA section 3540.1, subdivision (j), the Office of the General Counsel correctly disregarded these allegations and instead supplied the appropriate provisions of EERA concerning alleged violations of an exclusive representative's duty of fair representation. (*Los Banos Unified School District* (2007) PERB Decision No. 1935; *Los Angeles Community College District* (1994) PERB Decision No. 1060, p. 9.)

[4] As discussed below, because UTLA's position statement was not signed under penalty of perjury with a declaration as to the truth and completeness of its contents, as required by PERB Regulation 32620, subdivision (c), and decisional law, the Board agent should not have considered the factual allegations included in the position statement or its supporting materials

On March 10, 2014, the Office of the General Counsel issued a warning letter advising Vasserman *inter alia* that the charge, as written, did not state a prima face case that UTLA had breached its duty of fair representation.

On or about March 20, 2014, Vasserman mailed a first amended charge, which was received in the Los Angeles Regional Office of PERB on March 24, 2014, and in the PERB Headquarters in Sacramento on March 26, 2014.

On April 1, 2014, the Office of the General Counsel dismissed the charge for failure to state a prima facie violation of the duty of fair representation.

On April 23, 2014 Vasserman filed the present appeal. UTLA filed no response to the appeal.

On May 12, 2014, PERB's Appeals Assistant advised Vasserman and UTLA that the filings were complete and that the matter had been placed on the Board's docket as of May 8, 2014.

## FACTUAL BACKGROUND[5]

As near as can be gleaned from the charge and its supporting materials, the essential facts are as follows:

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and we have likewise disregarded such allegations in considering the present appeal. (*United Educators of San Francisco (Banos)* (2005) PERB Decision No. 1764 (*UESF/Banos*), p. 3.)

[5] Because this matter comes before the Board on appeal of a dismissal without a hearing, we are not concerned here with making findings of fact or weighing the parties' conflicting allegations. (*Eastside Union School District* (1984) PERB Decision No. 466.) Rather, at this stage of the proceedings, we treat Vasserman's factual allegations as true and consider them in the light most favorable to him. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489.) Pursuant to PERB's regulations and decisional law, we may also consider factual information provided by the respondent, when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620(c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994; *Riverside Unified School District* (1986) PERB Decision No. 562a.)

On February 15, 2012, Vasserman worked as substitute teacher at the Dr. George Washington Carver Middle School, which is part of the Los Angeles Unified School District (LAUSD). On March 2, 2012, an official of the school counseled Vasserman and issued him an inadequate service report (ISR) for his conduct on February 15, 2012. The ISR recommended that Vasserman not be reassigned to Carver Middle School.

On March 14, 2012, UTLA filed a grievance, which alleged that the ISR issued to Vasserman violated the collective bargaining agreement (CBA) between UTLA and LAUSD. The same day, UTLA sent Vasserman a letter stating that he would be contacted in the very near future to schedule a Step 1 meeting for the grievance.

Beginning in March 2012 and continuing to May 2013, Vasserman was repeatedly separated from employment with LAUSD and then reinstated, with the final separation occurring on May 24, 2013. Vasserman does not allege that he contacted UTLA or otherwise sought its assistance in conjunction with any of these events.

On September 30, 2013, Vasserman filed a claim with LAUSD for damages allegedly suffered by Vasserman as a result of the March 2, 2012 ISR. Vasserman's claim for damages alleges that the ISR was not issued within 10 working days of service, as required by the CBA. Vasserman does not allege that he sought the assistance of UTLA in preparing and filing the claim for damages or that UTLA was aware of this claim.

On October 10, 2013, UTLA Area Representative Jose Govea (Govea) sent a letter to Vasserman advising him that the grievance challenging the March 12, 2012 ISR "will soon be calendared." Govea's letter also stated that he had tried to contact Vasserman by telephone but that no one answers and there was no voicemail or answering machine. Govea's letter requested that Vasserman contact him at the earliest convenience and provide him with a cellular telephone number and personal email address to facilitate communication. The letter

closed by advising Vasserman that his failure to contact Govea within 10 days of receipt of the letter "will be considered permission to close your case." Vasserman does not allege, and the file otherwise includes no indication that Vasserman responded to this letter or provided UTLA with additional contact information, as requested.

On November 5, 2013, Govea sent Vasserman a letter to inform him that a Step 1 meeting for the ISR grievance had been scheduled for "Thursday, November 8, 2013" at 2:00 p.m. After providing general information about the nature and objectives of a Step 1 meeting, Govea's letter requests that Vasserman call Govea's office to confirm his attendance at the Step 1 meeting. Vasserman does not allege, and the file includes no evidence, that Vasserman responded to this letter.

On January 24, 2014, Govea sent a letter to Sergio Franco (Franco) of LAUSD regarding the ISR grievance on behalf of Vasserman. Govea informed Franco that UTLA was withdrawing the grievance "without precedent or prejudice and will close the file on this case." The letter indicates that a copy was furnished to Vasserman. Vasserman does not allege and the file gives no indication that Vasserman objected to UTLA's withdrawal of the grievance, or that he responded to this letter.

## THE CHARGE ALLEGATIONS

Vasserman's charge, as amended, cites to three documents which he contends demonstrate that UTLA acted in bad faith. The first document is Govea's November 5, 2013 letter to Vasserman, in which Govea stated that a Step 1 grievance meeting had been scheduled for Thursday, November 8, 2013. Vasserman's charge points out that, in fact, November 8, 2013, fell on a Friday. Vasserman alleges that UTLA made no attempt to correct this error, though he does not specifically allege that he suffered any harm as a result of UTLA's alleged error or omission. Although it appears from Vasserman's charge that the Step 1 meeting was

not convened as scheduled, Vasserman's charge does not indicate whether the Step 1 meeting was cancelled or postponed at the request of UTLA, LAUSD or Vasserman, or for what reason.

The second document cited by Vasserman is Govea's letter of January 24, 2014, in which Govea stated that UTLA considered Vasserman's grievance closed. Vasserman contends that the letter's contents constitute a misrepresentation, because no Step 1 meeting was ever re-scheduled or offered to Vasserman. He does not allege that he had any further communications with UTLA in response to this letter. Nor does he provide any facts to dispute the accuracy of the contents of Govea's previous letter of October 10, 2013, regarding Vasserman's unavailability.

The third document cited by Vasserman is a letter dated February 13, 2014.[6] The letter is in all respects identical to Govea's November 5, 2013 letter to Vasserman regarding the Step 1 meeting, except that the date for the Step 1 meeting appears as "Friday, November 8, 2013," whereas Govea's previous letter to Vasserman had misstated the date as "Thursday, November 8, 2013." Vasserman contends that, submitting a "[d]octored, [a]ltered and [f]orged letter" to PERB, without explanation, demonstrates UTLA's dishonesty and bad faith, which are grounds for finding that a union has breached its duty of fair representation.

THE DISMISSAL OF VASSERMAN'S CHARGE

The Office of the General Counsel dismissed the charge for failure to state a prima facie case that UTLA had breached its duty of fair representation or otherwise violated any of the provisions of EERA cited in Vasserman's amended charge. Specifically, the warning and

[6] This letter was initially provided to the Board agent as part of the supporting materials for UTLA's unsworn position statement and, *in that capacity*, was not appropriate for consideration. However, because Vasserman attached a copy of the same document to his amended charge and incorporated its contents into the allegations of the amended charge, it was appropriate for consideration as part of the charging party's factual allegations.

dismissal letters advised Vasserman that, to state a prima facie case that a union has breached its duty of fair representation, the charging party must show that the exclusive representative's conduct was arbitrary or discriminatory, or it must be apparent from the allegations how or in what manner the exclusive representative'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 (*IAM/Attard*).) According to the dismissal letter, Vasserman provided no facts to indicate that any of the alleged errors or omissions in UTLA's correspondence with Vasserman or with LAUSD were deliberate or otherwise made in bad faith.

Additionally, the dismissal letter observed that Vasserman's charge included no facts documenting whether he had responded to UTLA's attempts to contact him and to obtain from him a working telephone number or other contact information. Citing *IAM/Attard* and *United Teachers-Los Angeles (Wyler)* (1993) PERB Decision No. 970, the Office of the General Counsel determined that, under these circumstances, the January 24, 2014 letter from Govea "does not demonstrate that UTLA abused its discretion or that its actions were without a rational basis or devoid of honest judgment" when it withdrew the ISR grievance.

## DISCUSSION

The exclusive representative's duty of fair representation extends to grievance handling. (*Fremont Unified School District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258 (*UTLA/Collins*).) In order to state a prima facie violation of this section of EERA, the charging party must show that the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. Because Vasserman does not allege discrimination, he must allege sufficient facts to demonstrate that UTLA's action or failure to act was arbitrary or undertaken in bad faith, i.e., unreasonable or devoid of honest judgment. (*Reed District Teachers Association, CTA/NEA*

*(Reyes)* (1983) PERB Decision No. 332 (*Reed/Reyes*), p. 9; *UTLA/Collins, supra*, PERB Decision No. 258, pp. 5-6.)

Additionally, PERB has long held that only those activities that have a substantial impact on the employment relationship are subject to the duty of fair representation. (*UTLA/Collins, supra*, PERB Decision No. 258, pp. 7-8; *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, p. 8.) As part of the prima facie case, a charging party must therefore allege sufficient facts to determine how the exclusive representative's acts or omissions have affected the charging party's employment relations. (*Union of American Physicians & Dentists (Meenakshi, et al.)* (2006) PERB Decision No. 1846; *California School Employees Association (Petrich)* (1986) PERB Decision No. 577.)

Nowhere in the initial or amended charge, or in any of the supporting materials, does Vasserman specifically allege that he has suffered any harm or that he was prejudiced in any way that is attributable to UTLA's allegedly dishonest acts or omissions. Because the only "statement of facts" provided by Vasserman, the chronology included with his initial charge, does not provide sufficient detail to determine whether UTLA had any role in, or even knew about, Vasserman's repeated separations from, and reinstatements to, employment with LAUSD between March 2012 and May 2013, the only adverse consequence to Vasserman's employment relations that may be attributed to UTLA is the withdrawal of the grievance contesting the March 2, 2012 ISR. Although the documents provided by Vasserman indicate that the March 2, 2012 ISR was later rescinded and did not preclude Vasserman from further employment as a substitute teacher with LAUSD, it was mentioned in subsequent correspondence from LAUSD and thus, presumably, played some role in the decisions to separate Vasserman from his employment with Virgil Middle School and, ultimately, from his employment as a substitute

teacher with LAUSD. Vasserman also alleges that he suffered damages, in an unspecified amount, as a result of the March 2, 2012 ISR.

Although the above facts are arguably sufficient to demonstrate that some impact on Vasserman's employment relations resulted from UTLA's withdrawal of the ISR grievance, Vasserman has not alleged sufficient facts to demonstrate how the withdrawal of the ISR grievance was arbitrary or undertaken in bad faith, i.e., unreasonable or devoid of honest judgment. (*Reed/Reyes, supra,* PERB Decision No. 332, p. 9; *UTLA/Collins, supra,* PERB Decision No. 258, pp. 5-6.) The duty of fair representation is not breached by a refusal to pursue a grievance if the representative has made an honest, reasonable determination that the grievance lacks merit. (*American Federation of State, County and Municipal Employees, Local 2620 (Moore)* (1988) PERB Decision No. 683-S.) The facts alleged by Vasserman do not establish that UTLA arbitrarily ignored a meritorious grievance or processed it in a perfunctory fashion. The facts, as alleged by Vasserman, establish that UTLA filed a grievance on his behalf to challenge the March 2, 2012 ISR and attempted to convene a Step 1 meeting for that grievance. While it took approximately a year and a half to schedule the Step 1 meeting, that fact alone will not usually establish that the representative has processed the case in a perfunctory manner. (*Service Employees International Union, Local 250 (Hessong)* (2004) PERB Decision No. 1693-M.) Moreover, the materials provided by Vasserman suggest that at least some of this delay was caused by his own unavailability. Moreover, although the grievance was eventually withdrawn on or about January 24, 2014, Vasserman has alleged no facts to explain how this decision was without a rational basis or devoid of honest judgment.

Although we conclude that the charge was appropriately dismissed for failure to state a prima facie case, we consider the grounds asserted in Vasserman's appeal. First, Vasserman argues that the dismissal letter misstates the date that his amended charge was filed with PERB

as "March 26, 2014, when, according to Vasserman's proof of service, the amended charge was mailed on March 20, 2014. Even assuming, as Vasserman asserts, the dismissal letter inaccurately states the date that the amended charge was filed, there is no indication in the dismissal letter that the Regional Attorney who investigated the charge failed to consider any of the factual allegations, points of law or any other material included in Vasserman's amended charge. To the contrary, the dismissal letter includes a detailed discussion of the deficiencies in the amended charge but nowhere suggests that it was untimely filed. The first ground asserted by Vasserman is therefore without merit.

Second, Vasserman asserts that the Regional Attorney failed to initiate a discovery process by requesting that UTLA provide a sworn affidavit as to the authenticity and/or veracity of the documents included with its position statement. The Board agent assigned to a case must investigate its factual allegations to determine, among other things, whether it alleges sufficient facts to state a prima facie case. However, the Board agent is not authorized to make findings of fact (*San Juan Unified School District* (1977) EERB[7] Decision No. 12), nor to conduct discovery aimed at determining the truth or otherwise of the parties' claims or defenses. (PERB Reg. 32620, subds. (a), (b)(4), (b)(5), and (d).) It is only after the initial investigation has been completed, and a complaint has been issued, that the parties may request discovery through PERB's processes. (*King City High School District Association, CTA/NEA; King City Joint Union High School District; et al. (Cumero)* (1982) PERB Decision No. 197, p. 26; *Chula Vista Elementary Educators Association (Larkins)* (2003) PERB Decision No. 1575 (*Chula Vista*), p. 4.) Thus, the Board agent was not authorized or required to initiate

[7] Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

discovery at this stage of the proceedings and this part of Vasserman's argument is therefore without merit.

However, as noted above, UTLA's position statement included no sworn declaration, provided under penalty of perjury, as to the truth and completeness of its response and Vasserman is correct that, in the absence of such a declaration, the Board agent should not have considered or relied on the factual allegations included in UTLA's position statement or any of its supporting materials. (*UESF/Banos, supra,* PERB Decision No. 1764, p. 3.) The purpose served by the oath requirement is to place the parties on the same footing when making their factual allegations and counter allegations, so that both parties' factual claims are subject to the same standard of truth and completeness to the best of the declarant's knowledge or belief.[8] Because the factual allegations included in UTLA's position statement and, by extension, in the supporting documents attached thereto, were not in compliance with the regulation, we do not adopt those portions of the warning and dismissal letters that cited or relied on UTLA's factual allegation, including citations to an October 15, 2013 letter from Govea to Vasserman that was included with UTLA's position statement but not referenced in or attached to Vasserman's charge. However, this letter does little more than reiterate the contents of Govea's October 10, 2013 letter, which was attached to Vasserman's charge and which was therefore properly considered by the Board agent. Thus, while we find partial merit to this point in Vasserman's appeal, it does not alter the overall conclusion that his charge was appropriately dismissed, because, with or without the October 15, 2013 letter, the charge fails to state a prima facie case.

[8] The regulation governs the presentation and verification of facts and does not address itself to legal argument. Consequently, although it does not appear that the warning or dismissal letters relied on any legal points or authorities cited in UTLA's position statement, we would not regard it as contrary to the regulation or otherwise improper, if such had been the case.

The third ground cited in Vasserman's appeal is his contention that the Office of the General Counsel dismissed the charge without requiring UTLA to respond to Vasserman's amended charge with a position statement or sworn affidavit. Here, Vasserman's complaint is not that UTLA filed a defective or incomplete position statement, but that it was not required to file a second position statement *at all* in response to Vasserman's amended charge. According to Vasserman, this omission violates principles of impartiality and neutrality. We disagree.

PERB Regulation 32620, subdivision (c), requires that the respondent be advised of the allegations included in an unfair practice charge. The regulation also sets forth the requirements for filing a position statement or other response with PERB, *if the respondent chooses to address those allegations*. However, nothing in the regulation or in PERB's decisional law *requires* a respondent to file a position statement or to otherwise respond to a charge. Nor must a respondent file an amended position statement, simply because the charging party has filed an amended charge. A charging party cannot, in effect, use PERB's initial investigation of a charge as a way to obtain discovery from the respondent, if the respondent chooses not to respond. (*Chula Vista, supra*, PERB Decision No. 1575, p. 4.) As indicated above, the dismissal letter fully and fairly considered the allegations included in Vasserman's amended charge and there is no indication of bias or a lack of neutrality on the Board agent's part. We therefore reject the third ground asserted by Vasserman's appeal.

ORDER

The unfair practice charge in Case No LA-CO-1605-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Winslow joined in this Decision.

# PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
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April 1, 2014

Emmanuil E. Vasserman

Re: *Emmanuil E. Vasserman v. United Teachers Los Angeles*
Unfair Practice Charge No. LA-CO-1605-E
**DISMISSAL LETTER**

Dear Mr. Vasserman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 31, 2014. Emmanuil E. Vasserman (Vasserman or Charging Party) alleges that the United Teachers Los Angeles (UTLA 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 March 10, 2014, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it on or before March 24, 2014, the charge would be dismissed.

On March 26, 2014, Charging Party filed a First Amended Charge. In the amended charge, Charging Party continues to allege that UTLA breached its duty of fair representation in violation of EERA.

Charging Party cites to three documents in which UTLA allegedly committed an unfair practice. First, Charging Party identifies a letter dated November 5, 2013, in which UTLA informed Charging Party that a Step 1 meeting had been scheduled for Thursday, November 8, 2013. Charging Party states that such date and day of the week does not exist and therefore the document constitutes "misrepresentation" since no correction was made.

Second, Charging Party identifies a letter dated January 24, 2014, in which UTLA informed Charging Party that the grievance process had been closed. According to Charging Party, this document constitutes "misrepresentation" because no Step 1 meeting was rescheduled or offered.

[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.

Third, Charging Party cites to a letter dated February 13, 2014, in which the attorney for UTLA submitted a "doctored, altered and forged letter dated November 5, 2013 where Thursday is altered to Friday." Such conduct, according to Charging Party, constitutes a "fraudulent document."

Charging Party states that "the implication of Bad Faith can be derived" as a result of the use of the three documents cited above.

In support of his allegations, Charging Party cites to four cases arising out of the National Labor Relations Board (NLRB) and insists that the undersigned "address the relevancy of the legal precedents stated in [his] legal discourse." According to Charging Party, these cases stand for the proposition that (1) a union must make an honest effort in the representation of its members (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330); (2) a violation of common law creates grounds for an unfair labor practice (*Miranda Fuel Co.* (1962) 140 NLRB 181); (3) if a union's conduct involves bad faith, this violates the Duty of Fair Representation (*Vaca v. Sipes* (1967) 386 U.S. 171; and (4) misrepresentation is a ground for breach of Duty of Fair Representation (*Alicea v. Suffield Poultry, Inc.* (1990) 902 F.2d 125).

Although PERB is not bound by decisions of the NLRB, the Board will take cognizance of NLRB precedent were appropriate, as an aid in interpreting identical or analogous provisions of the statutes it administers. (*State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2106-S.) Here, however, PERB has well-established case law analyzing violations of the duty of fair representation. Such cases have been previously cited to Charging Party in the attached Warning Letter, and will be further discussed below.

In the attached Warning Letter, Charging Party was informed that in order to state a prima facie violation of the duty of fair representation, 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.)

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.)

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 should include facts 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.)

Charging Party's first document cited as evidence of UTLA's breach of the duty of fair representation was the November 5, 2013 letter in which UTLA incorrectly identified Thursday, November 8, 2013 as the date of Charging Party's Step 1 meeting. According to the calendar, such date does not exist. Charging Party contends that this document constitutes "misrepresentation" since no correction was ever made. The Board has held that union agents must refrain from purposefully keeping unit members uninformed concerning grievances or matters affecting their employment. Misrepresentations based on simple negligence, however, do not violate a union's duty of fair representation. (*Union of American Physicians & Dentists (Meenakshi, et al.)* (2006) PERB Decision No. 1846-S.) Without any information establishing that UTLA *purposely* sent Charging Party a letter identifying an incorrect Step 1 meeting date, the first document filed by Charging Party fails to establish that UTLA's action constitutes a misrepresentation. Moreover, the letter referenced by Charging Party specifically concludes by requesting Charging Party to "confirm [his] attendance at the meeting," yet Charging Party provides no facts documenting whether he had any futher communication with UTLA.

Charging Party's second document cited as evidence of UTLA's breach of the duty of fair representation was the January 24, 2014 letter in which UTLA informed Charging Party that the grievance process was closed. Although not alleged or cited to in the amended charge, the original unfair practice charge also contained a letter from UTLA dated October 10, 2013 informing Charging Party of a hearing to be calendared regarding Charging Party's pending

grievance and informing Charging Party that UTLA had been unable to reach Charging Party by telephone. Moreover, Respondent's position statement identified a letter dated October 15, 2013 to Charging Party again stating that UTLA has been unable to reach Charging Party.[2] The letter states that UTLA made several attempts to contact Charging Party and that Charging Party has no answering machine on which to leave a message. Again, the letter concludes by stating that if Charging Party does not contact UTLA, his "lack of response will be interpreted as a decision NOT to proceed with [his] grievance." As amended, Charging Party's second document, in which UTLA closed his grievance, fails to establish a breach of the duty of fair representation. This communication does not demonstrate that UTLA abused its discretion or that its actions were without a rational basis or devoid of honest judgment in issuing its withdrawal from Charging Party's grievance. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M; *United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.) Rather, it appears UTLA promptly filed a grievance on behalf of Charging Party and attempted to pursue it. From the correspondence provided by both Charging Party and Respondent, it appears that UTLA had considerable difficulty reaching Charging Party and that, having received no response from Charging Party, withdrew Charging Party's grievance. Nothing in the amended charge refutes this information or provides further information establishing that Charging Party attempted to contact UTLA at any time during the grievance process.

Charging Party's third document cited as evidence of UTLA's breach of the duty of fair representation was the February 13, 2014 letter from UTLA's attorney allegedly attaching a "doctored, altered, and forged" November 5, 2013 letter correcting the clerical error of changing Charging Party's Step 1 meeting from Thursday, November 8, 2013 to Friday, November 8, 2013. Charging Party provides no evidence in support of the proposition that the letter was doctored, altered or forged. The fact that a second letter exists with the clerical correction of changing Thursday to Friday is insufficient to establish fraud on the part of UTLA. Regardless, nothing in the amended charge states how this November 5, 2013 letter amounts to a misrepresentation sufficient to breach of the duty of fair representation. As stated above, union agents must refrain from purposefully keeping unit members uninformed concerning grievances or matters affecting their employment. (*Union of American Physicians & Dentists (Meenakshi, et al.), supra*, PERB Decision No. 1846-S.) Charging Party does not allege that he was purposely kept uninformed. Charging Party states nothing about his Step 1 meeting. Charging Party does not state whether he attempted to contact UTLA, attempted to attend the meeting, or otherwise attempted to pursue his grievance.

Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein and in the March 10, 2014 Warning Letter.

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[2] Nothing in PERB case law requires a Board agent to ignore facts provided by the Respondent and consider only the facts provided by the Charging Party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

Right to Appeal

Pursuant to PERB Regulations,[3] 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.)

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).)

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

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 _____
Katharine Nyman
Regional Attorney

Attachment

cc: Warren Fletcher, President

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377

March 10, 2014

Emmanuil E. Vasserman

Re: *Emmanuil E. Vasserman v. United Teachers Los Angeles*
Unfair Practice Charge No. LA-CO-1605-E
**WARNING LETTER**

Dear Mr. Vasserman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 31, 2014. Emmanuil E. Vasserman (Vasserman or Charging Party) alleges that the United Teachers Los Angeles (UTLA or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation.

Factual Background as Alleged

As a factual background, Charging Party provides a two page "supporting chronology." The chronology is as follows:

1. 03/02/2012 – Inadequate Service Report issued for Carver MS for 02/115/2012 service date.
2. 03/14/12 – UTLA files Union Grievance subject to Collective Bargaining Agreement in violation of Article X, Sec 7 (ISR Report filed by LAUSD on 11th day Breach of Union Collective Bargaining Agreement).
3. 03/20/2012 – Separated from the Employment (No Step 1 Meeting scheduled or Held).
4. 06/05/2012 – Reinstated to Employment (No Step 1 Meeting scheduled or Held).
5. 04/16/2013 – Separated from Employment (No Step 1 Meeting scheduled or Held).
6. 05/24/2013 – Separated from Employment (No Step 1 Meeting scheduled or Held).
7. 09/20/2013 – Administrative Claim filed against LAUSD (No Step 1 Meeting scheduled or Held).

[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.

8. 10/10/2013 – UTLA and its Representative Jose Govea sends a letter after more than 18 months showing interest in setting up Step 1 Meeting. Purpose to delete or to diminish my Cause of Action against LAUSD.
9. 11/05/2013 – Step I Meeting Scheduled on Thursday, November 8, 2013. Such Date and Day of the Week does not exist in the Calendar. (see copy of November Calendar)
10. 01/24/2014 – UTLA and its representative Jose Govea sends a letter informing me that my case is closed.

Attached to the charge are: (1) a photocopy of a November 2013 calendar; (2) a certificated day-to-day substitute teacher Inadequate Service Report (ISR) dated February 15, 2012; (3) a letter dated March 14, 2012 from Mr. Govea advising Charging Party that a formal grievance had been filed on his behalf; (4) a Notice of Separation from Employment dated March 20, 2012 from the Los Angeles Unified School District (LAUSD); (5) a Rescission of Notice of Separation dated June 5, 2012 from LAUSD; (6) a second Notice of Separation from Employment dated April 16, 2013 from LAUSD; (7) a corrected copy of the April 16, 2013 Notice of Separation from Employment; (8) a Claim for Damages dated September 20, 2013 filed by Charging Party; (9) a letter from Mr. Govea dated October 10, 2013 informing Charging Party of a hearing to be calendared in Charging Party's pending grievance and informing Charging Party that UTLA had been unable to reach Charging Party by telephone; (10) A letter from Mr. Govea dated November 5, 2013 identifying Thursday, November 8, 2013 as the date of Charging Party's Step I meeting; and (11) a letter from Mr. Govea dated January 24, 2014 withdrawing Charging Party's grievance.

Attached to UTLA's response are additional documents concerning Charging Party's grievance. First, UTLA provides a March 14, 2012 letter to Luz N. Cotto, Principal at Carver Middle School. Attached to the letter is UTLA's grievance form for Charging Party filed March 12, 2012 with LAUSD. Second, UTLA provides the same March 12, 2012 letter to Charging Party informing him of the grievance filing. Third, UTLA provides the same October 10, 2013 letter to Charging Party informing Charging Party of a hearing to be calendared in his pending grievance. As stated above, the letter informs Charging Party that UTLA had been unable to reach Charging Party by telephone. At the conclusion of the October 10, 2013 letter, UTLA states "[i]f you do not contact me w in 10 days of receipt of this letter your lack of response will be considered permission to close your case." Third, UTLA provides a letter dated October 15, 2013 to Charging Party again stating that UTLA has been unable to reach Charging Party. The letter states that UTLA made several attempts and that there is no answering machine on which to leave a message. Again, the letter concludes by stating that if Charging Party does not contact UTLA, his "lack of response will be interpreted as a decision NOT to proceed with [his] grievance."

Discussion

The charge alleges that UTLA refused "to participate in good faith in the mediation procedure involving Union Grievance Process" in violation of Government Code section 3519.5(d) Section 3519.5(d) pertains to a union's failure to participate in the statutory mediation procedure. However, individual employees lack standing to allege bargaining violations, including unilateral change violations, and violations of EERA sections that protect the collective bargaining rights of employee organizations and employers. (*Oxnard Union High School District* (2010) PERB Decision No. 2265.) Since Government Code section 3519.5(d) protects the bargaining rights of employers by making it unlawful for an employee organization to refuse to participate in good faith in the statutory mediation procedure, Charging Party lacks standing to allege a violation of Government Code section 3519.5(d).[2]

Charging Party also appears to be asserting 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 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 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

[2] In addition, Government Code section 3519.5(d) refers to the Ralph C. Dills Act (Dills Act), which covers employees in State civil service. Charging Party is not covered by the Dills Act. As a teacher, Charging Party is covered by EERA.

> 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.)
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.)

Charging Party alleges no facts that demonstrate that UTLA abused its discretion or that its actions were without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M; *United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.) Herein, UTLA promptly filed a grievance on behalf of Charging Party and attempted to pursue it with LAUSD. From the correspondence provided by both Charging Party and Respondent, it appears that UTLA had considerable difficulty reaching Charging Party and that, having received no response from Charging Party, withdrew Charging Party's grievance. No information presented herein demonstrates that UTLA acted arbitrarily or in bad faith. To the extent that Charging Party takes issue with the duration of the grievance process, PERB has held that delaying the resolution of a grievance does not breach the duty of fair representation where the union preserved any timelines for filing an appropriate action and where the length of delay did not foreclose the employee's ability to obtain a remedy. (*United Teachers of Los Angeles (Adams)* (2009) PERB Decision No. 2012.)

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

[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.*)

PERB. If an amended charge or withdrawal is not filed on or before March 24, 2014,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Katharine Nyman
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.)