

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



BRIAN CROWELL,

Charging Party,

v.

BERKELEY FEDERATION OF TEACHERS,  
LOCAL 1078,

Respondent.

Case No. SF-CO-789-E

PERB Decision No. 2405

January 13, 2015

Appearances: Brian Crowell, on his own behalf; Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Berkeley Federation of Teachers, Local 1078.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION<sup>1</sup>

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Charging Party Brian Crowell (Crowell) of a dismissal (attached) by the Office of the General Counsel of his unfair practice charge. The charge alleged that the Respondent Berkeley Federation of Teachers, Local 1078 (BFT) violated the Educational Employment Relations Act (EERA)<sup>2</sup> by violating the duty of fair representation.

The Board has reviewed the file in its entirety, including the initial and amended unfair practice charges and BFT's position papers in response thereto. Based on this review, the

<sup>1</sup> PERB Regulation 32320, subdivision (d), provides: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 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, this decision has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit.8, § 31001 et seq.)

<sup>2</sup> EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Board finds that the warning and dismissal letters accurately describe the factual allegations of the charge, and that they are well-reasoned and consistent with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself as supplemented below.

### The Unfair Practice Charge and Dismissal

Crowell is a teacher employed by the Berkeley Unified School District (District) and a member of the teachers bargaining unit represented by BFT. The allegations of the unfair practice charge largely concern BFT's participation in the Berkeley Peer Assistance and Review program (BPAR).<sup>3</sup>

The allegations of the unfair practice charge, as amended, and relevant supporting evidence, can be divided into six areas:

Disparate Impact: Crowell alleges that BPAR has a disparate impact on teachers who are African-Americans, Hispanics, Women, and over the age of 40, which violates Title 7 of the Civil Rights Act of 1964. Crowell alleges that BFT's participation in BPAR violates Article 6, the equal employment opportunity and non-discrimination clause, of the collective bargaining agreement (CBA).

Education Code Violations: BFT's participation in BPAR violates the California Education Code, which provides that the majority of the BPAR panel shall be composed of certificated classroom teachers chosen by other certificated classroom teachers. Crowell alleges that from 2002-2011, the panel was composed of only four teachers and four

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<sup>3</sup> BPAR is authorized under California Education Code section 44500, which provides that a governing board of a school district and the exclusive representative of the certificated employees in the school district may develop and implement a peer assistance and review program for teachers. Broadly stated, the main components of such a program include performance goals, multiple observations during classroom instruction, cooperative relationships between the consulting teachers and the principal, staff development activities, monitoring and evaluations. (Cal. Ed. Code, § 44500.)

administrators. By practice, BFT President Cathy Campbell (Campbell) serves as chair and appoints the certificated panel members. According to Crowell, using this practice to fill BFT positions instead of doing so by election violates the California Education Code.

Conflict of Interest: Because BPAR panel members make recommendations about whether a teacher should be retained or terminated and are paid a stipend for their participation, BFT's participation creates a conflict of interest. Attached to the initial charge is a letter from Counsel for BFT, Stewart Weinberg (Weinberg), in response to a letter from Crowell to BFT requesting answers to a number of questions related to BFT's participation in BPAR. The letter explains that the California Education Code authorizes exclusive representatives of public school employees to enter into peer assistance and review programs with school districts and, therefore, that such an arrangement exists within the District is not a violation of BFT's duty of fair representation. The letter states: "It is a statutory function of an exclusive representative authorized by the Education Code." The letter acknowledges that if the duties of the BFT President are in conflict with the duties of a BPAR panel member, "that could raise the specter of a conflict of interest." For that reason, neither the President nor the other teacher BPAR panel members take part in "the decisionmaking process relative to the Union's support of" a certificated teacher in the BPAR program. Instead, as the letter states, "representatives of the Union who are not involved in BPAR administration take over the function of deciding questions related to representation of individuals who are in the Program."

Adverse Actions by BFT against Crowell (raised in first amended charge): As alleged, Crowell's referral to BPAR resulted from BFT's failure to enforce Article 15.2.6 of the CBA. By failing to enforce that article, "BFT allowed School District officials to use my students middle school test scores in my performance evaluation." The portion of Article 15.2.6 relied on by Crowell provides that "during the course of a teachers performance of his/ or her duties

no electronic or mechanical surveillance shall take place for evaluation purposes without the teachers consent.”

Arbitrary and Bad Faith Acts by BFT against Other BFT Members: As alleged, Campbell recommended that one teacher be terminated and another, resign. Crowell also alleges that an administrator said that he would call Campbell to find out whether a performance evaluation rating could be changed so that the teacher being evaluated could avoid a referral to BPAR.

Crowell acknowledges in his above-referenced letter to BFT that “[t]he entrance into BPAR is based solely on the subjective evaluation of an administrator.” Crowell does not allege that BFT is involved in that referral process. As a remedy, Crowell requests that PERB terminate BFT’s participation in BPAR and award compensatory damages of \$2,000 to every teacher who ever participated in BPAR, excluding himself.

Crowell filed the unfair practice charge on January 13, 2014. On February 19, 2014, BFT filed a position statement. On October 9, 2014, the Office of the General Counsel sent Crowell a warning letter explaining the deficiencies of the initial unfair practice charge. Crowell filed a first amended charge on October 15, 2014. On October 20, 2014, BFT filed a second position statement. On October 21, 2014, the Office of the General Counsel dismissed the charge based on the following grounds:

- Disparate Impact: PERB has no jurisdiction over claims of race, age and gender discrimination. (*Alum Rock Union Elementary School District* (2005) PERB Decision No. 1748 (*Alum Rock*); *Antelope Valley College Federation of Teachers (Stryker)* (2004) PERB Decision No. 1624.)

- California Education Code Violations: PERB has no jurisdiction over California Education Code violations. (*Coachella Valley Unified School District* (2013) PERB Decision No. 2342.)

- Conflict of Interest: The Office of the General Counsel recognized that Crowell's conflict of interest allegations are the only allegations that fall under EERA. There are, however, no factual allegations supporting an actual conflict of interest. For example, Crowell did not allege that BFT assigned a BPAR panel member to represent him in a grievance concerning BPAR. The mere potential for conflict of interest based on the composition and structure of the BPAR panel is not a violation of the duty of fair representation, in and of itself. (*Teamsters Local 137 (Illum and DeMuro)* (1995) PERB Order No. Ad-265.) The California Education Code specifically contemplates the involvement of the exclusive representative in any school district where such a peer assistance and review program exists. (Ed. Code, § 44500.)

- Adverse Actions by BFT against Crowell: The charge does not describe with any specificity what, if any assistance, Crowell requested from BFT and therefore it is impossible to determine whether 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.)

- Arbitrary and Bad Faith Acts by BFT against Other BFT Members: An employee has no standing to challenge a violation of another employee's rights. (*United Teachers of Los Angeles (Hopper)* (2001) PERB Decision No. 1441 (*UTLA (Hopper)*)).

Crowell filed a timely appeal on October 28, 2014. In response, BFT filed a statement in opposition on October 29, 2014.

## DISCUSSION

The majority of the subject matter covered in the appeal was addressed in the warning and dismissal letters, is irrelevant to an unfair practice charge against an exclusive representative or is being raised for the first time on appeal. (See PERB Reg. 32635, subd. (b) [“Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence”].)

First, Crowell argues that the District violated Article 15.2.1 of the CBA governing the permissible bases for evaluating performance when it based Crowell’s performance evaluation on student test scores from middle school. Crowell presents the District’s alleged violation of Article 15.2.1 for the first time on appeal, without a showing of good cause, in non-compliance with PERB Regulation 32635, subdivision (b). Even if there were good cause, Crowell does not explain how the District’s alleged violation of Article 15.2.1 supports his charge against BFT.

Second, in a related argument, Crowell criticizes the dismissal of his allegation concerning BFT’s failure to enforce Article 15.2.6 of the CBA governing electronic or mechanical surveillance techniques used for evaluating a teacher’s performance. Crowell asks, “Why didn’t my union simply file [sic] the process and file a grievance for me based on the evaluation?” Crowell did not, however, allege that BFT breached its duty of fair representation in regards to the filing or handling of a grievance by failing to file a grievance.

Third, Crowell contends for the first time on appeal that his investigation into BPAR was protected union activity. In support of this contention, Crowell attaches a copy of his electronic public records request concerning BPAR. Crowell presents these allegations and supporting evidence for the first time on appeal, without a showing of good cause, in non-compliance with PERB Regulation 32635, subdivision (b). Even if there were good cause,

Crowell does not explain how his alleged investigation into BPAR supports his charge against BFT.

Crowell's fourth argument, labeled "Federal Jurisdiction," contains citations to two United States Supreme Court cases<sup>4</sup> on the duty of fair representation. There is no dispute that PERB has jurisdiction over charges alleging that the exclusive representative violated its duty of fair representation, nor is there any dispute that an exclusive representative's duty of fair representation extends equally to every member of the bargaining unit irrespective of race, gender or age. The question is whether Crowell has alleged sufficient facts to demonstrate that BFT violated its duty to represent Crowell fairly by its participation in BPAR. In a charge alleging that the exclusive representative violated its duty of fair representation, charging party bears the burden of demonstrating that the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. (*Teamsters Local 137 (Illum and DeMuro)*, *supra*, PERB Order No. Ad-265.) As the Office of the General Counsel previously determined, Crowell has not met that burden. As Crowell acknowledges, BFT plays no role in referring teachers to BPAR.

Fifth, Crowell asserts that PERB has jurisdiction over discrimination disputes, conflict of interest issues and Education Code violations. Regarding Crowell's assertion that PERB has jurisdiction over discrimination disputes, Crowell relies on *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375. *Healdsburg* held that bargaining proposals seeking to prohibit categorical forms of discrimination (e.g., age, race, gender) and discrimination based on union activity are within the scope of bargaining. The Board stated that the existence of comprehensive legislation on discrimination did not preclude the enforcement of those rights through the collective bargaining process, concluding that "the collective bargaining process is an

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<sup>4</sup> *Steele v. Louisville & Nashville Railroad Co. et al.* (1944) 323 U.S. 192 and *Vaca v. Sipes* (1967) 386 U.S. 171.

appropriate forum in which conflicts over discrimination in employment may be addressed and resolved.” That anti-discrimination bargaining proposals are negotiable subjects for collective bargaining purposes does not mean that PERB has jurisdiction to adjudicate Crowell’s statutory claim that BPAR has a disparate impact on teachers who by virtue of their race, gender or age fall within classifications protected under state and federal anti-discrimination laws. These laws are not administered or enforced by PERB. (*Alum Rock, supra*, PERB Decision No. 1748.)

Regarding Crowell’s assertion that PERB has jurisdiction over conflict of interest issues, there is no dispute. The problem is not one of jurisdiction, but whether the allegations of the charge are sufficient to state a prima facie case. The Office of the General Counsel correctly determined that they do not. Crowell alleged only the *potential* for a conflict of interest, *not an actual conflict* in which BFT breached a duty owed to Crowell. On appeal, Crowell contends that the President serves on the union grievance committee, “has a direct financial interest in continuing the adverse program,” citing “Government Code 18730 and PERB Statute 31100,” and has failed to recuse herself under the latter law. Government Code section 18730 concerns clerical pools under state civil service and was repealed in 1981. “PERB Statute 31100” is not a legal citation. It likely refers to PERB Regulation 31100, PERB’s conflict of interest code requiring designated employees of PERB to file statements of economic interest. Neither citation supports Crowell’s conflict of interest theory. BFT representatives who are not involved in BPAR administration take over the function of deciding questions related to representation of individuals who are in BPAR, according to supporting evidence attached to the initial charge. The allegations of the unfair practice charge do not contradict this characterization nor include any specific instance in which the BFT



President or any of the teacher BPAR panel members took part in decision-making or handling of Crowell's referral to BPAR, or any grievance or other challenge he wished to pursue.

Regarding Crowell's assertion that PERB has jurisdiction over violations of the California Education Code, Crowell asks, "Where do petitioners seek relief when the Union and the school district violate the California Ed Code?" Under well-established precedent, PERB's jurisdiction is set by statute. It does not include disputes over alleged violations of the California Education Code, as explained in the warning and dismissal letters.

In Crowell's sixth argument, he re-asserts that BFT failed to fairly represent three other BFT members. He does not, however, explain why the Office of the General Counsel was wrong to dismiss these allegations on the ground that an employee has no standing to challenge a violation of another employee's rights. (*UTLA (Hopper)*, *supra*, PERB Decision No. 1441.)

Based on the foregoing discussion, there is no merit to Crowell's appeal and it therefore, is denied.

#### ORDER

The unfair practice charge in Case No. SF-CO-789-E is hereby **DISMISSED**  
**WITHOUT LEAVE TO AMEND.**

Members Winslow and Banks joined in this Decision.

**PUBLIC EMPLOYMENT RELATIONS BOARD**

San Francisco Regional Office  
1330 Broadway, Suite 1532  
Oakland, CA 94612-2514  
Telephone: 510-622-1025  
Fax: (510) 622-1027



October 21, 2014

Brian Crowell

Re: *Brian Crowell v. Berkeley Federation of Teachers, Local 1078*  
Unfair Practice Charge No. SF-CO-789-E  
**DISMISSAL LETTER**

Dear Mr. Crowell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 13, 2014. Brian Crowell (Charging Party) alleges that the Berkeley Federation of Teachers, Local 1078 (BFT or Respondent) violated the Educational Employment Relations Act (EERA or Act)<sup>1</sup> by violating the duty of fair representation.

Charging Party was informed in the attached Warning Letter dated October 9, 2014, 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 October 16, 2014, the charge would be dismissed.

Charging Party filed a First Amended Charge on October 15, 2014. The First Amended Charge attaches copies of documents Charging Party previously attempted to file with PERB, but failed to serve on Respondent. The First Amended Charge was not served on Respondent's representative. Nonetheless, Respondent's representative filed a response on October 20, 2014. The entire First Amended Charge has been considered by the undersigned Board agent.

Race, Age, and Gender Discrimination

As discussed in the Warning Letter, the charge primarily concerns the Berkeley Peer Assistance and Review program (BPAP), which Charging Party alleges has a discriminatory impact on African Americans, Hispanics, Women, and persons over the age of 40. The Warning Letter informed Charging Party that PERB lacks jurisdiction over claims of race, age, and gender discrimination. (See *Alum Rock Union Elementary School District (2005)* PERB

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<sup>1</sup> 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](http://www.perb.ca.gov).

Decision No. 1748; *Antelope Valley College Federation of Teachers (Stryker)* (2004) PERB Decision No. 1624.) The First Amended Charge reiterates these allegations. Because PERB lacks jurisdiction, these allegations are dismissed.

#### Potential Conflicts of Interest

The charge also contains an allegation concerning the potential conflict of interest that may arise if union representatives participate in the BPAR panel and recommend that an employee be referred to the BPAR. The Warning Letter informed Charging Party that the mere potential for such conflicts is not a violation of the duty of fair representation. (See *Teamsters Local 137 (Illum and DeMuro)* (1995) PERB Order No. Ad-265.) Furthermore, the California Peer Assistance and Review Program for Teachers specifically contemplates the involvement of the exclusive representative in its implementation in any district where it exists. (Ed. Code, § 44500.)

The First Amended Charge reiterates these allegations. No facts are alleged showing an actual conflict of interest in any particular case. Charging Party argues that the mere presence of union officials on the panel is the “actual” conflict of interest.

However, as Charging Party was informed in the Warning Letter, 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.)

No actual conduct by Respondent is described in the First Amended Charge. There is no allegation that, for example, Charging Party was represented in a grievance concerning the BPAR by a BFT representative who also recommended him for the BPAR. The potential conflict of interest is insufficient to state a claim for a breach of the duty of fair representation. (*Teamsters Local 137 (Illum and DeMuro)*, *supra*, PERB Order No. Ad-265.) Therefore, this allegation is dismissed.

#### New Allegation

The First Amended Charge contains a new allegation:

BFT allowed School District officials to use my students middle school test scores in my performance evaluation. This is a direct violation of the BFT/BUSD collective bargaining agreement. See

transcript with Walton regarding Performance Review. The union had a duty to enforce this provision of the contract which it failed to do. Contract section is cited below.

The contract section cited is Article 15.2.6, which according to Charging Party, states, "during the course of a teachers performance of his/ or her duties no electronic or mechanical surveillance shall take place for evaluation purposes without the teachers consent."

The charge does not describe with any specificity what, if anything Charging Party requested Respondent to do. Assuming BFT represented Charging Party in some way in a grievance in connection with this performance evaluation, the duty of fair representation would apply. (*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, absent any description of any specific conduct by BFT, it is impossible to determine whether that action or inaction was without a rational basis or devoid of honest judgment. (*Reed District Teachers Association, CTA/NEA (Reyes), supra*, PERB Decision No. 332.)

Furthermore, as noted in the Warning Letter, it is Charging Party's burden to allege facts showing that the unfair practice charge is timely filed. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929.) Because no dates are provided for this new allegation, it is impossible to determine whether it occurred within the six months prior to the filing of the charge.

Finally, it is entirely unclear how the contract's prohibition on electronic or mechanical surveillance of teachers relates to the use of student test scores in performance evaluations.

For all of these reasons, this allegation is dismissed.

#### Education Code Violations

The original charge alleged that the composition of the BPAR panel at times violated various sections of the Education Code. The Warning Letter informed Charging Party that PERB lacks jurisdiction over pure Education Code violations. (See *Coachella Valley Unified School District* (2013) PERB Decision No. 2342.) This allegation is not repeated in the First Amended Charge, and is therefore dismissed for the reasons discussed in the Warning Letter.

#### Other Individuals

The First Amended Charge contains allegations concerning purportedly improper acts by Respondent affecting other individuals who are not parties to this case. Charging Party does not describe how these actions had an impact on his own employment. An employee has no standing to challenge a violation of another employee's rights. (*United Teachers of Los Angeles (Hopper)* (2001) PERB Decision No. 1441.) Therefore, the allegations concerning other individuals are dismissed.

Conclusion

For the above reasons and those contained in the October 9, 2014 Warning Letter, the charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,<sup>2</sup> 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

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<sup>2</sup> PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's Regulations may be found at [www.perb.ca.gov](http://www.perb.ca.gov).

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,

WENDI L. ROSS  
Acting General Counsel

By   
Daniel Trump  
Regional Attorney

Attachment

cc: Stewart Weinberg, Attorney

**PUBLIC EMPLOYMENT RELATIONS BOARD**

San Francisco Regional Office  
1330 Broadway, Suite 1532  
Oakland, CA 94612-2514  
Telephone: 510-622-1025  
Fax: (510) 622-1027



October 9, 2014

Brian Crowell

Re: *Brian Crowell v. Berkeley Federation of Teachers, Local 1078*  
Unfair Practice Charge No. SF-CO-789-E  
**WARNING LETTER**

Dear Mr. Crowell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 13, 2014. Brian Crowell (Charging Party) alleges that the Berkeley Federation of Teachers, Local 1078 (BFT or Respondent) violated the Educational Employment Relations Act (EERA or Act)<sup>1</sup> by violating the duty of fair representation.

As an initial matter, there are some procedural deficiencies regarding the charge. Subsequent to the filing of the original charge, Charging Party sent various other documents to PERB in connection with the charge. The undersigned Board agent informed Charging Party in a telephone conversation on March 5, 2014 that the documents received to that point appeared not to have been served on Respondent pursuant to PERB Regulation 32140, and they therefore were not properly filed in accordance with PERB Regulation 32135(a). During that conversation, Charging Party requested that PERB return those documents to him, which was done on March 7, 2014. However, on May 30, 2014, July 7, 2014, and July 25, 2014, PERB again received documents from Charging Party lacking a properly completed proof of service. As Charging Party was previously informed, unless and until these documents are served on Respondent and Charging Party provides a properly completed proof of service, they will not be considered. For this reason, the discussion in this letter is confined to the allegations contained in Charging Party's original unfair practice charge filed on January 13, 2014.

**FACTS ALLEGED**

The statement of the charge in this case is mostly composed of quotations from statutes and the contract between BFT and the Berkeley Unified School District (District). Taken together, the allegations concern the Berkeley Peer Assistance and Review program (BPAR), which is administered by BFT and the District. Charging Party alleges that the BPAR program has a

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<sup>1</sup> EERA is codified at Government Code section 3540 et seq. PERB's 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](http://www.perb.ca.gov).

disparate impact on African Americans, Hispanics, Women, and persons over age 40, and that the presence of BFT officials on the BPAR panel creates a “conflict of interest.” In addition, Charging Party alleges that the composition of the BPAR panel has, at times, violated the Education Code.

## DISCUSSION

### Charging Party’s 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.” In doing so, a charging party should allege with specificity the particular facts giving rise to a violation. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.) The charging party may do this by alleging sufficient facts describing 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 (*Dept. of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party’s burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

### Race, Age, and Gender Discrimination

PERB’s jurisdiction is limited to the determination of unfair practices arising under EERA and the other public sector labor statutes it administers. PERB lacks jurisdiction to enforce pure Education Code violations. (*Coachella Valley Unified School District, supra*, PERB Decision No. 2342.) Nor does PERB have jurisdiction over claims of race, age, and gender discrimination. (*Alum Rock Union Elementary School District* (2005) PERB Decision No. 1748; *Antelope Valley College Federation of Teachers (Stryker)* (2004) PERB Decision No. 1624.) The focus of the charge is Charging Party’s allegation that Respondent violated the Education Code and discriminated on the basis of race, age, or gender against its bargaining unit members. Because PERB lacks jurisdiction over such claims, these allegations must be dismissed.



Conflict of Interest

The only allegation in the charge that appears to relate to EERA is the “conflict of interest” allegation. As noted above, Charging Party alleges that the participation of BFT representatives—in particular, BFT President Cathy Campbell (Campbell)—in the BPAR panel creates a conflict of interest in the representation of affected teachers. Charging Party does not allege that he, at any time, was affected by a decision made by Campbell or other BFT officials on the BPAR panel who were also serving as his representative(s) in a related case.

Therefore, it appears that the allegation concerns merely the potential for conflict, rather than a specific instance of it. However, PERB has held that the mere potential for such conflicts is not a violation of the duty of fair representation. (*Teamsters Local 137 (Illum and DeMuro)* (1995) PERB Order No. Ad-265.) Furthermore, it is noted that the California Peer Assistance and Review Program for Teachers specifically contemplates the involvement of the exclusive representative in its implementation in any district where it exists. (Ed. Code, § 44500.)

The duty of fair representation imposed on the exclusive representative applies 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 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.)

Therefore, in the absence of allegations describing actual conduct by BFT representatives, Charging Party cannot establish a prima facie case for a breach of the duty of fair representation. Charging Party must show that some action, or inaction, by BFT was arbitrary, discriminatory, or in bad faith. (*Teamsters Local 137 (Illum and DeMuro)*, *supra*, PERB Order No. Ad-265.)

For these reasons the charge, as presently written, does not state a prima facie case.<sup>2</sup> 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 **October 16, 2014**,<sup>3</sup> PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Daniel Trump  
Regional Attorney

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<sup>2</sup> 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.*)

<sup>3</sup> A document is “filed” on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)