

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ROBERT HAMPLE,

Charging Party,

v.

SANTA BARBARA COUNTY PROBATION
PEACE OFFICERS ASSOCIATION,

Respondent.

Case No. LA-CO-182-M

PERB Decision No. 2410-M

February 10, 2015

Appearance: Robert Hample, on his own behalf.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION¹

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Charging Party Robert Hample (Hample) of the dismissal (attached) by the Office of the General Counsel of his unfair practice charge. The charge, as amended, alleges that the Santa Barbara County Probation Peace Officers Association (PPOA) violated the Meyers-Milias-Brown Act (MMBA)² by engaging in the following conduct: failing to hold a valid election for PPOA Executive Board members; failing to provide representation in a retaliation claim and also at civil service hearings; retaliation against

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

² The MMBA is codified at Government Code section 3500 et seq.

Hample for complaining about the habitual lack of response from the union president; and failing to provide a requested accounting of how union dues are spent. Hample alleges that by this conduct, PPOA breached its duty of fair representation.

By warning letter dated October 17, 2014, the Office of the General Counsel informed Hample that the allegations fail to state a prima facie case. Hample was instructed that, if there were any factual inaccuracies in the warning letter or additional facts that would correct the deficiencies explained in the warning letter, he could amend the charge. Hample was further informed that if an amended charge or withdrawal was not filed on or before October 27, 2014, PERB will dismiss the charge. On October 30, 2014, Hample confirmed that he had received the warning letter. Hample did not, however, comply with the instructions contained therein. The Office of the General Counsel received neither an amended charge nor a withdrawal. Therefore, by letter dated October 30, 2014, the Office of the General Counsel dismissed the charge based on the facts and reasons set forth in the warning letter.

After receiving an extension of time within which to file an appeal, Hample timely appealed the dismissal of his charge on December 4, 2014. Having received no statement in opposition from PPOA, the Appeals Assistant deemed the filings complete by letter dated December 30, 2014.

The Board has reviewed the case file in its entirety in its consideration of Hample's appeal. Based on that review, the Board finds that the warning and dismissal letters correctly describe the factual allegations contained in the charge. The warning and dismissal letters are well-reasoned and in accordance with applicable law. Accordingly, the Board hereby affirms

the dismissal of the charge and adopts the warning and dismissal letters as the decision of the Board itself except as specifically noted below.³

DISCUSSION⁴

Hample's appeal consists of an unfair practice charge form with the box for amended charges checked off, accompanied by a four-page attachment. To the extent Hample intended for this document to be treated as an amended charge, the Board declines to do so.

Historically, PERB has treated the filing of an amended charge after an unfair practice charge has been dismissed as an appeal from the dismissal of the charge. (*Regents of the University of California (Berkeley) (Quintanilla)* (2013) PERB Decision No. 2334-H; *California School Employees Association & its Chapter 746 (Perez)* (2011) PERB Decision No. 2187; *Compton Unified School District* (2008) PERB Order No. Ad-374; *Los Angeles Unified School District* (2007) PERB Order No. Ad-368.)

³ By this decision, the Board corrects a minor error on page 5 of the warning letter in the reference to "CSEA." The context of the reference allows us to conclude that the Office of the General Counsel intended to refer to "PPOA." Also, the reference to EERA on page 3 is to the Educational Employment Relations Act (codified at § 3540 et seq.). This charge is governed by the MMBA. While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.) The standards adopted by PERB for determining whether a union has breached the duty of fair representation are the same whether a charge is brought under the MMBA, EERA or any other statutory scheme administered and enforced by PERB.

⁴ Relying on *National Education Association-Jurupa (Norman)* (2014) PERB Decision No. 2371 (*Norman*), the Office of the General Counsel determined that "PPOA's denial of representation to Charging Party was an adverse action" for purposes of a retaliation analysis. (Warning letter, p. 6.) *Norman* involved a charge alleging breach of a union's duty of fair representation and retaliation. The Board dismissed the retaliation allegations on other grounds but assumed that withdrawing legal representation from an employee on the eve of his dismissal hearing constituted an adverse action. Those are not the factual allegations here. Hample does not appeal from any specific issues of procedure, fact, law or rationale related to the Office of the General Counsel's retaliation analysis or conclusion. (See PERB Reg. 32635, subd. (a)(1).) Therefore, there is no need to revisit the retaliation allegations on appeal. It is simply noted that the Board's holding in *Norman* is not to be painted with as broad a brush stroke as the statement in the warning letter would lead one to believe.

Also, the Board will not consider new evidence and new factual allegations contained in the appeal that were not presented in the unfair practice charge without a showing of good cause. (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.”].) Hample’s appeal contains a recitation of facts not presented in the unfair practice charge, primarily in a section entitled “History,” but in other sections as well. The Board declines to consider these new facts, as no good cause was shown.

Hample takes issue with the Office of the General Counsel’s determination that certain allegations relating to conduct that occurred more than six months prior to the filing of the unfair practice charge are untimely. Hample is correct that in cases alleging a breach of the duty of fair representation, the six-month 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. (*Service Employees International Union, Local 1021 (Horan)* (2011) PERB Decision No. 2204-M.) In dismissing the allegations outside the limitations period, the Office of the General Counsel was not dismissing Hample’s essential claim, i.e., that the PPOA breached its duty of fair representation when it failed to provide representation in a retaliation claim and also at civil service hearings, on timeliness grounds. That claim was dismissed on the grounds that the duty of fair representation does not extend to extra-contractual proceedings. (*Ibid.*) The dismissal of the allegations relating to earlier conduct served only to dismiss those allegations as independent bases for finding a violation, not to dismiss them as background information for considering either the merits or the timeliness of Hample’s essential claim. Relying on *Jurupa Unified School District* (2012) PERB Decision No. 2283, footnote 18, and cases cited therein, the Board in *Norman, supra*, PERB Decision No. 2371 stated:

Although PERB will not issue a complaint based on conduct occurring more than six months before the unfair practice charge was filed, older allegations may be considered to provide background or characterize conduct that does fall within the statute of limitations.

Hample also takes issue with the Office of the General Counsel's determination that Hample's essential claim, i.e., that the PPOA breached its duty of fair representation when it failed to provide representation in a retaliation claim and also at civil service hearings, is subject to dismissal because the duty of fair representation does not extend to extra-contractual proceedings. The fact that PPOA provided another employee with representation is not material to the analysis. PERB has long held that the duty of fair representation extends only to contractually-based remedies under the exclusive control of the exclusive representative. (*Bay Area Air Quality Management District Employees Association (Mauriello)* (2006) PERB Decision No. 1808-M.) Such is not the case here.

Hample takes issue with a statement of law in the section of the warning letter concerning the Executive Board election. The warning letter states that PERB will not review matters concerning internal union affairs unless they have a substantial impact on the relationship of unit members to their employer so as to give rise to the duty of fair representation, citing *Service Employees International Union, Local 99 (Kimmitt)* (1979) PERB Decision No. 106. The unfair practice charge alleges that during the election the ballots were not delivered to all members, that the ballots were left unsecured in a large, unsealed envelope in a common area for days, and that the ballots were counted by "sitting" board members running for reelection. The lack of accountability and potential for fraud alleged by Hample may indeed be present, but the conduct of a union election is a classic example of an internal union affair over which PERB has no jurisdiction. That Hample believes he will be unable to obtain a PPOA attorney to represent him in future unspecified hearings from the

current Executive Board does not constitute *a substantial impact on his relationship with his employer* so as to give rise to the duty of fair representation. Hample's concern may be well-founded but is far too speculative and attenuated from any impact on his employment relationship to warrant the Board's intervention in this matter by declaring an internal union election invalid, as Hample requests. Moreover, if the future unspecified hearings to which Hample refers are extra-contractual, then no duty of fair representation attaches as a threshold matter.

Hample asserts that the Office of the General Counsel erred in dismissing the allegation that PPOA failed to provide a requested accounting of how union dues are spent. The Office of the General Counsel correctly cited MMBA section 3502.5, subdivision (f), as the statutory provision raised by Hample's allegation. As stated by the Office of the General Counsel, the charge does not allege whether PPOA has an agency shop provision or arrangement, a threshold allegation necessary to stating a prima facie case.⁵ Hample was provided the

⁵ The Office of the General Counsel determined that the charge lacks allegations that Hample is an agency fee payer entitled to an annual accounting. MMBA section 3502.5, subdivision (f), requires a recognized employee organization in an agency shop arrangement to keep a record of its financial transactions and make a written financial report available annually to "the employees who are members of the organization." The charge alleges that Hample is a member of PPOA. This is sufficient to establish Hample's *standing* to pursue a violation. Also, the Office of the General Counsel determined that the charge fails to allege that PPOA failed to provide an annual accounting. The charge alleges that Hample requested a financial report from PPOA and that "the accounting has not been forthcoming." In our view, this is sufficient to establish that PPOA failed to "make available annually" a detailed written financial report to employees such as Hample who are members of PPOA as required by MMBA section 3502.5, subdivision (f). This is consistent with a decision involving a similar statute under EERA (§ 3546.5) in which the Board held that allegations similar to the ones here were sufficient to put the union on notice that charging party was requesting the union's financial report for the previous fiscal year. (*California School Employees Association & its Chapter 47 (Shampine, et al.)* (2014) PERB Decision No. 2355.) As stated above, however, the failure of the charge to allege the threshold element, i.e., whether PPOA has an agency fee provision or arrangement, is fatal.

opportunity to amend the charge and supply the missing factual allegations, but failed to do so. On appeal, Hample argues that under the United States Department of Labor, unions are required to file an annual financial report, make the report available to its members and permit members to examine supporting records for just cause. Hample may be referring to financial reports required of unions under the Labor Management Reporting and Disclosure Act of 1959 (see 29 U.S.C. §§ 401-531). PERB does not enforce federal laws. PERB does enforce the financial reporting requirements under MMBA section 3502.5, subdivision (f). Because Hample failed to cure the deficiencies in his initial charge by filing an amended charge supplying the Office of the General Counsel with the necessary factual allegations to state a prima facie case, he deprived himself of the opportunity to pursue the issue before PERB.

ORDER

The unfair practice charge in Case No. LA-CO-182-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Winslow joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820



October 30, 2014

Robert Hample

Re: *Robert Hample v. Santa Barbara County Probation Peace Officers Association*
Unfair Practice Charge No. LA-CO-182-M
DISMISSAL LETTER

Dear Mr. Hample:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 16, 2014. Robert Hample (Charging Party) alleges that the Santa Barbara County Probation Peace Officers Association (PPOA or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act) by engaging in the following conduct: failing to conduct a valid election for union PPOA Executive Board members; failing to provide representation in a retaliation claim and also at civil service hearings; retaliating against Charging Party; and failing to provide requested financial information.

Charging Party was informed in the attached Warning Letter dated October 17, 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, Charging Party should amend the charge. Charging Party was further advised that, unless Charging Party amended the charge to state a prima facie case or withdrew it on or before October 27, 2014, the charge would be dismissed.

On October 30, 2014, Charging Party confirmed he had received the October 17, 2014 Warning Letter.

PERB has not received either an amended charge or a request for withdrawal. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the October 17, 2014 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,¹ 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

¹ 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.

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).)

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.)

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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 
Mary Weiss
Senior Regional Attorney

Attachment

cc: Ed Torres, President, Santa Barbara County Probation Peace Officers Association

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
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Glendale, CA 91203-3219
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October 17, 2014

Robert Hample

Re: *Robert Hample v. Santa Barbara County Probation Peace Officers Association*
Unfair Practice Charge No. LA-CO-182-M

WARNING LETTER

Dear Mr. Hample:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 16, 2014. Robert Hample (Charging Party) alleges that the Santa Barbara County Probation Peace Officers Association (PPOA or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)¹ by engaging in the following conduct: failing to conduct a valid election for union PPOA Executive Board members; failing to provide representation in a retaliation claim and also at civil service hearings; retaliating against Charging Party; and failing to provide requested financial information.

FACTS AS ALLEGED

According to the charge, several years ago, Charging Party openly complained about the habitual lack of response from the current PPOA President Ed Torres (Torres).

On an unspecified date in 2013, Torres ignored Charging Party's request for the name of a PPOA attorney so that Charging Party could discuss his claim, that his employer had engaged in unlawful retaliation. PPOA also ignored most of Charging Party's subsequent e-mail messages. It took nearly one year for PPOA to provide Charging Party with the name and telephone number of a PPOA attorney.

On April 10, 2014, Torres mailed a letter to Charging Party stating that PPOA would not provide Charging Party with legal representation at his pending civil service hearing. PPOA did not provide any explanation for its position. Charging Party responded in writing with a request for representation at his pending civil service appearances. PPOA ignored Charging Party's requests and Charging Party appeared before the Civil Service Commission by himself in April and May 2014. According to the charge, a full hearing before the Commission was scheduled to take place on August 21, 2014.

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

In May 2014, PPOA conducted an election for Executive Board positions. Charging Party ran for an Executive Board position. During the election, ballots were not delivered to all members. Also, ballots were placed in a large, unsealed envelope in a common area for several days after members voted at Charging Party's location and the ballots were counted by "sitting" board members who themselves were on the ballot. According to the charge, Charging Party was the only person running for election that actually campaigned however, he was not elected. Existing board members counted the ballots and they were re-elected.

The charge alleges the election process "was totally devoid of accountability and invited fraud" and requests that the election be "declared invalid and another election held immediately" with safeguards, full participation by members, and ballot counting by a neutral third party. The charge further states that Charging Party fears that his complaint years ago about Torres' habitual lack of response "caused me to fall from favor and now, despite having been a member of the PPOA for 17 years, I am unable to receive replies to my correspondence, and have been denied any representation whatsoever."

At an unspecified time in 2014, Charging Party requested in writing that PPOA provide a detailed accounting of how PPOA dues are spent. The PPOA has not provided the requested accounting.

DISCUSSION

A. 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.)

To the extent Charging Party alleges PPOA failed to provide responses to him several years ago and that on an unspecified date in 2013, Torres ignored Charging Party's request for the name of a PPOA attorney, such conduct occurred more than six months before the instant unfair practice charge was filed and, therefore, such allegations are untimely.

B. Duty of Fair Representation

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

Representation at Civil Service Hearings

The duty of fair representation extends only to contractual remedies under the union's exclusive control. (*Service Employees International Union, Local 1021 (Horan)* (2011) PERB Decision No. 2204-M.) For instance, the duty of fair representation does not attach to *Skelly* hearings because they are extra-contractual proceedings where the union does not possess

exclusive control over the means to a particular remedy. (*Ibid.*; see also *Service Employees International Union, Local 99 (Wardlaw)* (1997) PERB Decision No. 1219 [the duty of fair representation does not extend to extra-contractual forums such as *Skelly* hearings, even if the union undertakes inadequate representation in such a forum]; see also *United Faculty of Grossmont-Cuyamaca Community College District (Tarvin)*, (2010) PERB Decision No. 2133.)

The charge does not include information demonstrating PPOA had a duty to provide representation at civil service hearings because those hearings do not appear to arise out of an obligation found in the collective bargaining agreement. Such representation, therefore, appears to be beyond the extent of the duty of fair representation. (*Service Employees International Union, Local 1021 (Horan)*, *supra*, PERB Decision No. 2204-M; *Service Employees International Union, Local 99 (Wardlaw)*, *supra*, PERB Decision No. 1219; *United Faculty of Grossmont-Cuyamaca Community College District (Tarvin)*, *supra*, PERB Decision No. 2133.)

C. Internal Union Affairs

PERB has held that activities or internal union affairs, such as union Board elections, that do not involve conduct which impacts the employment relationship, are not subject to intervention or regulation by PERB. (*Service Employees International Union Local 1292 (Marriott, et al.)* (2008) PERB Decision No. 1956-M.) In other words, PERB will not review matters concerning internal union affairs unless they have a substantial impact on the relationship of unit members to their employer so as to give rise to the duty of fair representation. (*Service Employees International Union, Local 99 (Kimmitt)* (1979) PERB Decision No. 106 [holding that only such activities that have a substantial impact on the relationships of unit members to their employer are subject to the duty]; see also *California State Employees Association (Hutchinson, et al.)* (1998) PERB Decision No. 1304-S [noting that PERB has traditionally refrained from reviewing the internal affairs of unions]; *California State Employees Association (Hard, et al.)* (1999) PERB Decision No. 1368-S [holding that, "PERB's function is to interpret and administer the statutes which govern the employer-employee relationship, not to police internal relationships among various factions within employee organizations ... internal union disputes are more appropriately presented in a different forum"]; *California State Employees Association (Gonzalez-Coke, et al.)* (2000) PERB Decision No. 1411-S [holding that charging parties fail to meet their threshold burden when no factual evidence of impact on the employer-employee relationship is provided in the charge].)

Further, in *American Federation of Teachers College Guild, Local 1521 (Saxton)* (1995) PERB Decision No. 1109, the Board held that an exclusive representative does not breach the duty of fair representation by failing or refusing to provide an employee with a union representative of his or her choice. (See also *SEIU-United Healthcare Workers West Local 2005 (Hayes)* (2011) PERB Decision No. 2168-M; *Los Rios College Federation of Teachers/CFT/AFT Local 2279 (Deglow)* (1998) PERB Decision No. 1275.)

PPOA Executive Board Election

In May 2014, PPOA conducted an election for Executive Board positions. Charging Party ran for an Executive Board position. During the election, ballots were not delivered to all members. Also, ballots were placed in a large, unsealed envelope in a common area for several days after members voted at Charging Party's location and the ballots were counted by "sitting" board members who themselves were on the ballot. According to the charge, Charging Party was the only person running for election that actually campaigned however he was not elected. Existing board members counted the ballots and they were re-elected.

The allegation lacks information demonstrating how or in what manner PPOA's Executive Board Election had a substantial impact on the relationship between Charging Party and the employer so as to give rise to a breach of the duty of fair representation. (*Service Employees International Union, Local 99 (Kimmett)*, *supra*, PERB Decision No. 106; *Service Employees International Union Local 1292 (Marriott, et al.)*, *supra*, PERB Decision No. 1956-M.)

D. Retaliation

Charging Party alleges that CSEA violated section 3543.6(b) which protects employees from retaliation.

In *California State Employees' Association (O'Connell)* (1989) PERB Decision No. 753-H, PERB held that where a charge alleges reprisal by an employee organization, an inquiry must occur utilizing the standard set forth by PERB in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), as to whether the actions were motivated by a charging party's exercise of protected rights. (See also *California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S [it is appropriate to apply the *Novato* standard to cases alleging employee organization misconduct]; accord, *Inlandboatmen's Union of the Pacific (O'Keefe)* (2011) PERB Decision No. 2199-M.)

Under *Novato, supra*, to demonstrate that respondent discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the respondent had knowledge of the exercise of those rights; (3) the respondent took adverse action against the employee; and (4) the respondent took the action because of the exercise of those rights. (*Novato, supra*, PERB Decision No. 210.)

Although the timing of the adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employee organization's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employee organization's departure from established procedures and standards when

dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employee organization's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employee organization's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employee organization's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employee organization's animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employee organization's unlawful motive (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

PPOA's denial of representation to Charging Party was an adverse action. (*National Education Association-Jurupa (Norman)* (2014) PERB Decision No. 2371.) However, the allegations do not provide information showing Charging Party engaged in any protected conduct for which PPOA allegedly retaliated against him. The charge also lacks allegations of any of the above described nexus factors; in other words, the charge does not demonstrate PPOA took actions against Charging Party, because Charging Party exercised rights under the MMBA.

E. Request for Detailed Accounting

Under the MMBA:

A recognized employee organization that has agreed to an agency shop provision or is a party to an agency shop arrangement shall keep an adequate itemized record of its financial transactions and shall make available annually, to the public agency with which the agency shop provision was negotiated, and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or corresponding principal officer, or by a certified public accountant.

(Gov. Code, § 3502.5, subd. (f).)

The charge alleges that Charging Party requested that PPOA provide a detailed accounting of how PPOA dues are spent but PPOA did not provide the requested accounting. The charge lacks sufficient information to determine whether section 3502.5(f) is applicable to PPOA because it lacks allegations that PPOA has an agency shop provision or arrangement and that Charging Party is an agency fee payer entitled to an annual accounting. The charge also fails

to allege that PPOA failed to provide an annual accounting. Also, because the charge fails to specify the date Charging Party requested financial information, it is not possible to determine whether such allegation was timely filed.

For these reasons the charge, as presently written, does not state a prima facie case.² 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 27, 2014,³ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Weiss
Senior Regional Attorney

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

³ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)