STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BABETTE DERSHEM, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Respondent.	Case No. LA-CO-1621-E PERB Decision No. 2426 June 2, 2015

Appearance: Babette Dershem, in propria persona.

Before Martinez, Chair; Banks and Gregersen, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Babette Dershem (Dershem) from the Office of the General Counsel's dismissal (attached) of her unfair practice charge. Dershem's charge, as amended, alleged that the California School Employees Association and its Chapter 584 (CSEA) violated its duty of fair representation under the Educational Employment Relations Act (EERA)[2] in its handling of a grievance filed on Dershem's behalf.

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

[2] EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code.

The Board has reviewed the unfair practice charge, the amended charges, CSEA's position statements, the warning and dismissal letters, and Dershem's appeal in light of relevant law. Based on this review, the Board finds the warning and dismissal letters accurately describe the allegations included in the charge and that the Board agent's legal conclusions are well-reasoned and in accordance with the applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself, subject to the following discussion of issues raised in Dershem's appeal.

PROCEDURAL HISTORY

Dershem filed her unfair practice charge on June 23, 2014, and on August 7, 2014, CSEA filed a position statement in which it denied any wrongdoing.

On September 26, 2014, the Office of the General Counsel sent Dershem a warning letter in which it advised Dershem that the charge, as stated, failed to state a prima facie case and would be dismissed if not amended or withdrawn.

On October 1, 2014, Dershem filed a first amended charge. After being granted additional time in which to respond, on November 3, 2014, CSEA filed an amended position statement. Dershem then filed a second amended charge on November 24, 2014.

On January 6, 2015, the Office of the General Counsel dismissed the charge for failure to state a prima facie case.

On January 27, 2015, Dershem was granted an extension of time in which to appeal the dismissal and on February 17, 2015, she filed the present appeal.

CSEA filed no opposition to the appeal.

FACTUAL ALLEGATIONS

CSEA and its Chapter 584 are the exclusive representative of classified employees of the Victor Valley Community College District (District).[3] At all times material to this charge, CSEA had a collective bargaining agreement with the District which contained a multi-step grievance process ending in binding arbitration.

Dershem alleges that she was an hourly employee of the District from 2001 until March 17, 2013. From 2001 until March 17, 2004, Dershem was excluded from the classified bargaining unit. When Dershem separated from employment in 2013, the District denied her retirement benefits because, under a June 25, 2001 agreement between CSEA and the District, known as the Master Settlement Agreement (MSA), only classified bargaining unit employees with ten years of service *in the classified unit* qualified for retirement benefits. According to Dershem, the language of the MSA requires only that a separating classified employee have

[3] Dershem's charge and amended charges variously identify the respondent as "California School Employees Association" and "California School Employees Association and its Local Chapter #584." PERB may take administrative notice of its own files. (*Antelope Valley Community College District* (1979) PERB Decision No. 97 (*Antelope Valley*), pp. 23-24.) According to PERB's files, in April 1976, CSEA and its Chapter 584 requested voluntary recognition from the District for a comprehensive classified unit. On May 11, 1976, the District's governing board adopted a resolution recognizing "CSEA Chapter 584" as the exclusive representative of employees in approximately 43 classified titles. On May 3, 1978, as the result of a classification study prepared by the California State Personnel Board, additional job titles were added to the classified unit represented by CSEA Chapter 584. On May 31, 1978, a Board agent notified the District and the president of CSEA Chapter 584 of PERB's receipt of the parties' mutually agreed change in the composition of the classified unit. In 1985, CSEA Chapter 584 petitioned PERB for a further modification of the unit. In 2000, the District agreed to a further modification of the unit. The agreement lists "California School Employees Association" as the party to this agreement but it is signed by Ruth Green, who is identified as the Chapter President. The accompanying correspondence with PERB identifies the exclusive representative as "California School Employees Association ***and*** its Chapter 584." (Emphasis added.) Because the charge form correctly identifies at least one of the organizations recognized as the exclusive representative and because the addition of other organizations in this case would not affect the outcome, we disregard any discrepancies in the charge and accompanying documents as immaterial. (*Antelope Valley, supra*, PERB Decision No. 97, pp. 23-24; *Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4.)

ten years of service with the District to be eligible for retirement benefits, but does not require that all ten years' service be worked *as a classified employee*.

CSEA filed and pursued a grievance on Dershem's behalf in which it argued that Dershem's eligibility for retirement benefits should be calculated based on her 2001 hire date, rather than her 2004 entry into the classified unit. The District denied the grievance at the initial steps and CSEA appealed the matter to arbitration, which is the third level of the grievance process. After reviewing the matter, however, CSEA decided not to proceed to arbitration, on the advice of CSEA Attorney Karen Hartmann who, according to the charge, had worked on the MSA. CSEA Chapter President Fred Board informed Dershem that, based on CSEA's review, there was not enough evidence to support the argument that Dershem was entitled to retirement benefits based on the 2001 date of hire.

Dershem alleges that CSEA breached its duty of fair representation by failing to conduct an adequate investigation before deciding to withdraw the grievance, by failing to provide Dershem with notice and opportunity to participate in the meeting at which CSEA decided whether to pursue the grievance through arbitration, by failing to inform Dershem of her options after CSEA decided not to pursue the grievance, and by discriminatorily failing to pursue the grievance filed on her behalf when it has successfully persuaded the District to adjust the hire dates of other employees.

WARNING AND DISMISSAL LETTERS

The warning and dismissal letters explained that in a duty of fair representation case, the issue is not whether the representative incorrectly judged the merits of the underlying grievance but whether its action or inaction in prosecuting the grievance was arbitrary, discriminatory or undertaken in bad faith and that negligence or poor judgment in handling a grievance by itself, does not constitute a breach of the duty of fair representation. The warning

and dismissal letters also explained that, while an exclusive representative's failure to execute a ministerial duty, such as timely filing or appealing a grievance, may constitute a breach of its duty in certain circumstances, a decision not to arbitrate *even a meritorious grievance*, which is based on such considerations as cost, the likelihood of success and the overall benefit to be achieved for the entire unit, is *not* a ministerial duty, but a matter in which the representative is afforded broad discretion. The warning and dismissal letters also recited PERB decisional law holding that the representative's failure to advise the employee of every detail involved in processing a grievance does not constitute a breach of the duty of fair representation, so long as the *overall pattern* of the representative's conduct demonstrates that a good faith effort was made to provide adequate representation and address the employee's concerns.

In light of the above standards, the warning and dismissal letters concluded that Dershem had failed to state a prima facie case that CSEA had acted arbitrarily or in bad faith, because it timely filed a grievance and all necessary appeals, its attorney investigated the merits of the dispute by contacting District to determine whether Dershem was entitled to an adjusted hire date based on the audit conducted by the District under the MSA, because, even though CSEA ultimately decided not to arbitrate the dispute, the cumulative effect of its actions demonstrated a good faith effort to represent Dershem and address her concerns.[4]

ISSUES ON APPEAL

Most of Dershem's appeal is devoted to reiterating the factual allegations of the charge to demonstrate that her correct hire date was 2001 not 2004. Dershem argues that, because the underlying grievance against the District was meritorious, the charge sufficiently stated a

[4] The warning and dismissal letters also determined that Dershem's charge failed to state a prima facie case that CSEA had acted in an invidious discriminatory manner when processing the grievance on behalf of Dershem. Because Dershem's appeal does not appear to contest this determination, we decline to review those portions of the warning and dismissal letters.

prima facie case that CSEA breached its duty of fair representation by refusing to pursue the matter to arbitration. According to Dershem, because "[t]he chance of [her] claim winning was 50/50," CSEA's decision not to arbitrate was arbitrary or irrational. Dershem also argues that the Board agent incorrectly assumed that the information presented by CSEA's attorney to justify its decision not to arbitrate was examined before CSEA made that decision. Dershem contends that much of the information included in CSEA's position statements was not, in fact, reviewed by CSEA until after Dershem filed the present charge with PERB.

The Board need not address arguments on appeal that were adequately explained in prior proceedings in this case. (PERB Reg. 32635, subd. (a); *American Federation of State, County, and Municipal Employees, Local 2620 (McGuire)* (2012) PERB Decision No. 2286-S, pp. 2-3; *Service Employees International Union Local 1021 (Harris)* (2012) PERB Decision No. 2275, pp. 2-3.) The warning and dismissal letters determined that a rational basis existed for CSEA's decision not to arbitrate, because CSEA's attorney inquired with the District's human resources department about Dershem's correct hire date under the MSA and, based on that information, decided not to proceed to arbitration. It is therefore unnecessary to address Dershem's contentions either that CSEA should have conducted *a more thorough* investigation before deciding not to arbitrate the grievance, or that, had a more thorough investigation been conducted earlier, arbitration "most likely would have been funded."

Dershem also contends that the dismissal letter incorrectly implies that Dershem was appropriately classified as a student worker from 2001 until 2004 and that the latter hire date is correct. We find no support for this contention. The dismissal letter restates the conclusion of the warning letter that, "it appeared CSEA declined to proceed to arbitration, because [Dershem's] permanent hire date *within the bargaining* unit was less than ten years before she separated from employment." (Emphasis added.) The Board agent simply re-stated CSEA's

reason for not arbitrating the grievance; she was not making a determination on the correct interpretation of the MSA or the merits of the grievance. As pointed out in the warning and dismissal letters, the ultimate issue in a duty of fair representation allegation is not whether the underlying grievance was meritorious, but whether the exclusive representative's action or inaction was arbitrary, discriminatory or conducted in bad faith. (*California School Employees Association & its Chapter 379 (Dunn)* (2009) PERB Decision No. 2028, p. 9; see also EERA, § 3541.5, subd. (b).[5])

Dershem cites federal authority suggesting that whether a grievance lacked merit and its importance to the employee may be factors to consider in determining whether a rational basis existed for a union's handling of a grievance. However, filing a grievance does not commit an exclusive representative to proceeding through all steps of the grievance process or to arbitration, particularly where, in the representative's honest judgment, the chances of success are minimal. (*California School Employees Association & its Chapter 500 (Williams)* PERB Decision No. 2304 (*CSEA (Williams)*), adopting dismissal letter at p. 3; *California School Employees Association & its Chapter 410 (Payne)* (2009) PERB Decision No. 2029, adopting dismissal letter at pp. 2-3; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) By Dershem's own estimation, the grievance had only a "50/50" likelihood of success and thus, a rational basis existed for CSEA's decision not to expend the time and resources necessary for arbitration.

Additionally, while CSEA's decision not to proceed to arbitration with the grievance completely extinguished any right Dershem may have had to retirement benefits, the warning and dismissal letters correctly point out that CSEA's decision was not a ministerial act, such as

[5] EERA section 3541.5, subdivision (b), provides: "The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter."

meeting a deadline to file or appeal a grievance. (*Amalgamated Transit Union, Local 1704 (Buck)* (2007) PERB Decision No. 1898-M, adopting proposed dec. at p. 13.) The fact that CSEA had already appealed the grievance to arbitration does not mean, as Dershem contends, that "the discretionary action of deciding to arbitrate had already passed," and that CSEA could no longer withdraw the grievance based on any number of considerations, including the cost of arbitrating a dispute with a 50/50 chance of success.

By Dershem's own description, the contractual grievance procedure "states only [that] CSEA can approve funding for arbitration and that if funding for arbitration is not approved[,] the claim ends." Nothing in this or in any other allegation in the charge suggests that CSEA has contractually committed itself to fund arbitration for every grievance that has been appealed to arbitration. In the absence of such a voluntary commitment or promise to an employee, the duty of fair representation imposes no requirement on the representative to arbitrate every grievance filed (*CSEA (Williams), supra*, PERB Decision No. 2304), nor does it limit the representative's ability to settle or withdraw a grievance in the best interests of the unit, so long as the decision is not based on arbitrariness, invidious discrimination or bad faith. (*Vaca v. Sipes* (1967) 386 U.S. 171, 192.) If the collectively-bargained grievance-arbitration machinery is to work, and not be crushed by the weight of demands to arbitrate every workplace dispute that may arise, then the representative must retain a wide degree of latitude to decide which grievances are deserving of the time and expense of arbitration, and which are better disposed of by other means. (*Vaca v. Sipes, supra,* 386 U.S. 171, 191-192.) Any review of such decisions by PERB must be highly deferential. So long as they are made without arbitrariness, invidious discrimination or bad faith, we are without authority to second-guess the wisdom or appropriateness of a union's priorities or decision-making process. (*Inlandboatmans Union of the Pacific* (2012) PERB Decision No. 2297-M, p. 7.)

Dershem also asserts that she was confused by the warning and dismissal letters and by the Board agent's instructions during the investigation of her charge. Dershem notes that she contacted the Board agent on September 29, 2014 upon receiving the warning letter, because it was the same day that Dershem mailed additional information in support of her charge. Dershem asserts that, after previously discussing this additional information with the Board agent, the Board agent had stated that she would wait to receive the additional information before issuing a warning letter. However, Dershem acknowledges that the Board agent provided Dershem with an additional opportunity to amend her charge, which Dershem utilized by filing a second amended charge. Thus, any possible confusion caused by the Board agent's instructions did not affect the processing of this case and may be disregarded as harmless. (*Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4; *Antelope Valley, supra,* PERB Decision No. 97, pp. 24-25.)

REQUEST FOR ORAL ARGUMENT

According to Dershem's appeal, she has difficulty putting her thoughts in writing, and has therefore requested an opportunity to explain her appeal over the telephone, which we construe as a request for oral argument. PERB's regulations do not specifically provide for oral argument in an appeal from dismissal without a hearing.[6] Although EERA grants the Board broad authority to investigate and remedy unfair practice allegations (EERA, § 3541.3, subds. (h), (i), (n)), we are unaware of any instance in which the Board has permitted oral argument pursuant to an appeal from dismissal/refusal to issue a complaint. Despite any difficulty she may have had putting her thoughts to paper, Dershem has adequately set forth her position and cogently explained her concerns, even if we conclude that her appeal presents

[6] Compare PERB Regulation 32635 governing Board review of dismissals without hearing with PERB Regulation 32315 governing exceptions to a proposed decision following a hearing.

no grounds for disturbing the dismissal of her unfair practice charge. We therefore decline Dershem's request for a telephonic conference or oral argument before the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-1621-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Gregersen 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

January 6, 2015

Babette Dershem
12761 Standing Bear Rd.,
Apple Valley, CA 92308

Re: *Babette Dershem v. California School Employees Association*
Unfair Practice Charge No. LA-CO-1621-E
DISMISSAL LETTER

Dear Ms. Dershem:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB) on June 23, 2014. Babette Dershem (Charging Party) alleges that the California School Employees Association (CSEA or Respondent) violated sections 3543.6(b), 3543.8 and 3544.9 of the Educational Employment Relations Act (EERA or Act).[1]

Charging Party was informed in the attached Warning Letter dated September 26, 2014, that the above-referenced charge did not state a prima facie case. In a telephone conversation with Charging Party on September 29, 2014, Charging Party stated she received the September 26, 2014 Warning Letter but had already filed a first amended charge.

On October 1, 2014, this office received Charging Party's first amended charge and on October 7, 2014, Respondent was provided the opportunity to file an amended position statement in response to the first amended charge on or before October 17, 2014. On or about October 14, 2014, the undersigned Board agent granted Respondent's request for an extension of time to file an amended position statement. On November 3, 2014, Respondent filed an amended position statement.

The September 26, 2014 Warning Letter discussed Charging Party's allegations that she was an hourly employee excluded from the bargaining unit from 2001 to March 17, 2004 and that on March 17, 2004, Charging Party became a classified employee and a member of the bargaining unit. On March 17, 2013, Charging Party separated from employment with the Victor Valley College District (District) due to a "CalPers Disability Retirement." The District denied retirement benefits to Charging Party because under the Memorandum of Understanding between the District and CSEA, only classified bargaining unit employees with ten years of employment qualified for retirement benefits. CSEA pursued a grievance on

[1] 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.

Charging Party's behalf asserting she should not have been denied retirement benefits, however, when the grievance reached arbitration, CSEA declined to proceed.

The Warning Letter stated that it appeared CSEA declined to proceed to arbitration, because Charging Party's permanent hire date within the bargaining unit was less than ten years before she separated from employment. The Letter further explained that even if Charging Party was correct that she was entitled to benefits and that CSEA erred in believing Charging Party did not work the minimum ten years in the bargaining unit, a meritorious grievance is not sufficient to demonstrate a violation of the duty of fair representation. Rather, the charge must provide sufficient information demonstrating the union's decision not to pursue arbitration lacked a rational basis or that the union abused its discretion.

The Warning Letter also explained that Charging Party's assertions that CSEA never provided Charging Party with the opportunity to participate in meetings concerning her retirement benefits grievance, that CSEA never responded to her questions and that CSEA never explained her options after CSEA determined it would not pursue arbitration, did not demonstrate that CSEA's cumulative actions were an arbitrary failure to represent Charging Party. The Warning Letter also explained why the charge failed to establish prima facie violations of EERA sections 3543.6(b) (retaliation) and 3543.8. 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 6, 2014, the charge would be dismissed.

As noted above, this office received Charging Party's first amended charge on October 1, 2014.

On November 24, 2014, Charging Party filed a second amended charge.

In the first and second amended charges, Charging Party disputes many assertions CSEA made in its initial and amended position statements and she primarily challenges CSEA's contention that Charging Party "was not one of the workers included in the MSA."

To review, the "MSA" is the June 25, 2001 Master Settlement Agreement between CSEA and the District. The purpose of the MSA was to resolve a dispute about whether or not the District had improperly employed persons outside of the classified unit to perform the same work as classified employees. Thus, the parties agreed that the District would perform an audit in order to identify all persons employed by the College on or after May 21, 1999 who may have been employed outside of the classified service improperly. The District agreed to examine the work of persons within the enumerated exemptions of Education Code section 88003. The District also agreed to verify "whether each exclusion from the classified service falls within a statutory exemption from the classification requirement." In every case where District records were inadequate to support a statutory exemption, the classification seniority date would be changed to include that period of employment within the classified service. Education Code section 88003 provides in relevant part:

> Full-time students employed part time, and part-time students employed part time in any college work-study program, or in a work experience education program conducted by a community college district and which is financed by state or federal funds, shall not be a part of the classified service.

Charging Party asserts she is "a prime example of why [CSEA] filed the claim against the District in the first place." Charging Party states that she was a student worker when she began working as a "Tutor I" in 2001. In 2003 Charging Party applied for a new IA III position. In a February 17, 2004 letter, the District notified Charging Party that the District had approved her "appointment to the position of Instructional Assistant III . . . effective on or after March 11, 2004." The letter also stated her work schedule is "Monday-Friday, 8:30 am to 5 pm." A February 24, 2004 letter from the District revised Charging Party's schedule, to "Monday-Friday~~, 8:30 am to 5 pm~~ 7 am to 3:30 pm."

Charging Party asserts she performed the same work as the classified employees before she became employed in the classified unit in March 2004 and further asserts that she was or should have been placed retroactively in the classified unit. However, a District audit dated February 20, 2004 does not list Charging Party among the bargaining unit employees and it appears Charging Party remained outside of the bargaining unit until March 11, 2004. The District's November 16, 2005 audit lists Charging Party as a bargaining unit member with permanent and revised hire dates of "03/11/04." Charging Party asserts that maybe she was "accidentally left off of the first list" because the District provided her the wrong work schedule in the February 17, 2004 letter. Charging Party further asserts that other employees "who were not included in the MSA and hired after the June 2004 MSA date have had their hire dates adjusted." Charging Party provides a page from a letter dated September 30, 2005 that appears to corroborate Charging Party's assertion that other employee hire dates were adjusted.

Charging Party also remembers discussing, in 2004 or 2005, the MSA and her hire date with Dave Chip, the CSEA job steward at the time, and Ray Navarro, who participated in the MSA meetings. "I was told my hire date would remain as 9/12/01 and when I asked for something in writing . . . Dave told me it was in the MSA meeting notes and something was placed in my employee file." Charging Party further states that "[a]fter the District first denied my grievance I asked Fred Board (Board) if I could see the MSA information and he gave me the MSA 3" binder to look through." Board said he did not have the time to look through the binder but that Charging Party was welcome to go through the hundreds of pages. There were no meeting notes in the binder so Charging Party asked Board if he knew where to find the meeting notes. Board stated he did not know and Charging Party suggested that the notes may be in the CSEA Chapter President's office, with former CSEA Chapter President Arlene Green or Ray Navarro, "but nothing was done to locate them."

Charging Party asserts that as late as October or early November, 2013, CSEA failed to inform her that the dispute centered around her correct hire date for benefit purposes. After CSEA

determined it would not pursue her grievance, Charging Party learned that there were date discrepancies on her Notices of Assignments (NOA). Other records stated Charging Party's hire date was 09/12/01 but all of her NOAs showed a hire date of 03/11/04. However, the 2011/2012 NOA showed a hire date of 2001. Charging Party states "One of the dates entitled me to the benefits and one did not." CSEA never asked the District why it had conflicting information or why it changed her permanent hire date on her 2011/2012 NOA. Charging Party states: "That simple question might have settled the dispute with the District."[2]

Charging Party further asserts that only CSEA had the power to enforce the MSA and CSEA discriminated against Charging Party by failing to enforce the 2004 MSA as they had for numerous other employees.

Charging Party also asserts CSEA relied solely on the opinion of one person, who had no knowledge of the particular facts in Charging Party's case, and not the totality of evidence to determine whether Charging Party's claim was meritorious. Charging Party states that by not going to arbitration to settle the discrepancy in her hire dates, CSEA "in essence made the decision that my correct hire date was March 11, 2004. CSEA does not have the power to decide which date is correct, that decision should have been up to an arbitrator to decide." Charging Party also asserts that "Ms. Hartmann's assumption that I was not included in the MSA is incorrect, because I did fall within the terms of the MSA" and CSEA did not have "definite proof one way or another as to which hire date was correct or why the District had changed it to 9/12/01 on my Notice of Assignment. The District never stated why they had changed it, and only they would know the reason why it was changed. The District denied me my benefits based on my Anniversary/Longevity Date of 3/11/04 and not my hire date of 9/12/01."

Charging Party also asserts that CSEA failed to fully investigate and analyze Charging Party's case with care, did not pursue all reasonable evidence suggested by Charging Party and failed to process Charging Party's claim in a timely manner, which exhausted any other actions available to her. Charging Party also states that CSEA delayed in notifying Charging Party of CSEA's decision not to fund her claim through arbitration, "resulting in me losing my appeal rights." Charging Party asserts that CSEA strictly relied on the revised seniority lists as the only controlling factor "without reviewing the total circumstances in my case, when [CSEA was] aware of the disputed discrepancy in my hire date [and that was] more than a simple error in judgment of the facts." Charging Party further states that the District keeps "at least three different employee files . . . for each CSEA employee . . . one in payroll and two in HR" and "[t]he fact that HR relies on a spreadsheet to keep track of employee information, including

[2] In a telephone conversation with the undersigned Board agent, Charging Party asserted that if CSEA had simply asked why the hire date was changed in the NOA to 2001, CSEA would have seen that Charging Party was entitled to benefits. Because CSEA did not do this, Charging Party lost her right to benefits and this, according to Charging Party, was an abuse of discretion.

hire dates, and it is not connected to the County Superintendent of School's information, makes it an unreliable source as far as being accurate."

Charging Party also asserts that CSEA's actions caused Charging Party a financial hardship. Charging Party further states "I found out recently I was screwed out of some of my donated sick leave time, which may have given me enough time to qualify for retirement benefits using either the 9/12/01 date or the 3/11/04 date." Charging Party states she is suspicious because she was told exactly 60 days had been donated but she eventually prevailed in getting payment for 62 days in January 2014.

Charging Party also questions CSEA's assertion in its position statement that it had a meeting with the District and discussed Charging Party's grievance on January 8, 2014, even though CSEA informed her on January 7 that "CSEA decided not to go forward with the grievance."

Charging Party also asserts that Education Code section 88003 does not state student employees are not employees of the District, they are just not considered classified employees.

As stated in the Warning Letter, a union breaches its duty of fair representation if its "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.)

As also previously explained, a union's decision not to pursue a grievance *is lawful* where a rational basis for the decision exists and the Charging Party must show how the union abused its discretion and proof that the underlying grievance was meritorious is not sufficient. (*Los Angeles County Education Association (Sanders)* (2012) PERB Decision No. 2264, citing *Castro Valley Unified School District* (1980) PERB Decision No. 149; see also *Sacramento City Teachers Association (Fanning, et al.)* (1984) PERB Decision No. 428.)

The Warning Letter also explained that if the charge alleges that the union failed to act on behalf of an employee, PERB looks to whether "'the cumulative actions of the exclusive representative, considered in their totality, [are] sufficient to constitute a prima facie showing of an arbitrary failure to fairly represent the employee.'" (*Mount Diablo Education Association (Scott)* (2010) PERB Decision No. 2127.) The Warning Letter stated "CSEA's cumulative actions, considered in their totality, demonstrate that CSEA made an effort to represent Charging Party and did not ignore or fail to address Charging Party's concerns."

Charging Party's amended charges assert CSEA did not have the power to decide when Charging Party was hired into the classified bargaining unit, or that CSEA should have realized Charging Party was supposed to have had her hire date adjusted pursuant to the MSA. However, none of the information provided by Charging Party demonstrates that CSEA's apparent determination that Charging Party was not included in the MSA was an arbitrary, discriminatory or bad faith action. Rather, it appears that wherever the District records were inadequate to support a statutory exemption, the employee would have their hire date adjusted pursuant to the MSA. In Charging Party's case, there are many records indicating that

Charging Party was a student worker exempted under Education Code section 88003 prior to March 2004 when Charging Party was hired into a position i the classified bargaining unit.

Although Charging Party asserts she should have had her hire date adjusted pursuant to the MSA, there is simply no showing that CSEA's action in accepting the evidence that Charging Party was not part of the classified bargaining unit, or in accepting that Charging Party was not improperly excluded from the bargaining unit prior to her hire in March 2004, lacked a rational basis or honest judgment. Assertions that Charging Party was accidentally left off of the MSA list, that former CSEA stewards and/or representatives told Charging Party that notes from the MSA discussions contained documentation showing her hire date *was* to be adjusted, that CSEA does not have the power to decide which hire date is correct, that CSEA lacked definitive proof over the matter, or that CSEA strictly relied on the revised seniority lists as the only controlling factor "without reviewing the total circumstances in my case, when [CSEA was] aware of the disputed discrepancy in my hire date," are not sufficient to demonstrate CSEA lacked a rational basis or honest judgment when it determined it would not pursue arbitration.

Charging Party asserted that if CSEA had simply asked why the hire date was changed in the NOA to 2001, CSEA would have seen that Charging Party was entitled to benefits. CSEA's failure to ask the question was, according to Charging Party, an abuse of discretion. "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 809.) The fact that CSEA did not ask why Charging Party's hire date was changed in the NOA to 2001 does not demonstrate that CSEA's determination that it would not proceed to arbitration was not supported by the other facts or information.

Charging Party asserts that CSEA's refusal to arbitrate extinguished her rights to proceed or to appeal the conduct. However, the relevant rule, as provided in the Warning Letter is that a union's "failure to perform a *ministerial act* [that] completely extinguishes the employee's right to pursue his claim" may be breach of the duty of fair representation. CSEA's refusal to arbitrate was a discretionary action, not a ministerial action, so the legal standard for analyzing a union's handling of ministerial actions does not apply.

Charging Party asserts that CSEA delayed in notifying Charging Party of CSEA's decision not to fund her claim through arbitration, "resulting in me losing my appeal rights." The allegation does not provide facts supporting this conclusion because there are no facts demonstrating that CSEA, the District, or some other entity provided an appeal process, the timeframes for such process or how CSEA's alleged delay in notifying Charging Party resulted in loss of the right to such process. (*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.) As stated in the Warning Letter, 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 assertion that CSEA discriminated against Charging Party by failing to enforce the 2004 MSA as they had for numerous other employees is insufficient because there

are no allegations or facts demonstrating that CSEA's conduct stemmed from invidious discrimination. (*Inlandboatmans Union of the Pacific* (2012) PERB Decision No. 2297-M; *California School Employees Association & its Chapter 168 (Gibson)* (2010) PERB Decision No. 2128.)

Charging Party's assertion that she was "screwed out of some of my donated sick leave time, which may have given me enough time to qualify for retirement benefits using either the 9/12/01 date or the 3/11/04 date" does not provide sufficient information to demonstrate CSEA breached its duty of fair representation.

Charging Party's concern that CSEA asserted in its position statement that it had a meeting with the District and discussed Charging Party's grievance on January 8, 2014, the date after CSEA "decided not to go forward with the grievance" lacks sufficient information to demonstrate that CSEA ignored or failed to address Charging Party's concerns. (*Mount Diablo Education Association (Scott)* (2010) PERB Decision No. 2127.)

Based on all of the above-stated reasons and the reasons set forth in the September 26, 2014 Warning Letter, the charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

WENDI L. ROSS
Acting General Counsel

By _____
Mary Weis
Senior Regional Attorney

Attachment

cc: Karen L. Hartmann, Staff Attorney, CSEA

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

September 26, 2014

Babette Dershem
12761 Standing Bear Rd.
Apple Valley, CA 92308

Re: *Babette Dershem v. California School Employees Association*
Unfair Practice Charge No. LA-CO-1621-E
WARNING LETTER

Dear Ms. Dershem:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB) on June 23, 2014. Babette Dershem (Charging Party) alleges that the California School Employees Association (CSEA or Respondent) violated sections 3543.6(b), 3543.8 and 3544.9 of the Educational Employment Relations Act (EERA or Act).[1]

FACTS AS ALLEGED

CSEA and the Victor Valley College District (District) were parties to a June 25, 2001 Memorandum of Understanding (MOU) that was in effect from 2001 through 2003. Section 9.4 of the MOU provided:

> The District will provide retirement benefits for unit members who are eligible for PERS/STRS retirement and who have a minimum of ten years of service at Victor Valley Community College District at the time of retirement. Said benefits will be the current health insurance benefits provided to the Classified as a whole and said benefits will be provided to both the eligible employee and said employee's spouse until the employee reaches Medicare age. In order to be eligible for this benefit, the unit member must have been employed by the District on or after July 1, 1999. In the event that any or all of the medical providers under the district paid plans are not available to a retired unit member and/or his/her spouse because of a change of residency or otherwise, the District shall be required to pay no more than the amount designated in section 9.2 above in order for the unit member and/or his spouse to obtain alternative benefits.

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

The same MOU also provided:

> "Hire date" means the initial date that the worker was hired by the District in any capacity. For purposes of the scope of workers contemplated under the terms of the herein Preliminary agreement, if a worker was rehired after resignation, termination or retirement, "hire date" means the most recent hire date for determining those persons employed on or after May 21, 1999.
>
> "Classification seniority date" is the first date on or after the hire date that the worker performed work of the particular classification for the District that did not fall within any express statutory exemption from the classified service . . . .

On September 12, 2001, the District hired Charging Party. Charging Party was first a Tutor I, then a Tutor II, then a substitute CIT/BET lA III, then a full time CIT/BET lA III, then an Instructional Media Tech, then an Instructional Media Coordinator. Charging Party was continually employed and promoted from 2001 to 2013.

It appears that CSEA and the District entered into another MOU, effective 2004-2007, that also contained provision 9.4. However, CSEA and the District entered into a Master Settlement Agreement (MSA) in 2004 that changed section 9.4 (in the 2004-2007 MOU) such that "the hire date will be the actual date of hire unless adjusted by the MSA." The new definition was carried over to all future and current contracts. Section 9.4 of 2010-2013 MOU provided:

> The District will provide retirement benefits for unit members who are eligible for PERS/STRS retirement and who have a minimum of ten years of service at Victor Valley Community College District at the time of retirement. The date of hire will be the actual date of hire unless adjusted by the MSA. Said benefits will be the current health insurance benefits provided to the Classified as a whole and said benefits will be provided to both the eligible employee and said employee's eligible dependents until the employee reaches Medicare age. In order to be eligible for this benefit, the unit member must have been employed by the District on or after July 1, 1999. In the event that any or all of the medical providers under the district paid plans are not available to a retired unit member and said retirees' eligible dependents because of a change of residency or otherwise, the District shall be required to pay no more than the super composite rate for active employees.

On an unspecified date, Charging Party made a request to District Vice President of Human Resources, Fusako Yokotobi (Yokotobi) to have her retirement health benefits commence on

March 17, 2013, the date of Charging Party's separation of service due to a "CalPers disability retirement."

On March 19, 2013, Charging Party received a reply from Yokotobi stating that retirement benefits "have been negotiated for bargaining unit members" and that Charging Party's permanent hire date, as a bargaining unit member, was March 11, 2004. Yokotobi further stated that anytime that Charging Party worked prior to that date would not be counted towards the required minimum ten years of service at the District.

On an unspecified date, Charging Party contacted CSEA Chapter President, Fred Board (Board), and informed him that the District stated that Charging Party did not meet the ten years of service requirement.

According to the charge, attempts were made to meet with Yokotobi on several occasions during March and April, however they were cancelled or rescheduled.

On April 19, 2013, CSEA filed a Grievance Formal Level 1 and Yokotobi denied the grievance.

On May 6, 2013, CSEA filed a Grievance Formal Level II which was presented to District Superintendent/President Christopher O'Hearn (O'Hearn). However, O'Hearn was retiring that month and he never responded to the level II grievance.

On June 13, 2013, CSEA filed a level III Grievance for Arbitration which was presented to District Interim Superintendent/President Peter Allan (Allan).

Between July 1, 2013 and November 12, 2013, several meetings were held with Allan and CSEA to discuss numerous grievances, including Charging Party's grievance. CSEA never informed Charging Party of the meeting dates or times, and Charging Party was never given the opportunity to attend any of the meetings regarding her grievance.

On November 8, 2013, Board sent Charging Party an e-mail message that stated:

> We discuss[ed] your grievance at our last grievance meeting with the District, currently it [i]s being reviewed at our Rancho office. We will contact you upon receiving more information.

On November 12, 2013, CSEA Chief Job Steward Carol Stump (Stump) informed Charging Party that Charging Party's paperwork had been sent to the CSEA Rancho Field Office and as soon as it was funded, an arbitrator would be chosen.

Section 16.4.3.2 of the 2010-2013 MOU provides:

> The fees and expenses of the arbitrator and the hearing shall be borne equally by the District and CSEA. Any expenses

> associated with arbitration which are billable to CSEA, must be authorized by CSEA prior to the start of the arbitration. If the expenses are not approved prior to the arbitration, the grievance will not proceed to arbitration.

In mid-December, Charging Party sent an e-mail message to Board asking for an update on her grievance. Board informed Charging Party that the grievance was still being reviewed by the Rancho Field Office.

The District was closed for Winter break between December 23, 2013 and January 2, 2014.

On January 6, 2014, Charging Party again sent an e-mail message to Board asking for an update. Board sent an e-mail message in reply that stated:

> CSEA decided not to go forward with the grievance we filed concerning your issue. After review from Rancho there was not enough evidence to support our argument to continue with the grievance-CSEA withdrew the grievance. I personally will take the responsibility of not informing you of the decision to withdraw the grievance, please call me at 760-515-0024 for further questions.

According to the charge, Charging Party did not understand how CSEA came to the conclusion that there was a lack of evidence, when all her paperwork stated that her hire date was September 12, 2001. When Charging Party and CSEA started the grievance process, both the District Representative at the CSEA Rancho office and the District Representative told Charging Party that there was "plenty of evidence" to support her hire date of September 12, 2001. Charging Party sent several e-mail messages to Board asking why she was not asked for more evidence and what her options were at that point, but she never received a response.

On January 22, 2014, Charging Party spoke with CSEA District Representative Lacey Gillespie (Gillespie) from the Rancho Cucamonga Office. He told Charging Party that for some reason the District had changed the hire date on Charging Party's 2011-2012 Notice of Assignment to September 12, 2001. He told her he was not sure why it had been changed. According to Charging Party, the simple fact that he was aware of this change shows he should have investigated the validity of the fact that her hire date was September 12, 2001, prior to making the decision not to move forward. Gillespie told Charging Party that he contacted Karen Hartman (Hartman), the CSEA attorney who worked on the Master Settlement Agreement (MSA). Hartman asked Gillespie to look at the documents to see if Charging Party's classified hire date had been changed. Gillespie informed Charging Party that because her March 2004 classification seniority date was not changed, CSEA denied the funding of her arbitration. According to the charge, if CSEA had been diligent, CSEA would have realized that the terms of the retirement benefits are not based on the classification seniority date but the original hire date.

DISCUSSION

A. Specificity Required in Allegations

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." A charging party may do so by alleging sufficient information to explain 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.)

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.)

With regard to when "mere negligence" might constitute arbitrary conduct, PERB 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 "to 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.)

A union's decision not to pursue a grievance is lawful where a rational basis for the decision exists. (*Los Angeles County Education Association (Sanders)* (2012) PERB Decision No. 2264, citing *Castro Valley Unified School District* (1980) PERB Decision No. 149.) The burden is not on the union to demonstrate its decision was correct, rather, the burden is on the Charging Party to show how a union abused its discretion. (*Id.*, citing *United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.) Charging Party may not establish a breach of the duty of fair representation merely by proof that the underlying grievance was meritorious. (*Id.*, citing *Vaca v. Sipes* (1967) 386 U.S. 171, 195; see also *Sacramento City Teachers Association (Fanning, et al.)* (1984) PERB Decision No. 428.)

When a charge alleges that the exclusive representative's failure to act on behalf of an employee constituted a breach of its duty of fair representation, PERB looks to whether "'the cumulative actions of the exclusive representative, considered in their totality, [are] sufficient to constitute a prima facie showing of an arbitrary failure to fairly represent the employee.'" (*Mount Diablo Education Association (Scott)* (2010) PERB Decision No. 2127.) "A violation may be established based on an overall pattern of conduct even if any one of the exclusive representative's actions by itself would not breach the duty of fair representation." (*Ibid.*) "However, the exclusive representative's failure to take certain actions does not establish a violation if the overall pattern of conduct was one in which the union assisted the employee." (*Ibid.*)

It appears that Charging Party is alleging that because she was hired by the District on September 12, 2001 and worked for the District through March 2013 without resigning, retiring or being terminated, she worked for at least ten years for the purposes of retirement benefits pursuant to MOU section 9.4. However, it appears that Charging Party was an hourly employee excluded from the bargaining unit from 2001 to March 17, 2004 and that on March 17, 2004, Charging Party became a classified employee and a member of the bargaining unit. It therefore appears that Charging Party was not a member of the bargaining unit for the minimum ten years required to obtain the retirement benefits. It appears that CSEA decided not to pursue the arbitration because CSEA understood MOU section 9.4 to require ten years of employment within the classified bargaining unit. Even if Charging Party is correct that her more than ten years working at the District entitled her to retirement benefits, regardless of whether she worked in a position in the classified bargaining unit, such proof of a meritorious

grievance is not sufficient. (*Los Angeles County Education Association (Sanders)*, *supra*, PERB Decision No. 2264.) The charge does not provide sufficient information demonstrating that CSEA's decision not to pursue arbitration lacked a rational basis or that CSEA abused its discretion.

Charging Party also asserts that CSEA never provided her with the opportunity to participate in meetings between July 1, 2013 and November 12, 2013 with Allan and CSEA and further asserts that Board never responded to her questions asking why she was not asked for more evidence and what her options were after CSEA decided not to pursue arbitration. CSEA's cumulative actions, considered in their totality, demonstrate that CSEA made an effort to represent Charging Party and did not ignore or fail to address Charging Party's concerns. (*Mount Diablo Education Association (Scott)*, *supra*, PERB Decision No. 2127.) Thus, the charge does not provide sufficient information to demonstrate that CSEA's cumulative actions, considered in their totality, were an arbitrary failure to fairly represent Charging Party.

C. 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 <u>because of</u> 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).

Charging Party exercised rights under EERA when she filed her grievance. (*Los Angeles Unified School District* (2012) PERB Decision No. 2244.) Assuming that the loss of a retirement benefit is an adverse action, the allegations still fail to state a prima facie retaliation violation because there are no facts indicating that CSEA took an adverse action because Charging Party filed the grievance or otherwise exercised rights under EERA. (*Novato*, *supra*, PERB Decision No. 210.) As such, the charge does not provide sufficient information to determine that CSEA retaliated against Charging Party.

D. Section 3543.8 Allegation

Charging Party alleges that CSEA violated section 3543.8 of EERA, however, section 3543.8 provides employee organizations with standing to sue and does not apply to a claim by an employee against an employee organization. (*Los Banos Teachers Association (Ulmschneider)* (2007) PERB Decision No. 1922.)

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

[2] In *Eastside Union School District* (1984) PERB Decision No. 466, PERB 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.*)

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 6, 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

MW

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