STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN JOSEPH CARVALHO, Charging Party, v. CALIFORNIA FACULTY ASSOCIATION, Respondent.	Case No. LA-CO-537-H PERB Decision No. 2437-H June 25, 2015

Appearances: John Joseph Carvalho, on his own behalf; Rothner, Segall & Greenstone by Jonathan Cohen, Attorney, for California Faculty Association.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION[1]

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by John Joseph Carvalho (Carvalho) of a dismissal by PERB's Office of the General Counsel (attached) of his unfair practice charge, as amended. The charge alleged that the California Faculty Association (Association) breached its duty of fair representation by refusing to arbitrate Carvalho's grievance over denial of his request for tenure and for allegedly colluding with the California State University (CSU) in denying tenure. Carvalho alleged that this conduct violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571.1(b) and (e) and section 3578.[2]

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

[2] HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

The Board has reviewed the case file in its entirety and has fully considered the relevant issues and contentions on appeal.[3] Based on this review, the Board finds the warning and dismissal letters accurately describe the allegations included in the unfair practice charge, as amended. The warning and dismissal letters are well-reasoned and in accordance with applicable law.

The appeal raises no issues warranting the Board's further consideration. Moreover, the appeal fails to comply with PERB Regulation 32635(a), as we discuss below. We therefore deny the appeal, affirm the dismissal of the charge, and adopt the warning and dismissal letters as the decision of the Board itself, as supplemented by the discussion below.

DISCUSSION

As determined by the Office of the General Counsel, all but two alleged violations are untimely because they occurred more than six months before Carvalho filed his unfair practice charge on September 2, 2014. The two remaining timely alleged breaches of the duty of fair representation concern the Association's March 12, 2014, denial of Carvalho's appeal of its February 4, 2014, decision not to arbitrate his grievance challenging his tenure denial, and the Association's refusal to identify its agent for service.

The warning and dismissal letters accurately set forth the legal standards for determining whether a union has breached its duty of fair representation in its handling of grievances. Specifically, PERB held in *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258:

> 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

[3] The Board did not consider the Association's position statement filed on October 20, 2014, because it was not signed under penalty of perjury by the Association or its agent, and therefore was not submitted in compliance with PERB Regulation 32620(c). (*Trustees of the California State University* (2014) PERB Decision No. 2384-H, fn. 5.)

> in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

(*Id.* at p. 5.)

PERB also noted in *United Teachers of Los Angeles (Clark)* (1990) PERB Decision No. 796 that:

> A union's estimation of the "probability of success on the merits is a judgment made by the union to which the courts have generally deferred." (Morris, The Developing Labor Law (2nd Ed. 1983) p. 1330).

(*Id.* Dismissal Ltr., p. 2.)

Under the applicable standard, for reasons articulated by the Office of the General Counsel, Carvalho has failed to allege facts sufficient to state a prima facie charge of a breach of duty of fair representation, i.e., that the Association's rejection of Carvalho's appeal regarding its refusal to arbitrate his grievance and its refusal to identify an agent for service were acts that were arbitrary, capricious, discriminatory or devoid of honest judgment.

Furthermore, Carvalho's appeal fails to comply with PERB Regulation 32635(a), "Review of Dismissals," which states in relevant part:

> The Appeal shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the ground for each issue stated.

Carvalho merely reiterates facts alleged in the unfair practice charge and restates arguments made to the Office of the General Counsel, failing to state "the specific issues of procedure, fact, law or rationale to which the appeal is taken." This failure to comply subjects

the appeal to denial on that ground alone. (*State of California (Department of Mental Health, Department of Developmental Services)* (2012) PERB Decision No. 2305-S, p. 4.)

ORDER

The unfair practice charge in Case No. LA-CO-537-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
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February 27, 2015

John Joseph Carvalho
800 S. Pacific Coast Hwy. #8-145
Redondo Beach, CA 90277

Re: *John Joseph Carvalho v. California Faculty Association*
Unfair Practice Charge No. LA-CO-537-H
DISMISSAL LETTER

Dear Mr. Carvalho:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 2, 2014. John Joseph Carvalho (Charging Party) alleges that the California Faculty Association (CFA or Respondent) violated section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] by failing to fairly represent him.

Charging Party was informed in the attached Warning Letter dated November 10, 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 November 20, 2014, the charge would be dismissed. Charging Party requested extensions of time to file an amended charge and the undersigned Board agent granted those requests. Charging Party timely filed a First Amended Charge on December 29, 2014.

Charging Party was informed in the attached Second Warning Letter dated January 20, 2015, 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 January 30, 2015, the charge would be dismissed. Charging Party requested an extension of time to file a second amended charge and the undersigned Board agent granted the request providing Charging Party until February 13, 2015 to amend the charge. Charging Party requested another extension of time to file a second amended charge and the undersigned Board agent granted the request providing Charging Party until March 2, 2015 to amend the charge.

[1] HEERA is codified at Government Code section 3560 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the HEERA and PERB Regulations may be found at www.perb.ca.gov.

On February 15, 2015, Charging Party sent an e-mail message to the undersigned Board agent stating the he "found that [he] had provided more than enough evidence to indicate CFA involvement in collusion with the University Administration from the beginning of my tenure applications and to the date of CFA's denial of my appeal for arbitration. As a result, I have decided not to amend the charge further." (Emphasis omitted.)

As explained in November 10, 2014 and January 20, 2015 Warning Letters, 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.)

It appears from the allegations that Charging Party knew in the Fall of 2011 that CFA tried to make changes to Charging Party's rebuttal letter to the University's denial of his tenure application, indicating to Charging Party "that CFA was colluding with" the retention tenure and promotion committee (RTP). It further appears that in the Fall of 2011 Charging Party knew that the RTP was formed under suspicious or unusual and improper circumstances and/or that the RTP reviewers suddenly gave poor reviews of Charging Party's work, thus indicating that Dr. John Thomlinson was "discriminating" against Charging Party.

It also appears from the allegations that Charging Party knew on June 12, 2013 that the CFA Representative that worked with Charging Party in the presentation of his grievance over the University's denial of Charging Party's tenure and promotion application tried to "'water down' my case and collude with my Department Chair and University officials."

It also appears from the allegations that Charging Party knew in the Fall of 2011 that Dr. David Bradfield was CFA's President and knew as of February 13, 2014 that Bradfield was CFA's Director of Representation. It further appears that Charging Party also knew as of those dates about Bradfield's alleged "collusion" with Dr. John Thomlinson and the RTP Committee.

In sum, the allegations demonstrate that Charging Party knew about CFA's alleged discrimination and/or collusion with the University in the Fall of 2011, on June 13, 2013, and in February 13, 2014; however, the instant charge was filed on September 2, 2014, more than six months later. As PERB may not issue 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, the charge fails to state a prima facie case. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) Therefore, the charge is hereby dismissed based on the facts and reasons set forth above and in the November 10, 2014 and January 20, 2015 Warning Letters.

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
Deputy General Counsel

By _____
Mary Weiss
Senior Regional Attorney

Attachment

cc: Jonathan Cohen, Attorney, Rothner, Segall & Greenstone

PUBLIC EMPLOYMENT RELATIONS BOARD

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January 20, 2015

John Joseph Carvalho
800 S. Pacific Coast Hwy. #8-145
Redondo Beach, CA 90277

Re: *John Joseph Carvalho v. California Faculty Association*
Unfair Practice Charge No. LA-CO-537-H
SECOND WARNING LETTER

Dear Mr. Carvalho:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 2, 2014. John Joseph Carvalho (Charging Party) alleges that the California Faculty Association (CFA or Respondent) violated section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] by failing to fairly represent Charging Party.

Charging Party was informed in the attached Warning Letter dated November 10, 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 November 20, 2014, the charge would be dismissed. Charging Party requested extensions of time to file an amended charge and the undersigned Board agent granted the requests. Charging Party filed a First Amended Charge on December 29, 2014.

Duty of Fair Representation

In the original charge, Charging Party asserted that CFA failed to fairly represent Charging Party by colluding with the University in order to deny Charging Party's applications for tenure and promotion in 2011 and 2012. In June 2013, CFA filed a grievance against the University regarding the University's denial of Charging Party's tenure and promotion application(s). The matter proceeded to a two hour hearing during which the CFA representative was confused, disorganized and weakened Charging Party's case. It appeared to Charging Party that the University was completely ignoring favorable evidence, that CFA was fully aware of such favorable evidence and that CFA did nothing about the University's lack of response to the favorable evidence. In July 2013, the University denied Charging Party's

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grievance and in February 2014, CFA denied Charging Party's request to proceed to arbitration. Charging Party filed an appeal of CFA's decision not to proceed to arbitration and CFA denied the appeal in a letter dated March 12, 2014. Therein, CFA stated it determined it would not proceed to arbitration because "it appears to us that the University met its contractual obligations . . . ."

The November 10, 2014 Warning Letter explained that the only conduct alleged to have occurred within the six month statute of limitations before the charge was filed was CFA's March 12, 2014 letter informing Charging Party that CFA had denied Charging Party's appeal of CFA's February 4, 2014 denial of Charging Party's request that his grievance against the university proceed to arbitration. The Warning Letter also explained that the charge did not provide specific information demonstrating that CFA abused its discretion, acted in an arbitrary, irrational or dishonest manner or was negligent when it determined it would not proceed to arbitration.

In the amended charge, Charging Party asserts that CFA acted in an erratic manner and constantly and haphazardly ignored Charging Party's concerns as well as material evidence that would prove the University made a wrong decision each time it denied Charging Party's applications for tenure. Charging Party alleges that CFA's denial of Charging Party's right to arbitration was "arbitrary, capricious and/or discriminatory." Charging Party states that if CFA "had made a comprehensive review of my file, it would have cited the extensive material evidence, the wrongful decision of the President,[2] and moved my case to arbitration." Charging Party asserts that he has material evidence, starting with his first application for tenure and promotion, that reveals that CFA attempted to thwart his chances of winning tenure and promotion by removing legal language that referenced the "Unusually Meritorious Criteria for Early Tenure And/Or Promotion" from his rebuttal letter to the Biology department Retention Tenure and Promotion (RTP) committee.

With regards to the "Unusually Meritorious Criteria for Early Tenure And/Or Promotion," Charging Party asserts that when he was hired, these criteria were the only criteria under which Charging Party's performance could be evaluated. However, Department Chair Thomlinson modified the "Unusually Meritorious Performance in Biology" criteria sometime after Charging Party was hired. Charging Party also alleges the RTP committee was formed under suspicious or unusual and improper circumstances which indicate that Dr. Thomlinson was trying to discriminate against Charging Party and actively thwart Charging Party's chances for being awarded tenure and promotion. In contrast to all previous years, Thomlinson and other department RTP reviewers[3] suddenly gave poor reviews of Charging Party's work, after he applied for tenure. Charging Party has extensive documentation that their complaints in their

[2] Charging Party asserts that the University President's decisions to twice deny tenure and promotions were not based on reasoned judgment.

[3] Charging Party alleges, and it is therefore assumed, that Dr. Thomlinson and other department reviewers were also representatives or agents of CFA.

reviews were a misrepresentation of Charging Party's record and there are many hints of unethical conduct on the part of the reviewers. For example, they tried to lower Charging Party's student evaluation scores from what they originally were and they claimed that the committees Charging Party served on either did not exist at all or that Charging Party had never served on them. Charging Party also states there are suggestions that certain items were added or removed from Charging Party's tenure files.

In sum, Charging Party asserts that because "the chance for success in arbitration was not minimal, but actually quite strong," "[t]here was no legitimate reason for the CFA to not take the case to arbitration." However, even assuming that Charging Party had a meritorious grievance, a union's decision not to pursue a grievance is not necessarily a violation of the duty of fair representation. (*IBEW Local 1245 (Flowers)* (2009) PERB Decision No. 2079-M; *California School Employees Association & its Chapter 168 (Gibson)* (2010) PERB Decision No. 2128.) In such cases, however, the a union must explain why it chose not to process an employee's grievance. (*IBEW Local 1245 (Flowers)*, *supra*, PERB Decision No. 2079-M.) In analyzing a union's conduct, PERB does not judge whether the union's assessment was "correct," but only whether that judgment had a rational basis, or was reached for reasons that were arbitrary or based upon invidious discrimination." (*International Union of Operating Engineers, Local 39 (Siroky)* (2004) PERB Decision No. 1618-M; *California School Employees Association & its Chapter 168 (Gibson)*, *supra*, PERB Decision No. 2128.)

Here, CFA stated it would not proceed to arbitration because "it appears to us that the University met its contractual obligations . . . ." (*IBEW Local 1245 (Flowers)*, *supra*, PERB Decision No. 2079-M.) Allegations that the grievance had quite strong chances for success in arbitration do not demonstrate that CFA acted irrationally, arbitrarily, capriciously or in bad faith when it denied Charging Party's request to proceed to arbitration. (*Ibid.*)

Statute of Limitations

Charging Party also asserts the statute of limitations should not bar his unfair practice charge because "[u]ntil [M]arch 12, 2014, I did not know the full scope of the who of the unfair practice. I now have a larger list of names, which strengthens the case that CFA's unfair practice was not the result of erratic actions by only a certain few officials. Indeed, throughout the tenure reviews there were gross violations of the CBA [and] CFA had access to all of this information." Charging Party states "FURTHER evidence . . . came to light on the date of March 12, 2014." (Emphasis in the original.)

As stated in the November 10, 2014 Warning Letter, "[t]he 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.) The statute of limitations begins to run when a charging party discovers the conduct that constitutes the alleged unfair practice, not when a charging party discovers the legal significance of that conduct. (*Charter Oak Unified School District* (2011) PERB Decision No. 2159.) Similarly, the limitations period does not begin to run only when the Charging Party "know[s] the full scope of the who of the unfair practice," when the Charging Party has "a larger list of names,

which strengthens the case," or when further evidence "came to light." (*Ibid.*) Therefore, the allegation that charging party did not receive more information defining the true scope of the alleged unfair practice until March 12, 2014 did not render timely the allegations concerning CFA's conduct more than six months before the charge was filed. (*Ibid.*) As stated in the November 10, 2014 Warning Letter, the only alleged conduct by CFA that occurred within six months before the instant charge was filed was CFA's March 2014 denial of Charging Party's appeal. All other alleged conduct occurred more than six months before the instant charge was filed and as such, those allegations are untimely.

PERB's Jurisdiction

The November 10, 2014 Warning Letter summarized Charging Party's contact with State Senator Ted Lieu's office wherein he asserted that he should have Whistle Blower status or protection because he raised his "concerns that CFA was illegally colluding with CSUDH and that both were trying to remove me from my appointment." On this issue, the First Amended Charge states, verbatim:

> **It remains to be explained why I was not given "whistle blower" protection.** Please note: The California Whistle Blower Protection Act clearly indicates that it is the public policy of the State of California to encourage employees to notify an appropriate government or law enforcement agency, person with authority over the employee, or another employee with authority to investigate, discover, or correct the violation or noncompliance, and to provide information to and testify before a public body conducting an investigation, hearing or inquiry, when they have reason to believe their employer is violating a state or federal statute, or violating or not complying with a local, state or federal rule or regulation. In this particular case I was concerned about illegal collusion and violations of the CBA (both of which would have constituted unfair practice on the part of both CFA AND CSU) and I contacted the California State Senate via Senator Lieu, but was ignored. The unjust proceedings continued in violation of the *California Labor Code Section 1102.5* (also consult sections 1101-1106; see especially sections 1101 and 1102 in relation to the faculty strike on our campus in fall 2011). The contents of this letter are now being investigated by a separate state agency.

PERB's jurisdiction is limited to the determination of unfair labor practice claims arising under the HEERA and other public sector labor statutes. (See, e.g., *Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.) PERB's jurisdiction does not include enforcement of the Whistleblower Protection Reporting Act. (*Ibid*; *Housing Authority of the City of Los Angeles* (2011) PERB Decision No. 2166-M.) PERB's jurisdiction similarly does not include enforcement of the Labor Code. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S, citing *Wygant v. Victor Valley Joint Union High School Dist.* (1985) 168 Cal.App. 3d 319, 323.)

Charging Party also reiterates in the amended charge that he contacted PERB June 2013 and stated "he was concerned with his CFA representation." PERB Regulation 32602(a) states "Alleged violations of the . . . HEERA . . . shall be processed as unfair practice charges." Once a charge is filed in accordance with the Regulations, an investigation into the allegations commences. (See PERB Regs. 32602 et seq.; 32620.) The allegation that Charging Party contacted PERB by telephone in June 2013 to express his concern over his CFA representation is insufficient to establish that Charging Party invoked PERB's jurisdiction over any claim.

For the reasons stated above, the First Amended Charge, as presently written, does not state a prima facie case. Since the November 10, 2014 Warning Letter did not present to Charging Party information concerning PERB's lack of jurisdiction over the Whistleblower Protection Reporting Act, the Labor Code or unfiled claims, Charging Party is hereby afforded an opportunity to file a Second amended charge if there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before January 30, 2015, PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

WENDI L. ROSS
Acting General Counsel

By _____
Mary Weiss
Senior Regional Attorney

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD

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November 10, 2014

John Joseph Carvalho
800 S. Pacific Coast Hwy. #8-145
Redondo Beach, CA 90277

Re: *John Joseph Carvalho v. California Faculty Association*
Unfair Practice Charge No. LA-CO-537-H
WARNING LETTER

Dear Mr. Carvalho:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 2, 2014. John Joseph Carvalho (Charging Party) alleges that the California Faculty Association (CFA or Respondent) violated section 3571.1 of the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] by failing to fairly represent Charging Party.

FACTS AS ALLEGED

Charging Party was an Assistant Professor of Biology and a Member of the Academic Senate at the University from 2007 to 2014. Charging Party had an excellent record with the University and had been told that he would receive tenure and promotion when he applied.

In the fall of 2011, Charging Party first applied for tenure and promotion. At or around that same time, a faculty strike occurred at the University. Charging Party was the Political Action Committee Representative of CFA at the University. Charging Party had been asked to serve as the CFA Political Action Representative by then Chapter President Dr. David Bradfield (Bradfield). Bradfield is a friend of Charging Party's Department Chair, Dr. John Thomlinson (Thomlinson). Charging Party alleges that Thomlinson formed a secret retention tenure and promotion committee (RTP) and that the members of the RTP gave Charging Party poor reviews and misapplied certain definitions for tenure. Charging Party prepared a rebuttal letter and he asked CFA to review the letter. CFA tried to make changes and CFA's changes "indicated" to Charging Party "that CFA was colluding with" the RTP committee.

On October 3, 2012, Charging Party filed another application for tenure and promotion and the same reviewers were involved. The application was denied. During this period Charging Party contacted State Senator Ted Lieu and discussed his "concerns that CFA was illegally

[1] HEERA is codified at Government Code section 3560 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the HEERA and PERB Regulations may be found at www.perb.ca.gov.

colluding with CSUDH and that both were trying to remove me from my appointment. On January 29, 2013, Senator Lieu's office . . . ignored my concerns, and simply referred me back to CFA. I had informed State Senator Ted Lieu that I was a 'whistle blower' concerning these matters."

On June 12, 2013, Charging Party filed a grievance regarding the denial of Charging Party's tenure and promotion application. Charging Party had extensive difficulty working with the CFA Representative "who I felt was trying to 'water down' my case and collude with my Department Chair and University officials."

On June 26, 2013, there was a two-hour hearing with the University Provost, the University Vice President of Academic Affairs and Personnel Services, the CFA Representative and Charging Party. The CFA Representative "made numerous comments that appeared to be an orchestrated attempt to weaken my case. For example, she made statements like 'I am sure that Dr. Carvalho will get his "act" together . . . .'" She also "acted confused and disorganized." It was also "clear that" the Provost and Vice President "were completely ignoring the evidence I was presenting."

After the June 26, 2013 meeting, Charging Party contacted PERB and stated he was concerned with his CFA representation.

On July 11, 2013, the Vice President denied Charging Party's grievance and stated that Charging Party had "shown 'no evidence.'"

On February 4, 2014, CFA denied Charging Party's request that the grievance proceed to arbitration.

On February 13, 2014, Charging Party filed an appeal of CFA's denial. At that time, Charging Party discovered that Bradfield was the CFA Director of Representation. Charging Party had concerns about Bradfield's "collusion" with Thomlinson and the RTP Committee since his first application.

On March 14, 2014, CFA informed Charging Party that his appeal was denied. CFA's letter dated March 12, 2014 stated:

> The California Faculty Association's Representation Committee met on March 11, 2014 to consider your appeal of the staff decision declining arbitration in your case.
>
> After carefully considering all the material in your file and other material you may have provided, the Committee voted to sustain that decision. Based upon our review, it appears to us that the University met its contractual obligations, and this decision was made in compliance with CFA representation policy. Therefore, I must inform you that CFA will not move your case to arbitration.

Charging Party alleges that during his tenure reviews there were gross violations of the Collective Bargaining Agreement but CFA totally ignored his concerns. The CFA Representative was extremely difficult and Charging Party "felt" he "was being treated with an 'unacceptable and unnecessary hostility' whenever" he "would contact them. When it came time for me to even file a PERB charge against CFA, I called the CFA office to determine who the agent of service was they refused to tell me."

DISCUSSION

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." 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.)

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by HEERA section 3578 and thereby violated section 3571.1(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Teachers Association (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 HEERA, 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.

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.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.)

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

The only alleged conduct by CFA that occurred within six months before the instant charge was filed was CFA's March 2014 denial of Charging Party's appeal. (See CFA's March 12, 2014 letter.) All other alleged conduct occurred more than six months before the instant charge was filed and as such, those allegations are untimely.

The allegations do not provide specific information demonstrating that CFA abused its discretion, acted in an arbitrary, irrational or dishonest manner or was negligent when it determined it would not proceed to arbitration. (*United Teachers – Los Angeles (Wyler)*, *supra*, PERB Decision No. 970.) The allegations that CFA refused to provide to Charging Party the name of CFA's agent for service is also insufficient to demonstrate that CFA breached its duty of fair representation.

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 November 20, 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 or electronic mail. (PERB Regulation 32135.)