STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GAIL NATALIE OLIVER, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721, Respondent.	Case No. LA-CO-5-C PERB Decision No. 2462-C November 24, 2015

Appearances: Gail Natalie Oliver, on her own behalf; Lauren Hazarian, Attorney, for Service Employees International Union Local 721.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Gail Natalie Oliver (Oliver) from the dismissal (attached) by the Office of the General Counsel of Oliver's unfair practice charge. The charge, as amended, alleged that the Service Employees International Union Local 721 (Local 721) violated its duty of fair representation under the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] through its perfunctory or bad-faith representation of Oliver in arbitration proceedings

[1] The Trial Court Act is codified at Government Code section 71600 et seq. Unless otherwise noted, all statutory references are to the Government Code.

We have not previously had occasions to consider the duty of fair representation under the Trial Court Act which, unlike most of the other PERB-administered statutes, includes no express provision establishing a duty of fair representation. However, as noted in the warning letter and authorities cited therein, in cases arising under the Meyers-Milias-Brown Act (MMBA), section 3500 et seq., which also contains no express duty of fair representation language, both PERB and the courts have inferred the existence of such a duty as the quid pro quo for an employee organization's exclusive right to represent employees in an appropriate unit. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, p. 4; *Amalgamated Transit Union, Local 1704 (Buck)* (2007) PERB Decision No. 1898-M, p. 2; *Service Employees International Union, Local 1021 (Horan)* (2011) PERB Decision

challenging Oliver's termination from employment by the Los Angeles County Superior Court (Court).

The Board has reviewed the unfair practice charge, the amended charge, Local 721's position statements, the warning and dismissal letters, Oliver's appeal and Local 721's opposition to the appeal in light of relevant law. Except as noted below, the Board finds the warning and dismissal letters accurately describe the allegations included in the charge, and that the legal conclusions stated therein are well-reasoned and in accordance with the applicable law.

DISCUSSION

PERB regulations require that an appeal from dismissal: (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; and (3) state the grounds for each issue stated. (PERB Reg. 32635, subd. (a)(1)-(3).)[2] The purpose of the regulation is to place the Board and the respondent on notice of the issues raised on appeal. An appeal that merely reiterates facts alleged in the unfair practice charge or advances no argument on appeal that was not considered and addressed by the Board agent fails to comply with the regulation and need not be considered. (*Beaumont Teachers Association/CTA (Grace)* (2012) PERB Decision

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p. 2; *Service Employees International Union, Local 1021 (Horan)* (2011) PERB Decision No. 2204-M, p. 7; *Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213, 1219, citing *DelCostello v. International Broth. Of Teamsters* (1983) 462 U.S. 151, 164, fn. 14; *Jones v. Omnitrans* (2004) 125 Cal.App.4th 273, 281-82.) Because the duty of fair representation is the "quid pro quo for the granting of exclusive representational rights to employee organizations" (*California State Employees Association (Norgard)* (1984) PERB Decision No. 451-S, pp. 1-2, fn. 1, and federal authorities cited therein), we extend the same reasoning of the MMBA cases cited above to the Trial Court Act and consider an alleged breach of an employee organization's duty of fair representation under the Trial Court Act to be an unfair practice allegation within PERB's jurisdiction. (Trial Court Act, § 71639.1, subds. (b), (c); see also *Teamsters (Ind.) Local 553 (Miranda Fuel Co., Inc.)* (1962) 140 NLRB 181.)

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

No. 2260, p. 2-3; *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.)

Oliver's appeal contends that the Office of the General Counsel did not thoroughly review the materials submitted with her amended charge and therefore did not fully understand why an unfair practice complaint must be issued against Local 721. The appeal asserts three factual inaccuracies in the warning and dismissal letters:

(1) Lydia Arzu and Marie Lopez worked in what Oliver describes as "an internal investigative department" of the court called the Labor, Equity and Performance Division. They did not work in the "Human Resources Department," as stated in the warning and dismissal letters. (Appeal, p. 2.)

(2) Gerri Taddwilliams (Taddwilliams), whom the dismissal letter identifies as "a management employee," was never Oliver's administrator. (Appeal, p. 4.)[3]

(3) The charge allegations concerned Local 721's conduct in arbitration proceedings pursuant to an agreement between Local 721 and the Court. (Appeal, p. 2.)

With respect to the first two issues, to the extent the warning or dismissal letters misidentified either a department name or an employee's title or relationship to Oliver,

[3] The appeal attributes this misstatement to the Office of the General Counsel's "second warning letter." (Appeal, p. 4.) PERB's case file includes only one warning letter and we can find nothing in either the warning letter or the dismissal letter suggesting that Taddwilliams was Oliver's administrator.

The precise spelling and punctuation of this individual's surname is unclear. Olivers's appeal and supporting materials variously identify her as "Taddwillisams,' "TaddWilliams" and "Taddwilliam." Following this convention, the dismissal letter employs both "Taddwilliams" (p. 1) and "TaddWilliams" (p. 2). However regrettable, we disregard these inconsistencies in spelling and punctuation as non-prejudicial error. (*Regents of the University of California* (2000) PERB Decision No. 1354a-H, pp. 4-5; *Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4.)

the appeal does not explain the significance of either alleged error or explain how either would affect the result in this case. We therefore disregard both alleged errors as harmless and non-prejudicial, even assuming they constitute factual errors. (*Regents of the University of California, supra,* PERB Decision No. 891-H, p. 4.)

We agree, however, with the third issue raised in Oliver's appeal. As noted in the warning and dismissal letters, the exclusive representative's duty of fair representation applies to the negotiation, administration and enforcement of its collective bargaining agreements with the employer but not to enforcement of other rights through extra-contractual proceedings. However, as also noted in the dismissal letter, Oliver's amended charge alleged:

> The arbitration procedure is within the scope of my contract. It's listed in Article 18 (Grievance Procedure, section 8 of the [Memorandum of Understanding (MOU)] contract. . . . The issues I have addressed are directly connected to matters mentioned in regards to the grievance.

(Dismissal Letter, p. 3.)

PERB regulations require the charging party to provide a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (PERB Reg. 32615, subd. (a)(5).) The regulations "were designed to permit 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." (*Eastside Union School District* (1984) PERB Decision No. 466, pp. 6-7.) Although a Board agent may, as part of the investigation of a charge, make inquiries and request relevant documents, the charging party's factual allegations included in the statement of the charge are treated as true and the charging party is not required to produce evidence. (*Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M, p. 6, fn. 6, citing *San Juan Unified School District* (1982) PERB Decision No. 204.)

Oliver's amended charge, as summarized in the dismissal letter, alleges that the arbitration procedure is contained within Article 18 (Grievance Procedure) of the Memorandum of Understanding (MOU) between Local 721 and the Court, and that the issues raised in her charge "are directly connected to matters mentioned in regards to the grievance." (See also Statement of Amended Charge, p. 1.) We conclude that these factual allegations are sufficient to cure the deficiency identified in the warning letter, namely whether the arbitration proceedings were part of a collectively-bargained grievance procedure to which the duty of fair representation attaches rather than extra-contractual proceedings for which no such duty attaches. Consequently, we do not adopt that portion of the dismissal letter concluding that the charge was deficient because it did not include a copy of the applicable MOU or allege facts showing that her arbitration hearing was pursued through a negotiated appeal process contained in the MOU. (Dismissal Letter, p. 3.)

The remainder of Oliver's appeal is devoted to reiterating the factual allegations and the arguments contained in the charge and amended charge to demonstrate that Local 721 acted negligently or in bad faith while representing Oliver in arbitration proceedings. These allegations and arguments were already adequately addressed in the warning and dismissal letters and we therefore decline to consider them on appeal. (*Beaumont Teachers Association/CTA (Grace), supra,* PERB Decision No. 2260, pp. 2-3; see also *Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959, p. 2.) We agree with the warning and dismissal letters that Oliver's charge, as amended, fails to state a prima facie case because it does not allege sufficient facts to establish that Local 721's conduct was without a rational basis or devoid of honest judgment. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself, subject to the discussion above.

ORDER

The unfair practice charge in Case No. LA-CO-5-C is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Winslow joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2806
Fax: (818) 551-2820

May 11, 2015

Gail Natalie Oliver

Re: *Gail Natalie Oliver v. Service Employees International Union Local 721*
Unfair Practice Charge No. LA-CO-5-C
DISMISSAL LETTER

Dear Ms. Oliver:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 13, 2013 and amended on May 19, 2014 (First Amended Charge). Gail Natalie Oliver (Ms. Oliver or Charging Party) alleges that the Service Employees International Union Local 721 (Union or Respondent) violated the Trial Court Employment Protection and Governance Act (Trial Court Act or Act)[1] by breaching its duty of fair representation.

Charging Party was informed in the attached Warning Letter dated February 27, 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, she should amend the charge. Charging Party was further advised that, unless she amended the charge to state a prima facie case or withdrew it on or before March 9, 2015, the charge would be dismissed. At Charging Party's request, the deadline to file an amended charge was extended to March 23, 2015. On March 23, 2015, this office received a Second Amended Charge (Second Amended Charge).

Relevant Facts

Investigation of the charge revealed the following relevant information. At all times relevant herein, Ms. Oliver was a Court Services Assistant II for the Los Angeles County Superior Court (Court). Respondent is the exclusive representative of an appropriate unit of employees, including Court Services Assistant classifications.

On March 8, 2012, Charging Party was involved in an altercation at work. The Court alleged that she threw her purse at a management employee (Gerri Taddwilliams) and "lunged" at another employee (Deirdre Robertson). Charging Party asserts that these allegations are false.

[1] The Trial Court Act is codified at Government Code section 71600 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the Trial Court Act and PERB Regulations may be found at www.perb.ca.gov.

On March 21, 2012, employees from the Court's Human Resources Department (Lydia Arzu and Marie Lopez) interviewed Charging Party. Charging Party denied that she threw her purse at Ms. TaddWilliams. On October 16, 2012, Charging Party received a "Notice of Intent to Discharge." On December 5, 2012, Charging Party received a "Notice of Discharge" that stated her termination was based on the following:

- Violation of the Court's Policy on Employee Acts or Threats of Violence in the Workplace, which stated in relevant part, "The [Court] prohibits and will not tolerate any act or threat of violence, whether implicit or explicit in the workplace;
- Continued inappropriate and unprofessional behavior;
- Failure to cooperate with an administrative investigation;
- Making false or inaccurate statements;
- Behavior unbecoming a Court employee.

The Notice of Discharge also cited the Court's Conduct Policy and Code of Ethics for the Court Employees of California as support for termination and asserted that the above-noted bases "independently warrant" Charging Party discharge from Court service, and "[t]he existence of multiple grounds simply reaffirms the justification of this action."

The Union submitted the disciplinary matter to arbitration pursuant to the Court's "Disciplinary and Discharge Policy."[2] A hearing was held on March 13 and 14, 2013. Charging Party testified during the hearing that the allegations of assault were not true. On August 28, 2013, the hearing officer issued an "advisory award" finding "just cause" for the termination.

The amended charge re-asserts that prior to her March 13, 2013 arbitration, Charging Party requested, and the Union refused, to include certain evidence into the record, including but not limited to: evidence that she was assaulted by a Court employee on May 5, 2011 but the Court did not take action to terminate the co-worker[3]; a Union representative's written account of the March 8, 2012 incident; and witness testimony from other court employees.

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[2] It is not clear whether this disciplinary appeal process is incorporated into the grievance process in the collectively bargained negotiated agreement between the Court and the Union.

[3] However, the charge admits that, during closing arguments, Respondent's counsel raised this issue. Further, the hearing officer asked Charging Party if the Court employee was terminated for the alleged assault, to which Charging Party responded in the negative.

In her amended charge, Charging Party also disputes that the arbitration decision was appropriate because the arbitrator failed to include all evidence in his decision and that he credited the testimony of Court management witnesses over her testimony. She also disputes that the arbitrator's findings of fact were based on the record as a whole.

Discussion

As discussed in the Warning Letter, it is the Charging Party's burden to establish that the Union's conduct toward Charging Party was arbitrary, discriminatory, or in bad faith. (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.) Charging Party may do so by alleging facts showing that the Union's action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M.)

In the Warning Letter, Charging Party was advised that based on the facts in the file, it was not clear whether Charging Party's termination hearing was pursued as part of a negotiated disciplinary appeal process between the Union and the Court and that, as a general matter, the Union's duty of fair representation does not extend to extra-contractual proceedings even if the Union undertakes representation at such a forum. (*Service Employees International Union, Local 99 (Wardlaw)* (1997) PERB Decision No. 1219.) In the amended charge, Charging Party asserts in relevant part:

> The arbitration procedure is within the scope of my contract. It's listed in Article 18 (Grievance Procedure, section 8 of the [Memorandum of Understanding (MOU)] contract. . . . The issues I have addressed are directly connected to matters mentioned in regards to the grievance.

However, the charge filed does not include a copy of the MOU or allege facts showing that her arbitration hearing was pursued through a negotiated appeal process contained in the MOU. Accordingly, the amended charge fails to cure the deficiency enunciated in the Warning Letter; namely, that if the termination arbitration was pursued at an extra-contractual forum, then the duty of fair representation does not attach as a threshold matter.

Even if there was a threshold showing that the duty of fair representation extends to Charging Party's arbitration hearing, for the following reasons, the amended charge fails to allege a prima facie case of a breach of the Union's representational duty. As explained in the Warning Letter, the Union's failure to present evidence to Charging Party's satisfaction at the arbitration hearing does not establish that the Union's conduct was "without a rational basis or devoid of honest judgment." (*Attard, supra*, PERB Decision No. 1474-M; see also, *California School Employees Association & its Chapter 198 (Bruce)* (2006) PERB Decision No. 1858, [the "duty of fair representation does not require the union to call all [the charging party's] witnesses or present documentary evidence [s/he] deems necessary"].) Further, it appears that the Union had a rational basis for not including the requested evidence after determining that it had no relevancy to the charges presented against Charging Party and that certain evidence she

suggested could potentially harm her defense at the hearing. As explained in the Warning Letter, Respondent's assertion that that the arbitrator's award was improper is outside of PERB's purview. The Union, *not the arbitrator*, owes a duty of fair representation to its membership.

The original charge and amended charge also include a multitude of exhibits (e.g., e-mail messages and handwritten notes) allegedly supporting the assertion that the Union violated the Act. However, a charge must include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (PERB Regulation 32615(a)(5).) These exhibits submitted to PERB do not satisfy the Charging Party's burden to establish a "clear and concise statement of the facts" alleged to constitute a violation of the Act. This type of deficiency was similarly discussed recently in *Brian Crowell v. Berkeley Unified School District* (2015) PERB Decision No. 2411, wherein the Board stated:

> While the powers of the Board agent include 'Assist[ing] the charging party to state in proper form the information required by [PERB Regulation] 32615' (PERB Reg. 32620, subd. (a)(l)), it is not the Board agent's responsibility to sift through the charging party's supporting documents and determine their possible relevance to the charge allegations where it is clear that the charging party has copied a stack of documents and attached them to the charge without an earnest effort to eliminate duplicates, place them in a logical order, ensure their authenticity and identify through labeling and cross-referencing which ones support the various allegations of the charge. [Citations omitted.]

(*Id.* at p.7, fn. 9.)

Conclusion

Accordingly, for the reasons set forth above and in the February 27, 2015 Warning Letter, this 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,

J. FELIX DE LA TORRE
General Counsel

By _____
Yaron Partovi
Regional Attorney

Attachment

cc: Lauren Hazarian

PUBLIC EMPLOYMENT RELATIONS BOARD

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700 N. Central Ave., Suite 200
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February 27, 2015

Gail Natalie Oliver

Re: *Gail Natalie Oliver v. Service Employees International Union Local 721*
Unfair Practice Charge No. LA-CO-5-C
WARNING LETTER

Dear Ms. Oliver:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 13, 2013 and amended on May 19, 2014. Gail Natalie Oliver (Ms. Oliver or Charging Party) alleges that the Service Employees International Union Local 721 (Union or Respondent) violated the Trial Court Employment Protection and Governance Act (Trial Court Act or Act)[1] by breaching its duty of fair representation.

Relevant Facts

Investigation of the charge revealed the following relevant information. At all times relevant herein, Ms. Oliver was a Court Services Assistant II for the Los Angeles County Superior Court (Court). Respondent is the exclusive representative of an appropriate unit of employees, including Court Services Assistant classifications.

On March 8, 2012, Charging Party was involved in incident where Court management alleged that she threw her purse at one employee and "lunged" towards two management employees. Effective March 9, 2012, Charging Party was placed on paid administrative leave pending the outcome of an investigation into the alleged incident. On March 21, 2012, the Court's management interviewed Charging Party who denied she threw her purse or lunged at Court managers. Charging Party received a "Notice of Intent to Discharge" on October 16, 2012. A *Skelly* hearing[2] was held on November 13, 2012. A Notice of Discharge was issued on December 5, 2012.

[1] The Trial Court Act is codified at Government Code section 71600 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the Trial Court Act and PERB Regulations may be found at www.perb.ca.gov.

[2] The California Supreme Court's decision in *Skelly v. State Personnel Board (1975)* 15 Cal.3d 194, 215 (*Skelly*) requires that prior to punitive action being taken against a permanent employee, the public employer must provide the employee with certain due process, including a notice of the proposed action, the reasons therefore, a copy of the charges upon which the action is based, and the right to respond to the authority initially imposing the discipline.

On December 5, 2012, Charging Party was terminated from employment for allegedly "hostile and aggressive conduct toward other Court personnel at a March 2012 meeting and subsequent alleged dishonesty during the ensuing internal investigation."

The Union submitted the disciplinary matter to arbitration pursuant to the Court's "Disciplinary and Discharge Policy."[3] A hearing was held on March 13 and 14, 2013. Charging Party testified during the hearing that the allegations of assault were not true. On August 28, 2013, the hearing officer issued an "advisory award" finding the termination was based on "just cause" and denying the grievance.

Prior to her March 13, 2013 arbitration, Charging Party requested that the Union include certain evidence into the record, including but not limited to evidence: that she was assaulted by a Court employee on May 5, 2011[4]; that she was on disability; a Union representative's written account of the March 8, 2012 incident; an e-mail message showing that her co-worker "cussed [her] out" and "ran up in [her] face"; that her co-worker threatened to "kick [her] ass"; and that a co-worker circulated pornographic e-mails using the Court's e-mail system. Respondent asserted that such evidence would not be used at the arbitration mostly due to lack of relevancy and that such evidence could be damaging to her position. Respondent also refused Charging Party's request that the Union call a management employee present at the *Skelly* hearing as a witness during the arbitration.

Charging Party also disputes that the arbitration decision was appropriate. She asserts that the arbitrator failed to include all evidence in his decision and that he credited the testimony of the management witnesses over her testimony. Charging Party also asserts that the Los Angeles Sherriff's Department took reports of the March 8, 2012 incident, but deferred investigation of the May 5, 2011 assault to the Los Angeles Police Department. The Sherriff's report was used as evidence in the arbitration hearing but it did not state that Charging Party "lunged" at the management employees on March 8, 2012. She also points to several inconsistencies between the Sherriff's report and witness testimony on behalf of the Court The Union filed a position statement and supplemental position statement with respect to the instant charge.

Discussion

While the Trial Court Act does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their

[3] It is not clear whether this disciplinary appeal process is incorporated into the grievance process in the collectively bargained negotiated agreement between the Court and the Union.

[4] However, the charge admits that, during closing arguments, Respondent's counsel raised this issue. Further, the hearing officer asked Charging Party if the Court employee was terminated for the alleged assault, to which Charging Party responded in the negative.

members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.) In *Hussey*, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power."

In *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M (*Attard*), the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including *Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332 and *American Federation of State, County and Municipal Employees, Local 2620 (Moore)* (1988) PERB Decision No. 683-S, are consistent with the approach of both *Hussey* and federal precedent (*Vaca v. Sipes* (1967) 386 U.S. 171).

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.)

Thus, in order to state a prima facie violation of the duty of fair representation under the Trial Court Act, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M.) 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.)

The exclusive representative's duty is to enforce the negotiated agreement; however, the this duty generally does not extend to extra-contractual proceedings. (*United Faculty of Grossmont-Cuyamaca Community College District (Tarvin)* (2010) PERB Decision No, 2133; *California Correctional Peace Officers Association (Kashtanoff)* (1993) PERB Decision No. 1007.) Under most circumstances, an exclusive representative does not breach the duty of fair representation even if the exclusive representative undertakes representation in an extra-contractual forum and the exclusive representative's representation is inadequate. (*Service Employees International Union, Local 99 (Wardlaw)* (1997) PERB Decision No. 1219.)

In the present case, Charging Party does not establish that the termination hearing was pursued as part of a contractual grievance mechanism negotiated between the Court and the Union. Notwithstanding, it appears Charging Party is alleging that the Union undertook representation for her termination, but the Union's representative failed to adequately represent her by not introducing certain evidence and witness testimony as she suggested. Even if the duty of fair representation attaches, the Board has held that a Union is accorded wide latitude in the

representation of its members concerning grievance matters. (*Inlandboatmans Union of the Pacific* (2012) PERB Decision No. 2297-M.)

The facts as demonstrated by documents attached to the charge show that the Union conducted its investigation of Charging Party's termination, appealed the discipline to a hearing officer, and expended the services of two attorneys throughout the hearing process. There is also evidence in the file showing that the Union communicated on numerous occasions with Charging Party concerning the merits of her case and attempted to interview Charging Party prior to the hearing. For example, the original charge includes a March 9, 2013 e-mail message from Union General Counsel Rebecca Yee stating that Charging Party has "not returned our phone calls and [has] not confirmed a decision in any of [Charging Party's] subsequent e-mail responses to [Union]" concerning whether she intended to move forward with the hearing scheduled for March 13, 2013. While Charging Party disagrees with the Union's strategy for presenting her case at the termination hearing, including failing to call certain witnesses and enter certain evidence into the record, this does not establish that the Union's conduct was "without a rational basis or devoid of honest judgment." (*Attard, supra*, PERB Decision No. 1474-M.) In *California School Employees Association & its Chapter 198 (Bruce)* (2006) PERB Decision No. 1858, the Board found that the "duty of fair representation does not require the union to call all [the charging party's] witnesses or present documentary evidence [s/he] deems necessary." Further, it appears that the Union had a rational basis for not including the requested evidence after determining that it had no relevancy to the charges presented against Charging Party and that certain evidence she suggested could potentially harm her defense at the hearing.[5]

Conclusion

For these reasons the charge, as presently written, does not state a prima facie case.[6] 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 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

[5] Further, PERB cannot review the arbitrator's award given that this charge only seeks to address the Union's conduct.

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

PERB. If an amended charge or withdrawal is not filed on or before March 9, 2015,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Yaron Partovi
Regional Attorney

YP

[7] 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.)