STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ROSIE MIEKO KATO, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 36, Respondent.	Case No. LA-CO-1653-E PERB Decision No. 2520 March 9, 2017

Appearances: Rosie Mieko Kato, on her own behalf; Michael R. Clancy, Chief Counsel, and Christina C. Bleuler, Attorney, for California School Employees Association & Its Chapter 36.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION[1]

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Rosie Mieko Kato (Kato) of a dismissal (attached) by the Office of the General Counsel of her unfair practice charge. The charge, as amended, alleges that the California School Employees Association & its Chapter 36 (CSEA) violated the Educational Employment Relations Act (EERA)[2] by failing to fairly represent her in various disputes with her employer, by being discourteous to her, by delaying in providing requested e-mail messages to her, and several other incidents described in the dismissal letter.

[1] PERB Regulation 32320, subdivision (d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [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 Regulations are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

[2] EERA is codified at Government Code section 3540, et seq.

The Office of the General Counsel dismissed the charge for failure to state a prima facie case and because PERB lacks jurisdiction over claims of discourteous treatment and defamation. Kato filed a timely appeal and CSEA filed a timely opposition.

The Board itself has reviewed this matter in full, including Kato's unfair practice charge and her first amended charge, the Office of the General Counsel's warning and dismissal letters, Kato's appeal and CSEA's opposition. Based on that review, the Board itself concludes that the warning and dismissal letters accurately summarize the charge allegations in all material respects and are well reasoned and consistent with the applicable law.

PERB Regulation 32635, subdivision (a) provides in pertinent 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 grounds for each issue stated.

An appeal that does not reference the substance of the dismissal fails to comply with PERB Regulation 32635, subdivision (a). (*San Bernardino City Unified School District* (2012) PERB Decision No. 2278.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge also fails to comply with PERB Regulation 32635, subdivision (a).

Kato's appeal fails in both these ways because it consists merely of a copy of her unfair practice charge, accompanied by voluminous documents with no explanation of how or why those documents are relevant to her appeal.[3] Missing from the appeal is any attempt to specify

[3] "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Regulation 32635, subd. (b).) No good cause was established for the documents appended to Kato's unfair practice charge on appeal. The Board itself therefore declines to consider these documents.

issues of procedure, fact, law or rationale to which the appeal is taken. Nor does the appeal state any grounds for any issue to which the appeal is taken. Failure to comply with this regulation 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.)

For these reasons, we reject the appeal and affirm the dismissal of the unfair practice charge as amended.

ORDER

The unfair practice charge in Case No. LA-CO-1653-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Gregersen and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2808
Fax: (818) 551-2820

June 13, 2016

Rosie Mieko Kato

Re: *Rosie Mieko Kato v. California School Employees Association & its Chapter 36*
Unfair Practice Charge No. LA-CO-1653-E
DISMISSAL LETTER

Dear Ms. Kato:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 1, 2015. Rosie Mieko Kato (Kato or Charging Party) alleges that the California School Employees Association & its Chapter 36 (CSEA or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation.

On October 1, 2015, Charging Party was issued a Warning Letter for failure to 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 she amended the charge to state a prima facie case or withdrew it on or before October 8, 2015, the charge would be dismissed.

On October 12, 2015, Charging Party was granted an extension of time to respond to the October 1, 2015 Warning Letter. On October 22, 2015, Charging Party was granted a second extension of time to respond.

On October 30, 2015, Charging Party filed a First Amended Unfair Practice Charge. On December 9, 2016, CSEA filed a response to the First Amended Unfair Practice Charge.

Alleged Facts

Before the filing of the instant charge, Charging Party worked for the Santa Monica Community College District (District) for approximately seven years.

[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.

In or about May 2010, Charging Party volunteered to be Chair of CSEA's committee on California School Employees Week. She asserts she was mistreated by committee members Vinessa Cook (Cook), Amelia Trejo (Trejo) and Connie Lemke (Lemke). Lemke called Charging Party a "bitch" and Cook yelled "[a]fter tonight's dinner, you're dead to me!"

She also asserts that in September 2012, Chief Job, Steward Mike Roberts, "laughingly stated that HR accused me of filing false work injury claims, because my medical condition was not documented-and proceeded to falsely accuse me angrily of filing false sexual harassment complaints against 'George'. . .This is an example of how CSEA members discriminate by marginalizing in bad faith members they do not like.[]"

At some point, it appears that Charging Party retained a workers compensation attorney. She asserts that on March 26, 2014, Field Labor Relations Representative (LRR) Liza Go (Go) refused to represent Charging Party at an April 1, 2014 "HR interactive [process] meeting" during which time the District intended to discuss Charging Party's disabilities. It appears that since CSEA characterized Charging Party's disabilities as work injuries, and apparently subject to worker's compensation, Go refused to represent Charging Party at the interactive process meeting.

Although Charging Party asserts Go refused to represent her at the April 1, 2014 interactive process meeting, on March 27, 2014, Go contacted Sandy Chung, the Human Resources (HR) Assistant Director. Charging Party asserts "I had already informed LRR Go that my worker's compensation attorney stated the meeting was premature and also that these meetings are not in the scope of his responsibilities."

Charging Party also asked LRR Lemke, who had previously cursed at Charging Party, for representation at the meeting. LRR Lemke stated that the Chapter President, Bernie Rosenloecher (Rosenloecher), had to decide.

When Charging Party approached Rosenloecher, he deferred his decision to the Chief Job Steward, Mike Roberts, who Charging Party asserts "had already previously treated [her] in a discriminatory manner." Roberts stated LRR Lemke could not represent Charging Party because both LRR Lemke and Charging Party shared the same supervisor, Angela Munoz. Charging Party asserts that this prohibition is not in the collective bargaining agreement.

Also on March 27, 2014, she asked Lee Peterson (Peterson), former Chapter 36 President and a current CSEA member, to represent her at her the interactive process meeting. He said that Rosenloecher had to approve it. Charging Party asserts that Rosenloecher refused to allow Peterson to represent her because she had filed "an unfair practice charge against Chapter 36" with CSEA Director Mike White.[2] Charging Party attended the April 1, 2014 "HR interactive [process] meeting" without CSEA representation.

[2] Charging Party mistakenly references her complaint as an unfair practice charge. It appears she likely meant that she filed an internal CSEA complaint.

Charging Party alleges that she filed two grievances. On or about June 11, 2014, Charging Party filed a grievance regarding her performance evaluation. CSEA Labor Representative, Paul Lee (Lee), initially assisted Charging Party with this grievance.

On August 4, 2014, Charging Party was placed on administrative leave for unspecified reasons. On August 12, 2014, Charging Party asserts the District withheld eight days of wages for alleged unauthorized use of sick leave in July. On an unknown date, Charging Party filed a grievance for "sick leave wages."

Charging Party also alleges that she repeatedly requested a copy of an e-mail message sent to CSEA by Robert Myers, the District's counsel. CSEA delayed in providing a copy of the e-mail message.

On September 19, 2014, Margie Espinoza (Espinoza), a new CSEA LRR, was assigned to Charging Party's grievances.

Charging Party asserts that at an October 30, 2014 meeting, CSEA's Field Office Director, Patrick Prezioso (Prezioso), and Espinoza tried to "coerce [her] into consenting to a recording." She also asserts that "they had already prepared a letter for [her] to sign and waive [her] right to CSEA representation" because CSEA believed that Charging Party was consulting with an attorney. Charging Party states that she refused to sign the waiver. Prezioso stated that Charging Party and Espinoza would be invited to a Chapter Executive Board meeting to discuss whether to arbitrate the matter. Charging Party asserts that Prezioso stated that "if he suspected that politics played a part in the Chapter's decision he could overturn that decision." However, Charging Party states that she was not invited to the Executive Board meeting and CSEA decided not to pursue this grievance.

On November 19, 2014, Charging Party received an e-mail message stating that CSEA had carefully reviewed her grievance and that based on their review it recommended that the matter not proceed to arbitration because the case lacked merit, and CSEA was unlikely to prevail in arbitration.

At some point, Charging Party appealed the Chapter's decision to Keith Pace, CSEA Director of Field Operations. With respect to the assistance she received from Pace, she states:

> [t]here was a lack of due diligence by Pace who did not '*conduct a thorough investigation*' as stated in [his] December 2, 2014 receipt confirmation letter. Pace's 'investigation' consisted of accepting everything at face value and regurgitating what was written by the District. There were no investigatory interviews to my knowledge for fact finding. Pace states that [']*my record keeping skills are very impressive and I can challenge the District in almost all areas*['.]"

[Emphasis in original.]

During a November 13, 2014 CSEA Executive Board meeting, Charging Party voiced her concerns over CSEA's intent to spend $500 for a holiday party. Charging Party asserts that CSEA made "slanderous, defamatory" comments in the draft minutes of the November 13, 2014 Executive Board meeting. The alleged "slanderous, defamatory" comments were:

> . . . '*No motion* was *made and no action taken plus this lends validation to Rosie's remarks. Not that she should not ask but she has a way of asking that makes you want to choke her. She could have said will there be an expense report provided to the Chapter later? Or many other things. instead of jumping into a process that was already approved and underway and scheduled to take place in 3 weeks.*'

[Emphasis in original.]

In or about January 2015, the above-quoted comment was distributed to all members and to the District's HR Department as part of the meeting's draft minutes.

On December 1, 2014, the District held an investigatory interview with Charging Party. On an unspecified date prior to December 1, 2014, Charging Party informed Prezioso that she did not want Espinoza to be her representative during the investigatory interview. She asked that CSEA provide her with another representative, but Prezioso stated that members cannot pick and choose their CSEA representative. Charging Party asked to reschedule the investigatory interview so that she may arrange for representation other than Espinoza, but the District denied her request and Charging Party states she "was forced to attend the meeting without representation." After the investigatory interview began, Espinoza walked in, but remained silent. When the District noted that "[her] representative had arrived," Charging Party clarified that CSEA was representing her, but Espinoza was not her representative.

On or about January 29, 2015, Charging Party and Espinoza attended a meeting with the District. During the meeting, the District's Vice President of HR, Marcia Wade, handed Charging Party a "Notice of Recommended Disciplinary Action – Dismissal From Employment" (Notice) along with two volumes of supporting documentation. After receiving the documents, Espinoza and Charging Party walked into a public staff lounge, where Espinoza spoke loudly and recommended that she find an attorney. Espinoza also stated that CSEA would not represent her at the *Skelly* hearing because she had waived her right to representation. Espinoza mockingly repeated Charging Party's December 1, 2014 statement "Espinoza is not my representative."

On an unspecified date, Charging Party asserts that she requested representation from CSEA for the *Skelly* hearing, CSEA refused and stated she had waived her right to representation. The *Skelly* hearing was scheduled for February 11, 2015. Charging Party asserts that on February 9, 2015, the Field Office Director, Espie Medellin (Medellin), reasserted that CSEA would not represent her at the *Skelly* hearing. Charging Party cites to a CSEA document

stating that members "may legally insist on CSEA representation at investigatory interviews including 'Skelly conferences' held prior to the effective date of the proposed discipline..." This document appears to be an internal CSEA document. The quoted language does not appear to be from the collective bargaining agreement between CSEA and the District.

On February 6, 2015, Espinoza contacted Charging Party to convey the District's settlement proposal to pay eight days of "sick leave wages" in exchange for the withdrawal of the grievance. It appears that Charging Party accepted the settlement offer. But, Charging Party states she was coerced into settling the grievance.

Charging Party asserts that on February 9, 2015, Espinoza and Medellin failed to inform her that CSEA's field office would be closed on Lincoln's Birthday, which was the due date for her response/rebuttal to the *Skelly* charges. The response/rebuttal was to be placed in her personnel file. Charging Party does not state whether she was foreclosed from presenting these documents at her *Skelly* hearing or whether the District refused to place them in her personnel file.

On February 20, 2015, Charging Party received a letter from CSEA Field Office Director Keith Pace, stating that he would recommend to the CSEA Board of Directors that her grievance concerning her performance evaluation not be pursued. The letter was dated February 17, 2015, and was attached to his recommendation dated February 13, 2015. The letter stated that Charging Party could file a written response by close of business on February 20, 2015, the very same day she received the letter. It appears Charging Party was unable to present an opposition to Pace's recommendation to CSEA's Board of Directors.

Discussion

I. Charging Party's Burden

As stated in the October 1, 2015 Warning Letter, Charging Party bears the burden of providing sufficient facts, alleging with specificity the particular facts giving rise to a violation. (PERB Regulation 32615(a)(5); *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 October 1, 2015 Warning Letter identified the following allegations in her initial charge: (1) failure to provide her with a labor representative other than Espinoza for the December 1, 2014 investigatory interview; (2) Espinoza's loud comments concerning the Notice; (3) CSEA's refusal to represent her at her *Skelly* hearing; (4) Espinoza's alleged false statements that Charging Party would not attend a meeting; (5) failure to file an unfair practice charge; and (6) trying to "coerce" her into signing a settlement agreement concerning one of her grievances. Despite having been advised in the October 1, 2015 Warning Letter that these

allegations did not state a prima facie case, Charging Party failed to address these concerns in her First Amended Charge.[3]

II. Duty of Fair Representation – Pattern of Conduct Theory

Charging Party states "[t]here is a Pattern of Conduct established through the cumulative actions of CSEA that establish an arbitrary failure (discriminatory & in bad faith) to fairly represent [her]." She then makes numerous additional allegations in an attempt to support her argument.

Specifically, she makes the following additional allegations: 7)[4] in May 2010, Lemke, Cook, and Trejo were discourteous to her; 8) in September 2012, CSEA Chief Steward, Mike Roberts, accused her of filing a false sexual harassment claim; 9) in March and April 2014, CSEA refused to represent her at an interactive process meeting; 10) in August 2014, CSEA delayed in providing her a copy of an e-mail message; 11) in February 2015, CSEA failed to tell her their field office would be closed on Lincoln's Birthday; 12) in February 2015, CSEA failed to give her sufficient notice of her right to file a response to CSEA field director's recommendation against taking her grievance to arbitration; and 13) violating the bylaws. These allegations standing alone, or under a pattern of conduct theory, fail to establish a violation of the duty of fair representation.

In assessing CSEA's cumulative actions, including the untimely allegations, considered in their totality, Charging Party does not establish that they are sufficient to constitute a prima facie showing of an arbitrary failure to fairly represent Charging Party. (See *Service Employees International Union, Local 1021 (Schmidt)* (2009) PERB Decision No. 2080-M.)

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[3] Charging Party only addressed one concern discussed in the October 1, 2015 Warning letter, i.e., the lack of detail surrounding the alleged slanderous/defamatory statements. Charging Party clarifies in her First Amended Charge that the alleged slanderous and defamatory statements were:

> '*No motion* was *made and no action taken plus this lends validation to Rosie's remarks. Not that she should not ask but she has* a *way of asking that makes you want to choke her. She could have said will there be an expense report provided to the Chapter later? Or many other things instead of jumping into a process that was already approved and underway and scheduled to take place in 3 weeks.*'

Even if these statements were "slanderous and defamatory," PERB does not have jurisdiction to over such claims. (*Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046.)

[4] This list is a continuation of the six allegations contained in the original charge. The October 1, 2015 Warning Letter to the original charge is incorporated herein.

1. Discourteous Statements and Treatment

Taking Charging Party's allegations as true, Lemke, Cook and Trejo's calling Charging Party a "bitch" and stating she was dead to them is discourteous, but the Board held that "breaches of courtesy do not demonstrate bad faith." (*Teamsters Local 137 (Illum and DeMuro)* (1995) PERB Order No. Ad-265.) Also, there is no indication that at the time these comments were made, Lemke, Cook and Trejo were CSEA officials and not merely rank-and-file members.

Additionally, CSEA Chief Steward Mike Roberts' accusation that Charging Party filed a false sexual harassment claim, may also constitute discourteous treatment, as well as slander/defamation, but, as noted above, PERB does not have jurisdiction to over such claims. (*Alvord Educator's Association (Bussman), supra*, PERB Decision No. 2046.)

2. Delay in Providing Requested Copies

PERB has held that a union does not violate the duty of fair representation by failing to provide copies of certain documents. (See, *Saddleback Valley Educators Association (Forlund)* (1990) PERB Decision No. 828 [the duty of fair representation does not require the union to provide the employee with a transcript or documents from grievance-arbitration hearing]; *Corona-Norco Teachers Association, CTA/NEA (Rumrill, et al.)* (2000) PERB Decision No. 1385 [union's failure to provide meeting minutes and failure to answer several questions, in and of themselves, do not establish a breach of the duty of fair representation]; *California State Employees Association (Bradford)* (2001) PERB Decision No. 1421-S [CSEA did not violate the duty of fair representation when it failed to supply a member with information regarding its litigation expenses]; *California State Employees Association (Mitchell)* (1993) PERB Decision No. 969-S [no breach of the duty of fair representation when union refused to provide copies of its insurance coverage and polices, workers compensation insurance coverage, and information regarding another union member's case].) In light of the foregoing, Charging Party's request for a copy of an e-mail message, which was ultimately provided, cannot be the basis of breach of the duty of fair representation.

3. Failure to Represent Charging Party During the Interactive Process

CSEA refused to represent her at an interactive process meeting. The Board has long held that the duty of fair representation is limited to contractually-based remedies under the union's exclusive control. (*United Faculty of Grossmont-Cuyamaca Community College District (Tarvin)* (2010) PERB Decision No. 2133; *Fremont Unified District Teachers Association (Turney)* (2001) PERB Decision No. 1443.) While the Board has recently held that an employee has a statutory right to representation in meetings regarding the "interactive process," the Board affirmed that the duty of fair representation does not apply to the enforcement of that statutory right, rather, it applies only with respect to negotiations and enforcement of its collective bargaining agreement. (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C p. 18, fn. 17, citing *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124, *Bay Area Air Quality Management District Employees Association (Mauriello)* (2006) PERB Decision No. 1808-M, *Service Employees International Union Local 1021 (Harris)* (2012) PERB Decision No. 2275.) In light of the

foregoing authority, CSEA's refusal to attend the interactive process meeting does not violate the duty of fair representation. Charging Party did not provide any facts that the interactive process was incorporated into the collective bargaining agreement between the District and CSEA.

4. Failure to Notify of Holiday Office Closure

The allegation that CSEA failed to inform Charging Party that its field office would be closed on Lincoln's Birthday, which was the due date for her to submit her *Skelly* package response/rebuttal, does not establish that CSEA breached its duty of fair representation.

Charging Party fails to provide sufficient facts that she was foreclosed from presenting her response/rebuttal and documents at her *Skelly* hearing or that her rebuttal was not added to her personnel file. It is also unclear why Charging Party submitted her *Skelly* response/rebuttal to CSEA when, according to Charging Party, CSEA had already informed her on several occasions that they would not represent her at the *Skelly* hearing. As noted in the October 1, 2015 Warning Letter, PERB has considered *Skelly* hearings as extra-contractual proceedings, for which unions generally do not have an obligation to assist members. Charging Party did not provide facts that *Skelly* hearing representation was incorporated into the collective bargaining agreement between the District and CSEA.

5. *Failure to Provide Sufficient Time to Submit Rebuttal and Violation of the Bylaws*

Charging Party alleges that CSEA did not provide her with sufficient notice to submit a response in opposition to field director Keith Pace's recommendation to CSEA's Board of Directors to not arbitrate her grievance. Taking Charging Party's allegations as true, such conduct is not arbitrary or discriminatory because CSEA has discretion to decide how far to pursue a grievance, with or without any input from the affected member. (See *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.)

Charging Party failed to state how Pace's recommendation against arbitrating her grievance regarding her performance evaluation was arbitrarily discriminatory or in bad faith. She states:

> [t]here was a lack of due diligence by Pace who did not '*conduct a thorough investigation*' as stated in [his] December 2, 2014 receipt confirmation letter. Pace's 'investigation' consisted of accepting everything at face value and regurgitating what was written by the District. There were no investigatory interviews to my knowledge for fact finding. Pace states that [']*my record keeping skills are very impressive and I can challenge the District in almost all areas*['.]"

[Emphases in original.]

In *California Faculty Association (Hale, et al.)* (1988) PERB Decision No. 693-H, the Board rejected a claim that the union reneged on a promise to "thoroughly investigate the matter." Since the union had indeed investigated, the Board held that Charging Parties were merely dissatisfied with the manner in which the investigation was conducted, which was insufficient to support a finding of a breach of the duty of fair representation. (*Ibid.*) Here, on November 19, 2014, the CSEA Chapter informed Charging Party that it had reviewed the grievance and determined that it lacked merit. In February 2015, Pace also reviewed the grievance and informed Charging Party that he would recommend to the Board of Directors that CSEA not arbitrate her grievance. It appears that Pace informed Charging Party by letter, the contents of which were not fully detailed by Charging Party or provided as an attachment by either party.

To the extent that CSEA provided for an internal process to hear a member's position on pursuing arbitration, and to the extent that this internal process or its bylaws were violated, such conduct would constitute an internal union affair outside the Board's jurisdiction. (See *Barstow College Faculty Association* (*Caudable*) (2012) PERB Decision No. 2256.)

Based on the totality of the facts provided by Charging Party, the charge fails to state a prima facie case that CSEA breached its duty of fair representation. Nor does Charging Party provide sufficient facts to establish a breach of the duty of fair representation under a pattern of conduct theory. Rather, from Charging Party's statement of facts and its attachments, it appears CSEA has attempted to assist her with respect to her grievances. In fact, Espinoza spoke to the District concerning her "sick leave wages." A settlement was reached and a monetary amount was negotiated on behalf of Charging Party. It also appears that Lee, another CSEA representative, assisted her with the June 11, 2014 grievance. In response to her concerns regarding Espinoza's representational services, CSEA met with Charging Party on October 30, 2014. Additionally, with regard to her evaluation grievance, CSEA assisted Charging Party at the lower levels of the grievance procedure, but on November 19, 2014, CSEA determined that they would not proceed to arbitration because the grievance lacked merit. CSEA was transparent and informed Charging Party that they would not pursue arbitration because the grievance lacked merit. Given this history, Charging Party did not allege sufficient facts to show that CSEA acted arbitrarily, discriminatorily or in bad faith under a pattern of conduct theory. Rather, from the alleged facts, it appears that Charging Party was dissatisfied with CSEA's handling of her grievances and the alleged discourteous treatment she received from other members, however, this conduct, as well as all of the other allegations, taken cumulatively, is insufficient to establish a prima facie case under a pattern of conduct theory.

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 _____
Mirna Solís
Regional Attorney

Attachment

cc: Christina Bleuler, Lead Staff Attorney
California School Employees Association

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2808
Fax: (818) 551-2820

September 29, 2015

Rosie Mieko Kato

Re: *Rosie Mieko Kato v. California School Employees Association & its Chapter 36*
Unfair Practice Charge No. LA-CO-1653-E
WARNING LETTER

Dear Ms. Kato:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 1, 2015. Rosie Mieko Kato (Kato or Charging Party) alleges that the California School Employees Association & its Chapter 36 (CSEA or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation.

Facts As Alleged

Before the filing of the instant charge, Charging Party worked for the Santa Monica Community College District (District) for approximately seven years. Charging Party alleges that she filed two grievances. On or about June 11, 2014, Charging Party filed a grievance regarding her performance evaluation. CSEA labor representative, Paul Lee (Lee), initially assisted Charging Party with this grievance. On September 3, 2014, a Step 2 grievance meeting was held with the District. The District attempted to tape record the meeting, but Charging Party objected. Lee and Charging Party walked out of the meeting.

On August 4, 2014, Charging Party was placed on administrative leave for unspecified reasons. On August 12, 2014, Charging Party asserts the District withheld eight days of wages for alleged unauthorized use of sick leave in July. On an unknown date, Charging Party filed a grievance for "sick leave wages."

On September 19, 2014, Margie Espinoza (Espinoza), a new CSEA labor representative, was assigned to Charging Party's grievances. On an unknown date, Charging Party expressed to CSEA's Field Office Director, Patrick Prezioso (Prezioso), her "concern of Chapter 36 bias influencing new LRR Espinoza."

[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.

On October 30, 2014, Prezioso met with Charging Party and Espinoza to discuss Charging Party's dissatisfaction with Espinoza's representational services. Charging Party asserts that Espinoza was "not doing due diligence in representing me based on her actions and lack of action . . . ."

Charging Party asserts that during the October 30, 2014 meeting Prezioso and Espinoza tried to "coerce [her] into consenting to a recording."[2] She also asserts that "they had already prepared a letter for [her] to sign and waive [her] right to CSEA representation" because CSEA believed that Charging Party was consulting with an attorney. Charging Party states that she refused to sign the waiver. Prezioso stated that Charging Party and Espinoza would be invited to a Chapter Executive Board meeting to discuss whether to arbitrate the matter. Charging Party asserts that Prezioso stated that "if he suspected that politics played a part in the Chapter's decision he could overturn that decision." However, Charging Party states that she was not invited. It appears that CSEA decided not to pursue this grievance. In an unclear manner, Charging Party asserts the following:

> NOTE: [CSEA Director, Espie] Medellin specifically recommended to the CSEA Executive Board to uphold the Chapter 36 decision to not support arbitration. My Grievance – Step 3 appeal was mailed after Thanksgiving 2014, but was agendized by CSEA Field Operations Director Keith Pace not for the January 2015 CSEA Board Meeting –but for the February 21, 2015 meeting AFTER the February 11, 2015 *Skelly* Hearing. And, there was no time for me to appeal Pace's recommendation to deny the appeal prior to the February 21, 2015 CSEA Board Meeting.

During a November 13, 2014, CSEA Executive Board meeting, Charging Party voiced her concerns over CSEA's intent to spend $500 for a holiday party. Charging Party asserts that CSEA made "slanderous, defamatory" comments in draft minutes for the November 13, 2014, meeting and released these minutes to all 450 members.

On December 1, 2014, Charging Party had an investigatory interview with the District. On an unspecified date prior to December 1, 2014, Charging Party informed Prezioso that she did not want Espinoza to be represented her during the investigatory interview. She asked that CSEA provide her with another representative, but Prezioso stated that "members cannot pick and choose the meetings for CSEA representation." Charging Party asked to reschedule the investigatory interview to arrange for representation other than Espinoza, but the District denied her request and Charging Party states she "was forced to attend the meeting without representation." After the investigatory interview began, Espinoza walked in, but remained

[2] Although unclear, presumably Charging Party's mention of a recording may be in reference to the Districts intent to record any subsequent meeting regarding her June 11, 2014 grievance.

silent. When the District noted that "[her] representative had arrived," Charging Party clarified that CSEA was representing her, but Espinoza was not her representative.

On January 30, 2015, Charging Party and Espinoza attended a meeting with the District, during which the District's Human Resource Vice President, Marcia Wade, handed Charging Party a "Notice of Recommended Disciplinary Action – Dismissal From Employment" (Notice) along with two volumes of supporting documentation. After receiving the documents, Espinoza and Charging Party walked into a public staff lounge, where Espinoza spoke loudly and recommended that she find an attorney. Espinoza also stated that CSEA would not represent her at the *Skelly* hearing because she had waived her right to representation. Espinoza mockingly repeated Charging Party's December 1, 2014 statement "Espinoza is not my representative."

On an unspecified date, Charging Party requested representation from CSEA for the *Skelly* hearing, CSEA refused and stated she had waived her right to representation. The *Skelly* hearing was scheduled for February 11, 2015. Charging Party asserts that on February 9, 2015, CSEA reasserted that it would not represent her at the *Skelly* hearing because she had waived her right to representation.

On December 5, 2014, Charging Party filed a discrimination complaint with the District. A meeting with the District was scheduled on January 8, 2015. Charging Party asserts that she contacted Espinoza and told her that she would not consent to any recording during the meeting. In an undated e-mail message, Charging Party states that Espinoza falsely stated that Charging Party had refused to attend the meeting and that she had indeed consented to a court reporter.

Charging Party also asserts that Espinoza failed to file a PERB unfair practice charge against the District for discrimination or for her owed "sick leave wages." On February 6, 2015, Espinoza contacted Charging Party to convey a settlement proposal to pay eight days of "sick leave wages" in exchange for the withdrawal of the grievance. Charging Party asserts that Espinoza tried to "coerce" her into agreeing to the settlement.

Discussion

I. Charging Party's Burden

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." In doing so, a charging party should allege with specificity the particular facts giving rise to a violation. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.) The charging party may do this by alleging sufficient facts describing the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture*) (1994) PERB Decision No. 1071-S (*Dept. of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

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

Charging Party filed her charge on May 1, 2015, therefore, for an allegation to have been timely filed, the alleged unfair labor practice must have occurred on or after November 1, 2014. It appears that prior to November 1, 2014, Charging Party already believed that Espinoza was "not doing due diligence in representing [her] based on [Espinoza's] actions and lack of action. . . ." This lead to a meeting with Prezioso and Espinoza on October 30, 2014. From the facts, as alleged by Charging Party, it appears that Charging Party was dissatisfied with the services she had received from CSEA regarding CSEA's handling of her grievances, yet her unfair practice charge was not filed until May 1, 2015, beyond the six month statute of limitations. Also untimely is her allegation that during the October 30, 2014 meeting, Prezioso and Espinoza tried to "coerce" her into signing a waiver of her right to CSEA representation.

II. Jurisdiction

Charging Party asserts that minute meetings for a CSEA Executive Board meeting contained "slanderous, defamatory" statements. No specific facts are provided concerning this statements.[3]

Charging Party bears the burden of alleging sufficient facts to demonstrate a prima facie case of a violation. (*State of California (Department of Food and Agriculture*), *supra*, 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*, *supra*, PERB Decision No. 873.) Charging Party only states in a conclusory manner that the statements were "slanderous, defamatory."

Notwithstanding, PERB does not have jurisdiction over such claims. In *Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046, the Board affirmed the dismissal of a charge, which alleged that the union made defamatory statements, thereby damaging charging party's reputation. PERB confirmed that it did not have jurisdiction of the such claims because PERB's jurisdiction is limited to claims arising under EERA and other public sector labor relations statutes. (*California School Employees Association, Chapter 245 (Waymire)* (2001)

[3] While Charging Party asserts in her statement of facts that the meetings minutes are attached as an exhibit, these minutes were not attached to the charge.

PERB Decision No. 1448; *Sweetwater Union High School District* (2001) PERB Decision No. 1417.)

III. The 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). It appears that the basis for Charging Party's allegations that CSEA violated the duty of fair representations are: 1) failing to provide her with a labor representative other than Espinoza for the December 1, 2014 investigatory interview; 2) Espinoza's loud comments concerning the Notice; 3) CSEA refusal to represent her at the *Skelly* hearing; 4) Espinoza's alleged false statements that Charging Party would not attend a meeting; 5) failing to file an unfair practice charge; and 6) trying to "coerce" her into signing a settlement agreement concerning one of her grievances.

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 <u>inaction</u> was without a rational basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under

federal precedent, a union's negligence breaches the duty of fair representation in "cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also *Robesky v. Quantas Empire Airways, Ltd.* (9th Cir. 1978) 573 F.2d 1082.)

1. Representative of Charging Party's Choice

Charging Party fails to assert a prima facie case that CSEA breached its duty of fair representation by failing to remove Espinoza as her representative. However, PERB has expressly held that the exclusive representative does not breach the duty of fair representation by refusing to provide an employee with the representative or counsel of her choice. (*Los Rios College Federation of Teachers/CFT/AFT Local 2279 (Deglow)* (1998) PERB Decision No. 1275; see also *American Federation of Teachers College Guild, Local 1521 (Saxton)* (1995) PERB Decision No. 1109.) Moreover, Charging Party does not assert how CSEA's decision to not provide her with a new representative was arbitrary, discriminatory or in bad faith.

2. Espinoza's Loud Comments Concerning the Notice and Alleged False Statements

Charging Party also alleges that Espinoza made loud comments in a public area stating that Charging Party should retain an attorney for her *Skelly* hearing. Charging Party also asserts that Espinoza falsely stated that Charging Party would not attend a meeting with the District.

It appears that at most, Espinoza's conduct would constitute mere negligence or poor judgment, which does not rise to the level of a breach of the duty of fair representation. (See *IFPTE, Local 21, AFL-CIO (Maxey)* (2009) PERB Decision No. 2077-M [holding that generally, the duty of fair representation is not breached by mere negligence or ineptitude].) Espinoza's conduct, as alleged by Charging Party, implies that Espinoza may have been insensitive and perhaps lacked good acumen in rendering representational services. However, such ineptitude, if true, does not establish arbitrary, discriminatory or in bad faith. In *Teamsters Local 137 (Illum and DeMuro)* (1995) PERB Order No. Ad-265, the Board held that "breaches of courtesy do not demonstrate bad faith."

3. Lack of Representation at the Skelly Hearing and Before PERB

Charging Party asserts that CSEA refused to represent Charging Party at her *Skelly* hearing. The duty of fair representation does not extend to representation at *Skelly* hearings. (*Service Employees International Union, Local 1021 (Horan)* (2011) PERB Decision No, 2204-M (*SEIU*); *California Correctional Peace Officers Association (Kashtanofj)* (1993) PERB Decision No. 1007.) In *SEIU,* the Board clarified:

> PERB has long held that a union has no duty to represent its members at pre-deprivation *Skelly* hearings. The duty of fair representation does not apply in a *Skelly* hearing because disciplinary issues are ordinarily handled in extracontractual

> proceedings where the union does not possess exclusive control over the means to a particular remedy. (*SEIU, supra*, PERB Decision 2204-M citing to *Bay Area Air Quality Management District Employees Association (Mauriello)* (2006) PERB Decision No. 1808-M; *Professional Engineers in California Government (Lopez)* (1989) PERB Decision No. 760-S; *Service Employees International Union, Local 99 (Wardlaw)* (1997) PERB Decision No. 1219.)

Accordingly, Charging Party's allegation that CSEA refused to represent Charging Party at her *Skelly* hearing does not establish a violation of the duty of fair representation because CSEA did not have an obligation to represent her at the *Skelly* hearing.

Nor does Charging Party establish a breach of the duty of fair representation based on CSEA's failure to file an unfair practice charge. As noted above, the Board has long held that the duty of fair representation is limited to contractually-based remedies under the union's exclusive control. (*United Faculty of Grossmont-Cuyamaca Community College District (Tarvin)* (2010) PERB Decision No. 2133.) Accordingly, in *Fremont Unified District Teachers Association (Turney)* (2001) PERB Decision No. 1443 (*Fremont*), PERB expressly held that the duty of fair representation does not extend to the filing of unfair practices with PERB. Therefore, CSEA was not obligated to file an unfair practice charge on behalf of Charging Party.

4. Handling of Grievances

Charging Party asserts that CSEA tried to "coerce" her into signing a settlement agreement concerning one of her grievances. However, PERB has held that a union's suggestion that an employee settle a claim, and requiring a waiver of future legal rights as part of that settlement, does not establish that the union violated the duty of fair representation. (*Service Employees International Union, Local 1000 (Gutierrez)* (2011) PERB Decision No. 2191-S.) Moreover, as noted-above, as a general rule, an exclusive representative enjoys a wide range of bargaining latitude. (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338.) A union can settle a grievance without consulting with the grievant. (*Hart District Teachers Association (Mercado and Bloch)* (2001) PERB Decision No. 1456.) Further, settlement of a grievance contrary to the grievant's wishes does not necessarily demonstrate a breach of the duty of fair representation. (*Service Employees International Union, Local 1000 (Gutierrez), supra*, PERB Decision No. 1456-S.)

While Charging Party asserts that CSEA attempted to "coerce" her into signing a settlement agreement, she fails to provide additional details concerning the alleged "coercion." As noted above, Charging Party bears the burden of establishing in what manner CSEA committed an unfair labor practice. (*State of California (Department of Food and Agriculture), supra*, PERB Decision No. 1071-S.) Moreover, since Charging Party has not provided additional facts concerning the "coercion" allegation, Charging Party has not met her burden.

Additionally, it appears that Charging Party was dissatisfied with CSEA's decision to not take the June 11, 2014 grievance to arbitration. As noted above, in *United Teachers of Los Angeles (Collins), supra*, PERB Decision No. 258, a union has the discretion to decide how far to pursue a grievance, without any input of an employee, so long as its decision is not arbitrary, discriminatory or made in bad faith. Charging Party fails to assert any facts to demonstrate that CSEA's decision to not pursue arbitration in her June 11, 2014 grievance was arbitrary, discriminatory, or in bad faith.

Pattern of Conduct

Even if any one action by the exclusive representative, standing alone, would not constitute a breach of the duty of fair representation, a violation may be established under a "pattern of conduct" theory. (*Mt. Diablo Education Association (Scott)* 2010 PERB Decision No. 2127.) PERB will assess 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. (*Service Employees International Union, Local 1021 (Schmidt)* (2009) PERB Decision No. 2080-M.) Based on the totality of the facts provided by Charging Party, the charge fails to state a prima facie case that CSEA breached its duty of fair representation. Charging Party fails to state how CSEA acted arbitrarily, discriminatorily or in bad faith. From Charging Party's statement of facts and its attachments, it appears CSEA has attempted to assist her with respect to her grievances. In fact, Espinoza spoke to the District concerning her "sick leave wages." A settlement was reached and a monetary amount was negotiated on behalf of Charging Party. It also appears that Lee assisted her with the June 11, 2014 grievance. In response to her concerns regarding Espinoza's representational services, CSEA met with Charging Party on October 30, 2014. Given this history, Charging Party does not allege sufficient facts that CSEA acted arbitrarily, discriminatorily or in bad faith under a pattern of conduct theory. Rather, from the alleged facts, it appears that Charging Party and Espinoza had unspecified differences and that Charging Party was dissatisfied with CSEA's handling of her grievances. Notwithstanding, Charging Party fails to assert how CSEA's actions or inactions were arbitrary, discriminatory or made in bad faith.

For these reasons the charge, as presently written, does not state a prima facie case.[4] 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

[4] 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.*)

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 [***7 days],[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mirna Solís
Regional Attorney

MZS

[5] 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.)