STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MARIA HERDELIZA L. CIRIACO, Charging Party, v. FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION, Respondent.	Case No. SF-CO-807-E PERB Decision No. 2521 March 10, 2017

Appearances: Maria Herdeliza L. Ciriaco, on her own behalf; California Teachers Association by Mandy Hu, Staff Attorney, for Fremont Unified District Teachers Association

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 Maria Herdeliza L. Ciriaco (Ciriaco) from a dismissal (attached) by the Office of the General Counsel (OGC) of her unfair practice charge against Fremont Unified District Teachers Association (FUDTA or Association). The charge, as amended, alleged that the Association violated the Educational Employment Relations Act (EERA)[2] by: (1) failing to fairly represent Ciriaco regarding her termination from employment on June 17, 2015; (2) acting in bad faith by failing to negotiate with Ciriaco's former

[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, § 31001 et seq.)

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

employer, the Fremont Unified School District (District), over the decision to lay off certain certificated employees and over the procedures for such a layoff; (3) failing to file a grievance on behalf of Ciriaco concerning the District's alleged failure to evaluate her performance; and (4) failing to file a grievance on behalf of Ciriaco asserting her claim that she had been retaliated against because she advocated on behalf of homeless students. Ciriaco alleged that this conduct constituted a violation of EERA sections 3540, 3543.2, 3543.5, 3543.6, and 3543.7, Education Code sections 44660-44665, and PERB Regulation 32604.

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

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

DISCUSSION

The OGC dismissed the charge, in part, because some of the allegations were untimely. Since the charge was filed on November 24, 2015, allegations of unlawful conduct occurring prior to May 24, 2015 fall outside EERA's six-month statute of limitations. (Gov. Code, § 3541.5, subd. (a)(1).) To the extent the unfair practice charge, as amended, can be interpreted to allege that the Association's conduct prior to May 24, 2015 violated the EERA, the OGC properly dismissed such allegations as untimely.

On the merits, the OGC correctly concluded that the duty of fair representation does not apply to non-contractual proceedings such as those governed by the Education Code. The reduction-in-force for certificated employees such as Ciriaco is such a proceeding. (Ed. Code, § 44949, et seq.; *California Teachers Association (Radford)* (2005) PERB Decision No. 1763.) It is not a contract-based remedy and the Association's duty of fair representation therefore does not apply to a statutory layoff hearing. Moreover, the OGC correctly noted that Ciriaco did not allege any facts to establish that the Association's conduct was arbitrary, discriminatory, or in bad faith in violation of its duty of fair representation. (Gov. Code, § 3544.9.)

With regard to Ciriaco's apparent contention that the Association should have negotiated with the District regarding the basis for its layoff decision—its lack of funds and/or lack of work—the OGC correctly concluded that a school district's decision to lay off is not subject to bargaining. (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223.) Therefore, the Association did not have the ability to negotiate with the District over its decision and cannot be held liable for failing to negotiate over a non-negotiable subject.

The OGC also correctly dismissed Ciriaco's allegations that the Association should have negotiated with the District regarding procedures for layoff. As noted above, layoff procedures are established by the Education Code (Ed. Code, §§ 44949 and 44955) and include due process and hearing rights. EERA section 3543.2(a)(1) specifically enumerates as a subject within the scope of representation "the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code." Section 44959.5 provides that provisions of a collective bargaining agreement may supersede the statutory

procedures regarding layoff. (Ed. Code, §§ 44955 through 44959.) However, subdivision (d) of Education Code section 44949.5 specifically limits its provisions to school districts with an average daily attendance of over 400,000 pupils.[3] Equally important, Ciriaco did not allege facts demonstrating that FUDTA's failure to negotiate over procedures for layoff was arbitrary, discriminatory, or in bad faith. She has therefore failed to allege a prima facie case for a breach of the duty of fair representation. (*Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124 [duty of fair representation does not encompass a duty to negotiate any particular item].)

Ciriaco alleged that FUDTA failed to file grievances on her behalf regarding two separate disputes she had with the District: 1) failing to evaluate her work performance; and 2) retaliating against her for advocating on behalf of homeless students. In her amended charge, Ciriaco alleged that she raised with FUDTA representatives the fact that she had not been evaluated and that her union-provided attorney told her that someone from FUDTA would be reaching out to her about filing a grievance over this matter. These communications occurred in February and March 2015 and included FUDTA's executive director and its president, according to the amended unfair practice charge. Nevertheless, we agree with the OGC's conclusion that Ciriaco has failed to allege facts necessary to establish a prima facie case because the collective bargaining agreement allows employees to file grievances in their own name with the approval or assistance of FUDTA. Therefore the unfair practice charge, as amended does not show that FUDTA's lack of action extinguished Ciriaco's ability to pursue her own grievance regarding the District's alleged failure to evaluate her.

[3] We take judicial notice of the California Department of Education Public School Directory which shows that the Fremont Unified School District had approximately 34,000 pupils enrolled in 2015.

With regard to Ciriaco's allegation that FUDTA unlawfully failed to file a grievance alleging retaliation against her by the District, the OGC correctly noted that the unfair practice charge, as amended, did not include any facts indicating that this was a grievable matter, i.e., that the CBA prohibited retaliation by the District. On that basis we agree with the OGC's conclusion that Ciriaco failed to state a prima facie case on this matter.

The unfair practice charge, as amended, alleged facts that Ciriaco filed a formal complaint against FUDTA with the California Teachers Association (CTA) in late September 2015, and that CTA conducted an investigation that concluded in October 2015. However, the amended charge did not add CTA as a respondent, and did not describe the outcome of CTA's investigation or otherwise allege that CTA had done anything unlawful. We do not interpret these facts as alleging that CTA violated EERA. Even if the allegations concerning CTA could be interpreted as an alleged violation of the duty of fair representation, we agree with the OGC that PERB does not have jurisdiction over internal union affairs (*Coalition of University Employees (Higgins)* (2006) PERB Decision No. 1855-H) and that CTA (the Association's parent affiliate) does not owe a duty of fair representation to Ciriaco, because CTA is not the exclusive representative of certificated employees of the District. (*Davis Teachers Association, CTA/NEA (Heffner)* (1995) PERB Order No. Ad-270.)

The Appeal

Ciriaco's appeal repeats the facts and arguments from her unfair practice charge, as amended, without identifying any errors that may provide grounds for an appeal. She also alleged new facts concerning her distrust of the Association's president, and appended what she referred to as "supporting documents as evidence that District administrators retaliated against me because of my advocacy for homeless students." (Appeal at p. 2.)

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

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

Ciriaco's appeal fails to state "the specific issues of procedure, fact, law or rationale to which the appeal is taken." This failure to comply subjects the appeal to dismissal on that ground alone. (*State of California (Department of Mental Health, Department of Developmental Services)* (2012) PERB Decision No. 2305-S, p. 4; *California School Employees Association and its San Juan Chapter #127 (Hare)* (1995) PERB Decision No. 1089, p. 5.)

Furthermore, the appeal contains facts not alleged in the unfair practice charge, as amended. PERB Regulation 32635, subdivision (b) states in relevant part: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." Ciriaco has not shown good cause to present the new allegations, and we must therefore disregard such newly alleged facts.

ORDER

The unfair practice charge in Case No. SF-CO-807-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Gregersen and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

August 25, 2016

Maria Herdeliza L. Ciriaco

Re: *Maria Herdeliza L. Ciriaco v. Fremont Unified District Teachers Association*
Unfair Practice Charge No. SF-CO-807-E
DISMISSAL LETTER

Dear Ms. Ciriaco:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 24, 2015. Maria Herdeliza L. Ciriaco (Ms. Ciriaco or Charging Party) alleges that the Fremont Unified District Teachers Association (FUDTA or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by: (1) failing to fairly represent Charging Party regarding her termination from employment on June 17, 2015; (2) acting in bad faith by failing to meet with Charging Party's former employer, the Fremont Unified School District (District) to negotiate regarding procedures and criteria concerning Charging Party's layoff from employment for lack of funds; (3) failing to file a grievance on behalf of Charging Party concerning her performance evaluation; and (4) failing to file a grievance on behalf of Charging Party on the basis she had been retaliated against because she advocated on behalf of homeless students.

FUDTA filed a verified position statement on December 18, 2015.

Charging Party was informed in the attached Warning Letter dated June 24, 2016 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, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to July 15, 2016, the charge would be dismissed.

On July 15, 2016, Charging Party filed an amended charge. On August 15, 2016, FUDTA filed a further verified position statement in response to the amended charge. The amended

[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.

charge does not cure the deficiencies discussed in the Warning Letter, and the charge does not state a prima facie case.

Summary of Facts

As stated in the Warning Letter, Charging Party was employed by the Fremont Unified School District (District) as a School Social Worker in a position exclusively represented by FUDTA. In February and March 2015, the District notified Charging Party, and her FUDTA representative, that her position would be eliminated and that her contract would not be renewed for the subsequent school year.

According to documents provided by FUDTA, Charging Party was laid off pursuant to the Reduction in Force provisions of Education Codes sections 44949 and 44955. The District issued a Board Resolution dated March 11, 2015, stating that the District was terminating the employment of one Full-Time Equivalency School Social Worker "as a result of the reduction or discontinuance of the programs and services due to the lack of funds or lack of work."

In March and April 2015, Charging Party met several times with FUDTA President Kathleen Beebe, and with attorney Gening Liao regarding the layoff. On April 20, 2015, Charging Party signed a settlement agreement regarding the terms of her layoff; the agreement was signed by the District on May 2, 2015. Her employment ended effective June 17, 2015. In September and October 2015, Charging Party contacted the California Teachers Association (CTA) to make a complaint about FUDTA.

The following facts are provided by the amended charge.

Charging Party clarifies that attorney Liao was Charging Party's independent legal counsel. Charging Party appears to allege that, although she was laid off "due to lack of funds or work," the District did have funds available and work for her to do. Charging Party details some of her duties in the position and provides documents purporting to show that the District had funding for her position.

Charging Party reiterates the allegations of the original charge, that she had several meetings and communications with FUDTA representatives and Liao regarding the layoff. In February and March 2015 she asserted that she had not had an evaluation performed and asked about filing a grievance. On February 25, 2015, Liao told Charging Party that someone from FUDTA would reach out to her regarding a grievance. On March 13, 2015, the subject of filing a grievance was raised during a meeting with Beebe. And, in a March 19, 2015 meeting with Beebe and Liao, Charging Party asked about FUDTA filing a grievance. In September and October 2015, Charging Party communicated with representatives of CTA regarding filing a complaint against FUDTA.

Discussion

As stated in the Warning Letter, PERB has a six-month statute of limitations (Gov. Code, § 3541.5, subd. (a)(1).) Charging Party's allegations of conduct prior to May 24, 2015 are

untimely filed. Charging Party does not allege any new facts in the amended charge that would change the conclusion that her allegations concerning FUDTA's conduct in March and April 2015 were untimely filed. Charging Party's specific allegations concerning her inquiries about grievance filing, in February and March 2015, are similarly untimely.

As also stated in the Warning Letter, FUDTA's duty of fair representation is limited to contract-based remedies within the union's exclusive control. (E.g., *California Teachers Association (Radford)* (2005) PERB Decision No. 1763.) Charging Party does not allege any facts to establish that FUDTA's conduct was arbitrary, discriminatory, or in bad faith in violation of its duty of fair representation. (Gov. Code, § 3544.9.)

Charging Party further appears to allege that FUDTA should have negotiated with the District regarding the basis for its layoff decision—its lack of funds and/or lack of work. However, a school district's decision to lay off is not subject to bargaining. (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223.) Therefore FUDTA did not have the ability to negotiate with the District over its decision.

Charging Party also alleges that FUDTA should have negotiated with the District regarding "procedures" for layoff. Layoff procedures are established by the Education Code (Educ. Code, §§ 44949 and 44955) and include due process and hearing rights. PERB lacks jurisdiction to independently enforce the Education Code. (*California Teachers Association (Radford), supra*, PERB Decision No. 1763.)

Regarding Charging Party's allegations that she sought assistance from CTA, as stated in the Warning Letter, PERB does not have jurisdiction over internal union affairs. (*Coalition of University Employees (Higgins)* (2006) PERB Decision No. 1855-H.) It is noted that CTA, FUDTA's parent affiliate, does not owe a duty of fair representation to Charging Party, because CTA is not the exclusive representative. (*Davis Teachers Association, CTA/NEA (Heffner)* (1995) PERB Order No. Ad-270.)

Because the charge does not state a prima facie case, it is hereby dismissed based upon the facts and reasons set forth herein and in the June 24, 2016 Warning Letter.

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 _____
Laura Z. Davis
Senior Regional Attorney

Attachment

cc: Mandy Hu, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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June 24, 2016

Maria Herdeliza L. Ciriaco

Re: *Maria Herdeliza L. Ciriaco v. Fremont Unified District Teachers Association*
Unfair Practice Charge No. SF-CO-807-E
WARNING LETTER

Dear Ms. Ciriaco:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 24, 2015. Maria Herdeliza L. Ciriaco (Ms. Ciriaco or Charging Party) alleges that the Fremont Unified District Teachers Association (FUDTA or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by: (1) failing to fairly represent Charging Party regarding her termination from employment on June 17, 2015; (2) acting in bad faith by failing to meet with Charging Party's former employer, the Fremont Unified School District (District) to negotiate regarding procedures and criteria concerning Charging Party's layoff from employment for lack of funds; (3) failing to file a grievance on behalf of Charging Party concerning her performance evaluation; and (4) failing to file a grievance on behalf of Charging Party on the basis she had been retaliated against because she advocated on behalf of homeless students.

FUDTA filed a verified position statement on December 18, 2015.

Summary of Facts[2]

In assessing unfair practice charges to determine whether a charging party has stated a prima facie case, PERB must treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party. (*Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.) However, where allegations contained in the Respondent's verified position statement do not conflict with the allegations in the charge, they have been included herein. Nothing in PERB case law requires a Board agent to ignore

[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.

[2] Charging Party has also filed a charge against the District, PERB Case Number SF-CE-3163-E. Administrative notice is taken of this related case file. (*Antelope Valley Community College District* (1979) PERB Decision No. 97.)

undisputed facts provided by the Respondent and consider only the facts provided by the Charging Party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

In November 2011, the District hired Charging Party to work as a School Social Worker. She was subsequently employed under a series of one-year temporary employment contracts. According to FUDTA, Charging Party was a categorically-funded employee which meant she was not a permanent or tenured employee. It is presumed that Charging Party was employed in a position exclusively represented by FUDTA. FUDTA and the District were signatories to a Collective Bargaining Agreement (CBA) which was in effect at all times relevant. Article 10 of the CBA provides for evaluations. She received good performance evaluations for three consecutive school years.

In February 2015, the District informed Charging Party, via her union representative (FUDTA President Sherea Westra), that her work contract would not be renewed the following school year. She was encouraged to submit a letter of resignation, otherwise the District's Governing Board would vote to non-re-elect Charging Party for the next school year.

Charging Party had several phone calls and a meeting with attorney Gening Liao. Charging Party alleges that Liao is the union's lawyer. However, FUDTA alleges that Liao is an independent counsel from a private law firm; FUDTA arranged for Charging Party to be represented by Liao under its Group Legal Service program. FUDTA alleges that Liao's client was Charging Party, and not FUDTA.

Charging Party told Liao "about not being evaluated." Charging Party also told Liao that she had previously spoken with the Director of Student Support Services regarding "concerns related to McKinney-Vento (Homeless) Program."[3] Charging Party submitted a letter of resignation on February 25, 2015. The resignation letter states that Charging Party's resignation is effective "after the last day of this school year, June 12, 2015." Charging Party also received communications from FUDTA President Westra and was asked to meet briefly on March 6, 2015, with various personnel from the District and FUDTA.

During the week of March 9, 2015, the District's Director of Student Support Services met with Charging Party. He said that the school social worker position would be eliminated as part of a departmental reorganization. Subsequently, attorney Liao advised Charging Party to rescind her letter of resignation. Later in the day, Liao told her that the District had treated the resignation letter as not received, therefore there was no need for Charging Party to rescind it.[4]

[3] This appears to be a program Charging Party helped coordinate as part of her duties.

[4] FUDTA alleges that the District initially was going to non-re-elect Charging Party, because she was a probationary, non-permanent employee. After discussions with FUDTA, it was agreed to treat her termination as a layoff, rather than a non-re-election, because a non-re-election could be detrimental to Charging Party's ability to find future employment.

On March 13, 2015, Charging Party met with the District's Assistant Superintendent for Human Resources Raul Zamora (Dr. Zamora) and FUDTA Executive Director Kathleen Beebe. During the meeting, Dr. Zamora told Charging Party that she was a probationary employee, not a temporary employee. He confirmed that the letter of resignation was not necessary. He presented a proposed agreement: that if Charging Party would opt out of a hearing (i.e., a layoff hearing under the Education Code), the District would give her re-hire rights up to 36 months. Charging Party was given a Notice of Recommendation that Services be Terminated, pursuant to Education Code sections 44949 and 44955, dated March 12, 2015. This included a copy of a Board Resolution. The Board Resolution did not include the information that Charging Party was the District's Foster Youth and McKinney-Vento (homeless) education liaison. Charging Party asked about this omission but Dr. Zamora did not respond.

According to documents provided by FUDTA, Charging Party was laid off pursuant to the Reduction in Force provisions of Education Codes sections 44949 and 44955. The Board Resolution dated March 11, 2015, states that the District was terminating the employment of one Full-Time Equivalency School Social Worker "as a result of the reduction or discontinuance of the programs and services due to the lack of funds or lack of work," effective at the end of the 2014-2015 school year.

In March and April 2015, FUDTA asked Charging Party to meet to plan for an administrative hearing (i.e., regarding the layoff). On March 19, 2015, Charging Party met with FUDTA representative Kathleen Beebe, along with President Westra and attorney Liao, filled out a request for hearing form, and reviewed documents. Later, Charging Party provided information related to her job duties as Foster Youth Liaison and McKinney-Vento Liaison. Liao said it would be up to FUDTA to return to the District to discuss information and advocate on behalf of Charging Party.

On April 16, 2015, Charging Party met with Beebe and Liao. She thought the meeting was to prepare for the administrative hearing. FUDTA told Charging Party that the hearing would be short, lasting only ten minutes. FUDTA discussed a settlement agreement under which Charging Party would have rehire rights for 24 months and that she would receive paid medical benefits through the end of September 2015. Charging Party said she would not go forward with the hearing. On April 20, 2015, Charging Party called Liao and stated she had changed her mind and wanted to go through with the hearing. Liao stated she had already cancelled the hearing, even though Charging Party had not submitted a signed agreement. Later that day, Liao called again to find out if Charging Party had sent an executed agreement.

FUDTA provides a copy of a Certificated Layoff Agreement, signed by Charging Party on April 20, 2015.

From May 2015 through August 2015, "fewer communications occurred between" Charging Party and FUDTA. In September 2015, Charging Party contacted the California Teachers Association (CTA) (i.e., FUDTA's parent affiliate) to file a complaint regarding FUDTA's failure to fairly represent Charging Party, and "unfair practices in addressing work layoff and school district's lack of transparency" regarding the District's grants and programs concerning

foster youth and homeless students. CTA Board of Director Greg Bonaccorsi conducted an investigation in October 2015. On October 30, 2015, CTA Regional Manager Gerry Fong left Charging Party a voicemail message stating that the investigation had been completed.

Discussion

A. Statute of Limitations

EERA section 3541.5(a)(1) prohibits PERB 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." 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.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.) In cases alleging a breach of the duty of fair representation, the six-month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. Repeated union refusals to assist a unit member with the same issue do not start the limitations period anew. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M; *SEIU, United Healthcare Workers West (Rivera)* (2009) PERB Decision No. 2025-M.)

The instant charge was filed on November 24, 2015, therefore allegations of conduct occurring prior to May 24, 2015, are untimely. Charging Party alleges she sought FUDTA's assistance in February through April 2015. She signed a settlement agreement about her layoff on April 20, 2015. These allegations are untimely filed and must be dismissed.

B. Duty of Fair Representation

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance

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

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment.

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

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

A union's duty of fair representation only applies to the enforcement of contract-based remedies under the union's exclusive control, and therefore does not apply to actions in "extra-contractual forums," such as the pursuit of a civil lawsuit (*SEIU Local 790 (Hein)* (2004) PERB Decision No. 1677), or enforcement of Education Code violations. (*California Teachers Association (Radford)* (2005) PERB Decision No. 1763.) Under Education Code section 44949, certificated employees are afforded certain due process rights, including an administrative hearing, in the event of a layoff. The right to this hearing is afforded by statute, not by the CBA between the District and FUDTA. Therefore, the layoff hearing is not a contract-based remedy and the union's duty of fair representation does not apply to these proceedings. Even if it did, none of the facts alleged show that the union's conduct was arbitrary, discriminatory or in bad faith.

Charging Party alleges that FUDTA failed to file grievances regarding her performance evaluations and on the basis she had been retaliated against because she advocated on behalf of homeless students. Charging Party does not allege any facts to show that she believed there was a contract violation giving rise to these grievances, or that she ever asked FUDTA to file a grievance on her behalf.[5] She alleges that she told attorney Liao "about not being evaluated" and that she had spoken to a District administrator regarding "concerns related to McKinney-

[5] It is noted that Article 6.11 of the applicable CBA allows employees to file grievances in their own name, without the approval or assistance of FUDTA.

Vento (Homeless) Program." However, there are no facts to show that FUDTA was aware of these concerns, or that FUDTA's action or lack of action extinguished Charging Party's ability to pursue a claim.

Charging Party alleges that in September and October 2015, she requested CTA to investigate FUDTA's alleged failure to represent her, and CTA apparently conducted an investigation. On October 30, 2015, Fong told Charging Party that the investigation was completed. These facts do not show any conduct by FUDTA that was arbitrary, discriminatory or in bad faith. PERB will not review internal union affairs unless they have a substantial impact on the relationship of unit members to their employer so as to give rise to a duty of fair representation. (*Coalition of University Employees (Higgins)* (2006) PERB Decision No. 1855-H.)

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 First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **July 15, 2016**,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Z. Davis
Senior Regional Attorney

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[6] 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.*)

[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.)