STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SHARON CURCIO, Charging Party, v. FONTANA TEACHERS ASSOCIATION, Respondent.	Case No. LA-CO-1700-E PERB Decision No. 2551 February 22, 2018

Appearance: Sharon Curcio, on her own behalf.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION[1]

GREGERSEN, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Sharon Curcio (Curcio) from the Office of the General Counsel's dismissal (attached) of her unfair practice charge. The charge, as amended, alleged that the Fontana Teachers Association (Association) violated the Educational Employment Relations Act (EERA)[2] by failing to represent Curcio in her unfair practice charge against the Fontana Unified School District (District), and by refusing to provide Curcio with legal advice. The charge further alleged that the Association violated Curcio's constitutional right to

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

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

privacy. The Office of the General Counsel dismissed the charge as untimely and, in part, for lack of jurisdiction.

We have reviewed the entire case file in this matter and given full consideration to the issues raised on appeal. Based on this review, the Board finds the warning and dismissal letters accurately describe the charge allegations and are well reasoned and in accordance with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself, supplemented by the discussion below.

BACKGROUND

On February 5, 2016, Curcio filed a charge against the District alleging that the District violated EERA, the Labor Code, and the Education Code, and the collective bargaining agreement between the Association and the District by failing to provide Curcio with access to certain documents related to an incident involving Curcio and another teacher.[3] In April 2016, Curcio provided both the Association and the California Teachers Association (CTA) with a copy of her charge against the District and requested a meeting with an attorney to discuss the District's conduct. Throughout April and May 2016, Curcio repeatedly sought assistance with her charge against the District from both the Association and CTA. During this time, both the Association and CTA representatives repeatedly refused to represent Curcio or provide her with legal advice regarding her charge against the District. Later, in October 2016, Curcio learned that the Association president asked the District about the status of Curcio's unfair practice charge against the District.

[3] On November 10, 2016, the Office of the General Counsel issued a partial dismissal and a complaint in *Sharon Curcio v. Fontana Unified School District*, Case No. LA-CE-6110-E. This matter is currently being held in abeyance. (*State of California (Department of Personnel Administration)* (1993) PERB Decision No. 995-S [the Board and its agents may take official notice of documents in PERB files and records].)

On December 5, 2016, Curcio filed the present unfair practice charge alleging that the Association and CTA breached their duty of fair representation under EERA by refusing to provide Curcio with representation or assistance in pursuing her unfair practice charge against the District. The charge further alleged that the Association violated Curcio's constitutional right to privacy when the Association president asked the District about the status of Curcio's unfair practice charge against the District in October 2016.

On May 5, 2017, the Office of the General Counsel issued a warning letter informing Curcio that the breach of duty allegation was untimely because the statutory time period began to run in May 2016 when the Association and CTA repeatedly refused to represent Curcio with regard to her unfair practice charge against the District or to provide legal assistance or advice. With respect to the Association's October 2016 inquiry, the warning letter informed Curcio that PERB lacked jurisdiction over any invasion of privacy claim under the California Constitution.

On June 19, 2017, Curcio filed an amended charge. With respect to the Association's October 2016 conduct, Curcio stated that on October 24, 2016, she informed the Association president that the District still had not provided her with copies of requested documents to which the Association president responded "oh well, let PERB handle it."

By letter dated July 31, 2017, the Office of the General Counsel dismissed the charge as untimely and for lack of jurisdiction to enforce the California Constitution. With respect to timeliness, the Office of the General Counsel reasoned that because the Association and CTA had repeatedly refused to represent Curcio or assist her with her unfair practice charge against the District throughout May 2016, Curcio knew or should have known that further assistance from the Association was unlikely as of the end of May 2016. And, since the present charge was

not filed until December 5, 2016, any conduct occurring in May 2016 occurred outside of PERB's six-month statute of limitations. With respect to Curcio's discussion with the Association president in October 2016, the Office of the General Counsel found it to be a repetition of Curcio's earlier unfruitful efforts to gain assistance from the Association and therefore insufficient to restart the running of the statute of limitations.

CURCIO'S APPEAL

On appeal, Curcio asserts that the Office of the General Counsel erred in dismissing the charge as untimely. Curcio argues that her charge was timely filed because it was filed within six months of October 2016, when Curcio first learned that the Association had asked the District about the status of Curcio's unfair practice charge against the District. According to Curcio, this type of inquiry is evidence of collusion between the Association and the District and explains why the Association refused to assist Curcio with her unfair practice charge against the District.

DISCUSSION

The statute of limitations for filing an unfair practice charge under EERA is six months. (*Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (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.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Long Beach Community College District* (2009) PERB Decision No. 2002.)

In cases involving the duty of fair representation, the six-month 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. (*Los Rios College*

Federation of Teachers, CFT/AFT (Violett, et al.) (1991) PERB Decision No. 889; *International Union of Operating Engineers, Local 501 (Reich)* (1986) PERB Decision No. 591-H; *SEIU, United Healthcare Workers West (Rivera)* (2009) PERB Decision No. 2025-M.) Once the statute begins to run, the charging party cannot cause it to begin anew by making the same request over and over again. (*California State Employees Association, Local 1000, SEIU, AFL-CIO (Sutton)* (2003) PERB Decision No. 1553-S.) Repeated refusals by a union to provide assistance also do not start the statute of limitations period anew. (*SEIU Local 1021 (DeLarge)* (2009) PERB Decision No. 2068.) Nor does a charging party's complaint to higher-level union officials extend the limitations period. (*California School Employees Association (Spiegelman)* (1984) PERB Decision No. 400.)

The facts as alleged by Curcio establish that the Association and CTA clearly declined to represent or assist her in her unfair practice charge against the District throughout May 2016. Because such conduct occurred more than six months prior to the date the unfair practice charge was filed, the Office of the General Counsel properly found such conduct to be outside the statute of limitations and therefore untimely.

On appeal, Curcio argues that her charge was timely filed because it was filed within six months of October 2016, when she first learned that the alleged reason the Association declined to assist her was because it was colluding with the District. Curcio's argument on appeal is unavailing for two reasons. First, there is no indication that the Association's refusal to assist Curcio was the result of any agreement or consultation with the District. The mere fact that the Association inquired about the status of Curcio's charge against the District, alone, is insufficient to demonstrate collusion. Second, even if Curcio's theory of the Association's motivation is assumed correct, the statute of limitations begins to run when a charging party

discovers the conduct that constitutes the alleged unfair practice, not when a charging party discovers the legal significance of that conduct. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H; *Compton Unified School District* (2009) PERB Decision No. 2016.) The fact remains that Curcio was aware that she was not going to receive assistance or representation from either the Association or CTA in May 2016, seven months prior to filing the present charge. As such, the Office of the General Counsel properly determined the charge to be untimely.

Even if this charge was timely filed, we would nevertheless uphold the dismissal because Curcio has not articulated any duty owed to her by the Association. An exclusive representative does not have a duty to represent employees in enforcing rights not secured by the collective bargaining agreement and therefore beyond the exclusive reach of the union. (*California School Employees Association & its Chapter 130 (Simpson)* (2003) PERB Decision No. 1550; *California School Employees Association (Garcia)* (2001) PERB Decision No. 1444.) For example, a union has no duty to file an unfair practice charge on behalf of an employee. (*California State Employees Association (Sandberg)* (2004) PERB Decision No. 1694-S.) Nor does a union have a duty to enforce the Education Code (*California Teachers Association (Radford)* (2005) PERB Decision No. 1763); or to notify an employee that a non-contractual remedy exists. (*University Council - American Federation of Teachers (Chan)* (1994) PERB Decision No. 1062-H.)

To the extent Curcio alleges that CTA itself breached a duty owed her, we reject this allegation for three reasons. First, CTA was not named as a respondent to Curcio's unfair practice charge. Second, CTA is not the exclusive representative for certificated bargaining units, and therefore owes no duty of fair representation. (*California Teachers Association and*

Oakland Education Association (Welch) (2006) PERB Decision No. 1850, pp. 1-2, proposed decision, p. 2.) Third, PERB does not have jurisdiction to enforce alleged promises or contracts between CTA and its members to provide legal services. (*National Education Association-Jurupa (Norman)* (2014) PERB Decision No. 2371, pp. 12-13.)

For the reasons herein and for those described in the warning and dismissal letters, we affirm the dismissal of the unfair practice charge.

ORDER

The unfair practice charge in Case No. LA-CO-1700-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Banks and Winslow joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2813
Fax: (818) 551-2820

July 31, 2017

Sharon Curcio

Brenda Sutton-Wills, Staff Counsel
California Teachers Association

Re: *Sharon Curcio v. Fontana Teachers Association*
Unfair Practice Charge No. LA-CO-1700-E
DISMISSAL LETTER

Dear Parties:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 5, 2016.[1] Sharon Curcio (Charging Party) alleges that the Fontana Teachers Association (FTA or Respondent) violated sections 3544.9 and 3543.6, subdivision (b), of the Educational Employment Relations Act (EERA or Act)[2] by failing to represent Charging Party, refusing to provide Charging Party with legal advice, and violating a contract between FTA and Charging Party.[3] FTA filed a verified Position Statement on January 9, 2016.

[1] Charging Party filed a second copy of the charge on December 14, 2016. The second copy contained a different unfair practice charge form but the same statement of facts and the same attachments (in a different order). This second filing has not been treated as a First Amended Charge because it is substantively the same as the charge filed on December 5, 2016.

[2] 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.

[3] Charging Party filed an unfair practice charge against the Fontana Unified School District (District) on February 5, 2016, in *Sharon Curcio v. Fontana Unified School District*, Case No. LA-CE-6110-E (District Charge). The undersigned Board agent, who was also assigned to investigate the District Charge, issued a Partial Dismissal and a Complaint on November 10, 2016. That case is currently scheduled for formal hearing beginning on October 2, 2017. The undersigned Board agent hereby takes official notice of the contents of the District Charge. (*State of California (Department of Personnel Administration)* (1993) PERB Decision No. 995-S [the Board and its agents may take official notice of documents in PERB files and records].)

Charging Party was informed in the attached Warning Letter dated May 15, 2017, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Party should amend the charge. Charging Party was further advised that, unless Charging Party amended the charge to state a prima facie case or withdrew it on or before May 29, 2017, the charge would be dismissed.

Following grant of an extension of time from the undersigned Board agent, Charging Party filed a First Amended Charge on June 29, 2017. FTA filed a second Position Statement on July 13, 2017.

Facts as Alleged[4]

Charging Party filed the District Charge on February 5, 2016. Charging Party filed the District Charge at least in part to gain access to written complaints against her, which the District had cited in support of adverse action taken against her by the District in or about May of 2015. Charging Party sent FTA a copy of the District Charge. Charging Party met with FTA representatives regarding the District Charge on April 5, 2016. That same day, Charging Party spoke by phone with an attorney employed by the California Teachers Association (CTA) who verbally agreed to review the District Charge. Charging Party then sent a copy of the District Charge to the CTA attorney with whom she had spoken. On April 8, 2016, the same CTA attorney refused to review the District Charge. From April 9 through April 13, 2016, Charging Party made three telephone calls to FTA representatives, but received no response. On April 13, 2016, Charging Party sent an electronic mail (e-mail) message to FTA's President informing him or her that FTA representatives were not returning Charging Party's telephone calls.

On May 2, 2016, Charging Party requested that FTA representatives notify District representatives that the District had violated Education Code section 44031.[5] On May 2, 2016, an Association representative communicated to Charging Party that a CTA or FTA attorney could not represent Charging Party in relation to her District Charge. On May 6, 2016, an FTA representative communicated to Charging Party that FTA had no obligation to accept or agree with Charging Party's legal theory (that the District had violated Education Code section 44031).

On May 9, 2016, Charging Party contacted Ramon Gomez (Gomez), FTA Regional Director, and informed him that she was not receiving the legal representation she had requested from

[4] Many of the facts in the FAC are the same as those alleged in the original charge. For the sake of completeness, all allegations in the FAC have been summarized herein.

[5] Education Code section 44031, subdivision (a), provides that every employee has the right to inspect personnel records pursuant to section 1198.5 of the Labor Code.

FTA. On May 9, 2016, Gomez reiterated that FTA would not provide Charging Party with legal representation regarding the District Charge.

On May 10, 2016, Charging Party asserted, to Gomez, that Education Code section 44031 afforded her a right to see derogatory information in her personnel file. On May 10, 2016, Gomez inquired whether the derogatory statements existed and why Charging Party needed to review them. On May 16, 2016, Charging Party inquired of Gomez what purpose FTA (as an entity) serves. On May 25, 2016, Gomez responded by citing to EERA section 3544.9, which states that an exclusive representative "shall fairly represent each and every [unit] employee." Also on May 25, 2016, Gomez stated to Charging Party that the District's refusal to provide her with requested documents was based on the District's understanding of provisions in a memorandum of understanding between the District and FTA and that, accordingly, the District had no obligation to "present evidence" in support of its decision to refuse to provide Charging Party with the documents she had requested.

On October 24, 2016, Charging Party informed the FTA President that the District still had not provided Charging Party with copies of the requested documents. The FTA President responded by stating, "oh well, let PERB handle it."

Charging Party alleges that the District's refusal to provide her with requested documents violated the Education Code and that FTA, in the words of the charge, "essentially sided with [District] management and denied that an Education Code violation occurred." Charging Party alleges that she was forced to file an unfair practice charge with PERB because FTA failed to assist her.

Discussion

Statute of Limitations

As discussed in the May 15, 2017, Warning Letter, 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.) 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. (*Stationary Engineers Local 39 (Fisher)* (2008) PERB Decision No. 1940-M, citing *Los Rios College Federation of Teachers, CFT/AFT* (1991) PERB Decision No. 889.) Once the statute begins to run, an employee cannot cause it to begin anew by simply making the same request over and over again. (*IFPTE, Local 21, AFL-CIO (Hosny)* (2011) PERB Decision No. 2192-M, p. 7.)

As discussed in the Warning Letter, Charging Party filed the instant charge on December 5, 2016. Accordingly, if Charging Party knew or should have known, prior to June 5, 2016, that further assistance from FTA was unlikely, her allegations are untimely. In May of 2016,

FTA's representatives repeatedly refused to represent Charging Party or provide her with legal advice regarding her District Charge. FTA representatives also failed to respond to Charging Party's phone calls and e-mail messages. Thus, as of the end of May 2016, Charging Party knew or should have known that further assistance from FTA was unlikely. Yet, Charging Party did not file her charge until more than six months later, on December 5, 2016. Charging Party alleges in the FAC that she informed the CTA President, in October of 2016, that Charging Party still had not received the documents she had requested from the District. In response, the CTA President stated, "oh well, let PERB handle it." As discussed above and in the May 15, 2017, Warning Letter, once the statute of limitations begins to run, an employee cannot cause it to begin anew by simply making the same request over and over again. (*IFPTE, Local 21, AFL-CIO (Hosny)* (2011) PERB Decision No. 2192-M, p. 7.) Charging Party's October 2016 effort to get assistance from FTA was a repetition of her earlier unfruitful efforts to gain FTA's assistance. Accordingly, this communication did not restart the running of the statute of limitations. Charging Party still knew, or should have known, in May of 2016, that FTA was not going to assist her. For these reasons, the allegations in the charge are untimely and must be dismissed.

Jurisdiction

As discussed in the May 15, 2017, Warning Letter, PERB lacks jurisdiction to enforce the California Constitution. (*Housing Authority of the City of Los Angeles* (2011) PERB Decision No. 2166-M.) Accordingly, the allegation that FTA and/or CTA violated Charging Party's constitutional right to privacy by inquiring with the District as to the status of the District Charge is subject to dismissal for lack of jurisdiction.

Conclusion

The charge is hereby dismissed based on the facts and reasons set forth above and in the May 15, 2017, 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 _____
Blaire Baily
Regional Attorney

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2813
Fax: (818) 551-2820

May 15, 2017

Sharon Curcio

Re: *Sharon Curcio v. Fontana Teachers Association*
Unfair Practice Charge No. LA-CO-1700-E
WARNING LETTER

Dear Ms. Curcio:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 5, 2016.[1] Sharon Curcio (Charging Party) alleges that the Fontana Teachers Association (FTA or Respondent) violated sections 3544.9 and 3543.6, subdivision (b), of the Educational Employment Relations Act (EERA or Act)[2] by failing to represent Charging Party, refusing to provide Charging Party with legal advice, and violating a contract between FTA and Charging Party.[3] FTA filed a verified Position Statement on January 9, 2016.

Facts as Alleged

Charging Party is an employee of the District and an English teacher at Fontana High School. On or about May 8, 2015, an incident occurred involving Charging Party, another teacher, and

[1] Charging Party filed a second copy of the charge on December 14, 2016. The second copy contained a different unfair practice charge form but the same statement of facts and the same attachments (in a different order). This second filing has not been treated as a First Amended Charge because it is substantively the same as the charge filed on December 5, 2016.

[2] 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.

[3] Charging Party filed an unfair practice charge against the Fontana Unified School District (District) on February 5, 2016, in *Sharon Curcio v. Fontana Unified School District*, Case No. LA-CE-6110-E (District Charge). The undersigned Board agent, who was also assigned to process the District Charge, issued a Partial Dismissal and a Complaint on November 10, 2016. That case is currently in abeyance. The undersigned Board agent hereby takes official notice of the contents of the District Charge. (*State of California (Department of Personnel Administration)* (1993) PERB Decision No. 995-S [the Board and its agents may take official notice of documents in PERB files and records].)

an order of textbooks (incident).[4]

In response to the incident, in or about May of 2015, Charging Party received a Written Reprimand (Written Reprimand) from the District. The Written Reprimand references the existence of certain documents upon which the Written Reprimand relies, including written letters of complaint from a teacher and some students. Charging Party contends that the Written Reprimand violated the Memorandum of Understanding (MOU) between FTA and the District. FTA filed a grievance on Charging Party's behalf regarding the Written Reprimand in or about May of 2015.

The District denied the grievance in or about the end of October or start of November of 2015. Neither FTA nor CTA provided Charging Party with a copy of the District's denial of the grievance, although Charging Party did ultimately obtain a copy of the denial. Neither CTA nor FTA asked for further explanation, evidence, justification, or documentation regarding the representations made by the District in its denial of the grievance.

In January of 2016, CTA and/or FTA requested that the District participate in a mediation regarding the Written Reprimand. Charging Party asserted that she was unable to effectively participate in the mediation without access to the documentation related to the incident. At Charging Party's request, the mediation was then "paused" and has not yet taken place.[5]

Charging Party filed the District Charge on February 5, 2016. In the District Charge, Charging Party alleged, in part, that the District violated EERA, the Labor Code, the Education Code, and the MOU by failing to provide Charging Party with access to the documents related to the incident.

From May of 2015 to at least May of 2016, Charging Party made three written requests to the District to review the documents related to the incident.

On March 31, 2016, Charging Party sent an electronic message (e-mail message) to Sue Felt, FTA representative, requesting to meet with an attorney regarding the District's conduct.

At some point prior to April 14, 2016, Charging Party came to the CTA office and met with Barbara Smith (Smith), FTA Regional Uniserv Staff, and Brenda Sutton-Wills, CTA attorney.

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[4] 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, citing *Golden Plains Unified School District* (2002) PERB Decision No. 1489.) Where the charging party offers conflicting versions of the facts, the Board accepts the version most favorable to the charging party's case and disregards others. (*California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.)

[5] All quoted material originates in the instant charge unless otherwise specified.

Smith and Sutton-Wills informed Charging Party that CTA would not represent Charging Party in her PERB proceedings. Sutton-Wills agreed to review the District Charge and provide feedback to Charging Party. The next day, Charging Party sent the case file to Smith and Sutton-Wills.

Charging Party followed up with Sutton-Wills over e-mail message. Sutton-Wills responded and stated that, contrary to her earlier statement, she would not review what Charging Party has submitted to her and would not provide an opinion on it.

On April 13, 2016, Smith sent Charging Party an e-mail message, which stated that, "once you pulled the grievance and mediation away from FTA and you filed the PERB case on your own theories, CTA Legal and the lawyers there do not advise or represent you in the case. When [Sutton-Wills] asked for the package, she said that she wanted to review it in order to understand my questions, not to analyze or represent you on the case."

In an e-mail message to Smith on April 25, 2016, Charging Party stated that she was not seeking CTA representation in her PERB matter but rather seeking an hour-long attorney consultation.

A document entitled "CTA GROUP LEGAL SERVICES PROGRAM SUMMARY OF GUIDELINES FOR MEMBERS", which Charging Party attached to the charge, states as follows:

> NOTE: This is a summary of provisions for employment-related legal services for CTA members. Full explanation of coverage and participation procedures is available from staff representatives and the CTA Legal Department.
>
> A. Advice and Consultation
> An individual member may be referred by a staff representative to an attorney for advice and consultation regarding covered employment-related matters. CTA will pay for the specified number of hours of legal advice for designated matters:
> - General Employment-Related Civil Disputes - One Hour
> - Temporary Teacher Dismissal - Two Hours
> - Probationary Non-reelection - Three Hours
> - Child Abuse or Child Abuse Reporting - Three Hours
>
> B. Legal Representation
> CTA will provide representation by an attorney in covered administrative and court proceedings as set forth below. CTA will pay the specified amounts for attorney fees and costs:
> (1) Permanent Teacher For-Cause Dismissal/Suspension
> - Commission on Professional Competence Hearing: Maximum of $20,000. Appeal to superior court if CPC decides that the member shall not be dismissed: Maximum of $7,000.

(2) RIF Dismissals (Layoff)
- CTA will pay first $5,000 for members facing layoffs within a Chapter.
- CTA and Chapter will each pay 50% of amount over $5,000.
(3) Credential Review
- Informal Review. Maximum of $4,000.
(4) Employment-Related Criminal Matters
- Maximum of $5,000 for eligible cases.
(5) STRS Disability Appeal
-Maximum of $5,000.

A document entitled "Group Legal Services SUMMARY OF COVERAGE FOR MEMBERS", which has a CTA logo and which Charging Party attached to the charge, states as follows:

IMPORTANT NOTE: This is a brief summary of coverage for certain employment-related matters. Full explanation of coverage, limitations, and participation procedures is contained in the group legal services program guidelines. Refer to CTA staff for details. This summary does not supersede the program guidelines.

A. Advice and Consultation
Individual members may be referred to staff by representatives to an attorney for one hour advice and consultation for covered employment-related matters. However, if the matter relates to a collective bargaining agreement which contains a grievance procedure, the referral, if any, will be made as a chapter consultation.

...

C. Representation
Representation by an attorney is provided in administrative and court proceedings as set forth below. Coverage amounts are maximums and include both fees and costs.

(1) Permanent Teacher For-Cause Dismissal/Suspension
- Commission on Professional Competence Hearing: Maximum of $20,000. Appeal to superior court if CPC decides that the member shall not be dismissed: Maximum of $7,000.
(2) RIF Dismissal (Layoff)
- CTA will pay first $5,000 for members facing layoffs within a chapter.
- CTA and Chapter will each pay 50% of amount over $5,000.
(3) Credential Review
- Informal Review. Maximum of $4,000.

(4) Employment –Related Criminal Matters
- Maximum of $5,000 for eligible cases.
(5) STRS Disability Appeal
- Maximum of $5,000.

At some point in or before April of 2016, Sutton-Wills sent Charging Party a letter stating that CTA would not represent Charging Party in her PERB proceedings.

On April 26, 2016, Smith responded to Charging Party stating that the District Charge was not eligible for CTA representation and that Smith could not override that decision.

Also on April 26, 2016, Charging Party wrote back to Smith in an e-mail message and stated that Charging Party wanted to consult the CTA attorney for an hour about "a procedural matter" that had nothing to do with the District Charge. Charging Party asserted in the same e-mail message that she had a right to an hour legal consultation according to the CTA website.

On May 2, 2016, Charging Party sent Smith an e-mail message asking how CTA would notify the District that it had violated the Education Code (by failing to give Charging Party access to the documents she was requesting).

On May 6, 2016, Smith sent an e-mail message to Charging Party stating that CTA had no obligation to notify the District that, according to Charging Party, the District had violated the Education Code. Smith stated her belief that mediation was the best way to handle the Written Reprimand and grievance. Smith stated that Charging Party had, "taken over to pursue [the grievance and/or case] on your own because you are in disagreement with my advice and approach [to mediate the grievance]."

On or about May 9, 2016, Charging Party requested, by e-mail message, assistance from Ramon M. Gomez (Gomez), Assistant Executive Director of CTA's Region IV.[6]

On May 10, 2016, Gomez wrote Charging Party an e-mail message that stated, in part, as follows:

> As to the issue of needing an attorney referral in this case, it is unnecessary, Ms. Smith advisement [*sic*] is correct. There is no issue to be litigated, or action to be defended against. The appropriate action (grieving the letter of reprimand) has been taken and is in process. To the extent that complaint letters exist and are relevant to the original discipline levied, that issue can be resolved in arbitration if the original fact pattern of the case constitute[s] a violation the contract and an organizational

[6] Charging Party refers to Mr. Gomez as Mr. Diaz, but it appears that Mr. Gomez is correct.

> interest exists to proceed to arbitration as determined by the exclusive bargaining representative.
>
> As for the issue at hand, you will need to decide how you wish to proceed. As I understand your options, you have three possible courses of action, they are:
>
> 1. Participate in mediation process.
> 2. Do not participate in mediation, and move the grievance to the next level.
> 3. Withdraw the grievance.
>
> What outcome you are seeking in this process?

In an e-mail message to Gomez on May 11, 2016, Charging Party stated that CTA and/or FTA had failed to demand that the District substantiate the claims contained in the Written Reprimand. Charging Party asserted further that CTA and/or FTA had failed to question the District's assertion that the incident was "similar to others."[7] Charging Party stated that, "I am appalled at how the union and CTA never question the district on its decisions, and never ask the district to substantiate with evidence their claims in writing."

FTA alleges in its Position Statement that, "all correspondence with Mr. Gomez regarding CTA's refusal to provide legal services ended in May 2016.[8]

In October of 2016, Felt spoke with a District representative regarding the District Charge. The District representative told Felt that Charging Party's charge was "approved for processing." Charging Party asked Felt, in an e-mail message on October 24, 2016, what "approved for processing" meant. Felt responded that the phrase meant the charge was "now in order and would be reviewed." It appears that Felt meant that the District Charge was under review by a Board agent. Charging Party alleges that Felt's inquiry to the District constituted an invasion of her privacy.

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[7] Under the MOU, the District may not issue a written reprimand to an employee unless that employee has been given one written warning "about similar actions or infractions within the past year." (MOU Art. 19, § 19.3.3.)

[8] The Board may also consider information provided by the respondent, when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994; *Riverside Unified School District* (1986) PERB Decision No. 562a.) Because FTA's written response is in compliance with PERB's regulations, this summary also includes relevant, undisputed facts provided by FTA. (PERB Reg. 32620(c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

Charging Party alleges further that FTA and/or CTA's conduct violated a contract between Charging Party and FTA and/or CTA.

By way of remedy, Charging Party seeks the return of the membership dues she has paid to FTA over the course of sixteen years, which Charging Party alleges amounts to $22,000. Charging Party also seeks $1.5 million in damages.

Discussion

Charging Party alleges that FTA failed to represent her and failed to provide her with legal advice such that she was forced to represent herself without FTA assistance. Charging Party alleges further that FTA's conduct violated a contract between FTA and Charging Party.

A prima facie case is established if the factual allegations set out in the charge are sufficient to satisfy the legal elements of the alleged violation. In the initial processing of an unfair practice charge, PERB will assume that the facts set out in the charge are true. (*Golden Plains, supra*, PERB Decision No. 1489.) If these alleged facts establish the legal elements of a violation, so as to set out a prima facie case, PERB will issue a complaint, thereby allowing the charge to proceed to an evidentiary hearing. (PERB Regulation 32640; *Eastside Union School District* (1984) PERB Decision No. 466.) However, if the alleged facts are not sufficient to establish a prima facie case, PERB will notify the Charging Party of any deficiencies in the allegations, so as to give the Charging Party an opportunity to cure the deficiency by filing an amended charge. (PERB Regulation 32620(c).) If the Charging Party still fails to establish a prima facie case, the charge will be dismissed by PERB without the issuance of a complaint. (PERB Regulations 32620, 32621, 32630.)

Overview of Duty of Fair Representation

Charging Party has alleged that FTA and/or CTA 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.)

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. (*Stationary Engineers Local 39 (Fisher)* (2008) PERB Decision No. 1940-M, citing *Los Rios College Federation of Teachers, CFT/AFT* (1991) PERB Decision No. 889.) Once the statute begins to run, an employee cannot cause it to begin anew by simply making the same request over and over again. (*IFPTE, Local 21, AFL-CIO (Hosny)* (2011) PERB Decision No. 2192-M, p. 7.)

Charging Party filed her charge on December 5, 2016. The statutory limitations period extends back six months prior to the filing of the charge to June 5, 2016. Therefore, unless an exception applies, allegations regarding conduct about which Charging Party knew or should have known that occurred prior to June 5, 2016, are untimely filed.

FTA alleges in the Position Statement that "all correspondence [between Charging Party and Gomez] regarding CTA's refusal to provide legal services ended in May 2016." No allegations contained in the charge and no supporting document filed with the charge demonstrate any communications between Charging Party and CTA and/or FTA after May of 2016 (except Charging Party's question regarding Felt's inquiry to the District in October of 2016).

CTA repeatedly refused to represent Charging Party with regard to the District Charge and to provide Charging Party with legal assistance or advice in May of 2016. Thus, it appears that, as of the end of May 2016, Charging Party knew or should have known that further assistance, in the form of representation or legal advice, from CTA and/or FTA was unlikely. Charging Party alleges that the denial of legal representation and/or the denial of Charging Party's request for legal advice violated a contract between Charging Party and FTA and/or CTA. Given the above, Charging Party's allegations that CTA and/or FTA refused to represent her, refused to provide her with legal advice, and/or violated a contract between Charging Party and FTA and/or CTA are subject to dismissal because they are untimely.

Jurisdiction

PERB's jurisdiction is limited to resolving claims of unfair practices, as defined, which violate the collective bargaining statutes enforced by PERB. (See, e.g., *Los Angeles Unified School District* (1984) PERB Decision No. 448.) PERB lacks jurisdiction to enforce other statutory or constitutional schemes. (*Housing Authority of the City of Los Angeles* (2011) (*Housing Authority*) PERB Decision No. 2166-M; *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S.)

Charging Party alleges that Felt's October 2016 inquiry to the District constituted an invasion of Charging Party's privacy. It appears that Charging Party may be alleging that Felt's conduct violated Charging Party's right to privacy under the California Constitution. (Cal. Const., art. I, § 1.) However, as discussed above, PERB does not have jurisdiction to enforce the California Constitution. (*Housing Authority*, *supra*, PERB Decision No. 2166-M.) Accordingly, the allegation that Felt and/or FTA and/or CTA violated Charging Party's constitutional right to privacy by inquiring with the District as to the status of the District Charge is subject to dismissal for lack of jurisdiction.

For these reasons the charge, as presently written, does not state a prima facie case.[9] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies

[9] 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.*)

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 May 29, 2017,[10] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Blaire Baily
Regional Attorney

BHB

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[10] 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.)