STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LANCE HOWARD, Charging Party, v. EAST SIDE TEACHERS ASSOCIATION, Respondent.	Case No. SF-CO-819-E PERB Decision No. 2559 April 4, 2018

Appearance: Lance Howard, on his own behalf.

Before Gregersen, Chair; Winslow and Shiners, Members.

DECISION[1]

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Lance Howard (Howard) of the Office of the General Counsel's dismissal (attached) of his unfair practice charge. The charge, as amended, alleged that the East Side Teachers Association (Association) violated its duty of fair representation under the Educational Employment Relations Act (EERA)[2] when: (1) the two Association members of a Level 2 grievance panel voted to deny Howard's grievance over alleged improper deduction of time from his sick leave bank; and (2) the Association's president did not inform Howard of

[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 noted, all statutory references are to the Government Code.

his ability to appeal the panel's decision to Level 3 of the grievance procedure. The Board agent found the charge was untimely and failed to state a prima facie violation of EERA.

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, and are well-reasoned and in accordance with applicable law. We therefore adopt the warning and dismissal letters as the decision of the Board itself, supplemented by the discussion below.

DISCUSSION

1. Compliance with PERB Regulation Governing Appeal of a Dismissal

PERB Regulations require an appeal of a dismissal to identify "the specific issues of procedure, fact, law or rationale to which the appeal is taken"; "the page or part of the dismissal to which each appeal is taken"; and "the grounds for each issue stated." (PERB Reg. 32635, subd. (a)(1), (2), (3); *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 15-16.) The purpose of the regulation is to place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, p. 6.) An appeal that does not reference the substance of the dismissal, the page or part of the dismissal to which the appeal is taken, or the grounds for each issue, or otherwise fails to identify specific issues of procedure, fact, law, or rationale as grounds for reversal is subject to dismissal on that basis alone. (PERB Reg. 32635, subd. (a); *Beaumont Teachers Association/CTA (Grace)* (2012) PERB Decision No. 2260, pp. 2-3.)

Although Howard's appeal does not discuss or reference the substance of the dismissal or warning letters, it does assert two grounds for appeal—that the charge should have been

deemed timely under the legal theories of equitable tolling and equitable estoppel. Because these grounds identify by implication a legal error in the dismissal that could constitute a basis for reversal, the appeal arguably complies with PERB Regulation 32635, subdivision (a). We therefore will consider the merits of these two grounds for appeal. The remainder of the appeal, however, is denied for non-compliance with PERB Regulations.

Additionally, attached to the appeal is a "Notice of Entry of Judgment" (Notice) from the Santa Clara Superior Court in a small claims action brought by Howard against his employer, the East Side Union High School District (District), over the District's alleged improper deduction of time from his sick leave bank. New evidence may be considered on appeal only upon a showing of good cause. (PERB Reg. 32635, subd. (b).) Good cause may be found when the charging party could not have discovered the new evidence with the exercise of reasonable diligence before the charge was dismissed. (*American Federation of State, County, and Municipal Employees, Local 2620 (McGuire)* (2012) PERB Decision No. 2286-S.) Although the Notice is undated, it indicates it was served on the parties on October 13, 2015. Howard therefore had the Notice more than one year before he filed his charge on March 13, 2017. The appeal provides no reason why this document could not have been provided with the original or amended charges. Accordingly, Howard has not demonstrated good cause for the Board to consider the Notice on appeal.

2. The Exceptions to the Statute of Limitations Raised in the Appeal Do Not Apply

On appeal, Howard argues that his charge was improperly dismissed as untimely because the doctrines of equitable tolling and equitable estoppel should apply in this case. We disagree.

a. Equitable Tolling

Howard asserts that his time to file the charge should have been equitably tolled while he pursued a remedy for his sick leave dispute in workers' compensation proceedings and in small claims court. The statute of limitations period is equitably tolled while the parties utilize a non-binding dispute resolution procedure if: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent. (*Long Beach Community College District* (2009) PERB Decision No. 2002, p. 15.) But "[t]he doctrine of equitable tolling does not apply any time a charging party pursues an alternative remedy; rather, the doctrine applies only when the charging party has used mutually negotiated dispute resolution procedures contained in a written agreement." (*County of Riverside* (2011) PERB Decision No. 2176-M, p. 11.)

The charge does not allege that the workers' compensation procedures or the small claims court procedures Howard utilized were contained in a written agreement negotiated by Howard and the Association—the parties to this case. Further, Howard used these procedures to address his dispute with the District over sick leave, not to resolve whether the Association fairly represented him on that issue, which is the subject of this charge. And tolling in this case would frustrate the purposes of EERA's six-month statute of limitations by forcing the Association to mount a defense to events that occurred more than three years ago. For these reasons, equitable tolling does not apply in this case.

b. Equitable Estoppel

Howard also contends the Board should excuse the untimeliness of his charge under an estoppel theory because the Association "concealed" from him the availability of an appeal to Level 3 of the grievance procedure. Equitable estoppel applies only when: (1) the party to be estopped misrepresents or conceals material facts; (2) that party knows the true facts; (3) that party intends for the other party to act on the misrepresentation or concealment; (4) the other party is ignorant of the true facts; and (5) the other party relies on the conduct to his injury. (*Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 11; *Los Angeles Unified School District* (2012) PERB Decision No. 2299, pp. 6-7.) "Equitable estoppel generally requires an *affirmative* representation or act" by the party to be estopped. (*J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648, 657, emphasis in original.) Thus, the alleged misrepresentation or concealment must be proven as a certainty; it cannot be based on inference alone. (*Los Angeles*, *supra*, at p. 7.)

Howard's estoppel argument rests solely on an allegation that, when responding to Howard's emails asking for assistance with his sick leave dispute, Association President Marisa Hanson (Hanson) did not inform him that there was a third level to the contractual grievance procedure. Hanson's alleged silence about the availability of a Level 3 appeal does not establish that she intentionally concealed that information from Howard for the purpose of inducing him not to file a timely unfair practice charge. Nor are there any other factual allegations in the amended charge that could demonstrate intentional concealment by the Association of the Level 3 appeal procedure. Thus, equitable estoppel cannot apply in this case.

Additionally, even if Hanson intentionally concealed Level 3 of the grievance procedure from Howard, he suffered no harm because this conduct did not prevent him from filing a timely unfair practice charge once he discovered the concealment. Howard admits in his appeal that he learned of Level 3 "around late 2015."[3] He thus knew the facts underlying his allegation of concealment at that time. But Howard did not file his charge within the following six months, as required by EERA section 3541.5, subdivision (a)(1). (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) Instead, he waited over a year to file. Because the Association's alleged concealment did not prevent him from filing a timely charge once he learned of Level 3 in late 2015, Howard suffered no harm that could justify applying equitable estoppel.

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

ORDER

The unfair practice charge in Case No. SF-CO-819-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Gregersen and Member Winslow joined in this Decision.

[3] Because this statement is against Howard's interest, we treat it as an admission of fact. (See *Moore v. Powell* (1977) 70 Cal.App.3d 583, 586, fn. 2 ["A factual statement in a brief may be treated as an admission or stipulation when adverse to the party making it."].)

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-7242
Fax: (916) 327-6377

September 5, 2017

Lance Howard

Re: *Lance Howard v. East Side Teachers Association*
Unfair Practice Charge No. SF-CO-819-E
DISMISSAL LETTER

Dear Mr. Howard:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 13, 2017, and amended on August 14, 2017. Lance Howard (Charging Party) alleges that the East Side Teachers Association (ESTA or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation.

Charging Party was informed in the attached Warning Letter dated July 31, 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, he should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it on or before August 14, 2017, the charge would be dismissed.

On August 14, 2017, Charging Party filed an amended charge. Like in the initial charge, Charging Party alleges he filed a grievance on his own behalf alleging that the District violated section 6.4.7 of the collective bargaining agreement (CBA) between ESTA and the East Side Union High School District (District) when it charged his worker's compensation appointments as sick leave rather than as Industrial Accident leave. A panel consisting of representatives from ESTA and the District denied the grievance on November 12, 2014. Charging Party alleges ESTA breached its duty of fair representation: (1) when its representatives on the panel voted to deny the grievance, and (2) by not advising him there was an additional "Level 3 stage of the grievance process." Charging Party alleges that ESTA's decision to vote to deny the grievance was "devoid of honest judgment" and that ESTA acted in "bad faith" by not informing him about the Level 3 step of the grievance process.

[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.

The amended charge does not cure the timeliness issue explained in the Warning Letter. As stated in that letter, Charging Party knew or should have known on or before November 12, 2014, when ESTA took part in denying his grievance, that ESTA would not assist him any further with the matter. (*SEIU, United Healthcare Workers West* (2009) PERB Decision No. 2025-M.) Charging Party alleges that ESTA's refusal to assist him after November 12, 2014, was "not clear" due to conflicting messages he received. Among these conflicting messages, according to Charging Party, was a statement by a small claims court judge that he "could bring the case back to court." Even accepting this allegation as true, the amended charge does not establish that a person, in the exercise of reasonable diligence, would not have known, until the six month period preceding the date the instant charge was filed, that further assistance from the union was unlikely. (*Ibid.*; *Los Angeles Unified School District* (2007) PERB Decision No. 1929.) The charge is thus untimely. (*Ibid.*)

Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein and in the July 31, 2017, Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] 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

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's Regulations may be found at www.perb.ca.gov.

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 _____
Keith B. LaMar
Regional Attorney

Attachment

cc: Brian Schmidt, Staff Attorney
California Teachers Association

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-7242
Fax: (916) 327-6377

July 31, 2017

Lance Howard

Re: *Lance Howard v. East Side Teachers Association*
Unfair Practice Charge No. SF-CO-819-E
WARNING LETTER

Dear Mr. Howard:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 13, 2017. Lance Howard (Charging Party) alleges that the East Side Teachers Association (ESTA or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation.[2, 3]

[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] The charge cites Government Code section 3505 as a source of the violation. However, that section applies to "public employees" as defined in Government Code section 3501(d). The charge also cites Government Code section 3578 as a source of the violation. However, that section applies to "higher education employees" as defined in Government Code section 3562(e). Where charging party fails to allege that any specific section of the Government Code has been violated, a Board agent, upon a review of the charge, may determine under what section the charge should be analyzed. (*Los Banos Unified School District* (2007) PERB Decision No. 1935.) The facts in the present charge most closely align to a charge that ESTA breached its duty of fair representation to Charging Party, a "public school employee," in violation of EERA section 3544.9. Therefore, the charge will be analyzed under a duty of fair representation theory.

[3] The charge alleges ESTA violated Education Code section 89529.04. However, PERB lacks jurisdiction to enforce the Education Code. (*San Francisco Unified School District* (2009) PERB Decision No. 2040-E.)

FACTS AS ALLEGED

ESTA and the East Side Union High School District (ESUSHD) are parties to a collective bargaining agreement (CBA). Article 6 of the CBA addresses employee leave time. Specifically, Article 6 provides that employees may take "Industrial Accident Leave" for absences covered under a worker's compensation claim. The "Industrial Accident Leave" benefits, according to Article 6, section 6.4.7, "are in addition to the sick leave benefits." In other words, an employee's use of "Industrial Accident Leave" time does not affect the employee's accumulation of sick leave time.

Charging Party, a teacher with ESUSHD, sustained approximately nine on-the-job injuries spanning from December 20, 2012, through March 9, 2015.[4]

Charging Party was approved for worker's compensation, and attended medical appointments with a worker's compensation provider. ESUHSD did not record those absences as "Industrial Accident Leave," but rather, deducted the time from Charging Party's sick leave. Charging Party filed a grievance[5] against ESUHSD on September 11, 2014, alleging "worker's comp appointments charges to my sick leave account instead of the Industrial Accident account."[6,7]

On August 31, 2014, Charging Party sent an electronic mail (e-mail) message to MarisaVera Hanson (Hanson), ESTA President, asking whether the union provides attorneys to represent members on worker's compensation matters. On September 1, 2014, Hansen responded, "[o]ur dues are not part of workman's comp attorney" and that the union "does not pay for workman's comp. attorney." On July 19, 2016, Charging Party's worker's compensation case was "closed."

On November 3, 2016, Charging Party sent an e-mail message to Hanson asking her to provide him "the contract and the district's Worker's Comp rules and procedures from 2012." On November 3, 2016, Hanson responded, stating "[a]s I have explained to you before, workman's comp is not an area that ESTA is part of anymore." Hanson also suggested that Charging Party "get a workman's comp attorney." On November 3, 2016, Charging Party responded to Hanson, stating he believed the ESUHSD should have recorded his absences related to his worker's compensation claim as "Industrial Accident Leave," and should not have deducted

[4] The charge includes a table which indicates Charging Party sustained "industrial accident[s]" on December 20, 2012, January 25, 2013, February 12, 2013, February 28, 2013, March 6, 2013, April 18, 2013, October 7, 2013, February 14, 2014, and March 9, 2015.

[5] Section 13.3 of the CBA allows individual members to file grievances.

[6] The charge does not indicate the outcome of the grievance.

[7] Whether ESTA assisted Charging Party in filing the grievance is unclear. While the charge does not contain any facts to that effect, attached to the charge is an e-mail message from ESTA to Charging Party dated November 3, 2016, stating "[w]e already helped you when you filed a grievance."

that time from Charging Party's sick leave. Hanson repeated that the union could not assist him.

On November 16, 2016, Charging Party sent an e-mail message to Hanson stating. "[t]he time not charged to the Industrial Accident account means I lost money..." Charging Party requested to meet with Hanson about the matter. On November 16, 2016, Hanson responded to Charging Party, stating that the matter would be "best handled by a lawyer."

RESPONDENT'S POSITION[8]

Respondent contends the charge is untimely, and that Hanson initially told Charging Party as early as June 2014 that ESTA would not assist with his leave issue. According to Respondent, in September 2014 and November 2016, Hanson reiterated that same position to Charging Party. While Charging Party filed a grievance regarding the leave issue, a grievance panel comprised of members of both the District and ESTA unanimously held in favor of the District on November 12, 2014. Charging Party took no further action on the grievance.

DISCUSSION

Charging Party's Burden

PERB Regulation 32615(a)(5) requires 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.) Such allegations should focus on the elements of the prima facie case. Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) "Clear and concise statement of the facts and conduct alleged to constitute an unfair practice," as required by PERB Regulation 32615(a)(5), must be stated in the charge itself. Mere mention of the relevant facts in attached documents, without reference to those facts in the charge itself, is insufficient to satisfy this requirement. (*Sacramento City Teachers Association*

[8] Pursuant to PERB's regulations and decisional law, PERB may consider factual information produced by a 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. (*Lake Tahoe Unified School District* (1993) PERB Decision No. 994; PERB Reg. 32620(c).) ESTA's position statement includes a declaration under penalty of perjury. (PERB Reg. 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.) Thus, facts supplied by ESTA that do not conflict with facts set forth in the charge are considered. (*Ibid.*)

(Franz) (2008) PERB Decision No. 1959; see also, *Monrovia Unified School District* (1984) PERB Decision No. 460 [allegations of fact must be contained in the statement of the charge].)

Timeliness

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.) For charges that a party breached its duty of fair representation, the statute of limitations begins on the date that "the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely." (*SEIU, United Healthcare Workers West* (2009) PERB Decision No. 2025-M.) The statute of limitations period does not start over where a union simply repeats a previous refusal to assist a member. (*Ibid.*)

Here, Charging Party knew or should have known or on before November 12, 2014, that ESTA would not assist him any further with the matter involving the District deducting sick time, rather than "Industrial Accident Leave" time, for his absences related to his worker's compensation claims. (*SEIU, United Healthcare Workers West, supra*, PERB Decision No. 2025-M.) On that date, the grievance panel—which included ESTA representatives—held in favor of the District on Charging Party's grievance involving the same issue. (*Ibid.*) Thus, Charging Party had until May 12, 2015, to file an unfair practice charge. (*Los Angeles Unified School District, supra*, PERB Decision No. 1929.) While Hanson told Charging Party, on November 3, 2016, and November 16, 2016, that he should seek an attorney because the union would not assist with his worker's compensation matter, her statements merely repeated the union's position of November 12, 2014. Thus, the statute of limitations did not start over in November 2016. (*Ibid.*) Charging Party did not file the present charge until March 15, 2017, nearly two years after the statute of limitations had lapsed. Thus, the charge is untimely and must be dismissed.

Duty of Fair Representation

However, even if the charge had been filed timely, it does not, as written, demonstrate that Respondent breached its duty of representation.

EERA section 3544.9 expressly imposes a statutory duty of fair representation upon employee organizations, providing that: "[t]he employee organization recognized or certified as exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit."

However, in order to state a *prima facie* violation of this section of EERA, the Charging Party must show that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) A union's duty of fair representation extends to grievance handling. (*Beaumont Teachers Association* (2012) PERB Decision No. 2259-E) "Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance [or dispute] does not constitute a breach of the union's duty." (*United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.)

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

Thus, to state a prima facie violation of the duty of fair representation under EERA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.)

1. Independent Right to File Grievances

Where a CBA provides an employee with the right to present grievances without the aid of the union, PERB has found that a union's failure to file a grievance does not demonstrate a breach of its fair representation duty. (*Beaumont Teachers Association/CTA (Grace)* (2012) PERB Decision No. 2260 [*citing Service Employees International Union, Local 99 (Arteaga)* (2008) PERB Decision No. 1991]; *Los Angeles County Education Association (Sanders)* (2012) PERB Decision No. 2264].) Under the CBA, Charging Party had the right to file a grievance on his own behalf at any time during his employment with the District. In fact, Charging Party did so on September 11, 2014. Thus, because the MOU provided Charging Party with the right to file a grievance on his own without the aid of ESTA, ESTA's failure to file a grievance on Charging Party's behalf does not demonstrate a breach of its duty of fair representation.

2. Evidence that ESTA's Decision was Arbitrary, Discriminatory, or Made in Bad Faith

Charging Party alleges "ESTA did not faithfully or fairly defend the contract." However, Charging Party offers no facts to show that ESTA's action was arbitrary, discriminatory, or made in bad faith. (*United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.) There is no allegation that ESTA refused to assist Charging Party but assisted another similarly-situated member. (*Ibid.*) Furthermore, the charge does not establish ESTA's decision not to assist Charging Party was "without a rational basis or devoid of honest

judgment." (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M.) ESTA told Charging Party it would not assist him because it does not get involved with worker's compensation matters. (*Ibid.*) Moreover, ESTA had already considered Charging Party's leave credit issue when it partook in the ruling for the District on Charging Party's grievance. (*Ibid.*) Thus, the charge does not demonstrate that ESTA breached its duty of representation.

CONCLUSION

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 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 August 14, 2017,[10] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Keith B. LaMar
Regional Attorney

KBL

---

[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.*)

[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.)