STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KIMBERLY ROSALES, et al., Charging Parties, v. LAKE ELSINORE TEACHERS ASSOCIATION, Respondent.	Case No. LA-CO-1709-E PERB Decision No. 2562 May 2, 2018

Appearance: Kimberly Rosales, Representative for Kimberly Rosales, et al.

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 Kimberly Rosales, David Pickett, Victoria Pickett, and Lori Edwards (collectively, Charging Parties) from the dismissal (attached) of their unfair practice charge by PERB's Office of the General Counsel. As amended, the charge alleged that the Lake Elsinore Teachers Association violated the Educational Employment Relations Act (EERA)[2] by breaching its duty of fair representation and retaliating against Charging Parties for engaging in protected activity.

[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, this decision 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.

The Board has reviewed the entire case file and Charging Parties' appeal. Because the appeal fails to comply with PERB Regulation 32635, we dismiss the appeal and adopt the warning and dismissal letters as the decision of the Board itself and affirm the dismissal.

DISCUSSION

The requirements for an appeal from the dismissal of an unfair practice charge are set forth in PERB Regulation 32635. The appeal must: "(1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken; (2) Identify the page or part of the dismissal to which each appeal is taken; [and] (3) State the grounds for each issue stated." (PERB Reg. 32635, subd. (a).) In addition, "[u]nless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635, subd. (b).)

To satisfy the requirements of PERB Regulation 32635, subdivision (a), the appeal must sufficiently 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; *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent's dismissal fails to comply with PERB Regulation 32635, subdivision (a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381; *Lodi Education Association (Hudock)* (1995) PERB Decision No. 1124; *United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge without identifying any error or grounds for reversal does not comply with PERB Regulation 32635, subdivision (a). (*Contra Costa County Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.) An appeal that

fails to comply with PERB Regulations is subject to dismissal on that ground alone. (*American Federation of State, County & Municipal Employees, Local 2620 (McGuire)* (2012) PERB Decision No. 2286-S, pp. 2-3.)

The appeal in this case fails to meet these standards. It is a three-and-a-half page document, more than half of which appears under the heading of "Additional Background Inforamation [*sic*]." This is followed by four paragraphs under the heading of "Contentions," and, then the first and only reference to the dismissal: "The Charging Parties are requesting that the Board review and overturn the board agent's dismissal in this instant case, LA-CO-1709-E." It concludes with "Thank you," and a declaration verifying the statements in the appeal under penalty of perjury. Thus, the appeal includes only a single reference to the Board agent's dismissal, and no reference to the dismissal's substance. It therefore fails to comply with PERB Regulation 32635, subdivision (a).[3]

Accordingly, we dismiss the appeal, affirm the dismissal of the charge, and adopt the Office of the General Counsel's warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-1709-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Gregersen and Member Banks joined in this Decision.

[3] This conclusion makes it unnecessary to determine whether Charging Parties have included new charge allegations or new supporting evidence in their appeal, and whether they have established good cause for doing so, as required by PERB Regulation 32635, subdivision (b).

PUBLIC EMPLOYMENT RELATIONS BOARD

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November 17, 2017

Kimberlv Rosales c/o Lori Edwards

Re: *Kimberly Rosales, et al. v. Lake Elsinore Teachers Association*
Unfair Practice Charge No. LA-CO-1709-E
DISMISSAL LETTER

Dear Ms. Rosales:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 20, 2017.[1] Kimberly Rosales, David Pickett, Victoria Pickett, and Lori Edwards (Charging Parties), allege that the Lake Elsinore Teachers Association (LETA or Respondent) violated Educational Employment Relations Act (EERA or Act)[2] by breaching its duty of fair representation and by retaliating against Charging Parties for engaging in conduct protected by EERA.

On April 10, Charging Parties filed a First Amended Charge (FAC). Charging Parties alleged that LETA's conduct, with respect to grievances filed in 2014 and a grievance filed by David Pickett (Pickett) in or about April 2016, demonstrated that LETA had breached its duty of fair representation and retaliated against Charging Parties.

Charging Parties were informed in the attached Warning Letter dated May 30 (WL), that the initial charge and FAC did not state a prima facie case. The WL informed Charging Parties of their burden to state a prima facie case, the statute of limitation and the standards for establishing a breach of the duty of fair representation, retaliation, and interference. The WL informed Charging Parties that:

- LETA does not owe a duty of fair representation in extra-contractual proceedings such as PERB hearings (WL, pp. 5-6);
- The charge lacked facts demonstrating that the allegations concerning the handling of Pickett's grievance were timely filed (WL, p. 7) and, even if timely filed, none of Charging Parties' various theories were sufficient to demonstrate that LETA violated the duty of fair representation (WL, pp. 7-8);

[1] All dates refer to the year 2017, unless otherwise noted.

[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.

- The charge did not state a prima facie case of retaliation because there was no information demonstrating that a reasonable person under the same circumstances would consider LETA's conduct to have an adverse impact on the employee's employment (WL, pp. 9-10); and
- The charge did not state a prima facie case of interference because there were no allegations showing that Charging Parties' exercise of rights under EERA were harmed (WL, p. 10).

The WL advised Charging Parties that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Parties should amend the charge. Charging Parties were further advised that, unless they amended the charge to state a prima facie case or withdrew it on or before June 9, the charge would be dismissed.

Kimberly Rosales (Rosales) requested an extension of time to July 7, for Charging Parties to file an amended charge, and the request was granted. Rosales requested an additional extension of time to August 7, and the request was granted.

On August 7, Charging Parties filed a Second Amended Charge (SAC) that asserted again that LETA violated EERA with respect to its conduct at PERB hearings in September and October 2016 and with respect to its handling of Pickett's grievance. The SAC also contained new allegations that Charging Parties labeled "Violation One" through "Violation Nine."

Charging Parties were informed in the attached Second Warning Letter (SWL) dated August 21, that the SAC did not state a prima facie case. The SWL also informed Charging Parties of the specific statute of limitations standard applicable to an allegation that a union breached the duty of fair representation. Charging Parties were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Parties should amend the charge. Charging Parties were further advised that, unless they amended the charge to state a prima facie case or withdrew it on or before August 31, the charge would be dismissed. On August 30, Lori Edwards (Edwards) requested an additional extension of time to September 11, and the undersigned Board agent granted the request.

On September 11, Charging Party filed a Third Amended Charge (TAC). On September 19, Charging Parties filed their Fourth Amended Charge (Fourth AC). On November 14, Charging Parties filed their Fifth Amended Charge (Fifth AC.)

ALLEGATIONS CONTAINED IN THE TAC

LETA President's testimony at PERB hearings

In the TAC, Charging Parties dispute the statement in the WL and SWL that LETA does not owe a duty of fair representation in extra-contractual proceedings such as PERB hearings. Charging Parties state:

> In his testimony, [LETA President] Cavanaugh [(Cavanaugh)] stated that he was testifying voluntarily in the extra-contractual forum as the LETA President;
>
> [T]he LETA President appeared at the hearing without a subpoena as a "voluntary" representative of the "Association Members";
>
> Once LETA volunteered to represent the members in an extra-contractual forum as the exclusive representative[,] a duty of fair representation attached to the LETA President's testimony.

Charging Parties cite *California Union of Safety Employees (John)* (1994) PERB Decision No. 1064-S and *California State Employees Association (Parisi)* (1989) PERB Decision No. 733-S for the proposition that "A union may not have the obligation to represent an employee in a [PERB hearing], but if the union does undertake such representation voluntarily, it is held to a standard of care equivalent to the duty of fair representation." However, there are no facts to support that Cavanaugh, or LETA, represented Charging Parties in the formal hearing held in September 2016 in Unfair Practice Charge (UPC) No. LA-CE-6082-E. The allegation that "LETA volunteered to represent members in an extra-contractual forum as the exclusive representative" is directly contradicted by other information provided by the Charging Parties. For example, Charging Parties asserted that Cavanaugh was coached by the District and voluntarily testified on the District's behalf at the PERB hearings. In addition, the proposed decision in that matter, dated November 29, 2016, describes the Charging Parties as representing themselves and does not state that LETA represented Charging Parties at the hearing.[3] It is therefore apparent that LETA did not represent Charging Parties in an extra contractual forum. Thus, the cases cited by Charging Parties are inapplicable to the facts as alleged.

Charging Parties' additional allegation that LETA did not authorize Cavanaugh to testify or "to present an official position of the Association regarding the swapping of unit member's assignments" (TAC, p. 3), also does not provide sufficient information to establish that LETA owed any duty of fair representation to Charging Parties in the PERB hearing.

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[3] It is appropriate for PERB to take notice of information contained in its own records. (SWL, fn. 3, citing *Workforce Investment Board* (2014) PERB Order No. Ad-418-M; *County of Riverside* (2012) PERB Decision No. 2280-M; *Antelope Valley Union High School District* (2000) PERB Decision No. 1402.) As also stated in the SWL, the Board has held that "the pursuit of similar charges based on essentially the same circumstances…may be considered an abuse of PERB's process," and that, "[t]he repeated presentation of charges based on circumstances which have been considered by the Board in related cases previously suggests an abuse of that process." (SWL, fn.3, citing *Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Deglow)* (1997) PERB Decision No. 1238, quoting *Los Rios College Federation of Teachers (Deglow)* (1996) PERB Decision No. 1133.)

To the extent that Charging Parties appear to assert that LETA was required to represent them in their PERB hearing involving their charge against the Lake Elsinore School District (District), Charging Parties do not provide any legal authority supporting such assertion.

The Pickett Grievance

Charging Parties devote several pages of their TAC to make multiple assertions about Pickett's grievance. It appears that these are Charging Parties' salient points:

> LETA never filed the Pickett Grievance at Level 3 [thus it] could not have been labeled by LETA as "resolved".... The facts demonstrate LETA processed Mr. Pickett's grievance in a perfunctory fashion....
>
> On or about March 14, 2017 the Charging Parties learned that LETA considered the Pickett Grievance "resolved" and then had also improperly placed his grievance in abeyance.... Mr. Pickett was also away from work due to surgery from May-August and he could not have known about LETA's grievance mishandling due to LETA failing to perform their ministerial duties and keep him informed. [Citations.]
>
> In order to place Mr. Pickett's grievance in abeyance LETA first needed to inform Mr. Pickett that they wished to place his grievance in abeyances. Next, a formal agreement was to be constructed between LETA and the District and a copy provided to Mr. Pickett. Mr. Pickett was never informed of LETA['s] desire to place his grievance in abeyance and he was never provided a copy of the abeyance agreement. He also never received the contractually mandated grievance award (Article 8.7.3.) LETA also could not consider Mr. Pickett's grievance resolved and then place it in abeyance as unresolved (arbitrary, discriminatory, and bad faith grievance handling).

(TAC, p. 34.) Charging Parties also discuss past practices with respect to teacher assignments and swapping of assignments, but it is not clear how this relates to the charge.[4] The swapping allegations lack a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. (WL, pp. 4-5.) It further appears that allegations concerning swapping, as presented in the TAC, are allegations that Charging Parties knew of, or should have known of,

[4] Allegations concerning the swapping of teacher assignments were the subject of the November 29, 2016 Proposed Decision, UPC No. LA-CE-6082-E. (*Workforce Investment Board*, *supra*, PERB Order No. Ad-418-M [it is appropriate for the Board agent to take notice of information contained in PERB's own records]; *County of Riverside*, *supra*, PERB Decision No. 2280-M [same]; *Antelope Valley Union High School District*, *supra*, PERB Decision No. 1402 [same].)

more than six months prior to the filing of the instant charge or the filing of the amended charges. Thus, the allegation that LETA acted unlawfully because members did not know about swapping opportunities appears to be untimely and/or fails to demonstrate a prima facie violation of EERA. (PERB Regulation 32615(a)(5); *State of California (Department of Food and Agriculture*) (1994) PERB Decision No. 1071-S (*Dept. of Food and Agriculture*); *Charter Oak Unified School District* (1991) PERB Decision No. 873.) The allegations that LETA favored some members over others in providing swapping opportunities and did not allow members to communicate their views about swapping also appear to be untimely and/or fail to demonstrate a prima facie violation of EERA. (*Ibid.*)

The WL informed Charging Parties that it was not possible to determine from the initial charge or FAC whether allegations concerning the Pickett Grievance were timely, and even if timely, the allegations did not provide information demonstrating that LETA's conduct violated the duty of fair representation, or that LETA should not have been entitled to use its discretion to determine whether to pursue Pickett's grievance. (WL, pp. 5-8; SWL, p. 2.) The SWL explained that the SAC also failed to demonstrate that LETA handled Pickett's grievance, even if "meritorious," in a manner that breached the duty of fair representation. (SWL, pp. 3-4.)

The information provided in the TAC conflicts with information provided in the initial charge, FAC and SAC. For example, the TAC asserts that Charging Parties learned on March 14, 2017, that LETA considered Pickett's grievance resolved, yet Charging Parties' prior filings stated that Charging Parties learned on September 6, 2016, that LETA listed the grievance as being in "abeyance" and on September 16, 2016, the grievance was considered "resolved." However, even assuming that Pickett, in the exercise of reasonable diligence, did not know or should not have known until March 14, 2017, that further assistance from the union with respect to his grievance was unlikely, the charge still does not specify conduct that shows that LETA's handling of Pickett's grievance was arbitrary, discriminatory, or in bad faith. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) Charging Parties' various assertions about how they believe the grievance should have been handled, for example, that LETA was to construct a formal abeyance agreement, do not provide sufficient information showing how or in what manner LETA's action or inaction was without a rational basis or devoid of honest judgment. (*Ibid.*) Also, the allegations are unclear because it appears that Charging Parties are simultaneously alleging that LETA considered the grievance to be in abeyance and then ten days later considered it resolved, and that LETA considered the grievance resolved and then place it in abeyance. (PERB Regulation 32615(a)(5); *Department of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District*, *supra*, PERB Decision No. 873.)

SAC "Violation One" as revisited in the TAC

Charging Parties assert that on March 7, 2017, Cavanaugh sent an "unprofessional, hostile and condescending email communication" in response to Edward's e-mail message discussing "two arguably meritorious evaluation grievance issues." (TAC, pp. 17-23.) Charging Parties assert that Cavanaugh forwarded the e-mail message to other unit members, without Edward's authorization, in order to discredit Edwards, and, thereby, demonstrated "animosity against

[Edwards] for her participation in protect[ed] union activities." Charging Parties also assert that Cavanaugh breached confidentiality, that certain peers refuse to speak with Edwards, and that the District "is consistently violating her right to relevant and necessary information when representing members and constantly conjuring up false complaints against her, calling her into petty meetings, and subjecting her to disrespectful comments due to LETA animosity against her." Charging Parties further assert that Cavanaugh had an obligation to raise with the grievance committee the issue of whether "Deans of Students" were the proper evaluators of certificated educators at Edwards' work site. Charging Parties further assert that LETA "failed to perform a proper investigation" into the issue and "failed to meet and negotiate in good faith." Charging Parties also assert that violation of the duty of fair representation "has to be occurring" because there are no grievances "in a 1,000 unit member Association."

Charging Parties cite *San Bernardino City Unified School District* (1998) PERB Decision No. 1270 for the proposition that Cavanaugh's comments "violated EERA." However *San Bernardino City Unified School District*, stands for the proposition that a school district employee relations director violated the duty of the employer to refrain from contributing support or encouragement to any union in preference to another. (*Id.* at p. 73; § 3543.5(d).) Since section 3543.5(d) prohibits specified conduct by the employer, it is inapplicable to the instant charge filed against LETA.

To the extent that Charging Parties assert that LETA acted wrongfully because it failed to pursue or investigate meritorious grievance issues and failed to present the issues to the LETA grievance Board, the charge lacks information demonstrating that Charging Parties attempted to file or present a grievance that LETA ignored or otherwise mishandled. It instead appears that Cavanaugh disagreed with Edward's contentions regarding which District employees were allowed to evaluate teacher performance. However, as noted in the WL, mere disagreement with the union's strategy does not demonstrate a breach of the duty of fair representation. (WL, p. 6, citing *Inlandboatmans Union of the Pacific* (2012) PERB Decision No. 2297-M.) The information provided is insufficient to demonstrate that LETA's conduct was arbitrary, discriminatory, or in bad faith. (WL, pp. 5-6; SWL, p. 3, citing *Fremont Unified District Teachers Association, CTA/NEA (King)*, *supra*, PERB Decision No. 125 & *United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.)

The charge also lacks specific non-conclusory information demonstrating that LETA's conduct had an adverse impact on Edwards' or Charging Parties' employment. (WL, pp. 5 & 9, citing *Department of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District*, *supra*, PERB Decision No. 873 & *Newark Unified School District* (1991) PERB Decision No. 864.) Charging Parties' assertion that a violation of the duty of fair representation "has to be occurring" because there are no grievances "in a 1,000 unit member Association," is similarly conclusory and lacks sufficient facts to state a prima facie case. (*Ibid.*) The allegations that the District "is consistently violating [Edwards'] right to relevant and necessary information when representing members and constantly conjuring up false complaints against her, calling her into petty meetings, and subjecting her to disrespectful comments due to LETA animosity against her," are also conclusory and lack a clear and concise statement of facts demonstrating that LETA's conduct is arbitrary, discriminatory or in bad faith or that LETA has taken action against Charging Parties that a reasonable person

under the same circumstances would consider to have an adverse impact on the employee's employment. (*Ibid.*)

To the extent that Charging Parties assert that Cavanaugh or LETA "failed to meet and negotiate in good faith," Charging Parties lack standing to allege violations of sections which require good faith negotiations between employee representatives and employers. (*State of California (Department of Corrections)* (1993) PERB Decision No. 972-S.) Neither LETA nor the District owe Charging Parties a duty to bargain in good faith, instead, the duty runs solely between LETA and the District. (See *ibid.*)

SAC "Violation Three" as revisited in the TAC

In the SAC, Charging Parties discussed "inappropriate and offensive political propaganda" sent by Cavanaugh to Edwards on December 2, 2016 and LETA's failure to invite Edwards to a LETA Executive Board Meeting that was called "to hear Edward's concerns on the matter in violation of its duty of fair representation." Charging Parties cited "exhibit 24." The SWL informed Charging Parties that exhibit 24 appeared unrelated to the allegation as it consisted of transcripts from a PERB hearing. In the TAC, Charging Parties clarify that the correct exhibit is "24a." An exhibit labeled "24a" could not be located by the undersigned Board agent in the initial charge, the SAC or the TAC. However, exhibit 23 consists of copies of a four-page e-mail exchange and the next two documents, before exhibit 24, consist of copies of a two-page e-mail and a one-page e-mail. Both concern Edwards' question to Cavanaugh about whether the Deans of Students may evaluate certificated staff. The second e-mail also references an intervention position.

The TAC also provides citations to PERB Decisions holding that unions must provide some opportunity for, and must consider, bargaining employees' views regarding contract proposals and ratification. (TAC, p. 23, citing, e.g., *United Teachers Los Angeles (Raines, et al)* (2016) PERB Decision No. 2475.) While PERB case law holds that an exclusive representative must provide some access and consideration of the views of various groups of employees in the context of proposals and negotiations for an agreement with the employer, it is not clear that the duty would apply in the instant case where LETA failed to invite Edwards to an Executive Board Meeting that was called "to hear Edward's concerns on the matter."

SAC "Violation Four" as revisited in the TAC

Pages 24 through 29 of the TAC are devoted to "Violation Four" which alleges that on March 16, Cavanaugh sent an e-mail message to employee "BC" "unjustly degrading Ms. Edwards." Charging Parties state "[t]he LETA President arbitrarily, discriminatorily, and in bad faith contended Ms. Edwards and BC had no rights to relevant and necessary information prior to an investigatory or disciplinary hearing." (TAC, p. 26.) Charging Parties also state that "BC was disturbed by LETA's President's statements and Edwards relinquished her participation in protected activities as BC['s] representative." Charging Parties also assert that Cavanaugh participated with the District to attend and testify in a PERB hearing concerning Charging Parties' claims about evaluation cycles and that Cavanaugh' conduct "cause[d] harm to the Charging Parties…." (TAC, p. 28.) Charging Parties also allege that Cavanaugh made a

hostile comment to Edwards, during the September 2016 PERB hearing, that "the District can do whatever they want to do." Charging Parties also state that Cavanaugh has hindered Edwards' ability to investigate and represent BC. (TAC, p. 28.)

To the extent that Charging Parties assert that LETA violated the duty of fair representation because it did not support Edwards' request to the District for relevant and necessary information, the statements quoted above are conclusory and do not provide specific information demonstrating that LETA's conduct was discriminatory, arbitrary or in bad faith, was without a rational basis, or that LETA failed to perform a ministerial act that completely extinguished Charging Parties' right to pursue their claims. (*Fremont Unified District Teachers Association, CTA/NEA (King)*, *supra*, PERB Decision No. 125; *United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.) Similarly, Charging Parties' statement that "there was no rational basis for the LETA President's reprisals against her…," fails to provide information supporting the conclusion that there were "reprisals", or indicating what was irrational about the LETA President's conduct. (*Ibid.*) Moreover, as the District owes a duty to LETA, and not to individual representatives such as Edwards, to provide relevant and necessary information, it appears that Charging Parties lack standing to allege that they are entitled to the information requested. (See *State of California (Department of Corrections)*, *supra*, PERB Decision No. 972-S.)

While the allegations seem to indicate that LETA's conduct had an impact on Edwards' ability to serve as a representative, the allegations do not demonstrate that a reasonable person under the same circumstances would consider Cavanaugh's refusal to support Edwards' request for information, or any other alleged conduct by LETA, to have an adverse impact *on the employee's employment*. (*Newark Unified School District*, *supra*, PERB Decision No. 864; *County of Tehama* (2010) PERB Decision No. 2122-M.)

To the extent that Charging Parties assert that LETA and/or Cavanaugh have "creat[ed] a hostile work environment for [Edwards] with District Administrators and hostility with other unit members," and that the LETA President is engaged in "racial profiling," such allegations are beyond PERB's jurisdiction. PERB's jurisdiction does not include the enforcement of other independent statutory schemes. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S.) PERB does not have jurisdiction over claims of racial discrimination. (*Berkeley Federation of Teachers, Local 1078, AFL-CI0 (Moore)* (1988) PERB Decision No. 658.) PERB also does not have jurisdiction over the claim that LETA intentionally inflicted emotional distress on Charging Parties. (*Regents of the University of California* (2012) PERB Decision No. 2300-H.) PERB also does not have jurisdiction over claims involving the Education Code that do not also state a violation of EERA. (*San Francisco Unified School District* (2009) PERB Decision No. 2040.)

SAC "Violation Five" as revisited in the TAC

Charging Parties assert that the District's refusal to provide necessary and relevant information to Edwards was a per se violation of EERA. (TAC, p. 31.) Charging Parties assert that the employee identified as "NA" had "a statutory right" to the requested information and that the information was "a requirement of Ms. Edwards[']s duty of fair representation as NA's

representative." Charging Parties assert that "the LETA President['s] actions and inactions worked in collusion with the District to take adverse action against NA and Ms. Edwards." (TAC, p. 32.) As above, the allegations fail to provide a clear and concise statement showing that LETA acted without a rational basis, or that LETA took an action that was adverse to Charging Parties' employment. (*Department of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District*, *supra*, PERB Decision No. 873; *Newark Unified School District*, *supra*, PERB Decision No. 864)

The TAC also alleges that LETA and the District violated the Collective Bargaining Agreement to take adverse action against Charging Parties. This allegation lacks a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. (*Department of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District*, *supra*, PERB Decision No. 873; *Newark Unified School District*, *supra*, PERB Decision No. 864.)

ALLEGATIONS IN THE FOURTH AC

The Fourth AC consists of nearly two dozen pages asserting once more that Edwards was the target of discrimination, hostility and union animus from Cavanaugh because of her race and because of her participation in protected activities. Charging Parties again assert that Cavanaugh provided testimony at PERB hearings that favored the District and harmed Edward's case against the District. Charging Parties assert that Cavanaugh falsely contended that Edwards was a substitute teacher, and that Cavanaugh failed to assist Edwards to correct the start date of her employment from August 16, 2007 to August 11, 2007. Charging Parties assert that Cavanaugh's testimony at PERB hearings shows that Cavanaugh did not make an honest effort to protect Edwards' seniority, classification, and benefit rights. Charging Parties assert that although Edwards tried repeatedly to get LETA to provide her fair and non-discriminatory representation, LETA retaliated against Edwards and deprived her of full-time employment rights because of her race and because of her union participation, and breached their duty of fair representation. As stated above, the allegations fail to provide information demonstrating the allegations are timely and also fail to provide a clear and concise statement showing that LETA acted without a rational basis, or that LETA took an action adverse to Charging Parties' employment. (*Department of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District*, *supra*, PERB Decision No. 873; *Fremont Unified District Teachers Association, CTA/NEA (King)*, *supra*, PERB Decision No. 125; *United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258; *Newark Unified School District*, *supra*, PERB Decision No. 864.)

ALLEGATIONS IN THE FIFTH AC

The Fifth AC consists of nearly two dozen pages asserting once more that Cavanaugh was biased against Charging Parties and provided false testimony at PERB hearings that favored the District and harmed Edward's case against the District. Charging Parties also assert that the testimony demonstrates that LETA improperly waived Charging Parties' statutory evaluation rights and "forced the District to violate the CBA and the Education Code." Charging Parties also assert that in November 2015, they provided a copy of "the October 2015

PERB ruling on the *Lukkarila* evaluation case to…Cavanaugh," "[h]owever, Cavanaugh told Rosales that 'the *Lukkarila* evaluation case did not apply to her' although the *Lukkarila* case replicated the same evaluation statutory law and CBA language as the LEUSD/LETA CBA language." Charging Parties assert that Cavanaugh admitted in his testimony that he provided no assistance to Charging Parties. Charging Parties cite *Service Employees International Union, Local 721 (Oliver)* (2015) PERB Decision No. 2462-C in support of their assertion that Cavanaugh "failed to provide quid pro quo representation related to the enforcement of the CBA during the hearing(s)."

In *Service Employees International Union, Local 721 (Oliver)*, *supra*, PERB Decision No. 2462-C, the Board determined that although the Trial Court Act did not contain a provision expressly imposing a duty of fair representation, the duty existed under the act, just as it does in other PERB-administered statutes. (*Ibid.*, pp. 1-2, fn. 1.) Charging Party's assertion that unions have a duty of fair representation as the quid pro quo for an employee organization's exclusive right to represent employees does not provide any information demonstrating that the union's duty of fair representation should be extended to extra-contractual proceedings. (WL, pp. 5-7, citing *SEIU Local 790 (Hein)* (2004) PERB Decision No. 1677; *California State Employees Association (Parisi)* (1989) PERB Decision No. 733-S; *California Union of Safety Employees (John)* (1994) PERB Decision No. 1064-S; *California State Employees Association (Carrillo)* (1997) PERB Decision No. 1199-S; see also pp. 1-3, *ante*.)

The allegations fail to provide information demonstrating the allegations are timely and also fail to provide a clear and concise statement showing that LETA acted without a rational basis, or that LETA took an action adverse to Charging Parties' employment. (*Department of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District*, *supra*, PERB Decision No. 873; *Fremont Unified District Teachers Association, CTA/NEA (King)*, *supra*, PERB Decision No. 125; *United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258; *Newark Unified School District*, *supra*, PERB Decision No. 864.)

CONCLUSION

The charge is hereby dismissed based on the facts and reasons set forth above, in the May 30 Warning Letter and in the August 21 Second 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 _____
Mary Weiss
Supervising Regional Attorney

Attachments

cc: Brenda Sutton-Wills, Staff Counsel, California Teachers Association

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820

August 21, 2017

Kimberly Rosales c/o Lori Edwards

Re: *Kimberly Rosales, et al. v. Lake Elsinore Teachers Association*
Unfair Practice Charge No. LA-CO-1709-E
SECOND WARNING LETTER

Dear Ms. Rosales:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 20, 2017.[1] Kimberly Rosales, David Pickett, Victoria Pickett, and Lori Edwards (Charging Parties), allege that the Lake Elsinore Teachers Association (LETA or Respondent) violated Educational Employment Relations Act (EERA or Act)[2] by breaching its duty of fair representation and by retaliating against Charging Parties for engaging in conduct protected by EERA.

On April 10, Charging Parties filed a First Amended Charge (FAC). Charging Parties alleged that LETA's conduct, with respect to grievances filed in 2014 and a grievance filed by David Pickett (Pickett) in or about April 2016, demonstrated that LETA had breached its duty of fair representation and retaliated against Charging Parties.

Charging Parties were informed in the attached Warning Letter dated May 30 (Warning Letter), that the above-referenced charge did not state a prima facie case. Charging Parties were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Parties should amend the charge. Charging Parties were further advised that, unless they amended the charge to state a prima facie case or withdrew it on or before June 9, the charge would be dismissed.

Kimberly Rosales (Rosales) requested an extension of time to July 7, for Charging Parties to file an amended charge, and the undersigned Board agent granted the request. Rosales requested an additional extension of time to August 7, and the undersigned Board agent granted the request.

[1] All dates refer to the year 2017, unless otherwise noted.

[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.

On August 7, Charging Parties filed a Second Amended Charge (SAC). The SAC provides further information in response to the deficiencies identified in the Warning Letter, discussed immediately below (ALLEGATIONS). The SAC also alleges nine additional violations, discussed later in this letter (NEW ALLEGATIONS).

ALLEGATIONS

Timeliness

The Warning Letter explained that allegations regarding conduct that Charging Parties knew of, or should have known of, prior to September 20, 2016, were untimely and that the allegation concerning Pickett's grievance lacked sufficient information to determine that the allegation was timely. However, the Warning Letter failed to provide the correct legal standard with respect to the statute of limitations that is applicable to an allegation that a union breached the duty of fair representation. The specific standard is:

> In cases involving the duty of fair representation, the six-month limitations period begins to run when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*United Faculty of Grossmont-Cuyamaca Community College District (Tarvin)* (2010) PERB Decision No. 2133.) Once the statute begins to run, the charging party cannot cause it to begin anew by making the same request over and over again and repeated refusals by a union to provide assistance also do not start the statute of limitations from running anew. (*California Media Workers Guild/CWA/Local 3921 (Zhang)* (2012) PERB Decision No. 2245-I.)

Duty of Fair Representation

The Warning Letter explained that allegations concerning LETA's conduct in the PERB hearings held in September and October 2016 did not state a prima facie case because the duty of fair representation does not extend to extra-contractual forums, such as PERB hearings. The Warning Letter also explained that the allegations concerning Pickett's April 2016 grievance did not establish a prima facie case.

The SAC asserts:

> [T]he facts in the Charging Party UPC filing demonstrate that the Association's conduct was arbitrary, discriminatory, void of honest judgment, grossly negligent, and in bad faith and LETA's failure to provide necessary and relevant information to the Charging Party at each sta[g]e of the grievance process foreclosed any remedy for Mr. Pickett....

The SAC asserts that LETA was not entitled to exercise its discretion to determine whether to pursue Pickett's grievance because: the grievance was meritorious, LETA's conduct did not conform to its by-laws and the collective bargaining agreement, and "the violations exceeded the *mere* entitlement of LETA to use its own discretion...." It appears that Charging Parties assert that LETA was negligent and that LETA "purposely or recklessly" kept Charging Parties uninformed or misinformed as to matters affecting their employment," and that LETA was "the employees' only reasonable source of such information." In contrast, the FAC alleged that LETA Representative Mario Montano (Montano) discussed the grievance with Pickett and asked Pickett to prepare a summary on April 19, 2016 and again asked Pickett to provide a "response to Level 3" on May 18. The FAC further alleged that Lori Edwards (Edwards) requested a copy of the Grievance Tracking Matrix on September 6, 2016, and the LETA office manager provided it, and the matrix indicated the grievance was in abeyance. The FAC also alleged that a September 16, 2016 matrix indicated the grievance was resolved.

The Warning Letter informed Charging Parties that:

> 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.)

The Warning Letter also informed Charging Parties that, to establish a prima facie case of a breach of the duty of fair representation, Charging Parties must provide information showing that LETA's conduct was arbitrary, discriminatory, or in bad faith. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.)

The SAC does not provide a clear and concise statement of the facts and conduct alleged to constitute a breach of the duty of fair representation. (PERB Regulation 32615(a)(5); *Department of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District*, *supra*, PERB Decision No. 873.) The information does not specify conduct, with respect to Pickett's grievance, that shows that LETA's handling of the grievance was arbitrary, discriminatory, or in bad faith. (*Fremont Unified District Teachers Association, CTA/NEA (King)*, *supra*, PERB Decision No. 125; *United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.) Charging Parties' assertion that the grievance was

meritorious does not provide information demonstrating that LETA's decision, on September 16, 2016, to resolve or not pursue the grievance further, was arbitrary. Charging Parties assert that LETA President Cavanaugh (Cavanaugh) was biased against Pickett, because Pickett had previously filed unfair practice charges and questioned or criticized LETA leadership and decisions, however, the SAC does not provide information demonstrating that LETA's processing of Pickett's grievance was discriminatory. Charging Parties' assertion, in the SAC, that LETA failed to keep Pickett apprised of the status of the grievance, does not correspond with information provided in the FAC that indicates LETA provided information about the grievance to Pickett in April and May, 2016, and to Edwards in September 2016. The charge, therefore, lacks sufficient information to demonstrate that LETA breached its duty of fair representation with respect to Pickett's April 2016 grievance.

Retaliation

The Warning Letter explained that the charge did not demonstrate that LETA's conduct with respect to Pickett's April 2016 grievance had an adverse impact on Charging Parties' employment.

The SAC asserts that Pickett endured an adverse action when, in March 2015, he was forced to take an additional student into his class in violation of the CBA. Assuming that such action had an adverse impact on Pickett's employment, the adverse action occurred outside of the statute of limitations. (*County of San Diego (Health & Human Services)* (2009) PERB Decision No. 2042-M [in retaliation cases, the statute of limitations begins to run when the charging party discovers the conduct that constitutes the unfair practice].)

The SAC also asserts that LETA's failure to notify Pickett that the District filed an untimely response to the grievance on May 11, 2016, and LETA's failure to pursue the remedy requested in the grievance, was adverse to Pickett. The allegation is also untimely as the action occurred outside of the statute of limitations. (*County of San Diego (Health & Human Services)*, *supra*, PERB Decision No. 2042-M.)

Interference

The Warning Letter explained that the charge did not identify the harm to Charging Parties' EERA rights that LETA's conduct tends to or does cause. (*State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S.) The SAC does not provide sufficient information demonstrating that LETA's conduct within the statutory period tends to or does cause harm to Charging Parties exercise of rights protected by EERA. For example, Charging Parties assert that LETA's conduct with respect to the September-October PERB formal hearings, including testimony by agents of LETA, caused them harm. However the charge lacks information demonstrating that Charging Parties' exercise of EERA rights were harmed. (*Ibid.*)

NEW ALLEGATIONS

Under the heading "Violation Number One," Charging Parties assert that on March 1, Edwards asked Cavanaugh "'Are Deans of Students' able to evaluate and act in the same capacity as a principal over 'certificated staff' [and] [c]an an elementary teacher be evaluated by an Administrator who has never taught elementary students nor have a Multiple Subject Teaching Credential[?]" (Emphases omitted.) On or about March 7, Cavanaugh responded with an "unprofessional, hostile, and condescending email communication" to "Edwards [and] other unit members." The e-mail message also "belittled" Edwards' "concerns as 'opinions and conjectures.'" The SAC also alleges that "the LETA [P]resident always sides with the District without performing a proper investigation of their grievance issues."

Under the heading "Violation Number Two," Charging Parties assert that "Grade levels are determined by the State Legislature [and the] [D]istrict has no authority to create or change grade levels." The SAC then provides information concerning a 2014 grievance filed by Edwards and unfair practice charge numbers LA-CE-5908-E, LA-CE-6082-E, LA-CE-6088-E and LA-CE-6118-E. It appears that Charging Parties assert that "on or about April 17," they learned about testimony at a PERB hearing that indicates that Cavanaugh violated his duty of fair representation by "creat[ing] and sign[ing] an unlawful MOU on the day of Edwards' mediation in order to thwart her grievance resolution and acted in an arbitrary, discriminatory, and in bad faith manner in her grievance process." The SAC does not provide the date of testimony, however, PERB records indicate that the transcript containing the testimony is from a formal hearing for unfair practice charge number LA-CE-5908-E, conducted in May and June, 2015.[3]

Under the heading "Violation Number Three," Charging Parties assert that on or about December 2, 2016, Cavanaugh "emailed inappropriate and offensive political propaganda to Ms. Edwards (Exhibit 24)." Exhibit 24, however, is a copy of pages 82 and 84 of a transcript from a formal hearing. The SAC asserts that Edwards requested that LETA and Cavanaugh protect unit members from "the president's inappropriate political message… (which is not allowed as per the District Board Policies) (Exhibit 24)." The SAC further asserts that LETA held an Executive Board Meeting but "failed to invite Edwards and/or any of the Charging Parties…to hear her concerns on the matter in violation of its duty of fair representation."

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[3] It is appropriate for PERB to take notice of information contained in its own records. (*Workforce Investment Board* (2014) PERB Order No. Ad-418-M; *County of Riverside* (2012) PERB Decision No. 2280-M; *Antelope Valley Union High School District* (2000) PERB Decision No. 1402.) Charging Party is advised that the Board has held that "the pursuit of similar charges based on essentially the same circumstances…may be considered an abuse of PERB's process," and that, "[t]he repeated presentation of charges based on circumstances which have been considered by the Board in related cases previously suggests an abuse of that process." (*Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Deglow)* (1997) PERB Decision No. 1238, quoting *Los Rios College Federation of Teachers (Deglow)* (1996) PERB Decision No. 1133.)

Under the heading "Violation Number Four," Charging Parties assert that after Edwards requested information from the District, in connection with an investigatory meeting of LETA member "BC," Cavanaugh, on March 13, talked to BC by phone, and Edwards was surreptitiously listening in, and Cavanaugh "was very critical of Ms. Edwards... (Exhibit 26)." Exhibit 26 is an e-mail message dated March 13 from BC to Edwards and Cavanaugh and does not contain any information related to the allegation.

On March 16, Cavanaugh sent an e-mail message to BC "unjustly degrading Ms. Edwards." Exhibit 27 appears to the be the e-mail message from Cavanaugh to BC, wherein Cavanaugh states, among other things, that "As for Lori and I being on the same page, I assure you we are not. My approach as President has been to collaborate with the District…[, h]owever, there are some…who see the District as the enemy…." According to the SAC, BC told Edwards that she was not comfortable in the meeting with Cavanaugh and the administrator, that Cavanaugh did not say anything and did not request relevant and necessary information. BC did not feel her rights were being protected because she believed she was entitled to relevant and necessary information prior to the meeting but Cavanaugh disagreed. On March 17, Edwards sent an e-mail message to LETA and the District "to protect the unit members contractual rights." The SAC further states:

> Many unit members show unwarranted hostility towards Ms. Edwards and are afraid to seek representation from Ms. Edwards due to inappropriate comments about the Charging Party from the union president (including his racial profiling). Due to the hostility the union president has created for Ms. Edwards she is unable to regularly attend site rep council meetings, voice her concerns in site rep council meetings, receive extra duty assignments, receive her correct seniority date and earned seniority, her correct classification, constant removal from her assignments, unlawful class size overages, false complaints, repeated attacks by District administrators in violation of the CBA, told to take her complaints to PERB and so. [*sic*]

Under the heading "Violation Number Five," Charging Parties assert that on or about March 13, Edwards was representing unit member "NA" "in a contentious retaliation action against her for [enforcing] her contractual and EERA protected rights to representation and requesting necessary information prior to attending an investigatory and/or disciplinary hearing." "The Charging Parties[] contend [that] the LETA President [has] conflicts of interests and… numerous teachers are being called into…meetings without [] lawful assistance and proper representation…." On March 13, Edwards sent an e-mail message to the District and asked a series of questions, relevant to her representation of NA at the meeting, including which student's IEP notes would be addressed, whether such notes related to a request to test a student, whether the Principal and School Psychologist were invited and did attend such meeting, and what actions would be addressed that "may turn disciplinary. On March 14, the District informed Edwards in an e-mail message that "Upon meeting today we will provide you with the answers and we can discuss." Edwards replied by e-mail message, and included Cavanaugh as a carbon copy (cc:) recipient, and stated:

> This is not the way the system works. I need the information to properly represent [NA.] If you have time to email me repeatedly then you have the time to answer these four simple questions. Thereby, you are knowingly and willfully failing to provide relevant information needed to properly represent the unit member. If you are unable to provide the information at this time, I am again requesting [that] you reschedule the meeting until you are ready to provide me with the needed information.

The District responded that "Upon meeting today we will provide you with the answers and we can discuss. We will still meet today at 3:00." Edwards replied and asserted "We will need to reschedule the meeting until after I receive the information so I may properly represent [NA]." Cavanaugh replied to NA, Edwards, and the District, by e-mail message and stated, among other things, "[t]here isn't anything that requires the District to supply you with information prior to the meeting." Edwards replied to all by e-mail message and stated "this is a DFR," and disagreeing with all the assertions made in Cavanaugh's e-mail message. Cavanaugh replied and stated "I am trying to provide a Unit Member with accurate information, which she is not getting from you...." The District sent an e-mail message to all and NA stating that NA did not appear at the meeting and "We now also need to meet to document your insubordination in refusing to meet with administration at the scheduled time...." Edwards then sent an e-mail message to all and, among other assertions, asked the District "Please cease and desist from all adverse employment actions against [NA]."

Charging Parties assert that Cavanaugh is violating the duty of fair representation "by blindsiding unit members in investigatory and disciplinary meetings by refusing them the Weingarten rights and relevant and necessary information. The LETA President is misinforming and extinguishing unit members of their protected rights...."

Under the heading "Violation Number Six," Charging Parties assert that "As per the LETA [P]resident's testimony [at a PERB hearing on September 20, 2016,] he failed to properly investigate whether Edwards...was entitled to her seniority and other contractual benefits prior to his agreement with the District's position that the Charging Party did not earn her seniority...." The SAC further alleges that Cavanaugh "is constantly taking adversarial action against her efforts to have her employment status corrected and interfering in her participation activity due to her African American status."

Under the heading "Violation Number Seven," Charging Parties assert that "[t]here are numerous instances of Union Animus" with respect to Pickett. The SAC provides information concerning Cavanaugh's actions from 2011 through March 18, 2016. The SAC asserts that on March 29, Pickett was reviewing "Edwards' union emails" and discovered "snide" comments made by Cavanaugh in an e-mail message that Cavanaugh sent to a large number of LETA site representatives on June 2, 2015. The SAC alleges that Pickett's reputation was harmed by Cavanaugh's 2015 e-mail message.

The SAC also alleges that, on or about March 21, Pickett asked Cavanaugh and LETA Office Manager Marla Banks (Banks) to place him on the "Master Distribution List" to receive

"Weekly Enrollment Reports and Master Schedules." Cavanaugh replied by e-mail message and informed Pickett that he could get the information from his site representative each week. Charging Parties assert that this could result in delays and that Cavanaugh was "brusk" in his e-mail message.

Under the heading "Violation Number Eight," Charging Parties assert that on or about December 15, 2016, the District denied Victoria Pickett's (V. Pickett) request for union representation at a meeting. In addition "Cavanaugh did not offer to represent her" and also stated "this could not possibly be a Weingarten affair" and "sided with the District." The SAC states that "[t]he deliberate failure by LETA or its president to represent Mrs. Pickett when help is requested is exactly why she cannot get any reasonable accommodations, or even representation beyond her site rep for her ADA needs to be supported, and why she knows she cannot even request any representation no matter what harm she is exposed to by her employer."

Under the heading "Violation Number Nine," Charging Parties assert that Kim Rosales (Rosales) has "been experiencing ongoing retaliation and harassment from [LETA] due to her participation in a May 2015 PERB hearing, duties as [a] LETA site rep and other EERA protected activities that led to filing charges in PERB[] Case Nos. LA CE 6082 and 6088." The SAC alleges that "Cavanaugh failed to fully investigate" Rosales concerns about "her certificated permanent status evaluation cycle." The SAC further alleges that LETA violated the law with respect to its conduct regarding Rosales from "2013 to 2015."

Timeliness

The Warning Letter explained that 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.)
As discussed above, in cases involving the duty of fair representation, the six-month limitations period begins to run when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (See p. 2, *ante*, citing *United Faculty of Grossmont-Cuyamaca Community College District (Tarvin)*, *supra*, PERB Decision No. 2133.) Once the statute begins to run, the charging party cannot cause it to begin anew by making the same request over and over again and repeated refusals by a union to provide assistance also do not start the statute of limitations from running anew. (*California Media Workers Guild/CWA/Local 3921 (Zhang)*, *supra*, PERB Decision No. 2245-I.)

The instant charge was filed on March 20, therefore, allegations concerning conduct that Charging Parties knew or should have known about, before September 20, 2016, are generally untimely. With respect to claims alleging a breach of the duty of fair representation, such allegations are untimely if Charging Parties knew or should have known before September 20, 2016, that further assistance from LETA was unlikely.

The following allegations raised in the SAC are untimely because the information provided indicates that they involve conduct that Charging Parties knew about, or should have known about, prior to September 20, 2016 (*Gavilan Joint Community College District*, *supra*, PERB Decision No. 1177; *County of San Diego (Health & Human Services)*, *supra*, PERB Decision No. 2042-M), or that Charging Party knew, or should have known, that further assistance was unlikely, prior to September 20, 2016 (*United Faculty of Grossmont-Cuyamaca Community College District (Tarvin)*, *supra*, PERB Decision No. 2133):

- Violation Number Two: Concerns about a 2014 grievance and testimony at a June 2015 formal hearing, which testimony Charging Parties assert that they learned of "on or about April 17."
- Violation Number Seven: The assertions that "[t]here are numerous instances of Union Animus" against Pickett by Cavanaugh from 2011 through March 18, 2016, and that on March 29, Pickett discovered snide comments made by Cavanaugh in a 2015 e-mail message that Cavanaugh sent to a large number of LETA site representatives.
- Violation Number Nine: Rosales experienced ongoing retaliation and harassment by LETA because she participated in a May 2015 PERB hearing.

Duty of Fair Representation and Retaliation

As provided in the Warning Letter, Charging Parties must provide information showing that LETA's conduct was arbitrary, discriminatory, or in bad faith. (*Fremont Unified District Teachers Association, CTA/NEA (King)*, *supra*, PERB Decision No. 125; *United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.) The Warning Letter also provided that mere legal conclusions are not sufficient to state a prima facie case. (*Department of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District*, *supra*, PERB Decision No. 873.) As also provided in the Warning Letter, to demonstrate that LETA retaliated against Charging Parties, the charge must provide sufficient information demonstrating that the (1) the employee exercised rights under EERA; (2) the employee organization had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employee organization took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

The following allegations are conclusory and lack sufficient information demonstrating that LETA's conduct was discriminatory, arbitrary or in bad faith, was without a rational basis, or that LETA failed to perform a ministerial act that completely extinguished Charging Parties' right to pursue their claims. (*United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258; *Reed District Teachers Association, CTA/NEA (Reyes)*, *supra*, PERB Decision No. 332; *Coalition of University Employees (Buxton)*, *supra*, PERB Decision No. 1517-H; *Department of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District*, *supra*, PERB Decision No. 873.) The following allegations also lack specific non-conclusory information demonstrating the four *Novato* elements that are necessary to establish a prima facie case of retaliation:

- Violation Number One: On March 1, Edwards asked a series of questions of Cavanaugh and that Cavanaugh responded with an "unprofessional, hostile, and condescending email communication" to "Edwards [and] other unit members," that the e-mail message also "belittled" Edwards, and that Cavanaugh "always sides with the District without performing a proper investigation of their grievance issues."
- Violation Number Three: On or about December 2, 2016, Cavanaugh "emailed inappropriate and offensive political propaganda to Ms. Edwards," Edwards requested protection of unit members from "the president's inappropriate political message," LETA held an Executive Board Meeting, and LETA did not invite Edwards and/or any of the Charging Parties.
- Violation Number Four: Cavanaugh spoke to a LETA member by phone and was "very critical of Ms. Edwards," and also sent an e-mail message "unjustly degrading Ms. Edwards." Many unit members are hostile to Ms. Edwards and are afraid to seek representation from her. Cavanaugh made inappropriate comments about Edwards "including his racial profiling." The hostility created by Cavanaugh has rendered Edwards "unable to regularly attend site rep council meetings, voice her concerns in site rep council meetings, receive extra duty assignments, receive her correct seniority date and earned seniority, her correct classification, constant removal from her assignments, unlawful class size overages, false complaints, repeated attacks by District administrators in violation of the CBA, told to take her complaints to PERB and so [*sic*]."
- Violation Number Five: Cavanaugh has "conflicts of interests and…numerous teachers are being called into…meetings without [] lawful assistance and proper representation…." Cavanaugh sent an e-mail message correcting Edwards on the law, the message undermined Edwards' March 13 request for information from the District in preparation of her representation of a LETA member and Edwards refused to have the LETA member meet with the District. Cavanaugh is "blindsiding unit members" and "misinforming" them by "refusing them the Weingarten rights and relevant and necessary information."
- Violation Number Six: Cavanaugh's testimony on September 20, 2016, shows that "he failed to properly investigate whether Edwards…was entitled to her seniority and other contractual benefits prior to his agreement with the District's position that the Charging Party did not earn her seniority…" and Cavanaugh "is constantly taking adversarial action against her efforts to have her employment status corrected and interfering in her participation activity due to her African American status."
- Violation Number Seven: Cavanaugh was "brusk" in denying Pickett's request that he be provided "Weekly Enrollment Reports and Master Schedules."
- Violation Number Eight: The District denied V. Pickett's December 15, 2016, request for union representation, "Cavanaugh did not offer to represent her," Cavanaugh stated "this could not possibly be a Weingarten affair and sided with the District," and "[t]he deliberate failure by LETA or its president to represent Mrs. Pickett when help is requested is exactly why she cannot get any reasonable accommodations, or even representation beyond her site rep for her ADA needs to be supported, and why she

knows she cannot even request any representation no matter what harm she is exposed to by her employer."

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Third 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 31, 2017**,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Weiss
Supervising Regional Attorney

MW

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

[5] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
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May 30, 2017

Kimberly Rosales c/o Lori Edwards

Re: *Kimberly Rosales, et al. v. Lake Elsinore Teachers Association*
Unfair Practice Charge No. LA-CO-1709-E
WARNING LETTER

Dear Ms. Rosales:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 20, 2017. Kimberly Rosales, David Pickett, Victoria Pickett, and Lori Edwards (Charging Parties), allege that the Lake Elsinore Teachers Association (LETA or Respondent) violated Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation and by retaliating against Charging Parties because Charging Parties engaged in conduct protected by EERA. On April 10, 2017, Charging Parties filed a First Amended Charge.[2]

FACTS AS ALLEGED

Charging Parties are employed by the Lake Elsinore Unified School District (LEUSD or District) in a bargaining unit represented by LETA.

[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] On or about April 3, 2017, the undersigned Board agent spoke to Kimberly Rosales (Rosales) and informed her that the postal service had returned correspondence to PERB that PERB had sent to Rosales on March 28, 2017. Rosales told the Board agent that the PO Box was correct, the PO Box belonged to Lori Edwards (Edwards), and Rosales did not want to provide a different address. Rosales indicated that Edwards was the representative. The Board agent informed Rosales that a Notice of Appearance form designating Edwards as the representative was required and should be filed. On May 8, 2017, Rosales telephoned the Board agent and the Board agent again stated that Rosales remained the representative in the case because a Notice of Appearance form had not been filed with PERB.

2014 Grievances

Charging Parties allege that LETA's conduct with respect to grievances filed in 2014 demonstrate that LETA has discriminated and breached its duty of fair representation. It appears that Charging Parties' 2014 grievances are related to Unfair Practice Charges (UPC) LA-CE-6082-E and LA-CE-6088-E that asserted that the District unlawfully evaluated Charging Parties' performance more frequently than was permitted and unlawfully placed too many students in Charging Parties' classrooms. Charging Party believes that because PERB issued complaints on the UPCs, the grievances had merit and LETA unlawfully refused to assist them with their meritorious grievances.

It appears that the two UPCs proceeded to PERB formal hearings from September 19 through 22 and from October 3 through 11. Charging Parties assert that, although Cavanaugh "was clearly informed" "that permanent teachers with [']meet all[']' District standards evaluations and at least ten (10) years of service as per state law [are] not subject to annual evaluations," Cavanaugh "testified that the Charging Parties, (permanent teachers with more than ten (10) years of experience in the District and with meet all district standards evaluations) should be subjected to annual evaluations although he was never subject to an annual evaluation as a permanent teacher."

Charging Parties also assert that before or around the time of the hearing, Cavanaugh "knowingly and willingly in violation of his duty of fair representation sent an email to unit members stating permanent teachers with 'meet all' District's standards evaluations can be evaluated annually in order to negatively impact the Charging Parties' hearing" and "CTA also showed a video presentation to LETA representatives informing them that permanent unit members meeting the criteria of Ed Code 44664 were evaluated every two (2) years or every five (5) years," and stated that "permanent teachers with 'meet all' district standards evaluation can be evaluated annually."

Cavanaugh testified at the formal hearings in UPC cases LA-CE-6082-E and LA-CE-6088-E. Charging Party's assert that LETA, by and through the following conduct, retaliated against Charging Parties and breached the duty of fair representation:

- Cavanaugh told the District's legal counsel that he needed a subpoena to testify at the hearing(s), but Cavanaugh testified without a subpoena;
- Before the hearing(s), Cavanaugh met with the District's legal counsel for at least 20 minutes and the District's legal counsel coached Cavanaugh and told him what the District would ask him on the witness stand;
- Cavanaugh asserted on September 21 that "he received authorization to appear at the…PERB hearings as an official spokesperson for the organization," but this was "false" as there was no record of a request for authorization and there is no record of "any such approval;"
- Cavanaugh testified on behalf of the District: "he was stating what the District and the District's legal counsel had prepared him to state in the hearings" and he was "coached and/or fabricated testimony [] because he contradicts himself and appears to adjust his testimony to follow the scripted testimony he was told to convey by the District;"

- Cavanaugh never notified Charging Parties, or sought their authorization, permitting him to testify on the District's behalf; and
- Cavanaugh "has received preferential treatment from the District in the form of preferential assignments, unlawful evaluation cycles, and more to take adverse action in violation of his Duty of Fair Representation against the Charging Parties."

Charging Parties state that they "have repeatedly found themselves to be continuously in an adversarial position with the District and the union due to union animosity, collusion, and prejudice against them. [Cavanaugh] has repeatedly sided with the District and altered the long-standing clear language of the [Collective Bargaining Agreement (CBA)] in order to adversely impact the Charging Parties by agreeing with the District's position arbitrarily, discriminatorily and in bad faith e.g. extreme class size imbalances, TK-K unlawful changes in the Kindergarten grade levels, swapping assignments vers[u]s following contract language on all changes in assignments, and consecutive year evaluations of permanent teachers in violation of the CBA and state law."

Pickett Grievance

On April 19, 2016,[3] LETA required David Pickett (Pickett) to prepare a summary of his grievance to LETA Representative Mario Montano (Montano). The grievance "was moved to Level 1" and on April 21, the District denied the grievance, stating that it failed to state facts that would constitute a violation.

On April 29, Montano spoke with Pickett about the grievance for approximately five minutes in the teachers' lounge. On May 3, LETA submitted Pickett's Level 2 grievance.

On May 11, Judiel Sanchez, Secretary to the District Assistant Superintendent, sent the District's denial of the grievance to the LETA Grievance Chair, Jean Seibert (Seibert), District administrators and several other parties. Seibert sent the District's denial to Montano via an electronic mail (e-mail) message. The "email chain [was] forwarded to…Pickett" but, according to Charging Parties, the chain was manipulated to hide the fact that the District's response was filed one day late and Pickett did not learn that the District had filed a late response.[4] LETA asked Pickett to provide another grievance response "to Level 3," and on May 18, Pickett provided additional information to LETA about his grievance, but LETA never filed Pickett's level 3 grievance.

[3] All subsequent dates refer to the year 2016, unless otherwise specified.

[4] Charging Parties assert that Article 8.7.3 of the LETA-LEUSD CBA states: "If the District respondent at each level of the grievance procedure fails to supply a written statement with his/her finding(s) and decision(s) within the time limits as set forth in this Article then the District will award the grievant the remedy sought through the grievance, after approval by the Association."

On August 16, unbeknownst to Charging Parties, Executive Board minutes provide that Siebert stated that "the existing grievance is being resolved." On August 25, Seibert reported to the LETA Board that there were "No Grievances."

On September 6, Pickett could find no mention of his grievance in the Site Council or Executive Board agendas and minutes, and Lori Edwards (Edwards) asked LETA for a copy of the Grievance Tracking Matrix. LETA office manager Marla Banks (Banks) informed Edwards that there was not a matrix for the August 25, meeting. Edwards responded and asked if there were no grievances or no matrices. Edwards also asked for the last Grievance Tracking Matrix. Banks responded "Here you go!! Received this matrix after meeting after the last Site Rep Meeting." The attached Grievance Tracking Matrix was dated August 10 and stated: '1. Discrimination-Reps; LETA-Resp 5/10-Level 3 (Mediation) Abeyance.'"

Charging Parties contend that the Grievance Tracking Matrix was never presented to the Representative Council and the grievant was never notified that his grievance was in abeyance. Charging Parties further contend that LETA fabricated the matrix in response to Edwards' inquiry, and that it did not exist prior to the request. Also, Charging Parties allege that the Grievance Tracking Matrix sent by Banks failed to correlate with the information in the Site Representative Council or Executive Board minutes and agendas.

On or about September 22, 2016, the Representative Council meeting agenda, which included a Grievance Tracking Matrix dated September 16, stated "l. Discrimination, Level 3 (Mediation) Resolved." LETA did not provide Charging Parties with a date of resolution and never informed Pickett that it had been resolved.

Charging Parties contend that all of LETA's conduct was discriminatory against Pickett because of Pickett's previous Complaint issued by PERB against the union, the union's blatant conflicts of interest, union animus and animosity. Charging Parties further contend that LETA's conduct breached their duty of fair representation because LETA may not ignore a meritorious grievance or process a grievance in a perfunctory fashion, LETA was required "as part of their duties…to investigate [] Pickett's grievance [and] investigate a grievance response citing all applicable violations," as well as pursue the "proper grievance resolution." Charging Parties further contend that Montano is responsible for writing the grievance responses but LETA wrongfully made Pickett write his own grievance responses, LETA deliberately failed to request remedies after the District provided a late response and deliberately failed to apprise Pickett of the late response, LETA acted in bad faith and an arbitrary and discriminatory manner by "failing to continue the grievance filing to Level 3 and/or arbitration [and] LETA ceded the entire responsibility for the grievance over the District."

DISCUSSION

Burden and Statute of Limitations

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.)

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.)

The instant charge was filed on March 20, 2017, thus, claims regarding conduct that Charging Parties knew of, or should have known of, prior to September 20, 2016, are untimely.

The charge lacks facts indicating the date when Charging Parties learned that LETA considered the Pickett Grievance "resolved." It is therefore not possible to determine whether allegations concerning the Pickett grievance are timely filed.

Duty of Fair Representation

Charging Parties have alleged that the exclusive representative denied them the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). An exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (*SEIU Local 790 (Hein)* (2004) PERB Decision No. 1677; *California State Employees Association (Parisi)* (1989) PERB Decision No. 733-S.) This is because the unit member may seek representation outside of the exclusive representative in extra-contractual forums. Accordingly, PERB has held that the duty of fair representation does not attach to an exclusive representative in extra-contractual proceedings such as PERB or the SPB. (*Ibid.*; *California Union of Safety Employees (John)* (1994) PERB Decision No. 1064-S; *California State Employees Association (Carrillo)* (1997) PERB Decision No. 1199-S.)

The duty of fair representation does extend 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.) The wide latitude accorded a union in the representation of its members includes the union's processing of grievances. (*Inlandboatmans Union of the Pacific* (2012) PERB Decision No. 2297-M.) Mere disagreement with the union's strategy does not demonstrate a breach of the duty of fair representation. (*Ibid.*)

The allegations that LETA breached its duty of fair representation by virtue of Cavanaugh's participation at the September and October 2016 PERB hearings do not state a prima facie case because LETA does not owe a duty of fair representation in extra-contractual proceedings. (See also *SEIU Local 790 (Hein)*, *supra*, PERB Decision No. 1677; *California State Employees Association (Parisi)*, *supra*, PERB Decision No. 733-S; *California Union of Safety Employees (John)*, *supra*, PERB Decision No. 1064-S; *California State Employees Association (Carrillo)*, *supra*, PERB Decision No. 1199-S.) Therefore, the allegations that LETA, in the PERB hearings, supported an interpretation of the law with respect to evaluation cycles that was contrary to Charging Parties' view, refused to take notice of a PERB case that Charging Parties believe is definitive on the question, and testified on the District's behalf in a manner that disagreed with Charging Parties' view and opposed the position of Charging Parties' in the two UPCs, do not provide sufficient facts to establish a prima facie breach of the duty of fair

representation. (*Ibid.*) Also, the allegation that Cavanaugh testified without a subpoena, prepared with District counsel before the PERB hearing(s), asserted that he was an authorized spokesperson for LETA at the hearing(s), allowed himself to be coached by District counsel, testified without authorization from Charging Parties, and received preferential treatment from the District "in the form of preferential assignments, unlawful evaluation cycles, and more" is insufficient to establish a prima facie breach of the duty of fair representation. (*Ibid.*)

The charge appears to also allege that, even outside of LETA's conduct with respect to the PERB hearing, LETA breached its duty of fair representation by failing to agree with Charging Parties' interpretation of the law with respect to evaluation cycles and refusing to agree that the PERB case cited by Charging Parties could only be read to support Charging Parties' interpretation. As presently written, the allegationd lack facts necessary to establish that LETA's refusal to agree about a theory or a case was discriminatory, arbitrary or in bad faith, was without a rational basis, or that LETA failed to perform a ministerial act that completely extinguished Charging Parties' right to pursue their claims. (*United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258; *Reed District Teachers Association, CTA/NEA (Reyes)*, *supra*, PERB Decision No. 332; *Coalition of University Employees (Buxton)*, *supra*, PERB Decision No. 1517-H.)

With respect to allegations that LETA breached the duty of fair representation in its handling of Pickett's grievance, the charge as presently written lacks facts demonstrating that the allegations are timely filed. (See pp. 4-5, *ante*.) However, even if Charging Parties amended the charge with facts indicating that Charging Parties did not or should not have known of LETA's resolution of Pickett's grievance prior to September 20, 2016, the charge does not provide facts showing that LETA violated its duty of fair representation.

The allegations that Pickett's grievance was meritorious,[5] that LETA processed the grievance in a perfunctory fashion (and failed to cite all applicable violations, failed pursue a proper resolution and failed to request remedies after the District provided a late response), that LETA made Pickett write a summary, the grievance, and responses, that LETA failed to continue the grievance filing to "Level 3 and/or arbitration," and failed to communicate the status of the grievance as reported at LETA meetings, do not demonstrate a breach of LETA's duty of fair representation because LETA is entitled to use its own discretion or judgment to determine whether to pursue a bargaining unit member's grievance. (*Inlandboatmans Union of the Pacific*, *supra*, PERB Decision No. 2297-M.)

[5] To the extent that Charging Parties assert the Pickett grievance had merit because a PERB agent issued complaints in previous UPCs filed by Charging Parties, the conclusion is incorrect. The Board agent does not resolve factual disputes or determine whether the charge is meritorious. (*Cabrillo Community College District* (2015) PERB Decision No. 2453; PERB Regs., 32620.) The Board agent's role is to determine whether the Charging Party has alleged sufficient facts to establish a prima facie violation of the Act. It is up to the charging party at hearing to "prove the complaint by a preponderance of the evidence in order to prevail." (PERB Regs., 32178.)

The charge as presently written lacks facts to show that LETA failed to keep Pickett apprised of the status of the grievance. The charge instead states that on September 6, Pickett could find no mention of his grievance in the Site Council or Executive Board agenda and minutes. (PERB Regulation 32615(a)(5); *National Union of Healthcare Workers*, *supra*, PERB Decision No. 2249a-M; *Charter Oak Unified School Dist.*, *supra*, PERB Decision No. 873; *Dept. of Food and Agriculture*, *supra*, PERB Decision No. 1071-S.) And, to the extent that the charge alleges that LETA did not provide status updates to Edwards, there are no facts presented that might establish that LETA was required to keep Edwards apprised of the status of Pickett's grievance.

Charging Parties' allegation that e-mail messages from the District to Charging Parties and LETA show that LETA ceded the entire responsibility for the grievance to the District is conclusory and lacks specific facts supporting the conclusion. (PERB Regulation 32615(a)(5); *National Union of Healthcare Workers*, *supra*, PERB Decision No. 2249a-M; *Charter Oak Unified School Dist.*, *supra*, PERB Decision No. 873; *Dept. of Food and Agriculture*, *supra*, PERB Decision No. 1071-S.) Charging Parties' allegation that LETA breached its duty of fair representation because it harbored animosity toward Pickett, as well as the allegation that the District provided Cavanaugh with special treatment so that LETA would take adverse action against Charging Parties, are also conclusory. (*Ibid.*) So too Charging Parties' allegation that:

> [They] have repeatedly found themselves to be continuously in an adversarial position with the District and the union due to union animosity, collusion, and prejudice against them. [Cavanaugh] has repeatedly sided with the District and altered the long-standing clear language of the CBA in order to adversely impact the Charging Parties by agreeing with the District's position arbitrarily, discriminatorily and in bad faith e.g. extreme class size imbalances, TK-K unlawful changes in the Kindergarten grade levels, swapping assignments vers[u]s following contract language on all changes in assignments, and consecutive year evaluations of permanent teachers in violation of the CBA and state law.

(*Ibid.*) None of the allegations provide facts necessary to establish that LETA's conduct was discriminatory, arbitrary or in bad faith, was without a rational basis, or that LETA failed to perform a ministerial act that completely extinguished Pickett's right to pursue his claim. (*United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258; *Reed District Teachers Association, CTA/NEA (Reyes)*, *supra*, PERB Decision No. 332; *Coalition of University Employees (Buxton)*, *supra*, PERB Decision No. 1517-H.)

Retaliation/Discrimination

To demonstrate that an employee organization discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employee organization had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employee

organization took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the [employee organization's] action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864, emphasis added; fn. omitted.) The action must involve actual and not merely speculative harm. (*County of Tehama* (2010) PERB Decision No. 2122-M.) Thus, an adverse action will not be found in situations involving a future adverse impact on employment conditions when such impact is speculative. (*Ibid.*)

Although the timing of the employee organization's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employee organization's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employee organization's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employee organization's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employee organization's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employee organization's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employee organization animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employee organization's unlawful motive (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

Charging Parties allege that they have participated in grievances and UPCs, and LETA actively participated in the grievances or UPC hearings. Thus, Charging Parties sufficiently allege that they exercised rights under EERA and that LETA had knowledge of their exercise of protected rights. The charge, however, fails to provide information demonstrating that LETA took adverse action(s) against Charging Parties with respect to their employment. (*Novato*, *supra*,

PERB Decision No. 210.) Charging Parties allege LETA's conduct with respect to Pickett's grievance and at the formal hearings in September and October 2016 was motivated against Pickett because of Charging Parties' previous PERB complaint against the union, "blatant conflicts of interest," and "union animus." But the subjective reactions of Charging Parties is not the pertinent consideration. (*Newark Unified School District*, *supra*, PERB Decision No. 864.) The question is whether Charging Parties have provided allegations demonstrating that a reasonable person under the same circumstances would consider LETA's conduct to have an adverse impact on the employee's employment. (*Newark Unified School District*, *supra*, PERB Decision No. 864.) However, the charge as presently written, does not identify any adverse impact on Charging Party's employment. (*County of Tehama*, *supra*, PERB Decision No. 2122-M.)

Interference

The test for whether a respondent has interfered with the rights of employees under the EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 and *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, the Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

Under the above-described test, a violation may only be found if EERA provides the claimed rights. In *Clovis Unified School District* (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

The charge, as presently written, fails to identify the harm to Charging Parties' EERA rights that LETA's conduct tends to or does cause.

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

[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.*)

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 **June 9, 2017**,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Weiss
Supervising Regional Attorney

MW

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