PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

THOMAS A. ROMERO, Charging Party, v. ROCKLIN TEACHERS PROFESSIONAL ASSOCIATION, Respondent.	)	Case No. S-CO-28 PERB Decision No. 124 March 26, 1980

Appearances: Thomas A. Romero, in pro per; Delores Kuchenriter, President, for Rocklin Teachers Professional Association, CTA/NEA.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

Thomas A. Romero (hereafter Charging Party) appeals from a Public Employment Relations Board (hereafter PERB or Board) hearing officer's order dismissing with leave to amend his unfair practice charge against the Rocklin Teachers Professional Association (hereafter Association). For the reasons discussed below, the Board itself affirms the dismissal of the unfair practice charge as amended and orders that the Charging Party be permitted to further amend his charge to conform to the instant decision.

FACTUAL SUMMARY

On September 26, 1978, the Charging Party filed an unfair practice charge against the Association alleging violations of sections 3543.6(c) and 3543.7 of the Educational Employment Relations Act (hereafter EERA).[1] In support of his charge, the Charging Party alleges that the Association failed to negotiate with the employer as to employee benefits notwithstanding a provision in the negotiated agreement which provided for annual negotiations as to benefits.[2] The

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[1]The EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code.

Section 3543.6 (c) provides:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

Section 3543.7 provides:

> The duty to meet and negotiate in good faith requires the parties to begin negotiations prior to the adoption of the final budget for the ensuing year sufficiently in advance of such adoption date so that there is adequate time for agreement to be reached, or for the resolution of an impasse.

[2]The Association was voluntarily recognized as the exclusive representative of certificated employees on May 5, 1976. A two-year negotiated agreement was effected in July

allegation that Respondent had violated section 3543.7 of EERA was premised on the Charging Party's assertion that the final budget deadline had passed without re-negotiation.

On October 4, 1978, the hearing officer dismissed the unfair practice charge with leave to amend. In so doing he advised the Charging Party that section 3543.6 (c) of EERA does not provide a remedy for a member of a negotiating unit against the exclusive representative but rather that section 3543.6(b) is the appropriate statutory vehicle for a unit member to attack conduct of the exclusive representative said to be violative of the duty of fair representation imposed by section 3544.9 of EERA.[3] He further held that the failure

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1977 and expired in June 1979. At the time of filing the initial unfair practice charge, the parties were into the second year of their negotiated agreement. Article I, section 4 of the agreement cited by the Charging Party provides:

> Salaries and benefits shall be negotiated annually. Negotiations on any other part of said Agreement may be opened by mutual consent.

[3]Section 3543.6 (b) of EERA provides:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

to adhere to the time limitations imposed by section 3543.7 of EERA may be dealt with as part of the evidence of an unfair practice charge arising under section 3543.5(c) or 3543.6 (c) if such charges are alleged by an employee organization or an employer respectively.

Presumably in response to the hearing officer's decision, the unfair practice charge was amended on October 18, 1978.[4] Charging Party alleged that the Association violated section 3544.9 and thus 3543.6(b) of EERA by acting in an arbitrary and bad faith manner and thereby failing to fairly represent him. In support of the amended charge, Charging Party added the allegations that the Rocklin School Board had expressed its willingness to negotiate benefits in a resolution issued on June 29, 1978, and that the final budget for the Rocklin School District revealed a balance of approximately 12

> employees because of their exercise of rights guaranteed by this chapter.

Section 3544.9 of EERA provides:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

[4]Because the Charging Party did not appeal the hearing officer's dismissal but rather amended and resubmitted his unfair practice charge, the propriety of the hearing officer's dismissal is not before the Board and we therefore make no ruling on the basis for that determination.

percent of an approximate $2,230,000 budget. He also reiterated his claim that the contract reopener clause and the failure to comply with the time limitations of section 3543.7 are evidence of the Association's unlawful conduct.5

On October 26, 1978, the hearing officer issued a second dismissal with leave to amend. The basis for this dismissal was that the Charging Party had failed to allege facts demonstrating that the Charging Party had been treated differently from all other bargaining unit members.[6]

On November 14, 1978, the Charging Party appealed the hearing officer's second dismissal with leave to amend advising this Board that the thrust of his unfair practice charge was not unequal or differential representation but rather concerned the Association's failure to satisfy its representational obligation to the bargaining unit as a whole. Respondent failed to submit a timely response to the Charging Party's appeal. In considering the Charging Party's appeal of the

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[5]The Board finds that failure to comply with section 3543.7 is correctly included as evidence of the unfair practice charge asserted but that it is not an unfair practice in and of itself.

[6]The hearing officer also determined that a bare allegation of different treatment is insufficient to demonstrate a breach of the duty of fair representation unless accompanied by "an allegation of specific facts in support of the general allegation of bad faith."

hearing officer's dismissal of the unfair practice charge, the Board assumes that the facts as alleged are true.[7]

DISCUSSION

Although this Board has held that section 3543.6(b) is violated by an exclusive representative that fails to satisfy its duty to "fairly represent each and every employee in the appropriate unit" as required by section 3544.9 of EERA (Robert Quarrick and Thelma O'Brien v. Mt. Diablo Education Association, CTA/NEA (8/21/78) PERB Decision No. 68; Sandra Faeth and Judy McCarty v. Redlands Teachers Association (9/25/78) PERB Decision No. 72; Jules Kimmett v. Service Employees International Union, Local 99 (10/19/79) PERB Decision No. 106), the exact parameters of this duty have not been fully defined. In this case, however, it is necessary for the Board to articulate with some specificity those obligations imposed on the exclusive representative by the duty of fair representation. In so doing, the majority is guided by cases involving the duty of fair representation as interpreted under the National Labor Relations Act (hereafter NLRA) by the National Labor Relations Board and the federal courts. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; and see Jules Kimmett, supra, at note 8.)

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[7]San Juan Unified School District (3/10/77) EERB Decision No. 12.

In Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369], the Supreme Court held that under the NLRA a breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. In interpreting the standard set forth in Vaca, the court in Griffin v. United Auto Workers (4th Cir. 1972) 469 F.2d 181 [81 LRRM 2485] stated:

> A union must conform its behavior to each of these standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

The court, expressly focusing on the arbitrary standard, continued:

> The repeated references in Vaca to "arbitrary" union conduct reflected a calculated broadening of the fair representation standard. (Citations omitted) . . . Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation.

Other courts have similarly concluded that arbitrary conduct by the union in representing those within a particular bargaining unit may constitute a breach of the duty of fair

representation. (See Sanderson v. Ford Motor Co. (5th Cir. 1973) 483 F.2d 102 [83 LRRM 2859]; Woods v. North American Rockwell Corp. (10 Cir. 1973) 480 F.2d 644 [6 FEP Cases 22]; Beriault v. Warehousemen's Union (9th Cir. 1974) 501 F.2d 258 [87 LRRM 2070]; Robesky v. Quantas Empire Airways (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090].)

Based on the foregoing, this Board concludes that the basis for the hearing officer's dismissal of the unfair practice charge was erroneous. The Board finds that a standard which prohibits only discriminatory and bad faith conduct cannot ensure that an exclusive representative will offer representation to all the employees it serves. Arbitrary conduct by an exclusive representative may itself constitute a violation of the duty of fair representative because the Board believes that, without reliance on an arbitrary standard, employee organizations would be permitted to make unreasonable decisions as long as there were no evidence of deliberate wrongdoing or disparate treatment (Beriault, supra). Therefore, to the extent that the hearing officer's dismissal was based on the Charging Party's failure to specifically allege discriminatory treatment or bad faith conduct, the Board is in disagreement.[8]

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[8]The Board is not in disagreement with the hearing officer's conclusion that the Charging Party failed to allege sufficient facts to demonstrate either discriminatory or bad

However, the Board is not persuaded that the Charging Party has alleged in his amended charge sufficient facts to establish that the Association acted arbitrarily in refusing to negotiate benefits. A union's duty to fairly represent employees during negotiations does not encompass an obligation to negotiate any particular item and, in this case, the Charging Party has failed to demonstrate that the Association's failure to negotiate benefits violated any affirmative duty it owed to the unit members. A prima facie case alleging arbitrary conduct violative of the duty of fair representation 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. (DeArroyo v. Sindicato de Trabajadores Packing (1st Cir. 1970) 425 F.2d 281 [74 LRRM 2028].) While the Board recognizes that it may be difficult to set forth with exactitude the irrational or arbitrary nature of the union's conduct toward the unit membership, this requirement is necessary in order to insure that the bargaining agent, faced with the impossible task of pleasing all of the people all of the time, is afforded a broad range of discretion and

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faith conduct on the part of the Association. The Board's disagreement, as discussed infra, stems from the hearing officer's conclusion that the duty of fair representation is limited to instances of discriminatory or bad faith conduct.

latitude. The exclusive representative's obligation during the collective negotiating process necessarily involves a high degree of give and take, compromise and trade off and, therefore, cannot be subjected to a standard more rigid than is consonant with the realities of the bargaining process. Because the task of bargaining demands a balancing of benefits against burdens, a union should not be required to justify every decision it makes at the bargaining table.[9]

While the Board is conscious of the need to respect the exclusive representative's discretion, it must also afford protection to those unit employees who can establish that their representative's conduct has gone beyond the bounds of reasonable latitude and has thereby failed to satisfy its obligation to provide fair representation to those for whom it is statutorily empowered to speak.10

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[9]Based on these concerns, this Board advises that the standard for the duty of fair representation as it arises in the negotiating process may not be the same as that applied in situations arising out of grievance situations involving the enforcement of a contract. (Price v. International Brotherhood of Teamsters (3rd Cir. 1972) **457** F.2d 605 [79 LRRM 2865] .)

10The Board notes that unit members are not precluded from choosing to register their dissatisfaction with the exclusive representative through the decertification process as provided for in section 3544.5 et seq. of EERA. To the extent that the object of their dissatisfaction may, in certain circumstances, also constitute a violation of the duty of fair representation, it is the Board's view that these are simply alternative remedies. An employee may desire to bring a duty of fair representation charge without also wishing to exercise his/her rights to seek decertification.

The facts alleged by the Charging Party cannot be read to assume the absence of a reasonable explanation for the Association's conduct. It is true that the Charging Party's reference to the School Board resolution demonstrates the employer's willingness to bargain at least as to benefits. We do not know if the resolution indicated a willingness to negotiate salaries. In any event, since the parties' negotiated agreement included a wage and benefit reopener clause, the employer's resolution adds nothing to bolster the bare allegation that the exclusive representative acted arbitrarily in choosing to forego mid-contract negotiations. Similarly, the Charging Party also attempts to support his claim by alleging that a budgetary surplus existed over which the union could have negotiated. Since the exclusive representative is under no obligation to bargain in each instance where surplus funds are available, this assertion in itself does not raise sufficient doubt as to the lack of a rational basis for the union's decision. It is also noted that the Charging Party's allegation is that the Association failed to negotiate benefits. The reopener clause of the contract, however, provides that "Salaries and benefits shall be negotiated annually." While the significance of the Charging Party's incomplete reference to the contract cannot be ascertained by conjecture, it admittedly raises some questions as to what the Association did negotiate or was willing to

negotiate. However, by failing to bring further relevant facts before the Board, it is impossible to find a prima facie case of arbitrary conduct on the part of the Association. The Board cannot ignore the possibility that the Charging Party, by his selection of issues, is expressing personal dissatisfaction with the Association's representation rather than evidencing an arbitrary disregard of the rights of all employees in the unit. Essentially, the Charging Party's pleadings merely suggest that the Association could have negotiated as to benefits but did not do so. The charge does not establish any basis for finding that such action was required. The failure to negotiate becomes impermissible only where it is founded on the duty or obligation to do so. Thus in South San Francisco Unified School District (1/15/80) PERB Decision No. 112, the Board determined that an individual employee had standing to assert a refusal to negotiate charge against his employer because the allegation was premised on the employer's duty to refrain from making unilateral changes without first bargaining with the exclusive representative. While there is a general obligation imposed on the exclusive representative by the duty of fair representation to negotiate on behalf of the employees it represents, here, the Charging Party's pleadings fail to establish an obligation to negotiate as to any specific subject, i.e., benefits. Absent a showing, by virtue of specific factual circumstances, that the failure to negotiate

benefits was arbitrary, Charging Party has not established a prima facie case of a section 3544.9 violation. Therefore, the Board dismisses the amended charge for the reasons set forth above granting the Charging Party leave to amend his charge with specific factual allegations sufficient to establish that the Association's refusal to negotiate benefits was irrational or unreasoned.

ORDER

The Public Employment Relations Board ORDERS that the hearing officer's dismissal of the unfair practice charge be affirmed for the reasons set forth herein and that the Charging Party be granted leave to amend his charge to conform to this decision.

BY: Barbara D. Moore, Member

Harry Glick, Chairman

Raymond J. Gonzales, concurring:

I concur with my fellow Board members in the disposition of this case. I agree that a union may breach its duty of fair representation through arbitrary conduct in negotiations on behalf of unit employees, and allegations of discriminatory or bad faith conduct are not therefore indispensable to a charge alleging violation of Government Code section 3544.9. I also

agree that, in this case, the Charging Party's facts have failed to state a prima facie case, largely because of his incomplete and selective presentation of relevant facts.

I also believe, however, that the Board should proceed with caution in dismissing charges prior to a hearing. Such a dismissal means that a charging party will have no opportunity to develop relevant facts through the hearing process. And under PERB's procedures in unfair practice proceedings, there is no investigation of the allegations by this agency before the initial decision is made on whether to dismiss the charge for failure to state a prima facie case. Thus, under PERB procedures, the charging party is heavily, if not totally, dependent upon the hearing to obtain relevant and specific facts. In sum, I believe PERB must exercise great caution in dismissing this type of charge prior to a hearing, where a charging party may have had only very limited access to relevant facts, and considering that such a dismissal by the Board is not appealable to the courts.

A final comment is to suggest the confusion, under this decision, faced by a disgruntled unit member in deciding what type of charges to file against the exclusive representative. In South San Francisco Unified School District (1/15/80) PERB Decision No. 112 (in which I dissented), the majority inconsistently held that an individual employee had standing to file a refusal to negotiate charge against the employer, even

though only the exclusive representative, and not the employee, had the right to negotiate with the employer; the employee, the majority held, would not instead be required to file a charge against his union for failing to fairly represent him, even though it has a statutory duty to do so. (Gov. Code sec. 3544.9.) The majority emphasized that "any person" may file a charge. (Gov. Code sec. 3541.5(a).)

Similarly in this case did a disgruntled unit member—Romero—attempt to press a refusal to negotiate charge, only this time, against his own union. The hearing officer dismissed this original charge on the grounds that Romero lacked standing; Government Code section 3543.6(c), the hearing officer ruled, was the statutory vehicle for an employer to file refusal to negotiate charges against an exclusive representative, and the proper statutory vehicle for Romero was Government Code section 3544.9, setting forth the exclusive representative's duty of fair representation. (Emphasis added.)

While the majority has sidestepped the implication of its South San Francisco decision in this case by addressing only the amended charge, under the South San Francisco holding, Romero would have standing to file a refusal to negotiate charge against his own union. One can only wonder why the majority ORDER does not allow Romero to reinstate his original refusal to negotiate charge against his union, since this was

Romero's first choice.[1] The EERA clearly establishes the duty of an exclusive representative to negotiate with an employer. This would seem to be an easier allegation for stating a prima facie case, as there is no need for the charging party to creatively propound a standard of arbitrariness and then allege facts with sufficient specificity which, if proven, would show that union's duty not to be arbitrary has been breached.

Raymond J. Gonzales, Member

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1 would like to observe that footnote 4 (p. 4) of the majority decision, added only after my dissent was submitted, only underscores the "Catch 22" in which the majority decision has placed the Charging Party in this case.

Romero filed the duty of fair representation charge only because the hearing officer dismissed his refusal to negotiate charge and suggested he so file. If Romero had appealed this dismissal, he would have lost his opportunity to amend. Yet, by amending, he is now barred from appealing the dismissal, even though the dismissal charge could presumably now go to hearing under the South San Francisco decision. He is also apparently precluded from returning to that charge by the statute of limitations on the filing of unfair charges. Romero now faces the uphill task of attempting to meet the difficult pleading requirements of the denial of fair representation charge set forth in this decision. The probability of easier pleading requirements of the more traditional refusal to bargain charge, not involving "arbitrariness," are beyond his reach.

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

THOMAS A. ROMERO, Charging Party, v. ROCKLIN TEACHERS PROFESSIONAL ASSOCIATION, Respondent.	)	Case No. S-CO-28 (78-79) NOTICE OF DISMISSAL WITH LEAVE TO AMEND

Notice is hereby given that the above-captioned unfair practice charge is dismissed with leave to amend within twenty (20) calendar days after service of this Notice.

The charge alleges that the respondent has violated Government Code section 3543.6(c) and 3543.7 by failing to negotiate benefits with the employer during the second year of a two-year contract. According to the charge, the contract contains a provision for a reopener on benefits during each year of the contract. It is further alleged that the final deadline for the adoption of the employer's budget has passed for the 1978-79 fiscal year. The charging party has identified himself as a certificated teacher.

Government Code section 3543.6(c) provides a remedy under which a public school employer may file an unfair practice charge against an employee organization if that organization refuses to negotiate in good faith. Government

Code section 3543.6(c) does not provide a remedy for a member of a negotiating unit to file a charge against the exclusive representative of that unit. The statutory vehicle for a negotiating unit member to attack the conduct of the exclusive representative of that negotiating unit is through Government Code section 3543.6(b). The charge must allege that the exclusive representative has violated section 3543.6(b) by failing to fairly represent unit members as is required by Government Code section 3544.9. See Robert Quarrick et. al. v. Mt. Diablo Education Association (8/21/78) PERB Decision No. 68. This charge does not allege a violation of Government Code section 3543.6(b). A denial of the duty of fair representation can be found only if the exclusive representative's conduct was arbitrary, discriminatory or in bad faith. Sandra Faeth and Judy McCarty v. Redlands Teachers Association (9/25/78) PERB Decision No. 72. There is no allegation of facts in the present charge to indicate that the respondent acted in a manner that was arbitrary, discriminatory or in bad faith.

Finally, an alleged failure of a party to negotiate within the timetable of section 3543.7 is a matter to be dealt with as part of the evidence for proving a violation of section 3543.5(c) or 3543.6(c). Thus, the allegation of a violation of section 3543.7 can be made only by an employee organization against an employer or by an employer against an employee organization.

For the foregoing reasons, the unfair practice charge is dismissed in its entirety with leave to amend within twenty (20) calendar days.

This action is taken pursuant to PERB Regulation 32630(a).

If the charging party chooses to amend, the amended charge must be filed with the Sacramento Regional Office of the PERB within twenty (20) calendar days. (PERB Regulation 32630(b).) Such amendment must be actually received at the Sacramento Regional Office of the PERB before the close of business (5:00 p.m.) on October 24, 1978 in order to be timely filed. (PERB Regulation 32135.)

If the charging party chooses not to amend the charge, it may obtain review of the dismissal by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice. (PERB Regulation 32630(b).) Such appeal must be actually received by the Executive Assistant to the Board before the close of business (5:00 p.m.) on October 24, 1978 in order to be timely filed. (PERB Regulation 32135.) Such appeal must be in writing, must be signed by the charging party or its agent, and must contain the facts and arguments upon which the appeal is based. (PERB Regulation 32630(b).) The appeal must be accompanied by proof of service upon all parties. (PERB Regulations 32135, 32142 and 32630(b).)

Dated: October 4, 1978

WILLIAM P. SMITH
General Counsel

By Ronald E. Blubaugh

Ronald E. Blubaugh
Hearing Officer