

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ROBERT GLASS,)	
Charging Party,)	Case No. LA-CE-1622
v.)	
LOS ANGELES UNIFIED SCHOOL DISTRICT,)	
Respondent.)	PERB Decision No. 526
<hr/>		September 30, 1985
ROBERT GLASS,)	
Charging Party,)	Case No. LA-CO-245
v.)	
UNITED TEACHERS-LOS ANGELES,)	
Respondent.)	

Appearances: Law Offices of Garber & Riskin by Marilyn Garber for Robert Glass; Geffner & Satzman by Jeffrey Paule for United Teachers-Los Angeles; O'Melveny & Myers by Joel M. Grossman for Los Angeles Unified School District.

Before Hesse, Chairperson; Jaeger and Porter, Members.

DECISION AND ORDER

HESSE, Chairperson: Robert Glass excepts to the attached decision of the administrative law judge dismissing his charges that the Los Angeles Unified School District and United Teachers-Los Angeles violated the Educational Employment Relations Act.¹

¹The EERA is codified at Government Code sections 3540 et seq:

The Board has considered the entire record and the proposed decision in light of the exceptions and briefs and hereby affirms the rulings, findings, and conclusions of the administrative law judge and adopts his proposed Order. Accordingly, the unfair practice charges in Case Nos. LA-CE-1622 and LA-CO-245 are DISMISSED in their entirety.

Member Jaeger joins in this Decision.

Member Porter's concurrence begins on page 3.

PORTER, Member, concurring: I concur in the dismissals. I would also agree with the ALJ's discussion and determination as to equitable tolling principles if equitable tolling is applicable to Government Code section 3541.5's six-month proscription. This Board's regulations and prior decisions have treated section 3541.5's six-month proscription as a statute of limitations and not jurisdictional. If, however, section 3541.5's proscription is jurisdictional, then equitable tolling principles are not applicable. But jurisdictional or not, the results would still be dismissals in these cases.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



ROBERT GLASS,)
)
 Charging Party,) Unfair Practice
)
 v.)
)
 LOS ANGELES UNIFIED SCHOOL DISTRICT,)
)
 Respondent.)
)
 _____) Case Nos. LA-CE-1622
) LA-CO-245
)
 ROBERT GLASS,)
)
 Charging Party,)
)
 v.)
)
 UNITED TEACHERS - LOS ANGELES,) PROPOSED DECISION
) (10/29/84)
 Respondent.)
 _____)

Appearances: Marilyn Garber, Attorney, Garber and Riskin, for Charging Party; Jeffrey Paule, Attorney, Geffner & Satzman, for Respondent, United Teachers - Los Angeles; Joel M. Grossman, Attorney, O'Melveny and Myers, for Respondent, Los Angeles Unified School District.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

Case No. LA-CE-1622

On August 11, 1982, Robert Glass filed an unfair practice charge with the Public Employment Relations Board (hereafter PERB or Board) against the Los Angeles Unified School District (hereafter LAUSD or District) alleging violations of sections

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

3543, 3543.5(a) and (c) and 3548.5¹ of the Educational Employment Relations Act (hereafter EERA or Act) (commencing with section 3540 et seq. of the Government Code).²

On November 15, 1982, the Charging Party filed a First Amended Charge with the Board. This amended charge alleged violations of the same sections as the original charge.

On November 30, 1982, the General Counsel of the PERB issued a Complaint against the District.

On December 20, 1982, the District filed its Answer to the Unfair Practice Charge and Complaint.

On January 26, 1983, Judge Barbara E. Miller issued an Order to Particularize requiring the District to particularize its answer so that it would be more responsive to the specific allegations set forth in the charge. On February 17, 1983, Judge Miller issued an Amended Order to Particularize. On March 7, 1983, the District filed an Amended Answer to Complaint.

On March 7, 1983, the District filed a Motion to Dismiss the Charge and Complaint. On April 4, 1983, the Charging Party filed its Opposition to Motion to Dismiss. On June 6, 1983, Judge Miller denied the motion to Dismiss.

¹Charging Party actually alleged a violation of section 3543(c). As there is no subdivision (c) contained in section 3543, it is assumed that a violation of section 3543 was alleged.

²Unless otherwise noted, all section references are to the Government Code.

On May 20, 1983, the Charging Party filed a Request for Hearing. The matter was set for a formal hearing to commence on October 6, 1983.

On October 21, the third day of the formal hearing, after the Charging Party had put on its entire case against the District, the District renewed its motion to dismiss. After extensive discussions, the motion was granted and all charges against the District were dismissed.

Case No. LA-CO-245

On August 11, 1982, Robert Glass filed an unfair practice charge with the PERB against the United Teachers - Los Angeles (hereafter UTLA), the exclusive representative of the certificated employees of the LAUSD. The charge alleged violations of sections 3543.5(a), (c), 3543.6(a), (b) and 3544.9. A First Amended Charge was filed on November 15, 1982, and a Second Amended Charge was filed on November 22, 1982. The Second Amended Charge omitted the allegations of a violation of sections 3543.5(a) and (c), but continued to allege violations of sections 3543.6(a), (b) and 3544.9. A complaint was issued by PERB's General Counsel on November 30, 1982. On December 21, 1982, an Answer was filed by UTLA. On January 26, 1983, Judge Miller issued an Order directing UTLA to particularize its answer. On February 17, 1983, Judge Miller issued a second Order to Particularize Answer. On February 28, 1983, UTLA filed an Amended Answer.

Cases Consolidated

The two cases were consolidated for formal hearing and were heard on October 6, 7, 21 and November 3, 1983, before Judge Allen R. Link. The issues raised at the hearing were briefed by attorneys for the parties and the case was submitted on March 8, 1984.

JURISDICTION

Robert Glass is a high school teacher at Van Nuys High School and is a member of the certificated employee bargaining unit of the LAUSD. He is a public school employee within the meaning of section 3540.1(j) of the EERA. UTLA is the exclusive representative of the certificated employees of the LAUSD within the meaning of section 3540.1(e). The LAUSD is a public school employer within the meaning of section 3540.1(k).

INTRODUCTION

Case No LA-CE-1622

Robert Glass alleged the District violated section 3543.5(a) of the Act when it discriminated against him due to his exercise of protected rights. He stated that his activities on behalf of the Teaching Faculty Association (hereafter TFA) led Van Nuys High School Principal Koster to (1) castigate and berate him at a faculty meeting in January 1982 and (2) refuse to permit him to speak at that faculty meeting. He further alleges that the contractual grievance procedure is administered in such a way as to violate

section 3543.5(c) of the Act in that the District interpreted specified sections of the contract in such a manner as to render them inoperative. According to Mr. Glass such interpretations reveal, retroactively, that the District had no intention at the time of negotiating the collective bargaining contract of honoring those portions of the Agreement or to administer them in good faith during the life of the contract.

The District insists the charge regarding Principal Roster's comments at the faculty meeting are time barred and that there was insufficient evidence to support the "failure to bargain" charge.

Case No. LA-CO-245

Charging Party alleged that the UTLA discriminated against him because of his employee representational activities in the past. This discrimination took the form of the Association's failure to represent him in the preliminary steps of two grievances against the District and its failure to either take such grievances to arbitration or to permit him to use his own attorney to take such grievances through the arbitration phase of the contractual grievance procedure. Mr. Glass insists that due to these actions the UTLA has violated its statutory duty of fair representation.

UTLA insists it has no animosity towards Mr. Glass and the decision not to provide representation for Mr. Glass' two grievances was due to lack of merit in those grievances.

STATEMENT OF FACTS

Prior to 1970 Robert Glass was an active member and officer of the American Federation of Teachers (hereafter AFT) chapter at the LAUSD and Roger Segure was on the staff of that AFT chapter. In such positions they worked closely. AFT merged with the National Education Association (hereafter NEA) chapter in 1970. This merger created the UTLA. After the AFT and NEA merger, Mr. Glass refused to join the new organization and publicly disagreed with many positions taken by it. Roger Segure became, and is presently, the director of grievance services for UTLA.

Mr. Glass periodically meets with other members of the Van Nuys faculty to discuss items of mutual concern. They call themselves the Teaching Faculty Association. The organization has been in existence for two or three years. Only certificated personnel who teach a minimum of four classes a day with a specified number of students can join TFA. Mr. Glass is the Chair of this Association. On January 3, 1982, at the direction of that group, Mr. Glass sent a letter to Assistant Superintendent Harry Handler, immediate supervisor of Van Nuys High School Principal Koster, regarding a recent Koster decision concerning a specified District-wide policy. The nature of the specified policy is not relevant to this case.

Mr. Glass originally obtained permission from his supervisor to make copies of this letter on a school copy

machine. Mr. Koster learned of this and countermanded the supervisor's permission stating it would have been an improper use of the school's property. Mr. Glass copied the letter on private facilities and distributed copies of that letter to persons attending the January 12, 1982, faculty meeting. There were approximately 60 teachers and numerous non-teaching personnel at the faculty meeting.

The collective bargaining agreement (CBA) between UTLA and LAUSD contained a provision with regard to faculty meetings. This provision was designated Article IX, Section 4.2, and is set forth in its entirety as follows:

Such [faculty] meetings shall be held at a reasonable time and place, and shall not, except in special situations or emergencies, exceed one hour in duration or be held more than three times per calendar month. Agendas for faculty meetings are to be distributed at least one day in advance; employees shall be permitted to propose agenda items and to participate in a professional manner in discussions during the meetings.

On January 7, 1982, Mr. Glass submitted a letter to Mr. Koster proposing two agenda items: campus sweeps and attendance policy. He further suggested that the following problems should be addressed at faculty meetings:

(1) wandering football players (during) 6th period; (2) radios on campus; (3) bicycle riders on campus; (4) vandalism and graffiti; (5) freeing of xerox machine for classroom teachers; and (6) discipline procedures. The agenda for the January 12,

1982, faculty meeting was prepared and the items proposed by Mr. Glass were included under the heading "Other Items as Time Permits."

During the January meeting Principal Koster, at the conclusion of all other items on the agenda, but prior to mentioning Glass¹ items, announced to the assembled faculty that Mr. Glass seemed to think he represented a part of the faculty and he did not. Koster held a piece of paper in his hand—a paper a number of faculty members believed to be a copy of the letter distributed by Mr. Glass—and said that he only recognized UTLA and that if there were any other such faculty associations, anyone could join. He went on to state that he had told Glass not to duplicate this letter but that Glass had duplicated it anyway. He stated that such actions were unprofessional. Koster was acting in a raging manner. Such a manner was more than being mad and was more extreme behavior than he had manifested in any past faculty meeting. Koster went on in this manner for two to five minutes.

Koster finished the formal faculty meeting and, as was his custom, turned the meeting over to teacher Steve Reilly, UTLA's site representative, for a UTLA meeting. Before Mr. Koster left the auditorium, Reilly asked if there was anyone in the audience that wanted to make any announcements or anything. Glass raised his hand and Reilly asked Koster if he should call on him. Koster said "no."

On January 14, 1983, Robert Glass filed a grievance alleging a violation of Article IX, Section 4.2 of the CBA. Although Mr. Glass¹ agenda items were not discussed prior to Principal Roster's final remarks in January, they were discussed during the next faculty meeting in February, after the grievance had been filed.

The grievance stated that the principal violated Article IX, Section 4.2 of the contract when he failed to call on Glass to introduce his agenda items. The grievance listed as its requested remedy, that the District develop a set of guidelines for faculty meetings which include the following:

- (1) teachers' concerns occupy the first half of any meeting;
- (2) concise ways that teachers can present and argue motions (parliamentary rules); and
- (3) allowances for the Teaching Faculty Association to propose items and have them discussed.

A first step grievance meeting was scheduled by Principal Roster's office for January 21, 1982, at 2:15 p.m. Steve Reilly testified that Glass told him that he (Glass) did not want UTLA representation at this first step meeting. Glass preferred to have a fellow teacher and friend, Jack Doerr, represent him. Glass then informed Principal Koster of this choice.

Glass testified that he asked Reilly to go with him to his Step I meeting and that Reilly stated that he would go into the meeting as a witness, not as an official UTLA representative as

the UTLA staff didn't want him representing Glass on this grievance. (Reilly had, however, represented Glass on a grievance approximately six months prior to this early 1982 incident.) Glass felt that having a UTLA representative in a witness role would be a sign of weakness. He felt Jack Doerr would be a better person to join him at the "first step" meeting.

Reilly doesn't remember anything about being told to stay away from Glass, in general, by any UTLA staff person, but may have been told not to represent him with regard to this particular grievance. UTLA paid staff personnel usually represent members at the Step I meetings.

Upon learning that Doerr would be Glass¹ representative Koster changed the time of the meeting to 3:15 p.m. so that Doerr would be able to attend the grievance meeting without missing any teaching time. Glass replied that neither he nor Mr. Doerr could meet at 3:15 p.m. on that date and that Koster should keep the original 2:15 p.m. time and provide a substitute teacher for Doerr. The principal refused to do this but suggested Glass waive the five-day time limit so that an alternative date could be selected. Glass refused to waive the time limit. Glass attended the 2:15 p.m. Step I meeting without Mr. Doerr or any other representative. Principal Koster and Jack Thompson of LAUSD staff relations represented the District.

On January 25, 1983, Mr. Glass filed another grievance alleging a violation of Article V, Sections 2 and 3 of the CBA. The grievance alleged that Koster and Thompson denied Mr. Glass the right to have his representative, Jack Doerr, present at a Step I grievance meeting.

Article V, Sections 2 and 3, in pertinent part, are as follows:

2.0 Representation Rights: At all grievance meetings under this Article, the grievant shall be entitled to be accompanied and/or represented by a UTLA representative. A grievant shall also be entitled, prior to arbitration, to represent himself or herself, or to be represented by any other person, so long as that person is not a representative of another employee organization. The administrator shall have the right to be accompanied by another administrator or District representative. By mutual agreement other persons such as witnesses may also attend grievance meetings.

3.0 Released Time For Employees and UTLA Representatives: Grievance meeting and hearing will be scheduled by the District at mutually convenient times and places during District business hours. Such meetings will be scheduled so as to minimize interference with regular employee duties. If a grievance meeting is scheduled during duty hours, reasonable employee released time, including necessary travel time, without loss of salary and with mileage reimbursement, will be provided to the grievant, to a UTLA representative if one is to be present, and to any witness who attends by mutual agreement. . . .
(Emphasis added.)

Glass telephoned Roger Segure, UTLA's grievance coordinator, after the Step I meeting on his "agenda"

grievance, to inquire about representation on both grievances at all subsequent steps. Glass insists that Segure told him that (1) he could represent himself, (2) the real decisions were made at the arbitration level, and (3) his "released time" grievance had merit but that the "agenda" grievance did not.

Segure testified that he told Glass that neither grievance had merit and that therefore UTLA declined to represent him in these matters. He admitted he may have responded in some other fashion if something had been misrepresented but once he saw the written formal grievance he told Glass that there was no merit to either grievance.

Segure stated that he has encountered the "agenda" problem a number of times each year and his response has always been the same--the contract does not guarantee the right to discuss the subject items but merely guarantees the employee's right to get the items on the agenda.

In 1978 Glass himself had come to Segure regarding a grievance on this issue when the "teacher-proposed agenda items" was still in District board policy and had not yet been incorporated into the CBA. Segure testified that he gave Glass the same response at that time. Glass testified that he did in fact go to UTLA for representation on the same type of grievance in 1978. The difference between his testimony and Segure's on this matter is that Glass insists that UTLA staff personnel represented him through the first two steps of the

grievance procedure on this very same issue. UTLA recommended that he drop the grievance at that point. He believes they made this recommendation because of the cost of taking the case to arbitration. He remembers that Sam Kresner represented him at Step I and he believes it was Ray Butler representing him at Step II. Both of these men are UTLA staff members.

Segure testified that the "released time" grievance was without merit. He explained that the contract only requires release time for (1) the involved employee, (2) a UTLA representative, and/or (3) a mutually agreed upon witness. He explained that the "agenda" grievance lacked merit because the contract does not guarantee that teacher-proposed agenda items will be discussed at any particular faculty meeting. Due to these views it was UTLA's position that the contract had not been violated and that UTLA representation for Mr. Glass was not appropriate.

After Glass filed his "released time" grievance Mr. Koster stated that, as they had previously discussed the matter at length, he would give Glass a "first step" response but that it was not necessary to hold a "first step" meeting. No such meeting was held.

Prior to initiating Step II of the grievance procedure Mr. Glass retained a private attorney, Marilyn Garber, to represent him. Garber contacted Segure to request representation for the grievance step meetings. She testified

that Segure told her that he had known Glass for a long time and that he (Glass) was a "gadfly," wanted to have fun, that he was "strange" and "kiddish." She further testified that Segure told her that Glass could take UTLA to PERB, that he certainly knew how to do that as he had done it before. She insisted that she was told that Glass¹ "agenda" grievance had merit but that the "released time" grievance did not. Glass had previously testified that Segure had told him the "released time" grievance had merit but the "agenda" grievance did not. Glass attended the Step II grievance meeting accompanied by Ms. Garber. Robert F. Coutts, another Van Nuys High School teacher, was present as a witness for Mr. Glass. Mr. Thompson, the District's labor relations representative, represented the District. Mr. Parry, a LAUSD administrator, presided over the meeting and had the power to grant or deny the grievance. Mr. Parry stated that he would rely heavily upon the advice and counsel of Mr. Thompson.

Glass pursued his grievances through the first three steps of the contractual procedure and at each step the grievances were denied. At the third step an actual hearing is held only at the option of the District. A hearing was not held in these cases.

On March 20, 1982, Mr. Glass sent a letter to Roger Segure requesting that UTLA take the necessary steps to initiate the arbitration of his two grievances. In that letter he

referenced an earlier meeting, on February 9, in Segure's downtown office, in which he stated the two men discussed the probability that Glass would have to repay UTLA for its costs if this matter came to arbitration. Glass testified that Segure told him that he would recommend to the UTLA board that the matters be taken to arbitration if Glass, as a nonmember, would bear the costs. He assured Glass that the board would follow his recommendation.

Segure denied telling Glass he would have to reimburse UTLA for its costs of arbitration. He did state that UTLA had been considering asking for an arbitration hearing under the conditions that Glass represent himself and be personally billed for all costs.

Glass believed that UTLA would not represent nonmembers without charge. Segure and Sam Kresner, a UTLA official at some unstated time in the past, had told him that UTLA does not like to represent nonmembers. Other members of the unit had the same impression.

Jack Doerr had had some difficulty three or four years ago with his principal due to a heated conflict with another faculty member. Doerr testified that when requesting representation on this matter he was told by Steve Reilly that he would predate Doerr's membership if he would join so that it would appear he was a member prior to the events relating to the grievance. Doerr declined to join UTLA. He talked to

Roger Segure and was told that he had a good grievance. He mentioned his nonmembership status to Segure who was surprised as they had worked together prior to the establishment of UTLA. He was directed to discuss his problem with a UTLA staff person named Estes. Estes told him that he did not have a good grievance. Doerr testified that when his request for representation was denied, he believed it was due to his nonmembership status. Doerr admitted that a major difficulty with his case at that time was that there was no contractual breach alleged. He just felt that the principal's contemplated action was unfair. Mr. Doerr is a member of the Teaching Faculty Association.

Reilly admits to trying to get Mr. Doerr to join UTLA, but insists he did not condition representation on such membership. He testified that he put Doerr into contact with the staff members at UTLA headquarters and that the UTLA staff members knew of his nonmember status. Reilly doesn't believe that a staff member has ever asked him if someone was a member when he called in on a grievance. Roger Segure stated that he never asks the caller if the involved teacher is a member or not.

Mr. Robert F. Coutts, a Van Nuys High School teacher and the local site vice-president of UTLA, believes "that UTLA is somewhat reluctant to represent nonmembers although it claims to be willing to do so." He based this belief solely on cases

that he has heard about and not any written policy. Nor did he base this opinion on any specific cases or observation of Mr. Reilly's behavior on behalf of UTLA at Van Nuys High School. He personally has never represented teachers on grievances. He never brought the matter to the attention of the UTLA staff. Mr. Coutts is a member of the Teaching Faculty Association.

Mr. Morton S. Sirkus, a social studies teacher at the District's Cleveland High School is a chapter chairperson for UTLA at his site. He is also on the city-wide UTLA House of Representatives. He was on the faculty at Van Nuys High School for 18 years until he left in January 1980. He was under the impression, until a few days before the hearing, that UTLA did not represent nonmembers, didn't carry their grievances and if they did, the nonmember had to pay his/her own expenses. He received that impression from an announcement that was made at a school that he was assigned to at some unstated time in the past. He checked with UTLA shortly before the hearing and was informed that his previous impression was incorrect, and that because of some recent ruling, UTLA now has to represent both members and nonmembers. For approximately six years prior to 1980, while at Van Nuys High School, Mr. Sirkis was periodically the grievance chairperson. In that role he would represent various members of the certificated staff. He never inquired as to whether or not those teachers were members of

UTLA. He represented them irrespective of their membership. He never received a communication from UTLA headquarters that he should vary that policy of representation.

Mr. Reilly stated that UTLA membership would not have played a part in deciding to support or not to support a grievance, but that both Glass and Doerr may have complained in the past about nonmembers being represented.

Mr. Glass filed an unfair practice charge against UTLA during 1981 or 1982. The case was settled at the informal conference level. As a condition of that settlement, UTLA provided assistance to Mr. Glass in obtaining remuneration for the day he spent at PERB's Los Angeles Regional Office attending the informal conference. Roger Segure contacted the District on Mr. Glass¹ behalf in this matter. The salary payment was made to Mr. Glass and thereafter he withdrew his charge against UTLA with prejudice.

Roger Segure admitted that between 5 and 10 percent of the grievances filed are given representation by UTLA for what he termed "therapeutic" reasons. He described this term as covering grievances that were good for the members, but had no potential of providing a real winning result. It could be that such grievances have no merit or there is no adequate remedy, or perhaps the issue has become moot. He believes that the representation of such grievances is consistent with UTLA's duty of representation. The decision to accept such

therapeutic grievances is a result of a decision of a majority of three UTLA grievance staff employees (one of whom is Segure). Such group decision is not based on UTLA membership.

ISSUES

1. Whether the District violated section 3543.5(c)³ by (1) handling Mr. Glass¹ January 1982 grievances in a perfunctory manner without a good faith consideration of the facts or a reasonable interpretation of the contractual provisions; (2) failing to give an independent consideration of the grievance at each step of the procedure; or (3) de facto abolition of Step III (deputy superintendent level) of the grievance procedure as virtually all grievances reaching this level are denied and actual hearings are never held.

2. Whether Principal Roster's reproof of Mr. Glass before the school faculty was violative of section 3543.5(a)⁴

³Section 3543.5(c) is as follows:

It shall be unlawful for a public school employer to:

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

⁴Section 3543.5(a):

It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

even though it occurred more than six months prior to the filing of the charge?

3. Whether UTLA violated section 3543.6 (b)⁵ or 3544.9⁶ in its representation of Robert Glass in the matter of his two January 1982 grievances against the District?

CONCLUSIONS OF LAW

As set forth above, in the Procedural History, the District's Motion, made on the third day of the formal hearing, was granted, thereby dismissing all charges and the complaint against the District. Set forth below are the involved issues and conclusions of law relied upon in such dismissals.

Issue No. 1, Allegation re District's Violation of section 3543.5(c)

The Charging Party argues that the District violated section 3543.5(c) in that it failed to negotiate in good faith

⁵Section 3543.6 (b) :

It shall be unlawful for an employee organization to:

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

⁶Section 3544.9:

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.

when it negotiated the grievance procedure in the 1980-82 collective bargaining agreement with the UTLA. The Charging Party's general argument is that because the District so blatantly violated and circumvented the contractual grievance procedure in the spring of 1982, it couldn't possibly have negotiated in good faith those same procedures in the spring of 1980. There was no evidence proffered to show what the negotiating history was concerning these procedures. There was no evidence proffered to show whether the manner in which the District dealt with the grievance procedures with regard to the hundreds of grievances filed during this two-year period was better, worse, different or the same as the manner in which it dealt with Mr. Glass' grievances. The only evidence to support the allegations came from Mr. Glass¹ personal belief that the District:

1. Did not give his grievances a good faith consideration and that the District's interpretation of two specific contractual provisions was not reasonable;

2. Permits the administrators charged with the responsibility of ruling on a grievance at each step to be unduly influenced by the District's labor relations representative; and

3. Has unilaterally expunged the Step III level as it never holds an actual hearing at that level and that virtually all such grievances are denied.

It is acknowledged that a District, through its post-negotiating behavior, could manifest an attitude towards a contract or a particular provision of that contract that could retroactively bring into question its "good faith" state of mind while negotiating. However, the evidence offered in this case by the Charging Party is little more than a bold assertion of wrongdoing and falls far short of any sort of minimum level necessary to prove such a charge.

Therefore, it is determined that the District did not violate section 3543.5(c) with regard to the manner in which it dealt with Mr. Glass' January 1982 grievances.

Issue No. 2, Allegation re District's Violation of section 3543.5(a)

The District's primary defense to this charge is that the events complained of occurred more than six months prior to the date the charge was filed with the PERB. The faculty meeting at which Principal Koster allegedly berated Mr. Glass for his "unprofessional" conduct occurred on January 12, 1982. The charge against the District was filed at the Los Angeles Regional Office of the PERB on August 11, 1982, almost seven months later.

However, a charge may still be considered to be timely filed if (1) the alleged violation is a continuing one, (2) the violation has been revived by subsequent unlawful conduct within the six-month period, or (3) the limitation period was tolled while the Association was diligently and reasonably

pursuing alternative procedures for obtaining relief and other alternative remedies. San Dieguito Union High School District (2/25/82) PERB Decision No. 194.

Section 3541.5 prohibits PERB from issuing a complaint "in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The section provides, however, that the running of the six-month period will be tolled during the time that a complainant was pursuing grievance machinery which is provided by agreement between the parties and which has culminated in settlement or binding arbitration.

PERB has approved the application of the doctrine of "equitable tolling" in appropriate cases. State of California, Department of Water Resources, et al. (12/29/81) PERB Order No. Ad-122-S.

In recognition of the fact that the principal purpose of a statute of limitations is to prevent surprise and prejudice to a party from having to defend against stale claims, the doctrine of equitable tolling provides that a statute of limitations will not be imposed to bar a claim where no such risk exists because the defendant has been kept on sufficient notice by the plaintiff's pursuit of his claim in another forum. The general rule is that the doctrine is applicable where "an injured person has several legal remedies and reasonably and in good faith pursues one." Elkins v. Derby (1974), 12 Cal.3d 410. See also, Addison v. State of California (1978), 21 Cal.3d 313. Thus, in State of California, Department of Water Resources, supra, we found that a complaint should

issue even though more than six months had passed since the alleged violation of SEERA because the respondent had been placed on sufficient notice by the timely filing and prosecution of a complaint involving the same issues before the State Personnel Board. State of California, Department of Health Services, (12/22/82) PERB Decision No. 269-S. ("Emphasis added.)

In San Dieguito UHSD, supra, at p. 13, the Board set forth a two step test for the equitable tolling doctrine to be applicable. The first step is that it is necessary that tolling not frustrate achievement of the purpose underlying the statute of limitations. The purpose was defined as the prevention of surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The second step permits tolling of the limitations period when an injured person has several legal remedies and reasonably and in good faith pursue one. Both requirements must be present in order to permit the tolling of the statute of limitations.

This test assumes that there is only one dispute, such as an allegedly improper termination or a refusal to promote. The test is then applied to the charging party's various actions in attempting to overturn such termination or refusal. In this case against the District we have at least two separate and distinct disputes. The principal's reproof for copying the Association's letter and the principal's failure to call on Mr. Glass to discuss his agenda items. Complaining of one did

not put the District on notice the other was in dispute. The "representation" grievance had no factual relevance to the subject unfair practice charge and did not effectively put the District on notice re any aspect of such charge.

The unfair practice charge in this case complains of an employee having been subjected to reprisals, discrimination, interference, restraint and/or coercion by an agent of the District because of that employee's exercise of rights guaranteed by the EERA.

The "agenda grievance was directed toward remedying an alleged breach of Mr. Glass' contractual right to have a specified level of input into faculty meeting agenda and discussions. That grievance complained the principal "did not call on me to introduce . . ." and did not "allow me to participate . . . in discussions . . ." This is an entirely different dispute than one dealing with the manner in which the principal acted and the words he directed towards Mr. Glass. Neither the principal's demeanor nor his intent would have been necessary elements of proving the existence of a contractual breach. If there was a duty on the principal's part to discuss Glass' agenda items at the January meeting, there was a breach when he failed to do so.

The unfair practice charge, however, was directed towards remedying an alleged attempt on the part of the principal to discriminate, intimidate, interfere, or coerce Mr. Glass due to

his exercise of rights protected by the Act. In its investigation and preparation for the grievance the District would have had no reason to pay any attention to potential testimony or any other evidence regarding Glass¹ organizational activities the administration's general knowledge of such activities, more specifically the principal's personal knowledge of such activities, or the principal's specific intent towards Glass' right under the Act at the faculty meeting. Therefore, it is determined that the "agenda" grievance, as submitted, failed to put the District on notice that Glass was complaining of improper statements made by the principal.

The "representation" grievance failed to put the District on notice of any matter relevant to the subject charge.

With regard to the second step of the San Dieguito test, the charging party was not pursuing the same claim in another forum, nor had he chosen one of several alternative legal remedies available to him. The charging party's grievances had an entirely different objective than the unfair practice charge in this case. An examination of the two grievances and the charge filed with PERB leads to the conclusion that Mr. Glass was referencing three separate and distinct disputes with three separate and distinct remedies. He was not complaining of one single dispute and pursuing alternative routes to resolving such dispute.

An examination of these two grievances and their requested remedies vis-a-vis the charge in this case leads to the conclusion that the defendant District "has not been kept on sufficient notice by the plaintiff's pursuit of his claim in another forum. Grievances asking for modifications in faculty meetings and in grievance procedural rules do not reasonably put an employer on notice that an employee is complaining about being discriminated against, interfered with, or coerced due to protected activities.

In Siamis v. LAUSD & UTLA (5/20/83) PERB Decision No. 311, the Board supported its decision with a quote from San Dieguito, supra which is as follows:

The limitations period, as a consequence, would not run until after it became clear that the possibility of a remedy via [the grievance procedure] was foreclosed.

In this case there was never the remotest possibility that a relevant remedy would flow from either of the two grievances filed by Mr. Glass. Even if the District had agreed to everything that Glass prayed for in those grievances, the issue before us, the alleged discrimination, interference or coercion of Mr. Glass for protected activities, would not have been addressed nor remedied.

It is found, therefore, that the Charging Party's filing of the two grievances in January 1982 does not come within the parameters of the "equitable tolling" doctrine. Therefore, such grievances failed to toll the statute of limitations set

forth in subdivision 3541.5(a). Consequently, the charge alleging coercion of the Charging Party because of his exercise of rights guaranteed by the Act is barred by such statute.

Issue No. 3, allegation re UTLA's violation of section 3543.6(b) and 3544.9

A. Duty of Fair Representation General Precepts

In Rocklin Teachers Professional Association (3/26/80) PERB Decision No. 124, the Board, following precedent set by the National Labor Relations Board and affirmed by the Supreme Court in Vaca v. Sipes (1967) 386 U.S. 171, adopted the concept that 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.

The Board, in Rocklin, supra, affirmed the interpretation of this concept set forth in Griffin v. United Auto Workers (4th Cir. 1972) 469 F.2d 181 [81 LRRM 2485], as follows:

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 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.

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 (1970) 425 P.2d 281.

However, an employee does not have an absolute right to have a grievance taken to arbitration regardless of the provisions of the applicable collective negotiations agreement. (Citations omitted.) An exclusive representative's reasonable refusal to proceed with arbitration is essential to the operation of a grievance and arbitration system. (Citations omitted.) Castro Valley Unified School District and Castro Valley Teachers Association (12/17/80) PERB Decision No. 149.

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. See, e.g., Gleason v. T.I.M.E.-DC, Inc. (D. Colo. 1972) 84 LRRM 2107. United Teachers of Los Angeles (11/17/82) PERB Decision No. 258.

B. Charging Party's Specific Allegations Re Failure of Duty of Fair Representation

The specific allegations to be inferred from the charge are that UTLA violated its duty to represent Charging Party in good

faith by: (1) failing to provide representation for Mr. Glass at the preliminary steps of the grievance procedure with regard to both grievances, and (2) failing to take the two grievances to arbitration or, in the alternative, to permit Mr. Glass to take such grievances to arbitration at his own expense.

(1) Representation Denial During Grievance Steps

This allegation may be divided into two separate chronological instances: (a) the alleged request for representation re the "agenda" grievance at Step I meeting made to Reilly; and (b) the request for representation at subsequent grievance "step" meetings from Roger Segure.

(a) Mr. Glass made his first contact with UTLA through Mr. Reilly, Van Nuys High School site representative, regarding the upcoming Step I meeting on the "agenda" grievance. The two gentlemen involved have distinctly different recollections of what occurred in that conversation. Glass insists he asked for UTLA representation, and was turned down; Reilly insists Glass had already decided to use Doerr rather than a UTLA representative. Each of these men testified credibly although they have different personal styles. Mr. Reilly is more cautious and is inclined to add "maybe" and "it could have" to his testimony. He also used "I don't remember" more than Mr. Glass. Mr. Glass is more assertive and positive in his recollection. These differences are more a reflection of different personalities rather than a

manifestation of credibility or lack thereof. It must also be remembered that Mr. Glass is the Charging Party and directly involved in the outcome of this case. He filed it, he's paying for it, and he has a strongly partisan interest in the outcome. Mr. Reilly is a colleague and a friend of long standing of Mr. Glass. On the other hand, he is an elected representative of UTLA. He manifested no strong personal interest in the eventual outcome of this case.

The conflict in testimony between these men as to whether or not Glass originally asked for UTLA representation is unresolvable. As the burden of proof is upon the Charging Party it must be determined that Mr. Glass has not proven his case that UTLA refused him representation with regard to his "first step" meeting on the "agenda" grievance.

(b) The second representation denial instance occurred when UTLA declined to represent Mr. Glass at the subsequent steps of the grievance. The evidence proffered by both sides on this point is replete with charges and counter charges regarding attitudes and circumstances over the past 15 or more years. Irrespective of these charges, a basic question must be addressed. Did the grievances, as propounded by Mr. Glass, have sufficient merit so as to require UTLA to represent Mr. Glass, in his advocacy of them?

The "agenda" grievance hinges on the following contractual language: "employees shall be permitted to propose agenda

items and to participate in a professional manner in discussions during the meetings." Mr. Glass insists that this language should be interpreted to mean that the principal is contractually required to reach, introduce and discuss every item proposed by every teacher at the very next meeting after such proposal. UTLA insisted that the intent of the parties when negotiating this contractual provision was not to give the individual teachers such a right. It also pointed out the conflict between Charging Party's interpretation and the one-hour limitation in the same contractual provision.

It is unknown how he resolves the obvious conflict between this interpretation and the one-hour limitation in the same contractual provision. It would seem reasonable that if a particular principal had a continuing practice of accepting and including teacher proposed items on the agenda and then refusing to permit any subsequent introduction or discussion of such item, an argument could be made that the intent of the contractual section was being violated. In this case, we have no evidence of such a practice. On the basis of a one-time only circumstance it is determined that Mr. Glass' interpretation is without sufficient support in the applicable contractual language so as to deem his "agenda" grievance meritorious.

The Charging Party's "released time" grievance hinges on his interpretation of the following contractual language: "if

a grievance meeting is scheduled during duty hours, reasonable employee released time . . . without loss of salary . . . will be provided to the grievant, to a UTLA representative . . . and to any witness who attends by mutual agreement . . . "

Once Principal Koster scheduled the meeting for 2:15 p.m., a nonduty time for Mr. Glass, it is Mr. Glass¹ contention that the District was contractually bound to provide a substitute for any representative of his choosing that would otherwise be unable to attend the meeting. There are a number of contractual difficulties with that interpretation. First, the contract specifically states that the grievance meetings will "be scheduled so as to minimize interference with regular employee duties." Secondly, the contract only provides release time to a limited number of persons: (a) grievant, (b) a UTLA representative, and (c) any witness who attends by mutual agreement. Mr. Doerr did not fall into either of the first two categories and there is a serious question as to whether or not Mr. Doerr was a representative or a witness. Mr. Glass was assertively vague on this issue and called him both a representative and a witness.

If he was a non-UTLA representative, and Mr. Glass specifically identified him in the written grievance as "my representative, Mr. Jack Doerr," he would have no right to release time under this section. If he was a witness, and if the District agreed to his attendance, he may have been

entitled to release time. However, it is logical to assume that the District, through Mr. Koster, in rescheduling the meeting from 2:15 p.m. to 3:15 p.m., was making its "agreement" conditional upon Mr. Doerr attending the meeting during his nonduty hours.

Charging Party continually stressed that UTLA's interpretation of the applicable contractual provisions would render these provisions meaningless. It is determined that this position is inaccurate. UTLA's position regarding the agenda controversy acknowledges that an individual teacher has a right to have a limited degree of access into the agenda of faculty meetings. Its position regarding the representation grievance acknowledges the dual nature of the designation and attendance of a witness. Neither of UTLA's positions renders any part of the contract inoperative or meaningless.

It must also be stressed that a union's interpretation of the collective bargaining agreement is entitled to substantial weight in determining whether the grievance is unmeritorious. Freeman v. O'Neal Steel Company (5th Cir. 1980) 609 F.2d 1123 [103 LRRM 2398].

The Courts and the NLRB have also held that if the union's interpretation of the collective bargaining agreement is reasonable, the union is under no duty to investigate the grievance and process it. Washington-Baltimore Newspaper Guild, Local 35 Communication Workers of America (1979) 239 NLRB 1321.

Therefore, an examination of the grievances vis-a-vis the contractual language they are based on results in a conclusion that the grievances are without merit.

We have a number of additional conflicts as yet unresolved. Attorney Garber stated that she was told by Mr. Segure that the "agenda" grievance had merit but the "released time" grievance did not. Glass testified that he was told by Mr. Segure the exact opposite was true. Mr. Segure admits he may have commented favorably on any given grievance when discussing them over the phone, his decisions are no better than the information given to him, but that once he actually saw the grievances in writing he made his decision that neither grievance was meritorious. The conflict between the three witnesses need not be resolved by means of a credibility determination. All three witnesses are credible witnesses who testified as to what they saw and heard, or at least what they thought they saw and heard. Testimony regarding statements made in admittedly adversarial telephone conversations with no mechanical means of transcription is not the most reliable manner of deriving evidence in a formal hearing. In other words, interested parties, although testifying in a credible manner, sometimes have a tendency to hear what they want to hear and remember what they want to remember regarding such matters. There is a continuing conflict but the evidence proffered was not sufficiently

conclusive so as to support a determination that any one of these witnesses had greater credibility than any other.

It is determined that UTLA processed Mr. Glass¹ requests for representation in the same manner as it would process any request for representation by any other member of the bargaining unit. It made a reasonable determination that the grievances were without merit and they declined to provide representation at the grievance procedure steps. It is further determined that such decisions were not arbitrary, discriminatory nor made in bad faith and therefore did not violate UTLA's duty of fair representation.

(2) Representation Denial at Arbitration Level

The second allegation of wrongdoing to be inferred from Mr. Glass¹ charges deal with UTLA's decision not to take the case to arbitration. The above exhaustive discussion regarding the merits of the grievances is applicable to this discussion as well. If the grievances are not meritorious, in the reasonable interpretation of the exclusive representative, there is no duty to take them to arbitration. The decision to decline to permit Mr. Glass to take the matters to arbitration is a decision uniquely within the province of the union. Employees have traditionally been given certain individual rights vis-a-vis the grievance procedure, but a contractual arbitration procedure belongs exclusively to the contracting union. The union has reasonably determined that the underlying

grievances have no merit. It is therefore determined that there was no violation of the union's duty of fair representation when it chose not to make its arbitration procedure available to an individual employee to pursue such grievance(s).

It is further determined that UTLA's decision not to take such grievances to arbitration was based on the merits of the grievances and was not arbitrary, discriminatory or made in bad faith.

C. Implied Allegations Regarding UTLA's Policy Regarding Representation of Nonmembers

There were a number of additional allegations and some rather specific testimony that UTLA has or had a policy of nonrepresentation for all nonmembers or at least required such nonmembers to pay directly for any representational services. The testimony proffered with regard to such allegations was elicited from three witnesses. These three witnesses, all teachers with the LAUSD, testified as follows:

Jack Doerr is a teacher at Van Nuys High School, a member of the Teaching Faculty Association, and a nonmember of the UTLA. He testified that he was involved in a conflict with his principal three or four years ago and went to UTLA representative Reilly for help. He was told initially by Roger Segure that he had a good grievance but was turned over to another UTLA representative. After discussing the specifics with this new representative he was told he did not have a

meritorious grievance. He admitted there was no contractual breach involved. He nevertheless believed he was denied representation because of his nonmembership status.

Robert P. Coutts is a Van Nuys High School teacher, the local site vice representative for UTLA, and a member of the Teaching Faculty Association. He testified that he "believes UTLA is somewhat reluctant to represent nonmembers." He bases this belief on general hearsay.

Morton S. Sirkus is a teacher at Cleveland High School in the LAUSD, a chapter chairperson for UTLA at his site and is also on the city UTLA House of Representatives. He previously was a Van Nuys High School teacher. He was under the impression that UTLA did not represent nonmembers, and if they did, the nonmember had to pay his/her own expenses. He called UTLA shortly before the hearing and determined that his impression was incorrect, at least with regard to present policy.

To whatever extent the evidence accuses Respondent UTLA of violating its duty of fair representation by a general refusal to represent nonmembers or to charge them for representational services, it is determined that such charge fails for lack of proof.

CONCLUSION

Based on all of the foregoing it is specifically determined that the Los Angeles Unified School District has not violated

sections 3543.5(a) or (c) and that the United Teachers-Los Angeles has not violated sections 3543.6(b) or 3544.9. All other sections referred to in the charge are enforceable through these sections. It is determined that all charges filed by the Charging Party in this case are without merit and should be dismissed.

PROPOSED ORDER

Based on the foregoing statement of facts, conclusions of law and the entire record, the unfair practice charges and companion complaints in Case Nos. LA-CE-1622 and LA-CO-245, Robert Glass v. Los Angeles Unified School District and Robert Glass v. United Teachers-Los Angeles are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 19, 1984, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, Part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on November 19, 1984, or sent by telegraph or certified United

States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: October 29, 1984

Allen R. Link
Administrative Law Judge