STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MARY MCFARLAND, ROSA ETSON, JOAN HAW, LUCINDA MAESTAS AND ROSEMARY POMMELS,	)	
Charging Parties,	)	Case No. S-CE-334
v.	)	PERB Decision No. 549
WASHINGTON UNIFIED SCHOOL DISTRICT,	)	December 16, 1985
Respondent.	)	

Appearance; Pacific Legal Foundation by Anthony T. Caso for Mary McFarland, et al.

Before Hesse, Chairperson; Burt and Porter, Members.

DECISION

HESSE, Chairperson: Charging parties appeal the attached dismissal issued by an administrative law judge (ALJ) of the Public Employment Relations Board (PERB or Board). In the unfair practice charge, charging parties alleged that the Washington Unified School District (District) violated sections 3543.5(a), 3540.1(d) and (i)(2), 3543.2, and 3546 of the Educational Employment Relations Act (EERA or Act)[1] by executing a contract that recognizes more than one exclusive

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

Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:

representative and requires all members of the bargaining unit to pay a representational fee equal to the combined dues of the Washington Education Association (WEA), California Teachers

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> (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.

Section 3540.1 provides, in relevant part:

> As used in this chapter:
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> (d) "Employee organization" means any organization which includes employees of a public school employer and which has as one of its primary purposes representing such employees in their relations with that public school employer. "Employee organization" shall also include any person such an organization authorizes to act on its behalf.
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> . . . . . .
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> (i) "Organizational security" means either:
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> . . . . . .
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> (2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first.

Section 3543.2 provides, in relevant part, the "scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment."

Section 3546 states how organizational security provisions may be established and rescinded.

Association (CTA), and National Education Association (NEA). Charging parties further alleged that this fee exceeds the cost of collective bargaining and contract administration incurred by WEA, asserting that significant portions of this fee will be used to finance political, social and ideological activities as well as other activities with which the charging parties disagree and from which they will derive no benefits.

On appeal, charging parties argue that the unfair practice charge and complaint were improperly dismissed because the allegations state a prima facie violation of the EERA and the ALJ lacks the authority to dismiss the complaint sua sponte. For the reasons set forth below, we affirm the ALJ's dismissal of the unfair practice charge and complaint. We do, however, find it necessary to discuss the ALJ's authority to dismiss the complaint on his own motion.

DISCUSSION

On March 14, 1985, and subsequent to the issuance of the complaint, the ALJ issued a "warning letter," informing the charging parties that recent PERB decisions hold that the employer is not the proper respondent for an allegation that excessive fees are charged under an agency fee agreement. Thus, the allegations did not state a prima facie violation of the EERA. Unless the charging parties could show cause why the charge should not be dismissed, the ALJ indicated the charge and complaint would be dismissed. Charging parties asserted two reasons why the charge and complaint should not be dismissed:

(1) no grounds exist for the agency to dismiss the charge and complaint sua sponte; and (2) the ALJ's rationale for dismissing the charge was underinclusive and incorrect. After a review of the charging parties' assertions, the ALJ concluded that the charge did not state a prima facie violation of the EERA and he dismissed the unfair practice charge and companion complaint.

On appeal, the charging parties reassert their previous arguments that the ALJ lacks authority to dismiss a complaint sua sponte, the ALJ's rationale is underinclusive and incorrect, and that the charges state a prima facie violation of the EERA. They further argue that the ALJ's findings violate the rights guaranteed by the Fourteenth Amendment of the United States Constitution.[2]

Prima Facie Violation

The allegations did not state a prima facie violation of the EERA. Contrary to charging parties' assertion, the District did not recognize three employee organizations as the exclusive representative. The District recognized only one exclusive representative — WEA. The claim that the employer recognized more than one exclusive representative is based wholly on the

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[2]The Fourteenth Amendment states, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .
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> . . . . . .
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> [U.S. Const. amend. XIV, sec. 1.]

language of the contract. However, we take official notice of Leek v. Washington Unified School District (1981) 124 Cal.App.3d 43, which involved the same school district and the precise contract language before us. In that case, the court stated, at page 46:

> WEA is the local affiliate of California Teachers' Association (CTA) and the National Education Association (NEA) . . . .

We have found in Fresno Unified School District (1982) PERB Decision No. 208 that the mere affiliation of the local organization with CTA was insufficient to make CTA the exclusive representative and, hence, it was not liable for a violation of the EERA. See also Link v. California Teachers Association and National Education Association (1981) PERB Order No. Ad-123. Thus, the allegation that the District, through the contract language alone, has recognized more than one exclusive representative, is resolved as a matter of law.

Assuming all the factual allegations asserted by the charging parties are true, PERB decisions demonstrate that the public school employer is not the appropriate respondent in this case.[3] Although the ALJ incorrectly cited Fresno, supra, for

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[3]To the extent Link v. Antioch Unified School District et al. (1985) PERB Order No. IR-47 is inconsistent, we disapprove that case. In Link, complaints were issued against the associations and the districts on February 4, 1982. On December 31, 1984, charging parties sought injunctive relief requiring the CTA/NEA affiliates or the employers to escrow the entire amount of agency fees collected from the charging parties. In deciding if the first test for injunctive relief had been met (whether there was reasonable cause to believe that an unfair practice had been committed), the Board stated:

holding that "a public school employer cannot be held liable for unlawful expenditures made by the exclusive representative," he did cite the two PERB cases that directly make this specific finding: San Jose Unified School District (1984) PERB Decision No. 463 and Milpitas Unified School District (1984) PERB Decision No. 462. The allegations concern the exclusive representative's conduct. While the obligation to pay an agency fee arises by virtue of a negotiated agency fee provision in the contract, the Board held in Fresno, supra, that the amount of the fee is not negotiable. Thus, the obligation to pay the specified amount does not arise by virtue of the collective bargaining agreement, but rather, the amount is determined by the exclusive representative independently of that document. Therefore, we reached the conclusion in San Jose Unified School District, supra, and Milpitas Unified School District, supra, that the employer is not the appropriate respondent for claims of excessive agency fees. As a matter of law, the charging

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> Accordingly, there is reasonable cause to believe that the Districts and Associations unlawfully interfered with their statutory right not to participate in organizational activity in violation of section 3543.5(a) and 3543.6(a) and (b), respectively. (Antioch, supra, at p. 6.)

The Board in IR-47 found that injunctive relief was not "just and proper," and denied the charging parties' request for injunctive relief. The issue of an employer's liability in agency fee cases was not directly before the Board in that decision. Indeed, the issue of the employers' liability in this case was resolved on April 1, 1985, when the unfair practice charges against the employers were dismissed.

parties' allegations do not state a prima facie violation of the EERA.

Further, in upholding the ALJ's conclusions, we find his rationale was neither underinclusive nor incorrect.

Authority to Dismiss Complaint

The issue of whether an ALJ has the authority to dismiss a complaint sua sponte has not been previously addressed by this Board. It is clear, however, that Board agents have the authority to dismiss a charge that fails to establish a prima facie case. The Legislature granted the Board broad powers with regard to processing unfair practice charges,[4] including the

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[4]Section 3541.3 provides, in relevant part:

> The board shall have all the following powers and duties:
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> . . . . . .
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> (g) To adopt, pursuant to Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2, rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter.
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> . . . . . .
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> (i) To investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect of such charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.
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> . . . . . .
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> (n) To take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

duty to determine if the charges are justified.[5] 5

Under this authority, the Board promulgated regulations empowering its agents to determine if a prima facie case has been established and, if so, how to proceed.[6] There is no

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[5]Section 3541.5 provides, in relevant part:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board. . . .

[6]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

PERB Regulation 32620 provides, in relevant part:

> . . . . . .
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> (b) The powers and duties of such Board agent shall be to:
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> . . . . . .
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> (5) Dismiss the charge or any part thereof as provided in Section 32630 if it is determined that the charge or the evidence is insufficient to establish a prima facie case. . . .

PERB Regulation 32630 provides:

> If the Board agent concludes that the charge or the evidence is insufficient to establish a prima facie case, the Board agent shall refuse to issue complaint, in whole or in part. The refusal shall constitute a dismissal of the charge. The refusal, including a statement of the grounds for refusal, shall be in writing and shall be served on the charging party and respondent.

requirement that the respondent file a motion to dismiss a charge or complaint before the Board agent can dismiss the charge. Upon finding that the charge fails to establish a prima facie case, the Board agent must dismiss the charge.

At issue here is whether a Board agent may dismiss a complaint, prior to hearing, upon finding that the complaint and underlying charge fail to state a prima facie case. Regulation 32652 directs the Board agent to dismiss the complaint if the charging party fails to prosecute the case.[7]

In the instant case, however, the charging parties have not failed to prosecute their case. Instead, because of the unsettled state of the law regarding the issues involved in the underlying charge, the case was held in abeyance by stipulation of the parties. Only when cases decided subsequent to issuance of the complaint showed, as a matter of law, that allegations of this sort could not state a prima facie case against the employer, did the ALJ dismiss the charge and accompanying complaint.

Charging parties assert that, since PERB's regulations do not have a specific provision for a Board agent to dismiss a

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[7]PERB Regulation 32652 provides, in relevant part:

> If the informal conference procedure fails to result in a voluntary settlement, any party thereafter may file with the Board a request for hearing or the Board may order a hearing. If a request for hearing is not filed within six months from the date of the issuance of the complaint, the complaint will be dismissed.

complaint sua sponte, the ALJ was without authority to dismiss this case. In support of this assertion, the charging parties mistakenly rely on Mission Insurance Group, Inc. v. Merco Construction Engineers, Inc. (1983) 147 Cal.App.3d 1059. That case, however, is inapposite to the situation presently before us.[8] In Mission Insurance, the insurance company brought a declaratory relief action to determine the correct amount of a worker's compensation dividend due to the insured, who in turn filed a cross-complaint for an accounting. The trial court granted a summary judgment on the cross-complaint action. The Court of Appeals found that summary judgment was improperly granted, not because the trial court had no authority to dismiss the case, but because the insured had established a prima facie case. Therefore, there were several triable issues of fact.

In the instant case, there are no triable issues of fact. As discussed above, the allegations regarding employer recognition of more than one exclusive representative and excessive agency shop fees are resolved as a matter of law. Assuming all allegations are true, the allegations do not establish that the employer violated the EERA.

Contrary to charging parties' assertions, the lack of specific authority for a sua sponte dismissal is not fatal to the ALJ's actions under these circumstances. In Rich Vision Centers,

[8]The Board has no quarrel with the proposition that "administrative regulations have the force and effect of law." (Mission Insurance, supra, at p. 1069.)

Inc. v. Board of Medical Examiners (1983) 144 Cal.App.3d 110, the court held that, although no statute expressly authorized the Board of Medical Examiners to settle licensing disputes, the Board did possess such power. In reaching this conclusion, the court said:

> Administrative agencies only have the power conferred upon them by statute and an act in excess of these powers is void. [Citations omitted.] However, an agency's powers are not limited to those expressly granted in the legislation; rather, "[i]t is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers." [Citations omitted.] (Rich Vision, supra, at p. 114.) (Emphasis in original.)

The court found that this additional power could be fairly implied from the statute, because settlement is "administratively efficient and furthers the purpose for which the Board was created." (Rich Vision, supra, at p. 115.)

Likewise, in the instant case there is no specific authority in our regulations for an ALJ to dismiss a complaint sua sponte. Nevertheless, to require the ALJ to proceed with a formal hearing where there is no possibility, as a matter of law, of finding a violation of EERA would clearly be a waste of the taxpayers' money and would not effectuate the purposes of the Act. That is the purpose for the specific authority of Board agents to dismiss charges that fail to establish prima facie violations. Thus, we hold that Board agents do have the

authority to dismiss complaints where it is clear the allegations do not establish prima facie violations.

Due Process

The charging parties assert that by finding that only one employee organization was recognized by the District, the ALJ violated their due process rights to a hearing and to present evidence on that issue. The cases the charging parties cite for asserting due process violations are inapposite to the instant case. In Southern Railway Co. v. Commonwealth of Virginia (1933) 290 U.S. 190, a state statute authorized the state highway commissioner to deprive railway companies of certain property rights if it was "necessary for public safety and convenience." This violated the Fourteenth Amendment because the commissioner could do so without prior notice or hearing and there was no provision for any review. Such issues certainly involved factual determinations. Also, in Cleveland Board of Education v. Loudermill (1985) 470 U.S. ___, 105 S.Ct. 1487, 84 L.Ed.2d 494, discharged employees were not afforded a pretermination opportunity to respond to the charges.

In the instant case, the ALJ gave a warning notice and provided for an opportunity to respond, of which the charging parties took full advantage. The charging parties failed, however, to provide further facts that would establish a violation. Assuming all assertions of the charging parties are true, there were no violations of the EERA committed by the employer as a matter of law. Thus, no factual determinations

were required. A hearing and opportunity to provide evidence would be futile in this case.

We have reviewed the ALJ's dismissal in light of the appeal and find it to be free of prejudicial error. We agree the charges do not establish a prima facie violation of EERA, and we further find the ALJ properly dismissed the complaint. Thus, we adopt the dismissal as the decision of the Board itself.

ORDER

The unfair practice charges and complaint in Case No. S-CE-334 are DISMISSED.

Members Burt and Porter joined in this Decision.

STATE Of CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
SACRAMENTO REGIONAL OFFICE
1031 18th STREET, SUITE 102
SACRAMENTO, CALIFORNIA 93814
(916) 323-3198

April 1. 1985

Mr. Anthony T. Caso. Attorney
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento. CA 95814

Re: McFarland, et al. v. Washington Unified School District.
Unfair Practice Case No. S-CE-334.

Dear Mr. Caso:

I have received your March 28. 1985, statement of opposition to dismissal of the complaint in the above-referenced case. Your statement was in response to a March 14 letter in which I advised you that I would dismiss the charge on April 1. 1985, unless* you could show cause before that date to prevent dismissal.

After reviewing your statement and the authorities cited therein. I have concluded that the charge and accompanying complaint do not state a prima facie violation of the Educational Employment Relations Act and must be dismissed. The reasons for this conclusion are several.

As I advised you in the March 14 letter, which I incorporate herein by reference, decisions of the Public Employment Relations Board issued since the filing of charge S-CE-334 now make it clear that a public school employer cannot be held liable for unlawful expenditures made by the exclusive representative. San Jose Unified School District (12/13/84) PERB Decision No. 463; Milpitas Unified School District (12/13/84) PERB Decision No. 462; Fresno Unified School District C4/30/82) PERB Decision No. 208.

In your March 28 statement, you assert two reasons for why the charge should not be dismissed despite the rationale set out in my March 14 letter. You assert first that under PERB rules a charge may be dismissed sua sponte only if either party fails to request a hearing within six months of the issuance of a complaint. Since the requirement that a hearing be requested was dispensed with in this matter, you contend that no grounds exist for the agency to dismiss the charge and complaint sua sponte.

Regarding this contention, it should be noted that Government Code subsection 3541.3(i) gives PERB the power:

> (i) To investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect of such charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

It seems self-evident that within this grant of power is the authority to dismiss a charge and complaint which do not state a prima facie violation of the Educational Employment Relations Act. The agency is under no compulsion to require a hearing on an allegation which it concludes cannot be found in violation of the law. even if proven. A rule that the agency could not dismiss its own complaints prior to hearing would lead to frivolous litigation wasteful of both the agency's and the respondent's resources. Here, the PERB itself has issued decisions after the issuance of the complaint which make it apparent that the complaint rests on an erroneous legal theory. Based upon that ruling, dismissal of the complaint is the only appropriate action which the hearing officer can take.

You next assert that my March 14 letter advances a rationale for dismissing the action that is underinclusive and incorrect. You assert that there are two allegations in the complaint which my letter fails to consider. These allegations are that the respondent school district has recognized more than one exclusive representative in violation of Government Code section 3543.1(a) and that the amount of the representation fee is excessive in violation of Government Code section 3540.1(i).

Both of these allegations are answered in Fresno Unified School District, supra. PERB Decision No. 208. In that case, the PERB considered a hearing officer's conclusion that the California Teachers Association could be found guilty of an unfair practice because it supported and ratified an unlawful strike by the Fresno Teachers Association. Even though neither party filed an exception to that conclusion, the Board itself raised the issue sua sponte and reversed the hearing officer. The Board concluded that the relationship between the Fresno Teachers Association and the California Teachers Association

was one of affiliation and that mere affiliation was insufficient to make the California Teachers Association the exclusive representative. The Board therefore dismissed the charge against the California Teachers Association.

Representation records maintained by the PERB reveal only one recognition by the respondent of an exclusive representative for certificated employees. That action occurred on October 13. 1977. when the school board recognized the Washington Education Association as exclusive representative. There are no factual allegations in the charge from which one can conclude that the Washington Education Association, like the Fresno Teachers Association, has anything other than an affiliation relationship with the California Teachers Association and the National Education Association. The charge is therefore insufficient to establish a prima facie allegation that the respondent has recognized more than one exclusive representative in violation of the Educational Employment Relations Act.

In Fresno Unified, supra, the Board also reversed a hearing officer's conclusion that the school employer had a right to negotiate about the amount of an agency fee. The Board found that the employer could only negotiate over whether or not to grant an agency fee arrangement. The Board concluded that the employer's adamant insistence on a $75 cap on the agency fees bore no relationship to its legitimate concerns and constituted an unlawful bargaining proposal. It is evident, therefore, that the charging party states no prima facie allegation in its contention here that the amount of the agency fee is excessive. If the employer is precluded from negotiating about the amount of the fee. it cannot be held in violation of the Educational Employment Relations Act even if it be proven that the fee was in fact excessive.

You argue, finally, that the validity of Fresno Unified School District is dubious in light of Link v. Antioch Unified School District (1983) 142 Cal.App.3d 765. I find nothing in that case to support your conclusion that the PERB "must exercise jurisdiction over both the employer and the exclusive representative regarding claims involving the wrongful expenditure of fair share fees." The case holds that the PERB has initial jurisdiction over the matters which arguably constitute unfair practices and that the plaintiffs are required to exhaust their administrative remedies before

seeking judicial relief. Nothing in the decision supports the conclusion that the PERB must proceed to hear an unfair practice charge which the agency does not find to state a prima facie allegation of the EERA.

For these reasons, the unfair practice charge and companion complaint in McFarland, et al. v. Washington Unified School District. Case No. S-CE-334 are hereby dismissed.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8. part III), you may appeal this dismissal to the Board itself.

Right to Appeal

You. 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 (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on April 22, 1985. or sent by telegraph or certified United States mail postmarked not later than April 22, 1985, (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento. CA 95814

If you file a timely appeal of the dismissal of the charge and complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(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 the document filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

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 (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours.

By

Ronald E. Blubaugh
Administrative Law Judge

STATE Of CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO REGIONAL OFFICE
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March 14, 1985

Anthony T. Caso, Attorney-
Pacific Legal Foundation
555 Capitol Mall. Suite 350
Sacramento. CA 95814

Re: McFarland, et al. v. Washington Unified School District.
Unfair Practice Case No. S-CE-334

Dear Mr. Caso:

The above-referenced charge alleges that the Washington Unified School District has entered into a collective bargaining agreement which requires unit members who do not belong to the Washington Education Association to either join that organization or pay an agency fee. Authority to enforce the contractual clause is delegated to the Association. The charge further alleges on information and belief that.

> . . . significant portions of this fee will be used to finance political, social, ideological, and other activities with which charging parties derive no benefit.

This conduct is alleged to be in violation of Government Code subsection 3543.5(a).

Decisions of the Public Employment Relations Board issued since the filing of charge S-CE-334 now make it clear that such allegations against a school district do not state a prima facie violation of the Educational Employment Relations Act. The reasons for this conclusion are as follows:

The validity of compulsory payments to labor organizations is well established. Railway Employees Department v. Hanson (1956) 351 U.S. 225 [38 LRRM 2099]: International Association of Machinists v. Street (1960) 367 U.S. 740 [48 LRRM 2345]; Abood v. Detroit Board of Education (1977) 431 U.S. 209 [95 LRRM 2411]; Ellis, et al. v. Brotherhood of Railway. Airline and Steamship Clerks (1984) ____ U.S. ____ [116 LRRM 2001].

Consistent with this principle, the EERA specifically permits collective bargaining agreements to include agency fee provisions requiring employees either to join the exclusive

representative, or pay a service fee in an amount not to exceed the standard initiation fee. periodic dues, and general assessments. (Sections 3546 and 3540.1(2).) Employee organizations may violate the EERA when they spend objecting nonmembers' agency fees on activities which are unrelated to the exclusive representative's representational role. King City Union High School District (3/3/82) PERB Decision No. 197: Abood, supra.

This case, however, involves an allegation that the employer violated the EERA by agreeing to an agency fee clause under which the exclusive representative allegedly has made improper expenditures. PERB decisions now make it clear that the employer cannot be held responsible for the expenditures of the exclusive representative. Milpitas Unified School District (12/13/84) PERB Decision No. 462; San Jose Unified School District (12/13/84) PERB Decision No. 463; Fresno Unified School District (4/30/82) PERB Decision No. 208.

For these reasons, it is concluded that unfair practice charge S-CE-334 does not state a prima facie violation of the EERA. Accordingly, this charge will be dismissed on April 1, 1985. unless you can show cause before that date for why the charge should not be dismissed.

Sincerely.

Ronald E. Blubaugh
Administrative Law Judge