



violated when CSEA agents made misrepresentations about the effect of a certain clause in its newly negotiated collective bargaining agreement with California State University (CSU). A complaint alleging that CSEA had violated HEERA section 3571.1(b)<sup>2</sup> was issued January 16, 1987. The ALJ found that the misrepresentations made by CSEA, inter alia, did not have a substantial impact on charging party's relationship with her employer, CSU.

Charging party filed a timely exception to the ALJ's proposed decision, consisting, in toto, of the following paragraph:

I am appealing this case to the Board on the simple grounds that the conduct at issue had a substantial impact on the relationships between CSU employees and CSU. If the grievance procedure is not "substantial impact," what is? The hearing officer stated "the remedy for the negligence or lack of respect suggested by the evidence lies elsewhere." I dissent.

In response, CSEA argued that the appeal should be dismissed for failure to comply with PERB Regulation 32300.<sup>3</sup>

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<sup>2</sup>Government Code section 3571.1(b) provides as follows:

. . . . .  
(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.

<sup>3</sup>PERB Regulation 32300 reads, in pertinent part, as follows:

. . . The statement of exceptions or brief shall:

The Board finds that the charging party's appeal is not in compliance with PERB regulations. Exceptions must be stated with specificity in order to afford both the respondent and the Board with enough information to answer, and rule, on the appeal. Failure to so specify the issues will result in the Board's affirmance of the ALJ's dismissal. (San Diego Community College District (1983) PERB Decision No. 368.) Specifically, O'Connell has failed to state the rationale to which her exception was taken, nor has she identified that part of the decision to which she is excepting in an adequate manner.

Although we dismiss the appeal, for the reasons below, we need to clarify the duty of fair representation test given the Board's instruction in CSEA (O'Connell) (1986) PERB Decision No. 596-H,<sup>4</sup> and the legal analysis in the proposed decision. The ALJ held that a misrepresentation constitutes a violation only if it substantially impacts the employer-employee relationship. The

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- (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
  - (2) Identify the page or part of the decision to which each exception is taken;
  - (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
  - (4) State the grounds for each exception.

<sup>4</sup>In PERB Decision No. 596, the Board remanded charging party's case to the regional attorney for reconsideration. From this remand a complaint issued, a hearing was held, and the proposed decision now under review was rendered.

ALJ found the conduct at issue was a knowing misrepresentation, but it did not impact on the relationships between CSU employees and CSU. A different analysis must be made. In CSEA (O'Connell), the Board held:

. . . We believe that a prima facie case of a breach of the duty of fair representation has been stated where it is alleged that the exclusive representative knowingly misrepresented a fact in order to secure from its constituents their ratification of a contract. (Emphasis added.)

The HEERA places on the exclusive representatives, a statutory duty to fairly represent all employees in the negotiating unit (Gov. Code sec. 3578).<sup>5</sup> The Legislature was, no doubt, mindful of the standard set forth in Vaca v. Sipes (1967) 386 US 171 [64 LRRM 2369], using the very language that has, in the past 22 years, become indispensable in labor relations practice and litigation, ". . . arbitrary, discriminatory, or in bad faith." We do not wish to add to the vast array of tests used to describe the duty of fair representation. We, therefore, hold that the standard set forth in CSEA (O'Connell), supra, is but one example of "bad faith." The facts in the case before us

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<sup>5</sup>Government Code section 3578 states:

The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

suggest something less than bad faith conduct by the Association.

#### FACTS

From April through June of 1985, CSEA and CSU were in negotiations over a successor agreement. During that time, changes in the contractual grievance procedures were discussed and agreed to. The new language in the grievance procedures effectuated two changes: (1) Level IV grievances were required to now be heard in the chancellor's office in Long Beach; and (2) grievants no longer had an explicit right to be present at the meeting.

On August 1, 1985, a membership meeting was held at the San Jose campus to discuss the proposed contract. The meeting was conducted by two rank-and-file representatives from the CSEA negotiating team and was attended by 10 to 12 members. Some of the members present inquired as to CSEA's intention with respect to payment for travel expenses for the grievants to attend the Level IV meeting in Long Beach. One of the bargaining team representatives initially responded that CSEA would send the grievant, if necessary. Although the representative had not previously discussed the new grievance language with CSEA staff or leadership, and was not aware of any expressed internal policy regarding travel reimbursements, after continued questioning, he indicated that CSEA would pay all travel expenses. Testimony at the hearing indicated that under the prior contract language, CSEA had paid the travel expenses when a grievant travelled to Long Beach.

Subsequent to ratification of the new contract, the new chief of the CSU division of CSEA was dealing with the division's financial problems due to a recent loss of membership. At one of the first meetings held to discuss the new collective bargaining agreement, he announced a new CSEA policy whereby the grievant would be reimbursed for transportation expenses only in the most extraordinary or rare cases. In November of 1985, as a result of the new policy, the charging party was denied her request for payment of travel expenses to Long Beach concerning a grievance she had pending against CSU.

#### DISCUSSION

This Board adopted the standard of Vaca v. Sipes, supra. in Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124, a case interpreting the duty of fair representation under the Educational Employment Relations Act.<sup>6</sup> That case dealt with an alleged failure of a union to negotiate a mid-term salary increase and other benefits. Although the case before us involves statements made at a preratification meeting, i.e., a meeting set to provide information to Association members about the details of a recently negotiated contract, the specific alleged misrepresentation concerned a union policy regarding reimbursement for grievants' travel costs and not a provision of the contract.<sup>7</sup>

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<sup>6</sup>The Board has adopted this standard under HEERA. (International Union of Operating Engineers, Local 501 (Reich) (1986) PERB Decision No. 591-H.)

<sup>7</sup>PERB has recognized its authority to review the contract

It is not any misrepresentation made in the process of securing a ratification of a collective bargaining agreement that is a breach of the duty of fair representation. Because a union should not be subjected to a standard more rigid than is consonant with the realities of the bargaining process, a more practical approach is necessary. There is, in the course of the ratification process, the possibility that many representations will be made that concern solely the internal relationship between a union and its members. When dealing with matters of internal union business, the fact misrepresented must have a substantial impact on the relationships of the unit members to their employer to give rise to the duty of fair representation. (Service Employees International. Local 99 (Kimmett) (1979) PERB Decision No. 106.)

In this case the conduct at issue, discussion of a grievant's travel reimbursement policy, was a matter of internal union business. That policy did substantially impact the grievant's employer-employee relationship even though the parties were not addressing the language or implementation of the collective bargaining agreement itself. A grievant's decision on how to frame a grievance may well depend on his or her ability to

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ratification process vis-a-vis the union's duty of fair representation. (See, e.g., Oxnard Educators Association (Gorcey and Tripp) (1988) PERB Decision No. 681 (PERB can examine union conduct in communicating bargaining information to constituents); and Fontana Teachers Association (Alexander et al) (1984) PERB Decision No. 416 (non-members must be allowed input into the negotiation process, but the union is not required to permit them to vote in formal contract ratification elections).)

be present at a Level IV grievance meeting.

Independent of the appeal not being in compliance with PERB regulations, we find that the conduct described by the evidence does not amount to an unfair practice as defined by HEERA. The evidence does not support a finding that CSEA acted in an arbitrary, capricious or bad faith manner, or that the manner of conducting the grievance with the 10-12 San Jose members was improperly motivated. The CSEA representatives did not knowingly misrepresent a fact. The actions of the CSEA representatives, in context of a single meeting with employees who were aware of the prospective financial burden on the Association, were, at worst, poor judgment on their part. A breach of the duty will not be found where the exclusive representative is guilty of "mere negligence or poor judgment." (Service Employees International Union (Scates) (Pitts) (1983) PERB Decision No. 341.)

In sum, we dismiss the appeal on the grounds that it does not meet the standards outlined in Regulation 32300. We also find that even if O'Connell's appeal met the standards, the record does not establish that the Association knowingly misrepresented facts in order to secure the ratification of the contract.

ORDER

The charge and complaint against CSEA is hereby DISMISSED.

Member Shank joined in this Decision.

Member Porter's concurrence and dissent begins on page 9.

Porter, Member, concurring and dissenting: I concur with the majority's conclusion that, in examining this case on its merits, the charging party failed to establish that the Association violated its duty of fair representation. I must dissent, however, from my colleagues' dismissal on procedural grounds of charging party's exception to the ALJ's proposed decision. In addition, I respectfully disagree with the majority's analysis in connection with its application of the "substantial impact" standard to the facts of this case.

Initially, as to the issue of the adequacy of charging party's exception to the ALJ's proposed decision, examining substance over form, I would find that the exception is in substantial compliance with PERB regulations. The ALJ herein dismissed charging party's complaint on the around that the alleged misrepresentations by the Association concerning the grievance procedure--even if true--did not have a substantial impact on employer-employee relations. Charging party, in turn, excepted to the ALJ's proposed decision "on the simple grounds" that a grievance procedure (the subject matter of the alleged misrepresentation) does indeed have a substantial impact on employment relations. The statement from charging party clearly indicates the specific issue of fact or law, as well as the ground, on which the exception is based, as required by PERB Regulation 32300(1) and (4). (See fn. 2 at p. 2.) Subsections (2) and (3) of section 32300 require specification of the page or part of the decision objected to, and designation of the record

page or exhibit number, if any, relied upon for the exception. In this instance, inasmuch as the exception goes essentially to the heart of the ALJ's proposed decision, I submit that charging party's statement is sufficient as written. Alternatively, if my colleagues felt that further clarification was necessary, an opportunity to amend her timely filed exception should have been afforded to charging party.

It is a well-established principle of California law that the preservation of the right to appeal, and the hearing of appeals on their merits, are favored. (See, e.g., City of Santa Barbara v. California Coastal Zone Conservation Committee (1977) 75 Cal.App.3d 572, 581; Gibson v. U.I.A.B. (1973) 9 Cal.3d 494, 499; Pesce v. Department of Alcohol Beverage Control (1958) 51 Cal.2d 310, 313.) Thus, since charging party's timely-filed appeal substantially complied with PERB Regulation 32300 (or could have been amended to comply therewith), I would find that, in accordance with this principle, the appeal should be heard on its merits by this Board.

Turning to the merits, I agree with the majority that the record fails to show that the Association made a knowing misrepresentation of a fact to unit members in order to obtain ratification of the collective bargaining agreement. Accordingly, I would find no breach of the Association's duty of fair representation and, on this basis, I would dismiss the complaint.

However, I am in disagreement with the majority's analysis to the extent that, in addition to proof of a knowing misrepre-

sentation made by an exclusive representative in order to secure ratification, proof that the misrepresentation had a substantial impact on employment relations is also required. In CSEA (O'Connell) (1986) PERB Decision No. 596-H,<sup>1</sup> this Board held that a prima facie case of violation of the duty of fair representation is established where there has been a knowing misrepresentation of a fact in order to secure ratification of a collective bargaining agreement. The Board did not state that, in the context of a contract ratification process, there must be a further showing that the subject matter of the misrepresentation had a substantial impact on employment relations. The application of the "substantial impact" standard only becomes relevant and necessary where the alleged duty of fair representation violation occurs in the context of internal union affairs. (SEIU, Local 99 (Kimmitt) (1979) PERB No. 106 (internal union activities that do not have a substantial impact on the relationships of unit members to their employers are not subject to the duty of fair representation).) Statements made by the exclusive representative's agents, in the context of a contract ratification process, were not found to be internal union activities in the earlier O'Connell decision. Accordingly, on the facts in this case, I believe the proper analysis should be limited to whether there was a knowing misrepresentation of a fact by the Association's agents in order to secure ratification of the contract by bargaining unit members.

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<sup>1</sup>In this predecessor appeal by the charging party of a Board agent's dismissal of her charges, this Board held that a prima facie duty of fair representation violation was alleged.