

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STEVE A. LOHMANN,)
)
 Charging Party,) Case No. LA-CO-544
)
 v.) PERB Decision No. 898
)
 CALIFORNIA SCHOOL EMPLOYEES)
 ASSOCIATION,) August 30, 1991
)
 Respondent.)
 _____)

Appearance: Steve A. Lohmann, on his own behalf.

Before Shank, Camilli and Carlyle, Members.

DECISION AND ORDER

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Steve A. Lohmann (Lohmann) of a regional attorney's dismissal (attached hereto) of his unfair practice charge. Lohmann alleged that the California School Employees Association (CSEA) violated the Educational Employment Relations Act (EERA) section 3543.6(c)¹ by denying him

¹EERA is codified at Government Code section 3540 et seq. The regional attorney correctly characterized this case as an allegation of a violation of the duty of fair representation arising under EERA section 3544.9 and enforced under section 3543.6(b).

EERA section 3544.9 states:

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.

EERA section 3543.6 states, in pertinent part:

It shall be unlawful for an employee organization to:

representation in dealing with the San Diego Unified School District.²

The Board has reviewed the dismissal, and finding it to be free of prejudicial error, adopts it as the decision of the Board itself.

On appeal, Lohmann claims that CSEA made a commitment to assist him and then failed to represent him at the factfinder's meeting or provide further support for his appeal.

The Board has held that the exclusive representative is under no obligation to represent cases involving extra-contractual remedies. - (California School Employees Association (Mrvichin) (1988) PERB Decision No. 660, citing San Francisco Classroom Teachers Association (Chestangue) (1985) PERB Decision No. 544.) In Mrvichin, the Board also found that even if the exclusive representative has promised to appear at a hearing and then fails to attend, without facts showing that the failure to attend was motivated by bad faith, arbitrary conduct or capriciousness, no prima facie case is stated. Further, in California State Employees Association (Parisi) (1989) PERB Decision No. 733-S, the Board reaffirmed that an exclusive representative has no duty to represent a unit member in a matter

(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.

²The case citation on page 1 of the warning letter, footnote 2, should read: Oxnard Educators Association (Gorcey/Tripp) (1988) PERB Decision No. 664.

outside the scope of representation, and expressly rejected the argument that a duty of fair representation arises when the exclusive representative undertakes to assist a unit member in a matter outside the scope of representation.

In this case, the Merit System Rules procedure is independent of the collective bargaining agreement's grievance procedure and provides a separate remedy. As such, CSEA is under no duty to represent Lohmann in this matter. Having initially assisted him with his complaint, Lohmann failed to allege facts sufficient to indicate that CSEA's failure to attend the factfinding meeting was arbitrary, discriminatory or in bad faith. It should also be noted that CSEA continued to meet with Lohmann after the factfinding meeting, reimbursed him for the factfinder's fees, and advised him how to comply with CSEA's procedures in seeking litigation assistance.

Lohmann also contends there are significant factual discrepancies which call for resolution through a hearing. In footnote 8 on page 4 of the warning letter, the regional attorney noted that CSEA denied Lohmann's allegation that he requested representation at the factfinder's meeting. A regional attorney is not entitled to rule on the merits of a charge by resolving conflicting claims. (Eastside Union School District (1984) PERB No. 466.) However, in this case, the regional attorney did not resolve conflicting claims, as he did not rely on CSEA's contention as a true statement of the facts in reaching his determination.

The charge in Case No. LA-CO-544 is hereby DISMISSED WITHOUT
LEAVE TO AMEND.

Members Camilli and Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



June 7, 1991

Steve A. Lohmann

Re: Steve Lohmann v. California School Employees
Association. Unfair Practice Charge No. LA-CO-544,
First Amendment, DISMISSAL OF CHARGE AND REFUSAL
TO ISSUE COMPLAINT

Dear Mr. Lohmann:

The above-referenced charge was filed on August 22, 1990. It was placed in abeyance on January 16, 1991, and was officially taken out of abeyance on May 14, 1991, essentially due to your request.¹ You allege in the initial charge that the California School Employees Association (CSEA or Association) violated the Educational Employment Relations Act (EERA), Government Code section 3543.6(c)² through its actions or omissions to act on

¹At the time this case was placed in abeyance on January 16, 1991, you indicated you were going to try and obtain some further information about this case. On or about April 1, 1991, I received your unsigned letter dated March 28, 1991, which indicated, in part,, that you wished to amend the charge. I left a number of messages for you to call me. On or about April 25, 1991, we talked and you repeated your desire to amend. You requested that I provide you with information that would indicate all the allegations you are making against CSEA (whether found in your two unfair practice charges or in our telephone conversations prior to the abeyance). You preferred not to provide me with any additional information at that time.

²This case is being viewed as involving the union's duty of fair representation (DFR). The duty is expressed in EERA section 3544.9 which provides that

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.

Violations of the DFR are enforced through EERA section 3543.6(b). Also, the EERA section 3543.6(c) violation involves a union's refusal or failure to meet and negotiate in good faith with a public school employer. There are few facts in this charge to indicate a violation of this type. For that reason, this allegation will not be treated in detail. Furthermore, an

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your behalf. At all times relevant hereto, you have been an employee of the District working as a gardener.

I indicated to you in my attached letter dated May 14, 1991 that the original charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to May 21, 1991, the charge would be dismissed.

On May 21, 1991, you filed a First Amendment which you indicate is in addition to your original charge.³ The amendment appears to cover this entire matter generally criticizing CSEA for its actions or omissions to act on your behalf (prior to your Merit System Rules Complaint being ultimately denied on May 18, 1990, and later in not pursuing litigation on your behalf) again alleging that CSEA violated EERA section 3543.6(c).⁴

The charge and First Amendment fail to state a prima facie case for the following reasons. First, as noted in the attached letter dated May 14, 1991, all allegations of unlawful conduct occurring prior to February 22, 1990 are untimely and will be dismissed (EERA section 3541.5(a)). As a grievance was not or could not be filed in this matter (May 14, 1991 letter, p. 3), there is no statutory tolling.⁵

individual does not have standing to raise this type of violation. Oxnard School District (Gorcey & Tripp) (1980) PERB Decision No. 667. Thus, this allegation is being dismissed.

³I also note that your companion case, against the San Diego Unified School District; Unfair Practice Charge No. LA-CE-3020, First Amended Charge, was appealed to the Board. On May 21, 1991, the Board summarily affirmed the Regional Attorney's dismissal of the charge that the District discriminated/retaliated against you in handling your merit systems appeal. (San Diego Unified School District (1991) PERB Decision No. 879)

⁴For the reasons indicated in Footnote No. 2 above, the additional allegation (EERA section 3543.6(c)), is being dismissed.

⁵Tolling only occurs if the Agreement provides for binding arbitration, which in this case it does (Article XIII, section 5.D.1.b.), and only during the period it takes to exhaust the grievance machinery. EERA section 3541.5(a).

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Second, the above additional facts or arguments in the First Amendment are insufficient to show clear evidence of CSEA's unlawful motivation toward you, or bad faith conduct by the union, even assuming CSEA owed you a duty in this case. As noted in the attached letter dated May 14, 1991, it was not inappropriate for you to file a Merit System Rules Complaint in February 1990 regarding the entire December 1989 incident. Pleading or raising a bare allegation without sufficient supporting facts is insufficient for purposes of alleging a prima facie case. California State University (Pomona) (1988) PERB Decision No. 710-H. Negligence or poor judgment by the union are insufficient to violate the duty of fair representation. United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258.

Third, as pointed out in the attached letter dated May 14, 1991, it appears that CSEA does not owe you a duty of fair representation in this matter, including pursuing your Merit System Rules Complaint. This is because CSEA does not control the exclusive means to obtain a remedy in such matters. See San Francisco Classroom Teachers Association. CTA/NEA (Chestangue) (1985) PERB Decision No. 544 and California Faculty Association (Pomerantsev) (1988) PERB Decision No. 698-H.

I am therefore dismissing the charge and First Amendment without leave to amend based on the facts and reasons contained above and in my attached May 14, 1991 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, 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 (California Code of Regulations, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

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

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days

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following the date of service of the appeal (California Code of Regulations, title 8, 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 each copy of a document served upon a party or filed with the Board itself. (See California Code of Regulations, title 8, 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 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 (California Code of Regulations, title 8, 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.

Sincerely,

JOHN W. SPITTLER
General Counsel

By _____
Marc S. Hurwitz
Regional Attorney

Attachment

cc: William C. Heath, Deputy Chief Counsel
California School Employees Assn.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127



May 14, 1991

Steve A. Lohmann

Re: Steve Lohmann v. California School Employees
Association. Unfair Practice Charge No. LA-CO-544
WARNING LETTER

Dear Mr. Lohmann:

The above-referenced charge was filed on August 22, 1990. It was placed in abeyance on January 16, 1991, and is now officially being taken out of abeyance, essentially due to your request. You allege that the California School Employees Association (CSEA or Association) violated the Educational Employment Relations Act (EERA), Government Code section 3543.6(c)² through its actions or

¹At the time this case was placed in abeyance on January 16, 1991, you indicated you were going to try and obtain some further information about this case. On or about April 1, 1991, I received your unsigned letter dated March 28, 1991, which indicated, in part, that you wished to amend the charge. I left a number of messages for you to call me. On or about April 25, 1991, we talked and you repeated your desire to amend. You requested that I provide you with information that would indicate all the allegations you are making against CSEA (whether found in your two unfair practice charges or in our telephone conversations prior to the abeyance). You preferred not to provide me with any additional information at that time.

²This case is being viewed as involving the union's duty of fair representation (DFR) under EERA because you are employed by the San Diego Unified School District (District). The duty is expressed in EERA section 3544.9 which provides that

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.

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omissions to act on your behalf. At all times relevant hereto, you have been an employee of the District working as a gardener.

My investigation and the charge revealed the following information.³ On December 11, 1989, you were involved in an allegedly unfair interview for promotion in which you were not selected. Around December 12, 1989, you contacted Steve Burrell, a CSEA Field Rep. for assistance. He asked you to call him later in the week and that he would look into the matter. On December 15, 1989, you spoke to Mr. Burrell. He indicated he had spoken to Darrel Rogers, Supervisor, as to why you did not get the job. Mr. Rogers advised him that you did not do well on the interview, but invited you and Mr. Burrell to meet and discuss the matter. You declined to meet since you already spoke with Mr. Rogers. You advised Mr. Burrell that you would contact Michael Cashman, Director of Personnel, Mr. Rogers' supervisor. On December 15, 1990, you then called Mr. Cashman and indicated that you had a formal complaint and possible discrimination charge. He requested that you submit a memorandum which he would review upon returning from his vacation on January 2, 1990. On December 18, 1989, you learned that Bruce Bremmer was selected for the job on December 11, 1989, before you were even interviewed for that position. On January 2, 1990, you sent a memorandum to Mr. Cashman entitled "Denial of Merit System Rule rights pertaining to promotion and discrimination." On February 5, 1990, you and Mr. Burrell met with Mr. Rogers, Mr. Cashman and Mr. James R. Rhetta, Director of Classified Personnel, to discuss your claim. No resolution was reached.

Violations of the DFR are enforced through EERA section 3543.6(b). Also, the EERA section 3543.6(c) violation involves a union's refusal or failure to meet and negotiate in good faith with a public school employer. There are few facts in this charge to indicate a violation of this type. For that reason, **this** allegation will not be treated in detail. Furthermore, an individual does not have standing to raise this type of violation. Oxnard School District (Gorcey & Tripp) (1980) PERB Decision No. 667. Thus, this allegation is being dismissed.

³Factual information was also obtained from several telephone conversations we had in January 1991 and from your companion case, Lohmann v. San Diego Unified School District. Unfair Practice Charge No. LA-CE-3020, First Amended Charge, which was dismissed on March 11, 1991, and is currently on appeal to the Board.

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You discovered on or about February 9, 1990 that the District violated their administrative procedures. Since you desired to file a complaint under the Merit System Rules, Mr. Burrell assisted you on February 9, 1990, to the extent of having your complaint typed at CSEA's office.⁴ That same day, Mr. Burrell also called Mr. Rhetta, while you were there, regarding procedures not being followed in your case. Mr. Rhetta suggested that a meeting be scheduled to discuss this. Mr. Burrell stated to you that he would discuss the matter with Mr. George Russell, Assistant to the Superintendent for Personnel Services, to determine if something could be worked out. You filed your initial Merit System Rules Complaint on February 15, 1990 and revised it on February 20, 1990. You contend that on February 15, 1990, Mr. Rhetta advised you to file an administrative procedures violation on a Merit System Rules complaint form, knowing that it should have been filed as a grievance by the union.

Next, you allege that Mr. Rhetta made his decision denying your Merit System Complaint on February 22, 1990. You essentially contend, in part, that proper or standard procedures were not followed in that (1) the District, in part, violated their administrative procedures in December 1989 and (2) Mr. Rhetta incorrectly and/or knowingly advised you on February 15, 1990 to file this issue on a Merit System Rules complaint form instead of as a grievance filed by the union. In your First Amended Charge in your case against the District, Unfair Practice Charge No. LA-CE-3020, you contend that in spite of Mr. Rhetta's incorrect advice, "My union representative should have realized this was not the correct procedure to follow in this matter. His negligence resulted in this complaint not being handled in a timely manner." (Article XIII, section 6.M. of the Collective Bargaining Agreement (Agreement) between the District and the union, states that "Actions to challenge the Merit System, procedures and policies of the District, . . . or to appeal the District's adherence to or application of any of the aforementioned shall not be undertaken through the grievance procedure." (Emphasis added.) Thus, Mr. Rhetta's advice and your Merit System Complaint in February 1990 regarding the entire December 1989 incident do not appear to be inappropriate. You also argue that only the union can file grievances over violations of the District's administrative procedures. You

⁴The Association has indicated that in its experience, . . . this complaint procedure is merely a process for rubber-stamping employer actions."

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point out that the Agreement at Article III, Employee Organization Rights, Section 11, Administrative Regulations and Procedures, states that "The District will provide the Union one (1) set of Administrative Regulations & Procedures and revisions thereto." Section 19, Rights Grievable, states that "Rights granted by this Article III shall be grievable only by the Union." This only means that should the union not be given one set, only it can file a grievance. It does not mean that only the union can grieve violations of the Administrative Regulations & Procedures.)

Next, you allege that you appealed⁵ to Mr. George Russell, and he "either knowing (sic) or negligently allowed this inappropriate procedure to continue." After Mr. Rhetta's decision on February 22, 1990, you tried on numerous occasions to reach your representative, Mr. Burrell.⁶ In or about March 1990, you asked Ms. Tompkins if she was able to reach Mr. Burrell, in order to prepare for an upcoming Merit System investigatory meeting with the fact-finder. You requested copies of Mr. Burrell's notes of the above-referenced February 5, 1990 meeting. Ms. Tompkins called you back and stated 'There are no notes and there is no way to reach Mr. Burrell.' You requested that Ms. Tompkins also attend the meeting with the fact-finder. She advised you that she would accompany you, but that she had never attended such a meeting.⁷ On April 16, 1990, you called Ms. Tompkins and gave her the April 18, 1990 fact-finder's meeting date. Ms. Tompkins advised you that she was unable to attend, but gave no reason.⁸

⁵You appealed to Mr. Russell on March 2, 1990, and met with him on March 28, 1990.

⁶The Association has indicated that effective March 1, 1990, CSEA Field Rep. Cherri Tompkins was temporarily assigned to this bargaining unit, since Mr. Burrell went on a one-year leave of absence. You previously suspected that the District somehow caused Mr. Burrell's departure, but you have not been able to provide me with any evidence to support this theory.

⁷On April 14, 1991, you in fact received the District's notification of the fact-finder's hearing/meeting scheduled for April 18, 1991. The procedure was to begin at 2:30 p.m. You were scheduled to meet with the appointed fact-finder, Mr. Raymond J. Blake, at 3:00 p.m. in Mr. Rhetta's office.

⁸The Association contends that you called to inform

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Ms. Tompkins suggested that you call the local chapter President. You were unable to reach the President as she was on leave. You learned that the Interim President, Willy Surbrook, was also on leave and would not return to work until the late afternoon on April 18, 1990. Upon receiving Ms. Tompkins' letter on April 18, 1990, you called her and indicated you had just received her letter (which you contend outlined her reasons for not attending the April 18, 1990 meeting with the fact-finder). You told her that you were not notified of the meeting until April 14, 1990. She told you that it did not seem right and there was nothing she could do except to wish you good luck at the April 18, 1990 meeting. You attended the April 18, 1990 meeting alone and did not request a continuance or postponement. You allege that Mr. Blake, the Merit System Rules fact-finder, unfairly decided your case. He "either knowing (sic) or negligently decided on an Administrative Procedure violation when he no (sic) right or authority to do so." You further allege that since Mr. Blake took time to decide this matter, he increased his arbitrator's stipend, which resulted in Mr. Lohmann being charged an unfair amount.⁹ (The Merit System Rules for Classified Employees provide at Article XI, section 5.d.(3) that if the appeal is denied, the appellant and the Board of Education will share equally in the cost of the fact-finder's stipend. Here, your share was \$213.86, which was in fact later refunded to you by the union.)

After Mr. Blake's decision, you called CSEA for the telephone number of a union attorney. You were referred to Field Representative, Jim Brown, Mr. Burrell's replacement, who referred you to Patrick Prezioso, CSEA Field Director.

Ms. Tompkins of the April 18, 1990 meeting and to find out who would pay your portion of the fact-finder's fee or stipend if your appeal was denied. The Association acknowledges she was aware you were pursuing a Merit System Complaint. Contrary to your assertions, the Association denies Ms. Tompkins received any request to attend a meeting in that regard. Ms. Tompkins sent you a confirming letter dated April 17, 1990. The Association points out that the letter concerns your failure to make a timely request for financial assistance from the local CSEA chapter, as Policy 605 (Direct Assistance to Chapters) was not adhered to. (You attached the April 17, 1990 letter and only 2 of the 3 pages containing Policy 605 to your unfair practice charge.)

⁹Mr. Blake submitted the fact-finder's Review and Advisory Decision in favor of the District on April 23, 1990.

Mr. Prezioso wanted to hear about your case and a May 4, 1990 meeting was set up. On May 4, 1990, you met with Mr. Prezioso, Mr. Brown and Ms. Tompkins about your case, and provided them with the available documentation.¹⁰ Mr. Prezioso indicated he would try to get the union to reimburse you for the \$213.86, and that Mr. Brown would look into your case.

Next, you allege that on May 5, 1990, you appealed the fact-finder's decision to Superintendent Thomas Payzant and asked him to look into the case.¹¹ On May 18, 1990, in denying your appeal, you allege that "He negligently allowed this violation¹² of the Union Contract to go uncorrected. He stated in his decision 'This was not a matter relative to a union contract but dealt strictly with Administration of the Merit System Rules and, as such, was totally in the hands of the fact-finder.'"

On May 31, 1990, you met with Mr. Brown to review the case. He stated that the District violated some of your rights and that he would review the case, take it to the District again, or possibly "continue the complaint to the State Board."¹³ Mr. Brown indicated that the first step was to obtain reimbursement of the \$213.86 (one-half the fact-finder's stipend). You were advised to ask your local chapter to request reimbursement from the union, which you did.¹⁴ You allege that you called Mr. Brown on or about July 26, 1990 for an update on your complaint. He advised you that there was nothing more he could do, but was still attempting to obtain the reimbursement. On August 3, 1990, you asked Mr. Brown to indicate in writing the reason he was not

¹⁰The union contends that the May 4, 1990 meeting concerned your request for reimbursement of the fee.

¹¹As requested, you provided a copy of your appeal to the union before you submitted it to the District. Your appeal stated at one point, regarding the April 18, 1990 meeting with Mr. Blake, . . . "I could not get union (CSEA) assistance or representative (sic) because of the short notice"

¹²It is unclear which exact violation you are referring to here.

¹³It is unclear which "board" is being referred to here.

¹⁴The Association contends that you met Mr. Brown on May 31, 1990 to discuss possible reimbursement and the feasibility of recommending your case for litigation.

pursuing the case. He advised you he could not do that. Later in August 1990, he indicated you were going to be reimbursed for the fact-finder's fee. You met that afternoon and received the union's \$213.86 check dated July 24, 1990. Upon asking Mr. Brown again to indicate in writing the reason he would not pursue the case further, he stated, 'You had your day in court and it was binding arbitration,' and 'Why did you go to the fact-finding meeting alone?'¹⁵ You were unhappy with Mr. Brown's attitude, specifically, his refusal to put in writing the reason your appeal was not being continued. You then requested that Mr. Brown ask Mr. Prezioso to call you. You allege that he called you on August 17, 1990 and you reiterated your request for a letter indicating the reason CSEA was not pursuing your complaint further. Mr. Prezioso refused to provide a letter, but did refer you to your local chapter, as any further union action on this matter needed to start there.

You contend that although you used best efforts to follow union procedures, you were denied union representation in dealing with the District. You were especially disturbed by CSEA's failure to help you pursue a further appeal in your case in light of the fact the union did not represent you at the April 18, 1990 fact-finding meeting.

The charge fails to state a prima facie case. First, EERA section 3541.5(a) provides that the Board shall not issue a complaint based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. Therefore, all allegations of unlawful conduct occurring prior to February 22, 1990 are untimely and will be dismissed.

¹⁵ In a letter dated August 21, 1990, Mr. Brown confirmed your telephone conversation with him on Saturday, August 19, 1990. You were advised to make a litigation request regarding the fact-finder's decision to your local CSEA chapter. Further, you were advised that if your request was denied, you could appeal to the Association. Ms. Jan Henry, your Chapter President, was willing to bring your request to the next meeting of the Chapter's Executive Board for a second consideration. The Association noted that your earlier litigation request was denied after you failed to attend the local chapter meeting to explain your case. Further, that as of September 20, 1990, the date the Association informally responded to this unfair practice charge, you had not presented another request to your local chapter.

Second, you have generally alleged that, CSEA, the exclusive representative denied you the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section EERA 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258. In order to state a prima facie violation of this section of the EERA, a Charging Party must show that the Association's conduct was arbitrary, discriminatory, or in bad faith. In United Teachers of Los Angeles (Collins) f Id., the Public Employment Relations Board (PERB) stated:

Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty.

.

A union may exercise its discretion to determine how far to pursue a grievance on 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.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

. . . must, at a minimum, include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, citing Rocklin Teachers Professional Association (Romero), (1980) PERB Decision No. 124.

Assuming CSEA owed you a duty in this case, based on the above facts and allegations, the union acted properly in this matter. Insufficient facts are alleged to indicate that the action or inaction by the union was arbitrary, discriminatory, or in bad

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faith. The fact-finder's stipend was ultimately refunded to you. No grievance was filed or requested to be filed under the Agreement regarding your failure to be selected for promotion. Based upon all the above, your Merit System Complaint regarding the December 1989 incident was an appropriate vehicle. The inaction by CSEA to file a formal grievance involving this entire matter, including an alleged violation of the District's Administrative Regulations & Procedures, appears appropriate. Next, if there was insufficient time to obtain representation for the April 18, 1990 fact-finding meeting, you could have, but did not ask for a postponement. Next, CSEA did not refuse your requests for litigation after the superintendent denied your appeal. The union requested that you follow procedures and make a formal request to bring litigation to your local chapter, which you apparently failed to do.

Third, it is likely that CSEA in fact owes you no duty of fair representation in this matter including pursuing your Merit System Rules Complaint since CSEA does not control the exclusive means to obtain a remedy in such matters. See San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 544 and California Faculty Association (1988) PERB Decision No 698-H. You were permitted to, and did file your own complaint under the Merit System Rules. The decision of the Superintendent in denying your appeal was the final level of appeal. This procedure is independent of and wholly outside the grievance procedure in the Agreement between CSEA and the District. Also, the union has indicated that "CSEA does offer services, such as litigation, in addition to those services for which it has a duty of fair representation, but unless the problem is personal and outside of the employment relationship, all such services must be initially requested through the local chapter." You failed to follow this procedure.

For these reasons, the charge as presently written does not state a prima facie case. If there are factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent¹⁶ and

¹⁶William C. Heath, Dep. Chief Counsel, CSEA, Post Office Box 640, San Jose, California 95106.

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the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 21, 1991, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Marc S. Hurwitz
Regional Attorney