STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MARK A. KOTCH, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Respondent.	)	Case No. LA-CO-541 PERB Decision No. 953 October 5, 1992

Appearances: Mark A. Kotch, on his own behalf; William C. Heath, Attorney, for California School Employees Association.

Before Hesse, Chairperson; Camilli and Carlyle, Members.

DECISION AND ORDER

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Mark A. Kotch (Kotch) of a PERB Board agent's dismissal (attached hereto) of his charge alleging that the California School Employees Association (CSEA) violated section 3543.6(b) of the Educational Employment Relations Act (EERA)[1] by (1) failing or refusing to represent and assist Kotch in a grievance involving Kotch's

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee organization to:
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> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

reemployment rights after a personal leave of absence; and (2) requesting that the employer dismiss Kotch from employment.

The Board has reviewed the Board agent's warning and dismissal letters, and finding them to be free of prejudicial error, adopts them as the decision of the Board itself.[2]

The unfair practice charge in Case No. LA-CO-541 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Camilli and Carlyle joined in this Decision.

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[2]Generally, a proof of service must be signed by an individual over the age of 18 who is not a party to the action. (See PERB Regulation 32140.) Here, the proof of service attached to Kotch's appeal is defective (i.e. Kotch signed the proof of service). As CSEA filed a statement in opposition to Kotch's appeal, the Board finds there is no prejudice to CSEA.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

June 19, 1992

Mark A. Kotch

Re: DISMISSAL OF CHARGE AND REFUSAL TO ISSUE COMPLAINT
Unfair Practice Charge No. LA-CO-541, Mark Andrew Kotch v. California School Employees Association

Dear Mr. Kotch:

The above-referenced charge was filed on June 20, 1990. On December 21, 1990, the charge was placed in abeyance and on March 5, 1992, it was officially taken out of abeyance.[1] You allege that the California School Employees Association (CSEA, union or Association) failed/refused to represent you in the grievance process, failed to assist you in preparing a formal grievance, and requested/sanctioned the Ocean View School District (District) to take, or in taking, an arbitrary and discriminatory personnel action against you by dismissing you from employment. You allege that CSEA refused to protect seniority within its rank and file by allowing the District to replace you (a vested, permanent classified employee) with a temporary employee. Further you allege that CSEA sought to change the implementation and practice of the Collective Bargaining Agreement (Agreement) and limit the rights of its membership. This conduct is alleged to violate Government Code section 3543.6(a), (b) and (c) and section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).[2]

[1]On February 24, 1992 (cert, mail), you filed a Notice of Termination of Abeyance including exhibits and documents.

[2]This case is being viewed as involving, in part, the union's duty of fair representation (DFR) under EERA. The duty is expressed in EERA section 3544.9. Violations of the DFR are enforced through EERA section 3543.6(b). EERA section 3543.6(c) 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 and Tripp) (1988) PERB Decision No. 667. Thus, this allegation is being dismissed. In addition, as this charge is against CSEA, and a union cannot commit a violation of EERA section 3543.5(a) and (b), this allegation is being dismissed as well.

I indicated to you in my attached letter dated June 11, 1992 that the above-referenced 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 June 18, 1992, the charge would be dismissed.

I have not received either a request for withdrawal or an amended charge. I am therefore dismissing the charge based on the facts and reasons contained in my June 11, 1992 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 Regs., tit. 8, sec. 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 Code of Regs., tit. 8, sec. 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 following the date of service of the appeal (California Code of Regs., tit. 8, sec. 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 Regs., tit. 8, sec. 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

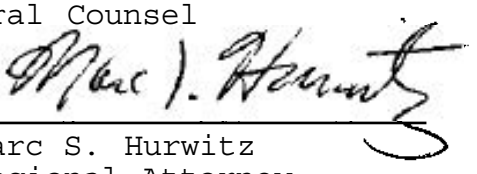
A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The 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 Regs., tit. 8, sec. 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, CSEA

PUBLIC EMPLOYMENT RELATIONS BOARD

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

June 11, 1992

Mark A. Kotch

Re: WARNING LETTER, Unfair Practice Charge No. LA-CO-541, Mark Andrew Kotch v. California School Employees Association

Dear Mr. Kotch:

The above-referenced charge was filed on June 20, 1990. On December 21, 1990, the charge was placed in abeyance and on March 5, 1992, it was officially taken out of abeyance.[1] You allege that the California School Employees Association (CSEA, union or Association) failed/refused to represent you in the grievance process, failed to assist you in preparing a formal grievance, and requested/sanctioned the Ocean View School District (District) to take, or in taking, an arbitrary and discriminatory personnel action against you by dismissing you from employment. You allege that CSEA refused to protect seniority within its rank and file by allowing the District to replace **you** (a vested, permanent classified employee) with a temporary employee. Further you allege that CSEA sought to change the implementation and practice of the Collective Bargaining Agreement (Agreement) and limit the rights of its membership. This conduct is alleged to violate Government Code section 3543.6(a), (b) and (c) and section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).

[1]On February 24, 1992 (cert, mail), you[2] filed a Notice of Termination of Abeyance including exhibits and documents.

[2]This case is being viewed as involving, in part, the union's duty of fair representation (DFR) under EERA. The duty is expressed in EERA section 3544.9. Violations of the DFR are enforced through EERA section 3543.6(b). EERA section 3543.6(c) 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 and Tripp) (1988) PERB Decision No. 667. Thus, this allegation is being

My investigation and the charge reveal the following facts. You were employed by the District as a permanent/classified gardener from on or about April 30, 1984 to in or about June, 1990. You were a member of CSEA for more than five years. On June 13, 1985, you injured your left wrist in the course of your employment. On or about August 25, 1989, you requested an unpaid, personal leave of absence from your position as a gardener in (Grounds) Maintenance and Operations in order to complete the requirements for an elementary credential (by student teaching). The proposed leave period was from January 2, 1990 through June 1, 1990. On or about August 30, 1989, Asst. Supt. Joseph D. Condon advised you in writing in part that "Under the leave provisions of the ...agreement, you have the right to return to your position if it is unfilled, or to be placed on the 39-month reemployment list if no position is available." On or about September 6, 1989, Dick Calister, Director of Classified Personnel, advised you in writing, in part, that "Provided a vacancy exists in your classification at the expiration of your leave, you have the right to return to your position at the same step but with a recomputed anniversary date." (emphasis in original.) The Board approved your request on September 12, 1989.

You contend that based on past practice, there was no possibility of a permanent classified employee being displaced while on a personal/unpaid leave. Further, you and Robert Buss, Maintenance and Operations Supervisor, had a hostile work relationship and he harassed you at work on several occasions. You are a Caucasian and the only member of that race to take a personal/unpaid leave from a gardening position while you were employed at the District. On March 15, 1990, while on leave, you executed the Stipulations with Request for Award form (85 ANA 157756) with the Workers' Compensation Appeals Board. You were the only gardener to settle such a claim while out on leave, during the time you worked for the District. You contend that based on the concurrent recommendations of Mr. Buss of the District, and Mr. Parks for CSEA, you were replaced with a temporary employee on or about April 1, 1990.

On April 9, 1990, you wrote to Scott Shook, Director of Maintenance and Operations, and indicated your intent to return to work. You also made your intentions and expectations known in

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dismissed. In addition, as this charge is against CSEA, and a union cannot commit a violation of EERA section 3543.5(a) and (b), this allegation is being dismissed as well.

your letter to Mr. Buss on May 5, 1990. Mr. Buss wrote to you on May 21, 1990 and attached copies of Article 7, section 7.9.3.4[3] of the 1988-91 Agreement (effective July 1, 1988 through June 30, 1991) between the District and CSEA, and Personnel Commission Rule 80.900.2.[4] He advised you, in part, that all positions of gardener were filled and that you may request that your name be placed on the Reinstatement List. Upon there being an opening, you would be considered along with other applicants, in the order of eligibility/seniority, up to 39 months. On May 26, 1990 you wrote to Mr. Buss and indicated in part that the only reason you took the leave was because you had a verbal agreement with Scott Shook, that you would have a job at the conclusion of your leave. You argued that a vacancy did in fact exist in Gardening. This is because Scott England was employed as a gardener although he never took a written test, was incapable of taking one, and was therefore unqualified for his current position. You also believed that Mr. Buss was settling a personal grudge. You also indicated that your letter initiated the grievance procedure, and you forwarded a copy to CSEA, requesting their assistance as well.

In your May 24, 1990 letter to your attorney, Wendy Hayward-Marshall of Rose, Klein & Marias, you indicated, in part, "If Ocean View feels my disability rating precludes a continuation of employment, then I should at least be entitled to due process." You indicated that "This latest action is part of a pattern of harassment I've experienced since I filed the claim." You noted that two other classified employees previously took unpaid personal leaves from the District and were able to return. A female gardener was permitted to miss a third consecutive summer of work, but was hired back. A male custodian was permitted to finish a six-month jail term and was also hired back. To your knowledge, no certificated employee had been denied a rehire at the end of a leave. You felt you were being retaliated against

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[3]Section 7.9.3.4 states that "The granting of a leave of absence without pay gives to the employee the right to return to his/her position (same step - but with a recomputed anniversary date) at the expiration of his/her leave provided a vacancy exists in his/her classification."

[4]Rule 80.900.2B states that "The granting of a leave of absence without pay gives to the employee the right to return to his/her position (same step--but with a recomputed anniversary date) at the expiration of the leave provided a vacancy exists in the classification the employee held at the time leave was granted."

by the District for having filed an injury claim and that this was a punitive action taken by the District "to settle a personal bias, and/or grudge." In addition, you felt that your leave was distinguishable (possibly from the other leaves) as you settled the workers' compensation case and completed work on a teaching credential. A copy of your letter was sent to CSEA Field Rep. Michael Parks.

By your letter dated June 7, 1990 to Mr. Buss, you filed a grievance indicating that (1) the District violated Article 7, section 7.9.3.4 of the Agreement by hiring a permanent replacement for you while you were out on leave. You indicated that neither the previous, nor the present Classified Personnel Directors ever construed this section to mean that "the District has a right to deprive an employee of employment at the conclusion of a personal unpaid leave, particularly where the employee indicates a desire to return to employment and complys (sic) with Sections 7.9.4.2 and 7.9.4.3.[5]"; that (2) the personnel action is an abuse of discretion because it was arbitrary and capricious. It is also a thinly veiled punitive action, taking into account the past practice of the District, particularly the intervention on behalf of Sabino Perez at the end of his leave; and that (3) the action subverts the intent of Article 19, section 19.7.1 by in effect laying off the grievant, while funding and work are still available.[6]

In your June 15, 1990 letter to Dick Calister, of the District's Personnel Commission regarding your PERS 167 form (Report of Status Change or Separation), you indicated in part that you returned to work on June 4, 1990 only to be told that there was no work available for you. You indicated that the provisions of your leave did not contemplate the end of your employment as a gardener, and reemployment "at whatever (if any) job was available, when (you) returned... (You) had a reasonable expectation of returning to employment as a Gardener based on the common interpretation of the CSEA agreement. Past practice by

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[5]Section 7.9.4.2 requires an employee to give notification no less than 15 days prior to the expiration of the leave, that he or she intends to return to his or her position. Section 7.9.4.3 makes failure to report for duty within 3 working days after a leave has been cancelled/expired an abandonment of the position, and the employee subject to termination.

[6]Section 19.7.1 provides in part that layoffs shall only occur for a lack of work or lack of funds.

the district (OVSD) gives no indication, nor offers any precedent for the type of personnel action taken against (your) interests."

In a letter dated June 12, 1990, to CSEA Field Rep. Michael Parks, Joseph Condon, Asst. Supt., disagreed with CSEA's position that you were entitled to a position in the classified service. Supt. Condon pointed out that on August 30, 1989, you were advised you had the right to return to your position if it was unfilled, which was consistent with the Collective Bargaining Agreement and the Personnel Commission's Rules. He also pointed out that on September 6, 1989, you were advised by the Personnel Commission that you could return to your position provided a vacancy existed in your classification, at the expiration of your leave. The District firmly maintained that at the end of your leave, there was no vacancy in the classification/position of Gardener. The District disagreed with CSEA's position that you were entitled to return to employment as a Sweeper Operator as this was not your classification at the time the leave was granted.[7] Also, there was no vacancy in the Sweeper Operator classification since the District long ago decided not to fill said position when it became vacant. The District maintained that you were only entitled to have your name placed on a list which would provide you reemployment as a Gardener, or a lower related classification, without taking a Merit System examination.

By letter dated June 15, 1990, Mr. Parks provided you a copy of the District's negative response. Mr. Parks advised you he intended to argue your "reemployment" right to a vacancy as opposed to your right to be considered for "reinstatement." Reemployment rights guarantee you a position if one became vacant. Reinstatement would only give you consideration along with other eligible candidates. Both rights require that there be a vacancy.

You indicate that this case involves the District's June 4, 1990 personnel action, the effective date of what you contend was your dismissal. You notified the District of your intent to return to work on April 9 and May 9, 1990. On May 24, 1990, you received an advance against your workers' compensation settlement and Mr. Buss' termination notice. You also notified your attorney and CSEA of this matter. On May 26, 1990, you began the grievance procedure. Thereafter, you spoke to Mr. Parks, and representation for you by CSEA was denied based on a conflict of interest. You contend that CSEA was in agreement with Mr. Buss'

[7]I note that Sweeper Operator and Gardener are both part of the Gardening Series.

recommendation. You also indicate that CSEA urged the District to fire you. A May 31, 1990 conference was set up. Thereafter, you and Mr. Parks conferred at CSEA's Orange, California office and Mr. Parks agreed to represent you. But on June 3, 1990, he telephoned you and again denied representation, citing a conflict of interest. When you attempted to return to work after your approved/unpaid leave of absence (1/1/90 through 6/1/90), you were denied work.[8] You filed a grievance on or about June 7, 1990. You contend that you met your obligations. You thought you would return to the same position with a recomputed anniversary date. You notified the union that you believed the District's action was illegal, discriminatory, and in violation of the collective bargaining agreement. You contend, in part, that your unpaid leave of absence does not create a vacancy and that you were dismissed without due process. You believe you were dismissed in retaliation for settling a workers' compensation claim against the District. Furthermore, you argue that no precedent exists to fire a classified employee who was on an unpaid leave. The contract has never been used to displace a gardening series employee, or any other employee. You contend that CSEA denied you representation during the grievance process, citing a conflict of interest. Also, you contend the District took the action at the urging of CSEA. According to Article 5, section 5.8 of the Agreement, a grievant shall be entitled on request to representation by CSEA at all grievance meetings beyond the first informal level. You contend that the personnel action recommended by CSEA was arbitrary, capricious and discriminatory under State and Federal Civil Rights Laws, and the California Labor Code. Furthermore, you reached a negotiated settlement with the District through the Dept, of Fair Employment and Housing, which settlement was also approved by the Workers' Compensation Appeals Board.

You argue that CSEA recommended an arbitrary and capricious personnel action. You contend that the main reason Article 7, section 7.9.3.4 was never before used to displace an employee is because its language, "provided a vacancy exists in his/her position", is poorly written and provides insufficient information should an employee be displaced. You contend it provides no authority for the District to place a separated employee on any type of list. You point out that section 7.3.3.6 (industrial accident or illness leave) allows an employee to be placed on a reemployment list for 39 months when all available leaves of absence have been exhausted, and the employee is not

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[8]On June 4, 1990, you, Mr. Parks and Mr. Buss met informally at 7:35 a.m. to discuss your employment status.

medically able to assume the duties of his/her position. Similarly, section 7.9.4.4 (conditions of return from leave) provides in part that when an employee's classification is abolished during the absence, he/she shall be laid off for lack of work and placed on the reemployment list for the class.[9] You also contend that the California Education Code does not contemplate that a temporary employee can block the return to employment of a permanent classified employee. At the time of your return, you contend that Scott England, who was transferred onto your crew, was still probationary,[10] and therefore, as only four permanent positions were occupied, there was one vacancy (excluding Mr. England's slot). Therefore, you see CSEA's recommended course of action to the District as taking away your due process rights under Education Code sections 45302 (demotion and removal from permanent classified service for reasonable cause) and 45304 (written charges for suspension, demotion, or dismissal).

You point to the case of Sabino Perez, Jr., a custodian and a permanent classified employee at Meadow View School. Although he had no formal authorization to be absent, his leave application was denied, yet he was permitted to serve a jail term of about 18 weeks and was then reemployed. You contend that Mr. Perez made a deal with Mr. Buss to circumvent the District and the collective bargaining agreement. No effort was made to replace Mr. Perez even though you believe there was good cause as he was the only classified employee at his site.[11] You argue that you were not

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[9]I disagree with your assumptions about section 7.9.3.4 for several reasons. First the language in section 7.9.3.4 (part of the conditions for granting leave without pay) has not been declared invalid by court decision. Also, the sections at 7.9.4 (conditions of return from leave) spell out the conditions for returning for those on personal leave without pay. The sections under 7.9.4 supplement those under 7.9.3 (conditions for granting leave).

[10]Based on Article 7, section 7.1.5 (leaves for probationary employees) and Education Code 45301 (both sections refer to a six month probation), as you were on leave for 5 months, you argue that Mr. England was not permanent.

[n]This example will not show disparate treatment by the District since Mr. Perez was not a gardener and you have not shown facts indicating that under circumstances substantially similar to yours, that he was allowed to return. Even if this did show disparate treatment by the District, you have alleged no

displaced due to business necessity but that Mr. Buss had a hostile relationship with you. You contend that CSEA improperly permitted Mr. Buss, without a showing of business necessity, to retaliate against you for personal reasons.[12]

Next, you contend that CSEA, through Mr. Parks, recommended a discriminatory personnel action against you. Looking at the past practice of the District, you believe it is apparent that CSEA was in collusion with the District and that section 7.9.3.4 of the Agreement "is merely a pretext to discriminate, as expressly prohibited by California Labor Code 132(a)."[13]

You allege CSEA agrees with the idea that your supervisor had a right to retaliate against you, someone your supervisor did not personally care for. You contend CSEA "got in bed" with the

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facts showing CSEA's causal^ role regarding Mr. Perez, as compared to your situation.

[12]You have offered no facts to support an unlawful motive or desire by CSEA to retaliate against you, or allow the District to retaliate against you. Also, based on the facts presented, the union did not cause Mr. Buss' alleged hostility toward you.

[13]There are no facts presented (beyond your conclusions) to support the proposition that CSEA acted in collusion with the District and/or urged the District to fire you or let you go. In fact, it also appears that around June 1990, CSEA attempted to obtain employment for you at the District in another classification (Sweeper Operator) until a vacancy occurred in your gardening classification. It appears in this matter that CSEA has opted for providing work for one of it's bargaining unit members, instead of stopping the arguable vacancy created by your voluntary leave, from being filled. Next, it is arguable that CSEA's failure to argue that you suffered retaliation by the District for filing a worker's compensation claim, is not improper since your exclusive remedy for this type of claim is indicated in Labor Code section 132a. You were represented by worker's compensation counsel and the union does not control the exclusive means to obtain a remedy in such a matter. Thus, it appears CSEA does not owe you a duty of fair representation (DFR). 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.

District on the idea that they[14] were above the law and could discriminate against employees pursuing industrial injury claims. You filed a race discrimination charge at the Dept, of Fair Employment and Housing[15] and a complaint with the Workers' Compensation Appeals Board alleging a violation of Labor Code section 132a. The only other gardeners to take leaves during the period you were employed at the District were Hispanic. You indicate that you were the only gardener to be displaced. You indicate in part that "CSEA apparently thought race based personnel policy was consistent with its mission as bargaining representative."

Next, you argue that "It does not matter if CSEA intended to discriminate against KOTCH, only the effect of the controversial personnel action can be weighed." (sic) You believe your due process rights under Education Code sections 45302 (demotion and removal from permanent classified service) and 45304 (written charges for suspension, demotion or dismissal) were taken away since CSEA would not file a grievance or represent you at the administrative level. You contend you were successful in litigating and now CSEA "must assume liability for the fruits of their actions."

By your letter dated February 25, 1992, you advised CSEA that you learned on February 21, 1992 that the District hired a gardener for an open position on or about December 1, 1990. You claimed that your name should be on a reemployment list, and you asked why you were not notified of the position and what CSEA intended to do about it. In several letters exchanged by you and CSEA in March 1992, issues involving your reemployment rights versus your reinstatement/restoration rights were discussed. In your March 9, 1992 letter to CSEA, you indicate in part, "It is my fervent hope that further litigation can be avoided, including any additional Unfair Labor Practice charges against CSEA." These allegations have not been made part of this unfair practice charge. If you wish to formally raise this conduct, you may do so by filing another unfair practice charge.

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[14]It is not clear who "they" are but I assume you are referring to the District.

[15]You obtained a negotiated settlement of $12,000 through the Department of Fair Employment and Housing on or about October 11, 1991. You also executed a Workers' Compensation Appeals Board Compromise and Release at that time.

Based on the above facts, the charge and Notice of Termination of Abeyance fail to state a prima facie violation of EERA.

You have alleged in part that 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 (DFR) 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, Charging Party must show that the Association's conduct was arbitrary, discriminatory, or in bad faith. In United Teachers of Los Angeles (Collins). 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.
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> . . . . . .
>
> 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.

You have alleged that CSEA would not represent you or assist you in your grievance against the District, and that it

requested/sanctioned the District's action leading to the loss of your position. You have not clearly and concisely alleged facts or shown that the union acted in an arbitrary, discriminatory or bad faith manner. You were advised prior to your leave that you could return "provided a vacancy exists in (your) classification." The Agreement between CSEA[16] and the District, as well as the Personnel Commission's Rules support this. CSEA did not contradict this by promising you that your job would not be filled before the end of your leave. In possibly assisting one of its other bargaining unit members to obtain a gardening slot, and in not pursuing your grievance, CSEA was not acting without a rational basis. You have not shown CSEA acted with an unlawful motive or in bad faith. Also, there are insufficient facts to show that CSEA acted in a discriminatory way or in unlawful collusion with the District. Further, my conclusions are supported by footnotes 11, 12 and 13 above.

Mere negligence or poor judgment does not constitute a breach of the union's duty. 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. Furthermore, PERB regulation 32615 (California Code of Regulations, title 8, section 32615), requires that a charge contain "a clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (emphasis added.) The Charging Party must allege with specificity who, what, when, where and how the union's activities were arbitrary, discriminatory or in bad faith. Mere speculation, conjecture or legal conclusions are insufficient.

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[16]It is also noteworthy that Article 15, section 15.1 provides that "It is understood and agreed that the specific provisions contained in this Agreement shall prevail over District practices, policies, rules and regulations, and procedures and over state laws to the extent permitted by state law, and that in the absence of specific provisions in this Agreement, such practices and procedures are discretionary with the District." Section 7.9.3.4 permitted you to return only if a vacancy existed in your classification. The language in this section is paramount over other practices such as the one you suggest, that no other gardener had been similarly displaced. The parties to the Agreement could properly advise you before your leave of Section 7.9.3.4 and then expect its full meaning to be given effect.

Next, you allege that CSEA caused or attempted to cause the District to violate EERA section 3543.5 in violation of EERA section 3543.6(a). You have not stated a prima facie violation of EERA section 3543.6(a). You have not clearly and concisely alleged facts to show that CSEA caused or attempted to cause such a violation. Based on the above facts, it does not appear that the union tried to make the District commit an unlawful reprisal/discrimination against you. It appears the union's motives and actions were not inappropriate. Also, the necessary elements for such a violation are not present. To demonstrate a reprisal/discrimination violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under the EERA, (2) the employer had knowledge of the exercise of those rights, and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. Moreland Elementary School District (1982) PERB Decision No. 227. Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee, (2) the employer's departure from established procedures and standards when dealing with the employee, (3) the employer's inconsistent or contradictory justifications for its actions, (4) the employer's cursory investigation of the employee's misconduct, (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons, or (6) any other facts which might demonstrate the employer's unlawful motive. Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264. As presently written, this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation of section 3543.S(a).[17]

[17]It appears that you have not shown that you engaged in protected/union activity. PERB has held that filing an individual complaint with the Calif. Dept, of Fair Employment and Housing based on age, race, sex, or other prohibited

Next, based on the above, you have not clearly and concisely alleged facts to show that the union caused or attempted to cause the District to commit an unlawful unilateral change. The actions and motives of CSEA in this matter do not appear to be inappropriate. Also, the elements for an unlawful unilateral change are not present. In determining whether a party has violated section 3543.5(c) of EERA, the PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. Stockton Unified School District (1980) PERB Decision No. 143. Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Unified High School District (1982) PERB Decision No. 196. In this case, section 7.9.3.4 appears to have been appropriately applied. In Marysville Joint Unified School District (1983) PERB Decision No. 314, the Board indicated that established policy can be embodied in the terms of an agreement (as here), or where the contract is ambiguous or silent regarding a policy, it may be ascertained by looking at past practice. But where the contractual language is clear and unambiguous (as in section 7.9.3.4 here), it in not necessary to go beyond the plain language of the agreement to obtain its meaning. As in Marysville. it does not appear that the District took action that was inconsistent with its contractual obligations. Even if the District chose not to enforce its contractual rights in the past (fill a position while the employee was out on an approved leave), does not mean it was forever prevented from doing so. Thus, you have not shown a unilateral change violation.

For these reasons, your charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge

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discrimination, is not protected conduct. University of California (1987) PERB Decision No. 615-H. Similarly, your filing a workers' compensation claim is not protected conduct under EERA. Retaliation by the District based on the workers' compensation claim is properly handled under the Labor Code statutes.

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 respondent[18] and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before June 18, 1992, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Marc S. Hurwitz
Regional Attorney

[18]William C. Heath, Deputy Chief Counsel, CSEA.