STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PAT KIRKALDIE,	)	
	)	
Charging Party,	)	Case No. SF-CO-470
	)	
v.	)	PERB Decision No. 1118
	)	
ALUM ROCK EDUCATION ASSOCIATION, CTA/NEA,	)	October 4, 1995
	)	
Respondent.	)	
	)	

Appearances: Pat Kirkaldie, on her own behalf; California Teachers Association by Ramon E. Romero, Attorney, for Alum Rock Education Association, CTA/NEA.

Before Carlyle, Garcia and Johnson, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Pat Kirkaldie (Kirkaldie) of a PERB regional attorney's dismissal (attached) of her unfair practice charge[1] against the Alum Rock Education Association, CTA/NEA (Association). In her charge, Kirkaldie alleged that the Association failed to adequately represent her in violation of section 3542.6 of the Educational Employment Relations Act (EERA)[2] when it refused to pursue her grievances

[1]The charge consists of a 21-page statement of facts, together with approximately 788 pages of exhibits.

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

> It shall be unlawful for an employee organization to:
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

to arbitration; failed to investigate the expenditures of funds received by the Alum Rock Union Elementary School District (District) for salaries and services of program specialists; and failed to investigate the District's illegal elimination of program specialist positions.

The Board has reviewed the warning and dismissal letters, Kirkaldie's appeal, the unfair practice charge, the Association's response and the entire record in this case. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself in accordance with the following discussion.

DISCUSSION

The Board finds that Kirkaldie's appeal is without merit. The Board finds that the warning and dismissal letters demonstrate that the regional attorney performed a thorough review of the pertinent details and followed the relevant PERB precedent and statutory law to correctly conclude that Kirkaldie failed to demonstrate how the District's conduct violated provisions of the collective bargaining agreement.

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discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

ORDER

The Board hereby AFFIRMS the regional attorney's dismissal of the unfair practice charge in Case No. SF-CO-470.

Members Carlyle and Garcia joined in this Decision.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

April 17, 1995

Pat Kirkaldie

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Pat Kirkaldie v. Alum Rock Educators Association
Unfair Practice Charge No. SF-CO-470

Dear Ms. Kirkaldie:

The above-referenced unfair practice charge, filed on July 8, 1994 and amended on April 6, 1995, alleges that the Alum Rock Educators Association (Association) failed to properly represent Pat Kirkaldie with respect to certain disputes with the Alum Rock Union Elementary School District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated March 20, 1995, 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 which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to March 28, 1995, the charge would be dismissed. An extension of time was granted for the filing of an amended charge.

An amended charge was filed on April 6, 1995. The amended charge contains additional allegations regarding the District's employment of Program Specialists. Documentation attached to the amended charge indicates that, beginning in 1981, the District agreed pursuant to a joint agreement among area school districts and the Office of the Santa Clara County Superintendent of Schools to employ Program Specialists under an integrated program of special education. The agreement was renewed periodically by the District as late as December 1993. Kirkaldie wrote several letters to the District in 1993 asserting that the District was restricted to using funds received through the area plan for Program Specialist salaries. The Director of the area plan informed the District in June 1994 that the funding allocated for Program Specialists were restricted to expenses associated with Program Specialist staffing.

In August 1994, Kirkaldie filed charges with the state Department of Fair Employment and Housing and the federal Equal Employment Opportunities Commission alleging discrimination in the District's reassignment of her. She also notified the Association of the filings. Kirkaldie took a medical leave from the District beginning in September 1994. On January 3, 1995, Kirkaldie wrote to the Association regarding the alleged misuse of the area plan's funding for Program Specialists pointing to expenditures on management salaries.

Kirkaldie cites California Education Code sections 56220 and 56826, regarding state mandates for Program Specialist services and use of funds exclusively for programs implemented through the area plans.

The allegations in the amended charge indicate that Kirkaldie continued during 1994 and 1995 to press with the District and the Association the issue of the District's failure to expend funds received for Program Specialist services for the salaries of Program Specialists. Kirkaldie also cites provisions of law which arguably render the District's elimination of Program Specialist positions illegal under the Education Code. However, the amended charge fails to demonstrate how the District's conduct also violated express provisions of the collective bargaining agreement so as to substantiate a grievance. While the District's conduct may have supported a civil lawsuit, the Association's duty of fair representation does not impose a duty to file such lawsuits, but is limited to enforcing provisions of the collective bargaining agreement. (California Faculty Association (Pomerantsev) (1988) PERB Dec. No. 698-H.) Thus, the amended charge fails to demonstrate elements necessary to state a prima facie violation of the EERA.

Therefore, I am dismissing the charge based on the facts and reasons contained above and in my March 20, 1995 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. (Cal. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. 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 (20) calendar days following the date of service of the appeal. (Cal. 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 Cal. 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 (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. 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,

ROBERT THOMPSON
Deputy General Counsel

By _____
DONN GINOZA
Regional Attorney

Attachment

cc: Ramon E. Romero

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, CA 94108-4737
(415) 557-1350

March 20, 1995

Pat Kirkaldie

Re: **WARNING LETTER**
Pat Kirkaldie v. Alum Rock Educators Association
Unfair Practice Charge No. SF-CO-470

Dear Ms. Kirkaldie:

The above-referenced unfair practice charge, filed on July 8, 1994, alleges that the Alum Rock Educators Association (Association) failed to properly represent Pat Kirkaldie with respect to certain disputes with the Alum Rock Union Elementary School District (District). This conduct is alleged to violate Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

Investigation of the charge revealed the following.[1] Pat Kirkaldie was first employed by the District as a Program Specialist in the Special Education Department of the District in 1981. Kirkaldie's bargaining unit is exclusively represented by the Association.

In June 1985, Steve Fiss, a Special Education program director for the District, wrote to Jack Kingsbury, then the District's Assistant Superintendent of Special Education, indicating that he was assisting Joyce Roberts-Palmquist, an employee formerly under his supervision at the Santa Clara County Office of Education, in obtaining a management position in the District. In July 1985, Roberts-Palmquist was successful in securing the position she had sought, Coordinator of Special Education. The selection was made without posting of a vacancy or engaging in the normal selection process.

In September 1985, Kirkaldie made an informal written complaint to Fiss regarding the "lack of affirmative action" with respect to the hiring of Roberts-Palmquist. During a meeting with Fiss at which Kirkaldie again raised her objections to the hiring process, Fiss became furious with Kirkaldie and told her that if she wanted to keep her position and get into management, she had better not complain further about the hiring.

[1] The charge consists of a 21-page statement of facts, together with approximately 788 pages of exhibits.

In May 1986, Kirkaldie complained to Fiss about Roberts-Palmquist's lack of support for staff and again about the District's failure to follow affirmative action/equal employment opportunity laws.

In October 1986, prior to the time that Kirkaldie was scheduled to interview for a curriculum Coordinator position, Fiss told Kirkaldie that she would not be selected. When Kirkaldie interviewed, Fiss, who was on the interview panel, rated Kirkaldie before she had completed her responses to the questions. Kirkaldie later complained to Fiss about his rating. Kirkaldie was not selected for the position.

In May, June, and July 1987, Fiss threatened Kirkaldie with a transfer to a classroom position and told her that she should start looking for alternative employment. Later, on five occasions between July and October 1987, Fiss informed her of his plans to transfer one of several different employees into her Program Specialist's position.

From September 1, 1987 through June 1, 1988, Kirkaldie was forced to take a medical leave due to the stress of her relations with Fiss. She encountered additional stress as a result of indications that she might not be able to return to her Program Specialist position.

In June 1988, Kirkaldie did return to her Program Specialist position. In September 1988, she observed that the secretarial staff were monitoring her movements, but not those of others.

Kirkaldie filed a grievance against Fiss with representation by the Association challenging the surveillance.

In February 1989, Kirkaldie complained in writing to Fiss about his retaliation following her complaint about his hiring practices. Copies of the letter were sent to various officers and representatives of the Association.

Privately retained counsel wrote a letter to Fiss in February 1989 "regarding retaliatory attempts to move Kirkaldie out of her Program Specialist position while Kirkaldie was on pregnancy leave." Again in July 1989, she complained herself about "retaliatory attempts" to remove her from her position. Copies of the letter to Fiss were sent to Association representatives, including David Oshige, Association Executive Director.

In August 1989, Kirkaldie complained to the District Superintendent regarding the newly opened position of Director of Special Education and how affirmative action policies were being

violated for the benefit of one individual. Copies of the letter were sent to Association representatives.

In August 1989, Brenda Smith was promoted to the position of Director of Special Education. Fiss was promoted to Assistant Superintendent of Educational Programs. Smith later told Kirkaldie in a discussion about Kirkaldie's interest in Smith's vacated position that it was "a good idea that she move outside of the District."

In November 1989, Kirkaldie complained to Smith regarding the District's plans "to eliminate Kirkaldie from her position" as a Program Specialist. A copy of the letter was sent to Oshige and Bill Empy, a California Teachers Association (CTA) staff person.

In May 1991, Kirkaldie met with Fiss to discuss the new created Resource Teacher positions. Fiss stated that Resource Teacher positions would be temporary and funded only for one to four years. He also stated that the Program Specialist positions would be eliminated.

In June 1991, Kirkaldie learned that Sue McBride, a Program Specialist, would be chosen for a Resource Teacher position. She later discovered in the copying room copies left by McBride, including McBride's resume and questions to be asked by the interviewing committee. No other applicant had access to these questions. Kirkaldie later interviewed and the questions asked were those left by McBride. McBride was chosen for the position.

Around the same time, Kirkaldie discovered District plans to divert much of the funding directed toward Program Specialist positions to Resource Teacher positions, resulting in the eventual elimination of Program Specialist positions. Kirkaldie claims that only she would be left without a position into which to transfer. Kirkaldie complained in writing to Fiss and sent a copy to Oshige and Empy.

In September and October 1991, Kirkaldie complained in writing to the District regarding the alleged retaliation and sent copies to Oshige. She stated her intention to prosecute discrimination claims with the Fair Employment and Housing Department (FEHD) and Equal Employment Opportunities Commission (EEOC).

In January 1992, Kirkaldie complained about the District plans to transfer funds and eliminate the Program Specialist positions. She later filed her discriminations claims and sent copies of further complaints to Oshige. She repeated her complaints in October 1992, again sending copies to Oshige and Empy. In October she also complained about the District's plans to

transfer her from her Program Specialist position. In November, she complained in writing to Fiss about the District's plans to eliminate the Program Specialist positions. She also complained about the District's plans to promote McBride into a Resource Specialist position so that the District could provide Kirkaldie with McBride's vacated Resource Teacher position, and thus resolve Kirkaldie's FEHD and EEOC claims.

On or about November 30, 1992, Kirkaldie met with Oshige and Colin Ford, Association Grievance Chairperson, regarding two possible grievances challenging the District's failure to follow hiring, transfer and reassignment provisions of the collective bargaining agreement. Questions were raised regarding the effectiveness of any remedy given the "process" nature of the alleged violations. Ford asked Oshige to obtain legal advice regarding these issues.

On or about December 9, 1992, Kirkaldie filed a grievance with Fiss and Smith regarding the District's plans to replace Program Specialists with other staff members. At a meeting to discuss the grievance on that date, Oshige implied that the Association would not support her in her grievance and that so long as the District transferred her to another position, she should be satisfied "that she had a job."

Kirkaldie attempted unsuccessfully to have Oshige send out a letter on her behalf reiterating her discrimination claims. She complained to the Association president in writing about the Association's failure to act.

In January 1993, Oshige and Fiss exchanged letters regarding Kirkaldie's grievance. Kirkaldie again complained about the District's plans to transfer her into McBride's vacated Resource Teacher position and eliminate Program Specialist positions.

CTA attorney Ramon Romero responded to Kirkaldie's December letter protesting the Association's failure to act. Kirkaldie was not satisfied and responded reiterating the abuses on the District's part. Two subsequent exchanges of letters between Romero and Kirkaldie in February 1993 failed to satisfy Kirkaldie.

In March 1993, the District Superintendent threatened to discipline Kirkaldie for having a manager copy a public document for her. Kirkaldie had permission from the Superintendent's secretary to copy the document.

In March 1993, Smith announced that she was recommending that the Board of Trustees eliminate Program Specialist positions for the

1993-94 school year. Smith had led Kirkaldie to believe in January that this would not happen. Fiss refused to meet with Kirkaldie regarding the recommendation and referred her to Laura Kidwiler, Assistant Superintendent/Human Resources Department. She complained directly to the Board of Trustees, but received no response.

In March 1993, Kirkaldie met with Kidwiler and Oshige to discuss the elimination of the Program Specialist positions. Kidwiler stated that the elimination was due to budgetary reasons and failed to claim that services provided by the positions would continue. Kirkaldie also complained to Fiss in writing about the action but he failed to respond to her. Oshige received a copy of this letter.

Kirkaldie's personal attorney, Lisa Aguiar, wrote a letter of protest to the Board regarding the proposed cuts but received no response.

In March 1993, the Board of Trustees voted to make reductions in the Program Specialist program. Immediately thereafter, Kirkaldie wrote to the Superintendent and Deputy Superintendent asking certain questions regarding the elimination of the Program Specialist positions. She received no response. She repeated her questions in April and again received no response.

In May 1993, the Board of Trustees voted to eliminate two Program Specialist positions.

From May through July, Kirkaldie attempted unsuccessfully to have attorneys from the CTA intervene on her behalf.

She applied for a Resource Teacher-Curriculum Technology position, but was denied in June 1993. She filed complaints with the FEHD and EEOC regarding the District's actions.

In August 1993, the Superintendent recommended reinstatement of the two Program Specialist positions, but the Board rejected the recommendation.

In the same month, Smith informed Kirkaldie that she would be assigned to a school site as a Resource Specialist, two other former Program Specialists would be remain at the District office with duties similar to those performed by Program Specialists and that other special education employees would be paid overtime to perform some of the duties of the eliminated positions.

On August 22, 1993, Kirkaldie filed a grievance against these actions. The grievance complained about the transfer of Program

Specialist job duties to other employees which allegedly breached Smith's prior assurances not to transfer the duties, as well as the inequitable reassignment of the Program Specialists, including the failure of Smith to give her written reasons for the transfer, more preferable assignments to two other Programs Specialists (Gallagher and Johnson), and retaliation. Kirkaldie also pursued inquiries and complaints with the Board of Trustees, which were ignored. Oshige informed Kirkaldie that it would help her pursue her grievance to the Superintendent's level. He acknowledged that the Association needed to place more emphasis on dealing with transfer and reassignment issues and that Kirkaldie's complaints to the CTA attorneys had put pressure on him to act.

After elevating her grievance to the Superintendent's level, Kirkaldie and Oshige met with the Superintendent's designees, including Smith and Kidwiler. Kidwiler indicated that the District was obtaining a legal opinion regarding the delivery of Program Specialist services. Oshige requested budgetary information regarding the subject. Oshige talked with Kirkaldie after the meeting and questioned her as to why "she was concerning herself with her protected concerted activities." Around this time Kirkaldie had requested legal services regarding possible violations of the Education Code. Oshige refused the request. The District rejected the grievance.

On November 3, 1993, Oshige indicated that he would recommend to the Association's Executive Board that it take the grievance to arbitration. The issue he believed to be viable was the assignment of one of the District office Resource Specialist positions to another employee, Jean Gallagher. Oshige stated that the grievance would be pursued as an individual grievance rather than an Association grievance. Kirkaldie complained to a CTA representative about this decision.

On December 17, 1993, Kirkaldie called Oshige about the arbitration when he informed her that he had obtained additional information as a result of a meeting with Kidwiler and Smith that resulted in his decision to reverse his position regarding arbitration. Kirkaldie had not been invited to this meeting. Kirkaldie contends that Oshige would not have notified her of his decision to change his recommendation at a January 3, 1994 Association's Executive Board meeting had she not called. Oshige stated that her individual grievance lacked merit. Kirkaldie focused on the improprieties underlying the District's granting of the District office position to Gallagher despite her lack of appropriate credentials.

On January 18, 1994, Oshige informed Kirkaldie that the Executive Board had approved his recommendation to drop her grievance. Contrary to his earlier promise to advise Kirkaldie of the date of the Executive Board meeting at which time her grievance would be taken up, Oshige failed to provide Kirkaldie advance notice, thereby depriving her of her opportunity to state her side of the case to the Board.

During this conversation, Oshige stated that he believed that the District had complied with the contract in making Kirkaldie's assignment, but acknowledged Kirkaldie's argument that by assigning Gallagher outside of her credentialed area the District had provided more favorable treatment to Gallagher than to Kirkaldie. However, Oshige believed that the District was constrained from placing Gallagher in a teaching position similar to Kirkaldie's because she was not a full-time employee. At this point in the conversation, Oshige laughed. Kirkaldie asked for Oshige's written recommendation to the Executive Board, a copy of which she received on January 24, 1994. The letter stated that Program Specialist services were being provided by Special Education staff on an overtime basis.

On January 18, Kirkaldie informed the Association that she would appeal the Executive Board's decision.

Also on January 18, Kirkaldie requested the CTA legal staff investigate if the District had committed an unfair labor practice by failing to negotiate with the Association when it eliminated the two Program Specialist positions, and then assigned the duties to other bargaining unit members and non-bargaining unit employees of the District. On February 4, Oshige responded, refusing to pursue her grievance further and declining her request for investigation of the potential unfair labor practice.

In February 1994, Kirkaldie consulted with a State expert on compliance with Special Education mandates, in particular, the requirement that funds received by the District for Program Specialist activities be spent for that purpose alone. She also notified a CTA representative that a lawsuit would be filed concerning the Association failure to represent her.

In April, she complained about the lack of representation to Ralph Flynn, CTA Executive Director, and Beverly Tucker, CTA Chief Counsel, and requested legal and financial assistance for a lawsuit against the District. The Association asserts that it has granted her request by providing financial assistance to Kirkaldie's personal attorney, Lisa Aguiar, for expenses associated with bringing her EEOC claim to court.

Also in April, the EEOC notified Kirkaldie of the existence of prima facie evidence of discrimination. Conciliation efforts were unsuccessful.

On or about June 30, 1994, Kirkaldie spoke with Association President Colin Ford who told her that Oshige stated that CTA was assisting her with her "requested grievance actions" and that her "grievance had not been appealed" to the Executive Board. The Association contends that Kirkaldie failed to make a personal appearance before the Executive Board on March 7, 1994 to argue her appeal of the denial of the request for arbitration, and therefore the appeal was not perfected.

Based on the facts stated above, the charge as presently written fails to state a prima facie violation of the EERA for the reasons that follow.

Government Code section 3541.5(a) states that the Public Employment Relations Board (PERB) "shall not . . . issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge."

PERB has held that the six month period commences to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (Regents of the University of California (1983) PERB Dec. No. 359-H.) Since the charge was filed on July 8, 1994, the statute of limitations period began to run on January 8, 1994.

The only events occurring within the six month statute of limitation period involve the Association's decision to not take Kirkaldie's August 1993 grievance to arbitration, and events thereafter. The charge specifically alleges that the Association failed to represent Kirkaldie in her December 1992 grievance against Fiss and Smith regarding the elimination of Program Specialist positions, the failure of the Association to provide legal assistance in September 1993 to research the legality of the District elimination of Program Specialist positions, and Oshige's decision to rescind his recommendation to take Kirkaldie's August 1993 grievance to arbitration based on the information he received in December 1993. These claims are untimely and no complaint may issue with respect to them.

The allegation that the Association refused to take her August 1993 grievance to arbitration is timely, but fails to state a prima facie violation for other reasons. PERB has held that breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary,

discriminatory, or in bad faith. (Rocklin Teachers Professional Association (1980) PERB Dec. No. 124.) In the context of grievance handling, PERB has defined the scope of the duty as follows:

> . . . 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. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citations omitted.] (United Teachers - Los Angeles (Collins) (1982) PERB Dec. No. 258.)

In addition, in order to show a prima facie violation involving a breach of the duty of fair representation, the charging party must present facts which would justify a finding that the union acted without a rational basis or in a way that is devoid of honest judgment. (Reed District Teachers Association. CTA/NEA (Reyes) (1983) PERB Dec. No. 332.)

In the present case, the charge as presently written fails to demonstrate that the Association abandoned a meritorious grievance. Since an exclusive representative is not required to process a grievance with a minimal chance of succeeding, the charge must demonstrate as a threshold matter that the facts of the case strongly support a violation of the terms of the collective bargaining agreement.

A review of the provisions of the collective bargaining agreement alleged in the grievance to have been violated[2] does not suggest a compelling case. None of the cited provisions, nor the agreement as a whole, appear to prohibit District management from making programmatic changes of the type involved here. The breaching of prior assurances of an administrator not to transfer

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[2] The grievance cited the following provisions of the contract: 1.4, 1.5, 1.7, 2.2, 2.3, 5.3.9, 8.3.3, 10.8, 11.1, 11.3, 14.2, 14.2.2, 14.2.9, 14.3.1 through 14.3.1.4, 14.3.4, 19.1, and 22.1.

Program Specialist duties also would not appear to be remediable under the agreement. Similarly, there does not appear to be any language in the contract that can remedy "inequitable" reassignments, except if the claim is based on reprisals for grievance filing.

Cases of retaliation require proof of unlawful intent. Kirkaldie's case was not without weaknesses, such as the fact that the person who apparently had the strongest feelings against her was Fiss, as opposed to Kidwiler and Smith, who were primarily responsible for the elimination of the Program Specialists and her subsequent job assignment. The elimination of the Program Specialists was also a decision that involved the Board of Trustees, and it appears questionable whether Kirkaldie could prove that its decision to eliminate an entire program was targeted solely to harm her.

Moreover, the charge fails to demonstrate that the Association refused to arbitrate the grievance for arbitrary, discriminatory, or bad faith reasons. It is significant to note that Oshige originally decided to recommend arbitration of the grievance. He informed Kirkaldie that the reason for changing his mind was based on factual information he received from Smith and Kidwiler regarding the reassignments. While such a reason may only have been a pretext and the decision may have actually been motivated by some other bad faith reason, the facts alleged in the charge appear to be insufficient to demonstrate that this was actually the case.

Kirkaldie also alleges that the Association violated Government Code section 3543.6(c) by failing to negotiate with the District over the elimination of the Program Specialist positions and the transfer of the work to other bargaining unit members and non-bargaining unit employees of the District. Kirkaldie, as an individual employee, lacks standing to raise this claim since PERB has held that the duty to negotiate is a reciprocal one between the exclusive representative and the public school employer. (See Oxnard School District (Gorcey) (1988) PERB Dec. No. 667.)

Kirkaldie further alleges that the Association violated section 3543.6(b) by discriminating against her by refusing to take her grievance to arbitration. In support of this allegation, she claims that the Association (1) provided perfunctory processing of her grievance, (2) deviated from its policy of investigating grievances to evaluate their merits, (3) failed to notify Kirkaldie of grievance meetings when she had demanded to be notified prior to the meetings so that she could attend, (4) willfully misinformed the Association president that CTA was

assisting Kirkaldie with her grievance, (5) failed to provide fair and equitable treatment to Kirkaldie as evidenced by the actions/inactions and comments of Oshige to Kirkaldie, (6) provided perfunctory assistance to Kirkaldie with regard to her claims of retaliation, (7) acquiesced in District discrimination against Kirkaldie, and (8) refused to address Kirkaldie's inequitable reassignment. While such evidence might suggest a retaliatory motive, these allegations are conclusory are not adequately supported by the underlying facts alleged in the charge.

Finally, Kirkaldie alleges that the Association violated section 3543.6(a) by causing or attempting to cause the District to discriminate against her for the exercise of protected activities. In support of this claim, Kirkaldie alleges, inter alia, that the Association (1) refused to negotiate with the District over the unilateral contracting out of Program Specialist duties, (2) refused to enforce the contract provisions regarding reassignments and involuntary transfers, (3) colluded with the District in Kirkaldie's inequitable reassignment, and (4) failed to investigate and arbitrate Kirkaldie's grievance. Again, these allegations are conclusory in nature and not adequately supported by the underlying facts alleged in the charge. Furthermore, since there is no evidence that the Association's conduct preceded the District's decision to eliminate Program Specialist positions, these acts or omissions in themselves do not demonstrate that the Association attempted to cause the District to discriminate against her.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. 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 be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before **March 28, 1995.** I shall dismiss your charge. If you have any questions, please call me at (415) 557-1350.

Sincerely,

DONN GINOZA
Regional Attorney