STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANNETTE (BARUDONI) DEGLOW, Charging Party, v. LOS RIOS COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. SA-CE-1778 PERB Decision No. 1274 July 20, 1998

Appearances: Annette (Barudoni) Deglow, on her own behalf; Steven W. Bruckman, Attorney, for Los Rios Community College District.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Annette (Barudoni) Deglow (Deglow) to a Board agent's dismissal (attached) of her unfair practice charge. Deglow filed an unfair practice charge alleging that the Los Rios Community College District (District) interfered with her exercise of rights under section 3543 of the Educational Employment Relations Act (EERA),[1] in violation of

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543 states:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their

section 3543.5(a)[2] when it agreed to contract language that limits individual grievants' right to representation at grievance meetings.

After investigation, the Board agent dismissed the charge for failure to establish a prima facie case.

The Board has reviewed the entire record in this case,

> employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
>
> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

[2]EERA section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

including the original and amended unfair practice charge, the Board agent's warning and dismissal letters, Deglow's appeal, and the District's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.[3]

ORDER

The unfair practice charge in Case No. SA-CE-1778 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Dyer joined in this Decision.

Chairman Caffrey's concurrence and dissent begins on page 4.

[3]The Board notes that the collective bargaining agreement (CBA) in effect both prior and subsequent to the February 7, 1995 modification provided that employees could present grievances to the District either alone or with the assistance of a union representative. Accordingly, the February 7 modification resulted in no objective harm to employee rights. The element of adverse action lacking, the Board declines to find that the District discriminated against Deglow because of her protected activities when it negotiated a change in the language of the CBA. (See Palo Verde Unified School District (1988) PERB Decision No. 689 at p. 12.)

CAFFREY, Chairman, concurring and dissenting: I concur in the majority's dismissal of the charge that the Los Rios Community College District (District) unlawfully denied charging party Annette (Barudoni) Deglow (Deglow) access to the arbitration process. I further concur in the majority's denial of the District's request that the Public Employment Relations Board (PERB or Board) order sanctions against Deglow in this case. However, I conclude that Deglow has stated a prima facie case of unlawful interference and discrimination by the District in violation of Section 3543.5(a) of the Educational Employment Relations Act (EERA). Therefore, I dissent from the majority's dismissal of that portion of the unfair practice charge.

DISCUSSION

In November 1996, Deglow filed a grievance with the District and sought representation from the Los Rios College Federation of Teachers, CFT/AFT Local 2279 (Federation). The Federation declined to represent Deglow in the grievance.

On February 3, 1997, Deglow agreed to a February 12 meeting with the District concerning the grievance. Deglow advised the District that an attorney would accompany her to the meeting.

On February 7, 1997, the District and the Federation agreed to modify the portion of their collective bargaining agreement (CBA) concerning representation in the grievance process. Prior to the modification, CBA Article 13.2.1.1 described an employee's right to representation as:

> At the Informal, College and District levels, the grievant may choose either:

> a. to be represented accompanied by [a Federation] agent, or
>
> b. to be represented by herself or himself alone.

The February 7 CBA modification changed Article 13.2.1.1 to describe the right to representation as follows:

> At the Informal, College, and District levels, the grievant may:
>
> a. request [Federation] representation. If the [Federation] agrees to represent at the Informal, College, or District level, no commitment to pursue the grievance to a Board of Review is implied.
>
> OR
>
> b. represent herself or himself alone. This option applies to situations in which the grievant does not request [Federation] representation or to situations where the [Federation] denies a representation request.

On February 10, 1997, the District advised Deglow of the CBA modification and told her that, as a result of the change, the attorney she had planned to bring to the February 12 grievance meeting could not attend.

On March 3, 1997, Deglow filed the instant unfair practice charge alleging, among other things, that the District unlawfully retaliated against her and interfered with her EERA-protected rights by agreeing to a CBA modification which deprived her of assistance in the presentation of her grievance. Deglow asserts that she has a right to obtain assistance in the exercise of the right to self-representation in grievances provided by EERA section 3543, which states in pertinent part:

> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

The Board has addressed itself on several occasions to the issue of the limitations on the employee right to grievance self-representation provided by EERA section 3543. For example, the Board has held that an employee has no right to be represented in a grievance by a representative of a competing employee organization (Mount Diablo Unified School District, et al. (1977) EERB Decision No. 44[1]); that the right to self representation in grievances does not extend to the arbitration stage (Mt. Diablo Unified School District (1978) PERB Decision No. 68); and that the exclusive representative does not breach its duty of fair representation by refusing to provide an employee with the representative or counsel of her choice (United Teachers Los Angeles (Bracey) (1987) PERB Decision No. 616).

In dismissing Deglow's charge, the Board agent relies on Chaffey Joint Union High School District (1982) PERB Decision

---

[1]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

No. 202 (Chaffey Joint Union) to conclude that the District's agreement to the CBA modification which denied Deglow the right to assistance in the presentation of her grievance did not constitute a prima facie violation of the EERA.

In Chaffey Joint Union, the Board considered whether EERA section 3543 permitted a contract provision which limited an employee's right to be assisted in a grievance to a representative selected by the exclusive representative. The Board concluded that the contract provision was not unlawful, finding that it was consistent with EERA's objective of providing for continuity and stability in employer-employee relations through exclusive representation. Importantly, the Board in Chaffey Joint Union did not consider whether EERA section 3543 permitted a contract provision indicating that an employee could have no assistance in the self-representation of a grievance.

More recently in Valley of the Moon Teachers Association, CTA/NEA (McClure) (1996) PERB Decision No. 1165, the Board considered an allegation that the exclusive representative violated its duty of fair representation by refusing to share information with the private counsel retained by an employee who was representing herself in a grievance. While the charge was dismissed, the Board declined to hold that the employee did not have the right to the assistance of counsel in grievance self-representation. Instead, the Board emphasized that it "has never held that the EERA entitles an exclusive representative to interfere with a member's selection of private counsel."

I agree with the limitations on the right to grievance self-representation enunciated in these prior decisions, but I find them all to be distinguishable from the instant case. The Board has not specifically addressed itself to the circumstances presented here.

Here, Deglow specifically requested grievance representation from the Federation. The Federation declined to provide that representation, thereby leaving Deglow to represent herself. The Federation and District then agreed to a CBA modification to provide that Deglow could have no assistance in that self-representation - that she must represent herself "alone" - even though the Federation denied her representation request. Therefore, the issue presented by this case is whether the District violated the EERA when it agreed to a CBA provision which provides that an employee may not be assisted by any representative or counsel when engaged in grievance self-representation after denial of representation by the exclusive representative.

Unlike the prior cases, this case presents no issue involving the employer and exclusive representative agreeing to conditions under which employees may engage in grievance self-representation; no issue involving representation by a rival employee organization; no issue of an exclusive representative's authority to select or approve an employee's grievance representative; and no issue of the exclusive representative refusing to provide an employee with a specific representative of

her choice. Clearly, there is nothing in any of the cases cited above which equates to the circumstances in the case at bar. Consequently, the prior cases do not lead to the conclusion that the District can act to deny Deglow any assistance or counsel in her grievance self-representation after the Federation has declined to represent her.

EERA section 3543 provides employees the right to self-representation in grievances. While that right is not unlimited, it must include the right of the grievant to obtain assistance or counsel in presenting a grievance when the exclusive representative denies representation to the employee, and there has been no indication that the assistance would in any way compete or conflict with the authority and role of the exclusive representative. These are the circumstances present in the instant case. Therefore, I conclude that there has been a showing of a prima facie violation of EERA in this case, based on the theory that the District's conduct interfered with Deglow's exercise of the EERA-protected right of grievance self-representation (Carlsbad Unified School District (1979) PERB Decision No. 89), and based on the theory that the District discriminated and retaliated against Deglow for her exercise of EERA-protected rights (Novato Unified School District (1982) PERB Decision No. 210). I would reverse the Board agent's dismissal of that portion of the unfair practice charge and issue a complaint.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

April 24, 1997

Annette (Barudoni) Deglow
8424 Olivet Court
Sacramento, CA 95826-3009

Re: NOTICE OF DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
DENIAL OF REQUEST FOR SANCTIONS
Annette (Barudoni) Deglow v. Los Rios Community College District
Unfair Practice Charge No. SA-CE-1778

Dear Ms. Deglow:

The above-referenced unfair practice charge, filed with the Public Employment Relations Board (PERB or Board) on March 3, 1997, alleges that the Los Rios Community College District (District) interfered with your exercise of rights under Government Code section 3543, thus violating Government Code section 3543.5(a).

I indicated to you, in my attached letter dated April 4, 1997, 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 April 14, 1997, the charge would be dismissed.

Your subsequent request for additional time was granted, and on April 22, 1997 a First Amended Charge was filed.

Discussion

The First Amended Charge itself largely responds to the request by the District that sanctions be awarded in this case against yourself as Charging Party. The issue of whether sanctions are appropriate in this case is addressed below. In addition, the First Amended Charge alleges that the request for sanctions itself constitutes a reprisal or threat of reprisal in violation of the Educational Employment Relations Act (EERA).[1] Though the Board has infrequently granted motions seeking attorneys' fees or other sanctions, I am unaware of any cases which hold that a request for sanctions by a party is itself an unlawful act, even

[1]The EERA is codified at Government Code section 3540 et seq.

where the motion is denied. (See, for example, Los Angeles Community College District (Watts) (1984) PERB Decision No. 411 and Los Rios College Federation of Teachers (Deglow) (1996) PERB Decision No. 1133.)

Also filed with the First Amended Charge was a letter which largely consists of argument setting forth the public policy issues which you believe the instant charge raises and how both statutory and case law should be applied to those issues. The letter further contends, however, that my April 4, 1997 letter contained one factual error, namely the statement on page one of that letter that only the Federation[2] or District Chancellor may appeal a Board of Review decision to the Board of Trustees.

Your letter correctly quotes the current written agreement as providing, in Article 13, Section 13.4.3.5, that a "decision of the Board of Review . . . shall become binding on all parties unless appealed by the aggrieved or the Chancellor." [Emphasis added.] However, the conclusory statement quoted from my April 4, 1997 letter relied on a reading of Section 13.4.3.5 in concert with other relevant provisions of the agreement, as follows:

1. Section 13.2.1.2 states that, should the Federation choose not to appeal to a Board of Review or the Board of Trustees, the "administrative remedy of the grievant shall be deemed exhausted."

2. The language of Section 13.4.3.5 which you quote is found within Section 13.4.3, which provides for a right of appeal to a Board of Review by the Federation but not by an individual grievant.

3. Section 13.4.4 expressly states that the Federation or the Chancellor may appeal a decision of the Board of Review to the Board of Trustees, but nowhere references a right of appeal by an individual grievant.

Reading these provisions together, my conclusion remains that the "aggrieved" referenced by Section 13.4.3.5 is the Federation.

The additional argument submitted by letter consists of a review of PERB case law and EERA language previously considered and discussed in my April 4, 1997 letter. I have considered your arguments but still conclude that Chaffey Joint Union High School District (1982) PERB Decision No. 202 (Chaffey) is applicable under the facts of your case and requires dismissal of the charge.

---

[2]"Federation" herein refers to the Los Rios College Federation of Teachers, exclusive representative of District faculty employees.

Therefore, I am dismissing the charge based on the facts and reasons discussed above as well as those contained in my April 4, 1997 letter.

Request for Sanctions

As noted above, the District argues that sanctions against the Charging Party are appropriate in this case, citing Los Rios College Federation of Teachers (Deglow) (1996) PERB Decision No. 1133 (Deglow), Los Rios College Federation of Teachers, CFT/AFT Local 2279 (Deglow) (1996) PERB Decision No. 1137 and Los Rios College Federation of Teachers, CFT/AFT Local 2279 (Deglow) (1996) PERB Decision No. 1140. The District bases its request on Charging Party's largely unsuccessful filing of five previous unfair practice charges against the District and thirteen against her exclusive representative; an alleged "pattern of abuse of various legal processes that goes far beyond the norm;" and the contention that the instant charge raises a question settled 15 years ago in Chaffey.

The Board described the standard for sanctions in Los Angeles Unified School District/California School Employees Association (Watts) (1982) PERB Decision No. 181a (LAUSD) as follows:

> The Board notes that Mr. Watts has repeatedly filed complaints which are virtually identical in content to this despite the Board's patient and adverse rulings. [Citations omitted.]
>
> Mr. Watts' repeated raising of such nonmeritorious complaints abuse Board processes and wastes State resources. Further, respondents must necessarily incur expenses in time, effort and money in continually defending against the same charges. Accordingly, the Board sees fit to order that Mr. Watts cease and desist from filing complaints which merely raise facts and questions of law which the Board has already fully considered. Further, if such complaints are filed in the future, the Board will consider the possibility of assessing Mr. Watts any litigation expenses incurred by a respondent while trying to defend against such actions.

In Deglow, the Board emphasized that it is the "repeated presentation of charges based on circumstances which have been considered by the Board in related cases previously [which suggest] an abuse of that process." Likewise, in Los Angeles Unified School District (Watts) (1993) PERB Decision No. 1013 the

Board reversed a Board agent's award of attorney's fees, ruling that the issues in the case were "properly before the Board" and had "not been the subject of Board decisions in the past." (See also Los Angeles Community College District (Watts) (1984) PERB Decision No. 411 and United Teachers of Los Angeles (Watts) (1993) PERB Decision No. 1018.)

The facts at bar in the present case do not warrant a finding that Charging Party is engaged in the kind of "repeated presentation of charges" (Deglow) which are "virtually identical in content" to issues previously raised by her before the Board. (LAUSD; see also Deglow.) While Chaffey was indeed decided some 15 years ago, it is certainly plausible that an individual employee, even one experienced at representing herself before PERB, could be unaware of the decision. In addition, it is the role of PERB to determine when and how its case law applies to the facts of a particular case. While the determination reached above finds Chaffey to be controlling under the facts of the instant case, it is also true that these facts are not identical to those in Chaffey. Thus, the issue presented was one which is "properly before the Board." (Los Angeles Unified School District (Watts) (1993) PERB Decision No. 1013.) For these reasons, I conclude that Charging Party's conduct in filing this charge does not fall within the ambit of the warning issued by the Board in Deglow.

The record does not support a finding that Charging Party has engaged in conduct which is "without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith or otherwise an abuse of process." (State of California (Office of the Lieutenant Governor) (1992) PERB Decision No. 920-S. See also Chula Vista City School District (1990) PERB Decision No. 834.) The request for sanctions in this case is denied.

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

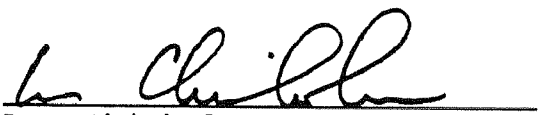
A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. 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 
Les Chisholm
Regional Director

Attachment

cc: Steve W. Bruckman

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

April 4, 1997

Annette (Barudoni) Deglow
8424 Olivet Court
Sacramento, CA 95826-3009

Re: WARNING LETTER
Annette (Barudoni) Deglow v. Los Rios Community College District
Unfair Practice Charge No. SA-CE-1778

Dear Ms. Deglow:

The above-referenced unfair practice charge, filed with the Public Employment Relations Board (PERB or Board) on March 3, 1997, alleges that the Los Rios Community College District (District) interfered with your exercise of rights under Government Code section 3543, thus violating Government Code section 3543.5(a).

The relevant facts are as follows. You are employed by the District in a bargaining unit represented by the Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Federation). On November 13, 1996, you filed grievance 5-F96 seeking correction of an error regarding your first date of employment with the District. You sought Federation representation on this grievance, but the Federation declined to represent you.

Under the collective bargaining agreement between the District and Federation, in Article 13, the steps or levels in the grievance procedure are defined as Informal, College, District, Board of Review and Board of Trustees. The Board of Review level is equivalent to advisory arbitration. A grievance may be filed by either a unit employee or the Federation itself. However, only the Federation may file an appeal to a Board of Review, and only the Federation or District Chancellor may appeal to the Board of Trustees.

The current agreement indicates in Section 13.2.1.1 that a grievant may choose, at the Informal, College and District levels, either:

> a. to be represented accompanied by [a Federation] agent, or
>
> b. to be represented by herself or himself alone.

The agreement further describes the Federation's right to have an observer present at meetings between the grievant and District where option "b" above is chosen, and the Federation's right to be notified of and have the opportunity to comment on any proposed settlement of a grievance.

Section 13.2.1.2 reads as follows:

> At the Board of Review and Board of Trustees, the grievant must be represented by [the Federation]. Should [the Federation] choose not to appeal to these levels, the administrative remedy of the grievant shall be deemed exhausted.[1]

Prior to February 3, 1997,[2] you and the District agreed on the date of February 12 for a District level meeting on your grievance. You advised the District that an attorney, Robb Hewitt, would attend the meeting with you.

On February 10, you were approached by a District representative, who indicated that the District and Federation had modified Article 13 and under its revised terms you would not be able to have your attorney attend the February 12 meeting. The District also provided you with a copy of the modified agreement, dated February 7, which reads as follows:

> 13.2.1.1 At the Informal, College, and District levels, the grievant may:
>
> a. request [Federation] representation. If the [Federation] agrees to represent at the Informal, College, or District level, no commitment to pursue the grievance to a Board of Review is implied.
>
> OR
>
> b. represent herself or himself alone. This option applies to situations in which the grievant does

---

[1]The foregoing citations to the agreement are based on the copy on file in this office, pursuant to PERB regulation 32120. The agreement on its face is effective for the period July 1, 1996 through June 30, 1999.

[2]All dates referenced are in the calendar year 1997, unless otherwise specified.

> not request [Federation] representation or to situations where the [Federation] denies a representation request.

On February 12, the District refused to allow Mr. Hewitt to attend or participate in the grievance meeting. The District also informed you that, under Article 13, your grievance could not be considered for the arbitration (Board of Review) process if the Federation declined to represent you.

On February 24, you attempted at the employee's request to represent a fellow District employee, Elmer (John) Sander, concerning his grievance. The District again cited the February 7 agreement as grounds for refusing to allow you to participate in the meeting on Mr. Sander's grievance.

Discussion

Your charge alleges that both the denial of the opportunity to have representation in a grievance meeting and denial of your opportunity to take your grievance to arbitration without Federation representation violates your rights under the Educational Employment Relations Act (EERA).[3] The legal theory which must be considered under the facts of this case is whether the District, by agreeing to and acting in accordance with the contract provisions described above, unlawfully interfered with the exercise of rights which are provided absolute protection under the EERA.

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. (State of California (Department of Developmental Services) and Public Practice Bureau/ California Medical Association (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

Under the above-described test, a violation may only be found if EERA provides the claimed rights. (Ibid.)

---

[3]The EERA is codified at Government Code section 3540 et seq.

You cite EERA section 3543, as well as Mount Diablo Unified School District/Santa Ana Unified School District/Capistrano Unified School District (1977) EERB[4] Decision No. 44 (Mount Diablo I) and Mount Diablo Unified School District (1978) PERB Decision No. 68 (Mount Diablo II), in support of your contentions.

EERA section 3543 provides in relevant part as follows:

> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

The two parts of your argument will be evaluated in light of this statutory language, and relevant precedent.

Access to Arbitration

In Mount Diablo II, the Board rejected the argument that the right of self-representation extends to the arbitration process, quoting the language of EERA section 3543 and observing that:

> On its face, the statutory right of self-representation falls short of the right to resort to the arbitration process.

It is not clear what in the parties' February 7 agreement helped clarify (or confuse) whether an individual employee could appeal a grievance to the Board of Review level, as the collective bargaining agreement already expressly provided that only the Federation could file such an appeal.

---

[4]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

Under the statute and Board precedent, this contractual limitation does not violate your section 3543 rights, and this element of the charge must be dismissed.

Representation Other than by the Exclusive Representative or Self

Neither Board decision cited in your charge is directly on point to the issue presented here. Mount Diablo I focused on whether an employee, in a unit exclusively represented by one employee organization, could be represented in a grievance by a representative of a different employee organization. All three Board Members agreed in that case that an employee's right to self-representation did not extend to representation by a competing employee organization. While one Board Member's concurring opinion touches on the issue presented by your charge, the majority in Mount Diablo I did not address it.

As noted in the discussion above, Mount Diablo II addressed the right of self-representation at the arbitration stage, and the Board rejected the claimed violation based on the plain language of EERA section 3543.

In Chaffey Joint Union High School District (1982) PERB Decision No. 202 (Chaffey), the Board addressed the issue of EERA section 3543's meaning under facts much like those presented in the instant case. In that case, the employer and exclusive representative had included in the collective bargaining agreement the following provision:

> The grievant has the right to be represented by one authorized representative selected by the [exclusive representative] at any personal conference or formal hearing requested by the grievant, as provided herein, beyond the informal level.

When an affected employee sought grievance representation by a person not authorized by the exclusive representative, and the employer refused to process the grievance, a dispute much like yours was presented for adjudication before the Board.

The hearing officer found for the charging party under the theory

> that an individual has an indefeasible right under [EERA] to be represented during a negotiated grievance proceeding by a representative of the employee's choice so long as that person is not an agent of an

> employee organization other than the exclusive representative. [Chaffey at p.1.]

The Board reversed the hearing officer and dismissed the charge in Chaffey, observing in pertinent part that:

> The proviso of section 3543 makes it clear that the exclusive representative has the duty to protect its authority as sole party empowered to negotiate for the employees of the unit on all matters of employment relations. The negotiated agreement in the Chaffey District does nothing to the contrary, other than adjusting the time frame for intervention.

In United Teachers Los Angeles (Bracey) (1987) PERB Decision No. 616, the Board dismissed a charge based, in part, on a finding that an exclusive representative does not breach the duty of fair representation by refusing to provide an employee with the representative or counsel of her choice. However, Valley of the Moon Teachers Association, CTA/NEA (McClure) (1996) PERB Decision No. 1165 (Valley of the Moon), held:

> [T]he Board has never held that the EERA entitles an exclusive representative to interfere with a member's selection of private counsel. In fact, every public school employee has the right to present grievances to the public school employer without the intervention of the exclusive representative.

In Valley of the Moon the charging party alleged that the exclusive representative failed to adequately represent her and refused to provide information to an outside counsel she retained both for contractual and non-contractual issues. These facts are sufficiently different from those in the instant case and Chaffey to warrant continued reliance on Chaffey, particularly as the Board did not specifically reverse Chaffey. In addition, the result in Valley of the Moon does not rely on the above-quoted statement and the quoted language can therefore be considered dictum.

Based on the foregoing analysis of relevant Board decisions, especially Chaffey, I find the District's agreement to contract language, as well as District action complying with the contract language, which denies employees the right to have a representative of the employee's choice in grievance meetings

fails to state a prima facie violation and this element of the charge must also be dismissed.

Conclusion

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 April 14, 1997, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, extension 359.

Sincerely,

Les Chisholm
Regional Director