STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KATHLEEN M. TURNEY, Charging Party, v. FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION, CTA/NEA, Respondent.	Case No. SF-CO-574-E PERB Decision No. 1443 June 7, 2001

Appearances: Kathleen M. Turney on her own behalf; Priscilla Winslow, Attorney, for Fremont Unified District Teachers Association, CTA/NEA.

Before Amador, Baker and Whitehead, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Kathleen M. Turney (Turney) of a Board agent's dismissal (attached) of her unfair practice charge.

The charge was evaluated as having alleged that the Fremont Unified District Teachers Association, CTA/NEA (Association) violated Section 3543.6(a) and (b) of the Educational Employment Relations Act (EERA)[1] by failing to represent Turney properly in certain disputes with her employer and engaging in collusion with her employer.

[1] 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:
>
> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters, Turney's appeal[2] and the Association's response. The Board finds the dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CO-574-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Whitehead joined in this Decision.

> (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.

[2] Turney has provided the Board with copies of two of her previous PERB charges from 1986 which she offers as "evidence of previous collusion" between the District and the Association. The 15 year old charges, which were settled, concerned distribution of contract ratification materials, which is unrelated to the instant charge of collusion regarding the parties' grievance procedure, except that the parties allegedly engaging in collusion are the same. Although the Board takes official notice of these documents, the documents do not sufficiently assist Turney in establishing a prima facie violation of EERA by the Association.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
(510) 622-1016

January 22, 2001

Kathleen M. Turney

Re: **DISMISSAL OF UNFAIR PRACTICE CHARGE/REFUSAL TO ISSUE COMPLAINT**
Kathleen M. Turney v. Fremont Unified District Teachers Association
Unfair Practice Charge No. SF-CO-574

Dear Ms. Turney:

The above-referenced unfair practice charge, filed on July 24, 2000 and amended on November 21, 2000 and January 22, 2001, alleges that the Fremont Unified District Teachers Association (Association) failed to represent Charging Party regarding certain disputes with her employer, the Fremont Unified 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 January 8, 2001, 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 January 19, 2001, the charge would be dismissed.

On January 19, 2001, an amended charge was received. The amended charge contains further documentation of the dispute described in the original charge. Although the amended charge includes additional allegations related to a companion unfair practice charge filed against the District, as it relates to the instant charge, the amended charge raises the following new allegations: (1) that the Association first "ignored" Charging Party's allegations regarding the District's refusal to support her discipline of the student caught cheating, as set forth in her May 22, 2000 grievance, but later "resurrected a defunct version" of it during the 2000-2001 school year; (2) that the Association failed to process her grievance(s) concurrently with the complaint process, favored by both the District and the Association"; and (3) that the Association and the District "insisted" that Charging Party process her issues regarding class assignments as a complaint rather than a grievance. These

allegations fail to cure the deficiencies identified in the January 8, 2001 letter.

With regard to the Association's refusal to treat the student discipline dispute and class assignment issue as grievances rather than as complaints, the charge as amended fails to demonstrate that the Association caused Charging Party to forfeit a meritorious grievance for arbitrary, discriminatory or bad faith reasons. (United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258; Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332; Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.) The reasoning for this conclusion is set forth in the January 8, 2001 letter and need not be repeated here.

With regard to the collusion allegation, the charge as amended also fails to cure the deficiencies identified in the January 8, 2001 letter. The Association's "insistence" on the filing of a grievance on the proper form does not demonstrate arbitrary, discriminatory or bad faith conduct in light of all the surrounding circumstances, nor an attempt to engage in collusion with the District. Charging Party has not demonstrated that the procedural hurdles she may have encountered before having her grievances heard caused her any harm that justifies issuance of a complaint. That harm was principally delay and not the inability to obtain a forum for her claims.

Therefore, I am dismissing the charge based on the facts and reasons set forth above and in my January 8, 2001 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 Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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 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 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

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 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: Priscilla Winslow

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
(510) 622-1016

January 8, 2001

Kathleen M. Turney

Re: **WARNING LETTER**
Kathleen M. Turney v. Fremont Unified District Teachers Association
Unfair Practice Charge No. SF-CO-574

Dear Ms. Turney:

The above-referenced unfair practice charge, filed on July 24, 2000 and amended on November 21, 2000, alleges that the Fremont Unified District Teachers Association (Association) failed to represent Charging Party regarding certain disputes with her employer, the Fremont Unified 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. Kathleen M. Turney is a certificated employee, employed by the District. She is a member of a bargaining unit exclusively represented by the Association (Association).

Turney's dispute with the District began in February 2000 when she took disciplinary action against a student in her class for cheating. Because the offense was not the student's first, Turney suspended the student and recommended his transfer to a continuation school. Sandra Prairie, Mission San Jose High School Assistant Principal, determined that the cheating in question warranted a different suspension than the one given and that the transfer would not be appropriate. Turney believed that management's refusal to support her disciplinary action violated her rights as a classroom teacher.

In April 2000, Principal Stuart Kew issued teaching assignments for the 2000-2001 school year. Turney was assigned classes she asked not be assigned to her. They included three ninth grade English classes. Turney believed that this assignment was made in retaliation for her earlier complaints against the vice principal.

Beginning in February 2000, Turney filed grievances over both matters. The District initially treated these grievances as complaints under the District's complaint procedure, which differs from the collective bargaining agreement's grievance procedure. Turney objected to this action on the District's part

because it caused a substantial delay in the processing of the grievances. When the grievances were elevated to the next level, the District administrator delayed his investigation allegedly causing the grievances to further languish. Additional scheduling and other procedural delays followed. Turney believes that if these grievances, particularly the one involving the class assignment, had been addressed in a timely manner she might have obtained a more suitable teaching assignment for the 2000-2001 school year.

Turney complained about these matters to the Association. She also raised issues concerning additional acts of harassment by Kew and Prairie. Turney met with an Association representative in May shortly after filing her grievances. The Association recommended that she pursue the two issues separately. The Association advised Turney that the complaint about the class assignment issue could not be addressed in the grievance procedure because the contract afforded the administrators wide discretion in making such assignments. Also, while Turney claimed that the assignment violated seniority rules, the Association advised her that seniority need only be considered in involuntary transfers between school sites and that Kew's action did not involve such a decision. In this regard, it is noted that Article 21, section 21.3.5 states that seniority applies to a "right" or "benefit" under the agreement. But the contract does not clearly establish that a particular teaching assignment is such an entitlement.

The Association agreed that the issue involving the lack of support for her disciplinary action could be addressed through the collective bargaining agreement. The Association represented Turney at the Level II grievance meeting. The District denied the grievance. Turney then requested that the Association arbitrate the grievance. The Association grievance chair was unable to make a decision within a time frame satisfactory to Turney, and so she filed the instant unfair practice charge.

The Association also received a request by Turney to pursue the class assignment grievance to arbitration. This matter was held in abeyance by the Association for some unspecified period of time.

In the fall of 2000, Kew engaged in further acts of retaliation by assigning Turney to an unsafe and unhealthy classroom and issuing her a letter of reprimand that was without justification. The grievance involving Prairie was partially resolved when the District agreed to assign a different evaluator to her. However, the new evaluator was unfair to her and rejected her proposed teaching goals.

Turney further alleges that the Association promised to file an unfair practice charge on her behalf with the Public Employment Relations Board (PERB) to address the District's alleged retaliation, but later reneged on the agreement.

Finally, Turney alleges that in the spring of 2000 the District and the Association delayed distribution of the newly ratified collective bargaining agreement and that this caused her grievance processing to suffer. Turney claims that this conduct demonstrates collusion between the Association and the District.

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.

In order to state a prima facie violation involving a breach of the duty of fair representation with respect to grievance processing, the charging party must show that the Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258, 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. [Citations.]
>
> 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.

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. (Emphasis added.)" (Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin

Teachers Professional Association (Romero)
(1980) PERB Decision No. 124.)

The charge fails to demonstrate that the Association, by failing to represent Charging Party, caused her to forfeit a meritorious grievance. An exclusive representative has discretion not to pursue grievances which it does not believe will ultimately prevail. In this case, the Association's decisions not to pursue either of the grievances to arbitration are accorded deference by PERB, unless the charging party can demonstrate that they were not made in good faith.

In regard to the class assignment issue, as noted above, the contract does not appear to clearly establish a right or entitlement to a particular teaching assignment. Charging Party has not demonstrated that the Association acted in an arbitrary, discriminatory or bad faith manner in not pursuing this grievance.

Similarly in regard to the student disciplinary matter, Charging Party has not demonstrated how the District's action, or lack thereof, violated any express terms of the agreement.

Furthermore, while there may be evidence of retaliation or discrimination by the District for grievance processing, there appears to be no provision of the contract granting protection against such misconduct. The alleged delays in processing the grievances, while possibly violating procedural requirements under the grievance procedure, also do not establish the existence of any clearly meritorious grievance.

Charging Party claims that the Association has refused to file an unfair practice charge with this agency against the District based on the alleged retaliation and discrimination for grievance processing and other protected activity. However, the duty of fair representation applies only to enforcing provisions of the collective bargaining agreement and does not extend to filing charges with PERB or other administrative agencies. (See American Federation of State, County and Municipal Employees (1988) PERB Decision No. 683-S.)

Finally, Charging Party's claims of collusion appear to be without merit. More is required to demonstrate collusion than the mere coincidence of actions which leave the charging party unsatisfied or unfulfilled. For example, if the Association caused or attempted to cause the District to violate Turney's rights under the EERA, the charge must demonstrate how and in what manner the Association's conduct led to this result. (Tustin Unified School District (1987) PERB Decision No. 626; see

also American Federation of State County and Municipal Employees (Waters) (1988) PERB Decision No. 697-H [failure to distribute contract to all bargaining unit employees not a violation].) The charge fails to do so.

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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before **January 19, 2001**, I shall dismiss your charge. If you have any questions, please call me at (510) 622-1024.

Sincerely,

DONN GINOZA
Regional Attorney