STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RUTH VALADEZ, et al., Charging Parties, v. UNITED TEACHERS OF LOS ANGELES, Respondent.	Case No. LA-CO-796-E PERB Decision No. 1453 June 29, 2001

Appearances: Adel & Pollack by Nancy P. Adel, Attorney, for Ruth Valadez, et al; Geffner & Bush by Steven K. Ury, Attorney, for United Teachers of Los Angeles.

Before Amador, Baker and Whitehead, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Ruth Valadez (Valadez) and Lillian Utsumi (Utsumi) to the proposed decision (attached) of a PERB administrative law judge (ALJ).[1] The charge alleged that the UTLA violated the Educational Employment Relations Act (EERA)[2] by discriminating against them when it refused to waive a certain contractual provision and by refusing to

[1] James Dunlap (Dunlap) and the United Teachers of Los Angeles (UTLA) resolved their dispute in this case through a voluntary settlement reached in a separate matter between the parties pending before PERB in Case No. LA-CO-844-E. The Board takes official notice of the parties' agreement that Dunlap would withdraw from the instant charge, with prejudice. The decision in this case and the remedy are modified to reflect Dunlap's removal as a charging party.

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

process a grievance. The charge alleged that these actions constituted a violation of the duty of fair representation and illegal discrimination for protected conduct in violation of EERA section 3543.6(b).[3]

The ALJ found UTLA's refusal to waive the contract provision was not in violation of EERA and therefore dismissed that portion of the charge. On the second element of the charge, he found the refusal to process the grievance was a violation of EERA. The finding of a violation on the second element was not excepted to by any party, and is therefore not before the Board and is not a part of the Board's decision in this case.

After reviewing the entire record in this matter, including the ALJ's proposed decision, the statement of exceptions filed by Valadez and Utsumi, UTLA's response, the hearing transcript and exhibits, and the briefs of the parties, the Board affirms the ALJ's findings of fact and his proposed decision and rationale in dismissing the allegation that refusal to waive the contract provision violated EERA (with respect to Valadez and Utsumi) and affirms the remedy granted for the violation that UTLA failed to process a grievance (with respect to Valadez) subject to the following discussion.

DISCUSSION

The ALJ's findings of fact (proposed dec. pp. 3-34) are not in dispute. On exception Valadez and Utsumi argue:

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[3]Section 3543.6(b) provides that:

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

1. The proposed decision's remedy for UTLA's failure to process the grievance is inadequate as a matter of fact and law and should be amended to include payment of attorneys fees as part of a "make-whole" remedy.

2. UTLA's failure to grant the four year waiver was illegal discrimination because the ALJ erred in not finding a violation as: (a) UTLA did not prove it would have acted the same in absence of protected activity as others similarly situated, including Charlotte Higuchi, were routinely treated differently through the granting of waivers, and; (b) Day Higuchi intended to ask the UTLA board for waivers, but changed his position in retaliation for the charging parties engaging in the protected activity of writing and transmitting a 1999 memorandum.

Remedy for Failure to Process the Grievance

With regard to the remedy for failure to process the grievance, Valadez and Utsumi argue that they should be awarded attorneys fees paid to try to accomplish what the UTLA failed to do. In denying the request for attorneys fees, the ALJ held that fees are not appropriate "unless there is a showing that the respondent's unlawful conduct has been repetitive and that its defenses are without arguable merit." (Modesto City School and High School District (1985) PERB Decision No. 518.)

Valadez and Utsumi argue that the standard applied by the ALJ is incorrect and that the correct standard is the conduct has been repetitive or that its defenses are without merit. Valadez and Utsumi rely on Modesto City and High School District (1986) PERB Decision No. 566 (Modesto) in support of this position. This argument flagrantly misrepresents PERB precedent. In Modesto, the Board found the union failed to demonstrate the district's conduct

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

met either prong of the test, separating the Board's findings on each prong with an "or." It is impossible to read this portion of the Board's decision in Modesto as altering the standard for an award of fees. In Modesto, mere inches above the text relied on by Valadez and Utsumi, the test relied on by the ALJ in that case, where both prongs need to be met, is laid out. Counsel arguing that Modesto provided a new standard for an award of fees borders on the unreasonable.

Valadez' and Utsumi's request for attorneys fees does not meet the Board's standard for an award of fees and is denied.

Failure to Grant the Waiver

Valadez and Utsumi repeat the same arguments presented to the ALJ that Charlotte Higuchi received more favorable treatment and that Day Higuchi promised he would grant a waiver, then changed his mind after the 1999 memorandum.

Other Waivers

Valadez and Utsumi argue they successfully proved that Charlotte Higuchi was treated differently from them. Their argument is that Charlotte Higuchi never had to return to the classroom, therefore received a waiver of the same provision from which they sought a waiver. The ALJ clearly and correctly concluded that the situation of Charlotte Higuchi and the charging parties were "quite dissimilar." (Proposed dec., p. 40.) Charlotte Higuchi never sought to become an administrator, therefore the provision did not apply to her. (Proposed dec., pp. 40-41.)

Valadez and Utsumi urge that the ALJ discounted the fact that other waivers were granted by the UTLA. The contract provision at issue applies only to the Professional Development Collaborative (PDC) members. There is not even an allegation that others

received a waiver from the four year provision for PDC members because the charging parties are the first group of employees seeking administrative positions as their PDC terms expire. The ALJ correctly concluded that waivers in dissimilar situations are not controlling.

Day Higuchi

Valadez and Utsumi argue that Day Higuchi changed his mind about granting waivers in retaliation for the 1999 memorandum. There is a fatal gap in their argument. Assuming the testimony is credited in a light most favorable to their argument, the best charging parties could prove is that Day Higuchi intended to ask the UTLA board to grant the waivers. The record demonstrates that Day Higuchi did not have the power to single-handedly waive the contract provision. The waiver could only be obtained from the UTLA board. Valadez and Utsumi argue that, "If he [Day Higuchi] had asked for it, they [UTLA board] would have done it."

As the ALJ found, Day Higuchi consistently maintained that the UTLA board would make the waiver decision, and that is what happened.

The Board finds neither of Valadez' and Utsumi's arguments regarding the requested waiver persuasive and hereby adopts that portion of the ALJ's proposed decision dismissing their charge. (Proposed dec. pp. 33-51.)

ORDER

The partial dismissal of the unfair practice charge in Case No. LA-CO-796-E is hereby AFFIRMED. Ruth Valadez' (Valadez) and Lillian Utsumi's request for oral argument is hereby denied as the record and the parties' briefs adequately set forth the issues and arguments in this matter.

James Dunlap is hereby removed from this decision and order.

Neither party excepted to the administrative law judge's (ALJ) finding that the United Teachers of Los Angeles (UTLA) violated the Educational Employment Relations Act (EERA) section 3543.6(b) when during or about the month of June 1999, it failed to fairly represent Valadez by arbitrarily refusing to process her grievance. The ALJ found this refusal to process her grievance also constituted illegal discrimination for protected activity.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that UTLA and its representatives shall:

A. CEASE AND DESIST FROM:

Arbitrarily and discriminatorily refusing to process the grievances of unit member Valadez and thereby violating its duty of fair representation toward her.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Effective immediately upon this decision becoming final, accept and process the request of Valadez to file a grievance against the Los Angeles Unified School District (District) regarding the District's refusal to grant her a one year extension in their service in the Professional Development Collaborative.

2. Immediately upon receipt of the request to file a grievance from Valadez, contact the District and make a good faith effort with the District to reach a satisfactory resolution of the grievance.

3. Within ten (10) workdays of this decision becoming final, post at all work locations where notices to bargaining unit members customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of UTLA, indicating that UTLA will comply with the terms of this Order. Such posting shall be

maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Members Amador and Whitehead joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CO-796-E, Ruth Valadez, et al v. United Teachers of Los Angeles, in which all parties had the right to participate, it has been found that the United Teachers of Los Angeles (UTLA) violated the Government Code, Educational Employment Relations Act (EERA), section 3543.6(b). UTLA violated the EERA when during or about the month of June 1999, it failed to fairly represent Ruth Valadez (Valadez) by arbitrarily and discriminatorily refusing to process her grievance. This refusal to process her grievance also constituted illegal discrimination for protected activity.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the UTLA and its representatives shall:

A. CEASE AND DESIST FROM:

Arbitrarily and discriminatorily refusing to process the grievances of unit member Valadez and thereby violating its duty of fair representation toward her.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Effective immediately upon service of a final decision in this matter, accept and process the request of Valadez to file a grievance against the Los Angeles Unified School District (District) regarding the District's refusal to grant her a one year extension in their service in the Professional Development Collaborative.

2. Immediately upon receipt of the request to file a grievance from Valadez, contact the District and make a good faith effort with the District to reach a satisfactory resolution of the grievance.

Dated: _____ UNITED TEACHERS OF LOS ANGELES

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

RUTH VALADEZ, LILLIAN UTSUMI AND JAMES DUNLAP, Charging Parties, v. UNITED TEACHERS OF LOS ANGELES, Respondent.	UNFAIR PRACTICE CASE NO. LA-CO-796-E PROPOSED DECISION (2/1/2001)

Appearances: Adel & Pollack by Nancy P. Adel, Attorney, for Ruth Valadez, Lillian Utsumi and James Dunlap; Geffner & Bush by Jesus Quinonez and Steven K. Ury, Attorneys, for United Teachers of Los Angeles.

Before Bernard McMonigle, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, Ruth Valadez, Lillian Utsumi and James Dunlap (Charging Parties) allege that they were the subject of discriminatory actions by the United Teachers of Los Angeles (UTLA or Union). More specifically, Charging Parties allege UTLA discriminated against them when it refused to waive a four-year prohibition on advancement to administrative positions. That prohibition, contained in the collective bargaining agreement, was exclusive to appointees of UTLA who work in the Professional Development Collaborative (PDC), created in 1993 to improve quality in teaching. Charging Parties also charge that after the waiver was denied, UTLA discriminatorily refused to process a grievance which would have allowed them to remain at the PDC despite the fact that their terms of appointment had expired. According to Charging Parties, UTLA retaliated against them because of their role in the 1994 departure from the PDC of the current UTLA president's wife and because of their vociferous opposition to certain organizational changes in the PDC made in 1998 and 1999.

UTLA rejects the contention that the denial of the contract waiver was retaliation, asserting that it merely enforced clear and unambiguous terms of the collective bargaining agreement. UTLA also contends that the alleged discriminatory failure to process a grievance is not contained in the complaint issued in this matter, nor is it supported by the facts.

The present unfair practice charge was filed against UTLA on April 17, 1999. The charge was amended on April 26 and August 11, 1999. On September 10, 1999, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on behalf of Charging Parties. The complaint alleges that Charging Parties exercised rights protected by the Educational Employment Relations Act (EERA)[1] as follows:

> On or about May 9, 1994, Charging Parties exercised rights guaranteed by the Educational Employment Relations Act (EERA) by sending a complaint letter to Respondent about Charlotte Higuchi (wife of Respondent's President, Day Higuchi), who was working with them. Due to their letter, Mrs. Higuchi ceased working for the PDC in May 1994.
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> On or about January 12, 1999, Charging Parties exercised rights guaranteed by the EERA by sending a complaint letter to Respondent about having their normal activities at the PDC brought to a halt.

The complaint alleges that because the Charging Parties participated in this activity:

> In or about May 1999, Respondent, acting through its Board of Directors, took adverse action against Charging Parties by denying a request to waive the requirement that UTLA appointees to the PDC were ineligible for administrative assignments for a period of four (4) years from their date of cessation of service with the PDC. After the District made a waiver request for all teacher members of the PDC on June 8, 1999, on or about June 9, 1999, the UTLA Board of Directors also denied a request for reconsideration of the waiver request.
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> On or about June 30, 1999, Respondent, acting through its agent, Elsie Myers, Area Representative, took adverse action against

[1]Unless otherwise noted, all statutory references are to the Government Code. EERA is codified at section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

> Charging Parties by failing to provide their representative, Judie Atlas, UTLA Chapter Chair with a grievance form.

The complaint alleges that by these actions UTLA violated section 3543.6(b).[2]

The complaint also alleges that by failing to grant the waiver and failure to pursue the grievance, UTLA failed to meet its duty of fair representation, established in section 3544.9, in violation of section 3543.6(b).

The Union answered the complaint on October 5, 1999, admitting certain of the factual allegations, denying all legal allegations and asserting numerous affirmative defenses. On October 5, 1999, UTLA also filed a motion to dismiss and alternative motion to strike. That motion was denied without prejudice on January 6, 2000. A hearing was conducted in Los Angeles over seven days beginning April 4, 2000 and concluding on May 5, 2000. With the filing of briefs, the matter was submitted for decision on July 31, 2000.

FINDINGS OF FACT

The Professional Development Collaborative

In 1992, UTLA and the Los Angeles Unified School District (LAUSD or District) participated in negotiations for a new collective bargaining agreement. It was a time of economic recession in California and the District sought reductions in salary increases which had been granted in 1989. As part of the negotiations, the District and the Union created the

[2]Section 3543.6(b) provides that it shall be unlawful for an employee organization to:

> (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.

Quality Educational Design-Collaborative, later renamed the Professional Development Collaborative. The PDC was located at the District offices.

The PDC consists of experienced teachers and administrators brought together to seek ways to improve professional development in classroom instruction. As stated in the collective bargaining agreement, the PDC mission is:

> to continuously improve curriculum, instruction, student assessment and the organization of schools for instructional delivery in order to empower all students to meet competitive standards of intellectual, practical and artistic achievement and the highest standards of personal development, character and integrity.

The activities of the PDC are determined by a policy board. That board consists of a designee of the District superintendent, a UTLA officer and the president of the Associated Administrators of Los Angeles (AALA). In addition to selecting collaborative projects, the policy board conducts ongoing evaluation of the PDC. Day Higuchi is the UTLA representative on the policy board.[3]

The original agreement called for a certificated staff of eight positions, including six appointed by UTLA. The PDC staffing was later extended to ten positions, including seven UTLA appointees and three members of the administrators' bargaining unit. UTLA appointments were not to exceed five years.

Of particular significance in this dispute, the Teacher Professional Development section of the collective bargaining agreement states:

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[3]Mr. Higuchi has been president of UTLA since 1996. Prior to that time, he was the American Federation of Teachers (AFT) affiliate vice-president. UTLA is one of the few local unions that is affiliated with both the National Education Association (NEA) and the AFT. There is a vice-president representing each organization. When employees join UTLA, they choose either NEA or AFT affiliation.

> Seven members appointed by UTLA who shall be classroom teachers or unit members who work directly with students in carrying out their primary assignment, and who shall be re-assigned to classroom teaching or assignment working with students upon concluding service with the [PDC]. UTLA appointees shall be ineligible for administrative assignments for a period of four years from their date of cessation of service with the [PDC]. Salary shall be regular teacher salary for the particular assignment basis. [Emphasis added.]

Linda Guthrie has been a UTLA board member for approximately eight years. She represents bargaining unit members in the north area, including teachers at the PDC. Ms. Guthrie testified that UTLA negotiated the four-year restriction on administrative assignments so that PDC appointees would share their expertise with colleagues when they return to school sites. UTLA did not want the positions used as stepping stones into administrative positions. The Union wanted the appointees to remain in the bargaining unit.

Sam Kresner is the assistant to the president of UTLA. He has been on the UTLA staff for 34 years and was involved in the negotiations which created the PDC. Mr. Kresner testified that the four-year exclusion from administrative assignments resulted from concerns of then UTLA President Helen Bernstein. She was quite concerned that, in the past, bargaining unit members had become administrators because they had worked with and befriended administrators at the District offices. The Union did not want PDC appointees to disassociate themselves from bargaining unit members and use their PDC positions to secure administrative positions.

The Five-Year Rule

The collective bargaining agreement between UTLA and LAUSD also contains, at Article XXXI, section 13.0, a five-year limitation on out-of-classroom assignments for bargaining unit members. The individuals in out-of-classroom assignments work at school

sites in such positions as Title 1 Coordinator, dean, or instructional advisor. They also work off-campus in educational support, grant writing, and specially funded projects. As a group, they are referred to as teacher/advisors or "0707s," reflecting their District classification code. UTLA appointees to the PDC are considered teacher/advisors working off-campus.

The five-year limitation of Article XXXI was negotiated in 1993. Terms of incumbents were due to expire in June of 1998. However, prior to that time it became apparent to both the District and the Union that a mass exodus of people from these positions would create problems, so they extended the five-year term limit by one year to consider options.

During that year (1998-1999), several groups of affected teacher/advisors addressed the UTLA board of directors. UTLA and the District negotiated an amended Article XXXI for the 1999-2000 school year. In May of 1999, the UTLA board approved the changes. The five-year limitation remained for out-of-classroom, non-school site assignments, but terms of service were staggered. One-half of the incumbents would be replaced by June 30, 1999, while all other terms would end June 30, 2000. Volunteers were to leave first, but if there was an insufficient number of volunteers, each office would determine its own method for deciding who remained.

Also negotiated were several exceptions to the five-year term limit, including one for an incumbent named in a grant whose compensation was at least 50 percent funded by the grant.

Charging Parties Join the PDC

Lillian Utsumi has been employed by LAUSD for 29 years. When she joined the PDC in 1993, she had been working in out-of-classroom positions on school reform. She was told by Helen Bernstein, then president of the UTLA, that she could remain at the PDC for five

years. Ms. Utsumi was also informed by Ms. Bernstein that she was not one of the six UTLA appointees but was an appointee of the District's superintendent. Ms. Utsumi testified that she originally did not believe that the contractual clause regarding UTLA appointees applied to her. Later, the collective bargaining agreement was amended to increase the number of UTLA appointees from six to seven. This provision was amended to reflect the fact that she was the seventh UTLA member of the PDC. After joining the PDC, Ms. Utsumi worked on a variety of projects including bilingual compliance training for secondary teachers, earthquake training and new teacher orientation.

James Dunlap has been employed by the District since 1969. He taught in the classroom for 24 years.[4] During his tenure with the District, Mr. Dunlap served on various District committees, including a committee that formed the foundation for the PDC. On that committee he worked with Day Higuchi. In May 1993, at the PDC's formation, Mr. Higuchi called Mr. Dunlap and told him that the organization would emphasize mathematics and English standards and that there was an opening for a person to work on mathematics standards. When Mr. Dunlap joined the PDC, he worked closely with Charlotte Higuchi, the wife of Day Higuchi, who was responsible for the English standards.

Ruth Valadez began work for LAUSD as a special education teacher in May 1987. Ms. Valadez has undergraduate degrees in special education, elementary education, psychology and learning disabilities. She has a graduate degree in special education.

During her tenure at the District, Ms. Valadez was active in the Union. Through her work with the Union, Ms. Valadez became acquainted with Helen Bernstein and Day Higuchi.

[4]Mr. Dunlap earned an administrative credential in the late 1970s.

In 1994, Ms. Valadez received a telephone call from Helen Bernstein informing her of an opening at the PDC. Ms. Bernstein wanted Ms. Valadez to apply.

After interviews, Ms. Valadez was offered a PDC position by Day Higuchi, who later visited Ms. Valadez at her school. According to Ms. Valadez, Mr. Higuchi told her that he would like her to report to him if PDC staff were not doing as he wanted. Ms. Valadez told Mr. Higuchi that she was not comfortable reporting on others.

Day Higuchi appointed the original UTLA appointees to the PDC. Mr. Higuchi interviewed Ruth Valadez prior to her appointment and also discussed the appointment with her prior to her joining the PDC. Mr. Higuchi testified that he never told Ms. Valadez that he expected her to report on other staff.

The 1994 Letter

In May 1994, UTLA appointees to the PDC, including the Charging Parties, sent a letter to the UTLA officers complaining of the actions of co-worker Charlotte Higuchi. The letter stated that Ms. Higuchi was unwilling to collaborate with others at the PDC and that her standards project consumed too much of the PDC's budget. It also charged that UTLA vice-president Day Higuchi "serves as Charlotte's personal advocate and seems unable to fulfill his job as a policy board member, serving all equally." The other UTLA appointees were no longer willing to work with Ms. Higuchi and requested that UTLA remove her. Soon thereafter, Charlotte Higuchi departed the PDC.

The relationship between Day Higuchi and the PDC teacher members changed after the letter. For one thing, they saw much less of him. Prior to the 1994 letter, Day Higuchi had kept a phone line and desk in his wife's office at the PDC.

Lillian Utsumi testified that prior to the letter, Day Higuchi was in the office at least twice a week and occasionally joined the staff for lunch. After the letter, there were fewer meetings of the policy board and the PDC staff received less direction from Day Higuchi. According to Ms. Utsumi, prior to the letter, PDC staff would meet with the policy board approximately bi-monthly, but after the letter, such meetings were held only once or twice a year.

James Dunlap testified that prior to the 1994 letter he often met with Day Higuchi. After the 1994 letter, Mr. Dunlap saw less of him. He believes there was a distancing of the Union from the PDC.

Ruth Valadez testified that prior to the 1994 letter she would see Day Higuchi three or four times a week, he attended functions that she had coordinated at the PDC. After the May 1994 letter, he did not attend such events.

In 1996, Day Higuchi asked the UTLA appointees at PDC to consider cycling themselves out of the PDC so that appointee terms would be staggered. The PDC teachers asserted that they were entitled to remain at the PDC for full five-year terms. They went to Helen Bernstein and were told that they were entitled to five-year terms.

According to Ms. Utsumi, Mr. Higuchi later mentioned the matter again. This time, Ms. Bernstein discussed the matter directly with Mr. Higuchi and the topic of cycling out was dropped. Ms. Utsumi testified that Ms. Bernstein also asked Mr. Higuchi to implement a more hands-off style of management.

Mr. Higuchi testified that in 1996 he discussed cycling out and staggered terms with PDC staff. He did not think it was good for the operation of the PDC for all appointees to depart at the same time.

Mr. Higuchi also testified that at the beginning of the PDC, there were weekly meetings of policy board members. Later, the meetings were held monthly. By 1998 or 1999, the policy board was meeting even less frequently. At the meetings, the policy board selected projects that the PDC staff would implement.[5] At times, the staff proposed projects to the policy board.

Day Higuchi testified that after the May 1994 letter, Charlotte Higuchi took a detached service job at the University of California, Los Angles (UCLA).[6] Ms. Higuchi did not return to the classroom immediately after leaving the PDC because she left the employment of LAUSD. At the present time, Charlotte Higuchi is again on leave from the District, working on a project that is funded through a federal grant. Between the UCLA assignment and the current assignment, she returned to the District's employment in a teacher advisor position.

Mr. Higuchi testified that he had been upset with the PDC members because of the lack of support for his wife. It was possible that Helen Bernstein had asked him to be more collaborative with the PDC members, but she had not told him to "back off" from the request that staff cycle out of the PDC.

Ruth Valadez at the PDC

Ruth Valadez worked on a variety of projects at the PDC, including a proposal to create the Special Education Training Academy. In 1997, Ms. Valadez' proposal was presented to

[5]Daniel Basalone, an administrative staff member of the PDC, testified that by its third year, the policy board had installed a supervisor to provide the staff with direction.

[6]Irene Yamahara, the District's assistant superintendent of personnel testified that a detached service assignment is a form of leave from the District. Sam Kresner testified that detached service does not count toward the five-year out-of-classroom limitation in Article XXXI.

LAUSD and she received positive feedback. The District had recently settled a lawsuit with an agreement to restructure special education and offer better training.[7]

After further work on her proposal and discussions with UTLA, Ms. Valadez met with the District staff which was implementing the lawsuit settlement. At this meeting, she was accompanied by Sam Kresner and Lois Bradford, a UTLA officer who worked with special education. The District approved the plan and appropriated a budget. Ms. Valadez began writing the curriculum, identified experts and found an appropriate location for a 40-hour program.

During this time, Ms. Valadez' supervisor was Richard Valdovic . Mr. Valdovic told her to include an administrative position in the program budget at the approximate salary level of an assistant principal. Mr. Valdovic took the proposal to the District and it was approved. Ms. Valadez testified that Mr. Valdovic also told her that he had met with UTLA staff members Theresa Montano and Terry Skotnes and they had indicated that UTLA had no opposition to Ms. Valadez filling the administrative position. Mr. Valdovic encouraged her to get an administrative credential as quickly as possible.

Terry Skotnes currently serves UTLA as its director of organizational services. He has been in that position for about three and a half years. Mr. Skotnes testified that he had a meeting with Richard Valdovic at which Ruth Valadez was discussed, but he denied having told Mr. Valdovic that he approved of Ms. Valadez becoming an administrator.

Ms. Valadez completed studies for her administrative credential in August 1998 and thereafter was generally regarded as an administrator by the District. She was invited to administrative meetings and listed as an administrator on a District organizational chart. On

[7]The settlement was known as the Chandra Smith Consent Decree.

August 6, 1998, Barbara Gutierrez, the director of the professional development branch of LAUSD, sent a letter to the Commission on Teacher Credentialing asking that the issuance of Ms. Valadez' administrator credential be expedited so that Ms Valadez could assume responsibility of administering the Special Education Teacher Training Academy. Ms. Valadez testified that in late 1998, Ms. Gutierrez told her that Day Higuchi stated that he would sign a waiver of the contractual restriction on UTLA appointees accepting administrative positions.

Ms. Valadez interviewed for an administrative position at the Special Education Teacher Training Academy on February 2, 1999. According to Ms. Valadez, the next week she was told by Ms. Gutierrez that Day Higuchi would sign the waiver and the District would be able to award her the position. After another week, however, Ms. Gutierrez told Ms. Valadez that there were some problems involving the waiver, as Day Higuchi had said that only two people would receive a waiver. Finally, on March 25, 1999, Ms. Gutierrez said that Day Higuchi would not sign a waiver for her.

Although she worked on other projects while she was at the PDC, Ms. Valadez supervised the Special Education Teacher Training Academy from 1997 until her departure in summer 1999. She believed that this experience qualified her to be the administrator for the program.

Lillian Utsumi at the PDC

Lillian Utsumi also worked on a variety of projects at the PDC, including new teacher orientation. In the spring of 1999, Ms. Utsumi wrote a grant proposal for the Pre-Intern Teaching Program. Ms. Utsumi testified that she involved UTLA in the formation of the grant

proposal.[8] At one point, she met with Day Higuchi, secondary vice-president, Beverly Cook, and several other UTLA officers to discuss specific questions they had about the grant. According to Ms. Utsumi, they were upset that UTLA had not been specifically written into several sections of the proposal. They were also unhappy that under the proposal an administrator, rather than a member of the UTLA bargaining unit, would be in charge of the program.

The final grant proposal submitted to the State of California stated that the program would be directed by Ms. Utsumi in an administrative position.[9] According to Ms. Utsumi, this last minute change was made at the request of Barbara Gutierrez. UTLA was not notified of the change, but did receive a copy of the grant after it had been submitted. The state grant was approved in June 1999.

In June, when Ms. Utsumi began establishing the Pre-Intern Teaching Program, she requested that UTLA sign off on the teacher/advisor positions which she needed to fill. When UTLA delayed signing off on the positions, Ms. Utsumi met with Beverly Cook and Day Higuchi, who told her that UTLA would not sign until the District assured them that Ms. Utsumi had not been placed in an administrative position.

Ms. Utsumi continues to direct the Pre-Intern Teaching Program under the grant as a program coordinator, a UTLA bargaining unit position. This position is not part of the PDC.

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[8]The proposal went through several drafts and review was done by both the District and UTLA.

[9]In March 1998, Ms. Utsumi began one year of university classes toward an administrative services certificate. She received that certificate in May 1999.

James Dunlap at the PDC

During James Dunlap's first year at the PDC, much of his time was devoted to creating mathematics standards for the District. During his tenure he also worked on a variety of projects. Since 1995, Mr. Dunlap has worked on the Systemic Initiative Grant which is funded by the National Science Foundation. He testified that at times he had problems carrying out the objectives of the grant because the District would not release funds without UTLA approval. He was therefore frustrated in carrying out his duties and meeting grant objectives.

Mr. Dunlap testified that on several occasions between January 1994 and June 1999, he told UTLA representatives that he wanted to leave the PDC and return to the classroom. Twice in his first two years at the PDC, Day Higuchi asked him to remain. According to Mr. Dunlap, Mr. Higuchi asked him to stay for "political reasons." Mr. Dunlap understood this to mean that if the teachers began leaving the PDC, it would demonstrate the Union couldn't manage a professional development program. He also interpreted the comment to mean that he should remain to promote teacher professional development.

During his third year, Mr. Dunlap met with Union officers and indicated that he was going to resign from the PDC and return to the classroom. After that meeting, Mr. Dunlap met with LAUSD Assistant Superintendent of Instruction Amy McKenna and told her that he was going to resign. A day later, Ms. McKenna called Mr. Dunlap and indicated that the superintendent requested that Mr. Dunlap remain at the PDC. Mr. Dunlap stayed.

Changes at PDC

Day Higuchi testified that beginning in May 1998, the PDC focussed major attention on the training of new teachers. Since 1997, twelve thousand teachers have been hired by the

District because of state mandated class-size reduction. Approximately half of the new teachers were not credentialed. State law requires that an emergency permit teacher receive 40 hours of training.

Also in the spring of 1998, the UTLA board of directors decided to identify the operation of the PDC more closely with UTLA. UTLA wanted to move the PDC work location to the UTLA headquarters. The District agreed to have three of the PDC members work at UTLA.

Since that time, most of the new teacher classes have been held at UTLA. Another PDC program at UTLA assists teachers in qualifying for national board certification. According to Mr. Higuchi, LAUSD now has more national board certified teachers than any other district in the country. Such teachers receive a 15 percent salary incentive.

Mr. Higuchi testified that during the 1998-1999 school year, Theresa Montano was hired by UTLA to coordinate its PDC activities with the District. According to Mr. Higuchi Ms. Montano does not supervise the PDC employees located at UTLA.[10] PDC employees continue to report to a District administrator.

In the summer of 1998, the PDC policy board made decisions that affected many of the projects which had employed PDC staff. According to Mr. Higuchi, these decisions were made jointly by himself, Barbara Gutierrez representing the District and Eli Brent, the president of the administrator's union. Some ongoing projects lost funding, which was redirected to the professional development education of new teachers and to national board certification.

[10]Lillian Utsumi testified that in December 1998, Ms. Montano informed Ms. Utsumi that she would be directing her work.

Barbara Gutierrez was the director of the Professional Development Branch for LAUSD from July 1, 1998 to May 14, 1999. During that time, she served as the District representative on the PDC policy board. Ms. Gutierrez testified that the restructuring of the PDC occurred as a result of the policy board meetings between the two union presidents and herself. According to Ms. Gutierrez, "the decision was made to shift the original functions, some of the original functions within the PDC to help support the superintendent with his initiatives." Among those initiatives was the reallocation of funds to put more focus on the teacher and administrator training academies. According to Ms. Gutierrez, the new emphasis reflected a training need caused by rapid growth in the teacher bargaining unit resulting from class-size reduction.

On July 21, 1998, the PDC policy board met with all of the PDC staff members regarding the changes under consideration. Ms. Utsumi testified that the staff was told that PDC would no longer operate as a collaborative organization and that teachers and administrators would be separated. Ms. Utsumi was told that she and two other PDC teacher members would move to the recently created Helen Bernstein Professional Development Center at UTLA where they would work only on projects that had teachers as an audience. Ms. Utsumi was not happy about the split at the PDC. According to Ms. Utsumi, the staff had been informed in May 1998 that a new policy board for the PDC teacher staff would consist of Day Higuchi and the District representative.

At a policy board meeting of August 1998, the restructuring was formally delineated. Policy decisions were made and a document was circulated. According to Ms. Gutierrez, the restructuring was set forth primarily by the two presidents of the unions. Daniel Basalone, an

administrator staff member of the PDC, testified that at a meeting with Eli Brent[11] and Barbara Gutierrez in January 1999, PDC administrative staff members were told that their separation from teacher staff was requested by Day Higuchi.

On November 20, 1998, Barbara Gutierrez sent a memorandum to the PDC staff thanking them for the "authentic meeting" held on November 13, 1998, regarding the priorities and budget of the PDC. She also stated "I know it has been a difficult year for each of you as we are aligning our work in the Division of Instruction with the superintendent's accountabilities."

The 1999 Memorandum

On January 12, 1999, PDC teacher members Roberta Bernstein, James Dunlap, Eric Grow, Lillian Utsumi and Ruth Valadez sent a memorandum to Day Higuchi. It was titled "Dismantling of the Professional Development Collaborative" and was copied to UTLA board members and Barbara Gutierrez. It stated that the administrative staff members of the PDC had met with Eli Brent and Barbara Gutierrez to review the status of the PDC and discuss the PDC budget. The signees requested an immediate meeting for similar discussions. The memorandum also stated:

> For this entire school year, the UTLA teacher members of this office have been put in the untenable position of postponing or canceling professional development for and by teachers while awaiting UTLA/District decisions on all PDC projects. We have received nothing but sketchy and inconsistent information as to our roles and responsibilities, particularly with regard to contractual changes in our working conditions. This has gravely hindered our ability to produce and deliver professional development as delineated in the contract.

The memorandum listed 23 accomplishments of the PDC teacher members and asked why the Union has "systematically put a stop to all our efforts of the last five years?"

[11]Mr. Brent is the president of the AALA.

According to Ruth Valadez, the memorandum was a result of PDC staff frustration with what they perceived as the dismantling of the PDC and the fact that administrative staff were receiving information not given to the teacher staff.

The memorandum resulted in two meetings. The first meeting involved all PDC staff and the PDC policy board. There was a discussion regarding the separation of teacher and administrative staff and projects. Ruth Valadez asked Barbara Gutierrez if the District had given taxpayer money to UTLA to run the PDC. She also asked whether PDC teacher members now worked for UTLA or the District. The questions sparked a heated discussion.

The second meeting took place on April 15, 1999, at UTLA. It was attended by PDC teacher staff, Barbara Gutierrez, Day Higuchi and Theresa Montano. According to Ruth Valadez, the relationship between PDC staff and Day Higuchi had seriously deteriorated prior to this meeting.

At the meeting, a document was distributed by Theresa Montano that was titled "Professional Development Collaborative Policy Board Decisions." The document stated that initiatives regarding subject matters such as language arts, physical education, math and history would be omitted from the current budget and the funding from those activities would be allocated to the Teacher Training Academy. The Teacher Training Academy and its related activities would become the primary responsibilities of all teacher staff of the PDC, four of whom would be located at the Helen Bernstein Professional Development Center at UTLA.

The memo also stated that the policy board would continue to determine the work of the PDC. Barbara Gutierrez would serve as the immediate supervisor and Ms. Montano would coordinate the work of the PDC members located at the Helen Bernstein Center.

Ruth Valadez testified that Ms. Montano stated that the document came from Barbara Gutierrez as a member of the policy board. Ms. Gutierrez departed the meeting before the document was circulated. She testified that she was not familiar with it, but it reflected earlier action taken by the policy board.

Another heated discussion took place concerning the document and the changes being made at the PDC. PDC staff objected to the new funding allocations and structure. Mr. Higuchi defended the changes.

Ruth Valadez testified that she was opposed to the changes because teachers no longer worked with administrators and the PDC was being "dismantled." James Dunlap was also displeased with some of the changes. In particular, he opposed the de-emphasis of the work on standards and the amount of funding directed at the National Board Certification program.

The direction of the PDC changed with the decisions made in 1998-1999, particularly the decision that resources of the PDC be directed to assistance for new teachers through the New Teacher Academy. The effect of that decision was that other projects were not funded. Mr. Higuchi testified that he received complaints from PDC staff for not being given new assignments.

The collective bargaining agreement between UTLA and the District provides that the PDC:

> policy board shall select collaborative projects and set implementation policy for those projects by mutual agreement. It shall be the responsibility of the policy board to conduct ongoing evaluation of the effectiveness of its projects.

Mr. Higuchi testified that the contract refers to collaboration and mutual agreement between the Union and the District. Barbara Gutierrez similarly testified that the contract authorized the policy board to select projects. Ruth Valadez contended that "mutual

agreement" had always meant that decisions were made jointly by PDC staff and the policy board.

Requested Waiver of the Four-Year Restriction

On March 25, 1999, Ruth Valadez was told by Barbara Gutierrez that Day Higuchi would not sign a waiver of the collective bargaining agreement section which banned teachers from administrative positions for four years after leaving the PDC. On April 17, this unfair practice charge was filed and signed by five members of the PDC teacher staff, including the three current Charging Parties.[12]

On April 19, 1999, the teacher members of the PDC met with Day Higuchi. They asked him to waive the four-year restriction. Ms. Valadez' handwritten notes from that meeting reflect that Day Higuchi responded that the waiver issue had been discussed at the last board meeting and only two board members were in favor. Ms. Valadez testified that Mr. Higuchi encouraged them to file an unfair practice charge against the District, he also told them that if they took the matter to court, they might win.

The meeting was confrontational. Lillian Utsumi accused Day Higuchi of having wasted a year of their lives. According to Ms. Valadez, Mr. Higuchi responded "Yes, sometimes that has to be done." Ms. Valadez asked Mr. Higuchi if the waiver refusal was retaliation for the 1994 letter regarding Charlotte Higuchi. Mr. Higuchi denied it.

In May 1999, Ms. Valadez and Ms. Utsumi met with Lilliam Castillo, the deputy superintendent for instruction, to discuss the issue. Ms. Castillo asked the assistant

[12]Later amendment of the charge limited this matter to Ruth Valadez, Lillian Utsumi and James Dunlap.

superintendent of staff relations, Andrew Cazares, to join them. Ms. Castillo instructed Mr. Cazares to write a letter to UTLA requesting waiver of the four-year restriction on administrative positions. According to Ms. Valadez, Mr. Cazares stated "you are targeted within the contract and beyond the contract." Ms. Utsumi also testified that Mr. Cazares referred to them as "targeted."

Lilliam Castillo recalled two meetings with Ruth Valadez and Lillian Utsumi regarding their request for a waiver of the four-year restriction. Ms. Valadez and Ms. Utsumi felt that the District should request a contract waiver on their behalf from UTLA. Ms. Castillo discussed the matter with Superintendent Ruben Zacarias and a decision was made to request a waiver. The request was made because District management thought highly of the skills of Ms. Valadez and Ms. Utsumi.

The second meeting, which included Mr. Cazares, took place after Mr. Zacarias approved the request to seek a waiver from UTLA. Ms. Castillo testified that Mr. Cazares said he already had a conversation with UTLA representatives with regard to waiver and had been turned down. He thought another request would be denied, but he would put it in writing. Ms. Castillo does not remember Mr. Cazares saying that Ms. Utsumi and Ms. Valadez were "targeted." She recalls that Mr. Cazares did say that the subject contract clause only applied to staff at the PDC.

On June 8, 1999, Mr. Cazares sent a letter to Sam Kresner at UTLA. The District requested that UTLA waive the four-year rule "for all six (6) existing teacher members of the PDC." The letter stated that it was the District's belief that they all had skills which qualified them for administrative assignments.

Judith Atlas is a 28-year LAUSD employee. She has served as a chapter chair for UTLA for 25 years. In that capacity, she administers the collective bargaining agreement and is involved in grievance proceedings. Since April 1998, Ms. Atlas has been the UTLA chapter chair for the teacher staff at the PDC. Ms. Atlas testified that in the spring of 1998 she was approached by PDC teachers regarding the four-year prohibition on administrative assignments. They were also concerned about the five-year limitation on out-of-classroom assignments. According to Ms. Atlas, the five-year rule was not being strictly enforced and many people were not returning to the classroom after five years.

After being contacted by the PDC staff, Ms. Atlas called Day Higuchi, whom she had known for twenty years. They discussed the fact that teacher advisors often move into administrative positions. Ms. Atlas told Mr. Higuchi that it looked like the Union was singling out people. She asked about a waiver of the four-year restriction. Ms. Atlas testified that Mr. Higuchi stated that he felt there would be a waiver, but he was waiting to hear from Barbara Gutierrez. In a subsequent phone call, Mr. Higuchi told her that he had made three calls to Ms. Gutierrez and she had not returned them. He also said that Union lawyers had advised him that they could not prevent a teacher from accepting an administrative position.

Day Higuchi testified that in early 1999, he had several discussions with Judith Atlas, regarding the contractual waiver issue. He denied telling her that UTLA would waive the contract. He told Ms. Atlas that if UTLA's legal position was untenable, maybe something could be done. Later discussions with Ms. Atlas reflected the fact that he had received legal advice; he told her that it was less likely that Charging Parties would be granted a waiver.

Ms. Atlas testified that she had a third conversation regarding the matter with Mr. Higuchi at a meeting which included the Charging Parties. According to Ms. Atlas, at this

meeting Mr. Higuchi denied having stated that a waiver was probable. Ms. Atlas asked him if he was accusing her of being a liar. Mr. Higuchi said he was not, he just didn't remember making the statement. At that time, Mr. Higuchi was very adamant that the PDC four-year rule would not be waived.

According to Ms. Atlas, a few days after the meeting she received a call from Beverly Cook, a friend and the secondary vice-president of UTLA. Ms. Cook told her to "back off" and not get involved in the PDC issue. According to Ms. Atlas, Ms. Cook told her there had been a problem between Charlotte Higuchi and the PDC members and she should not be involved. Ms. Atlas initially testified that this was her last conversation with Ms. Cook.

Ms. Atlas also attended another meeting in which UTLA was represented by John Perez, the NEA vice-president of UTLA, and Jesus Quinonez, a UTLA attorney. The meeting included the Charging Parties. According to Ms. Atlas, Mr. Quinonez asked the Charging Parties why they had not just taken the administrative positions rather than make a waiver request.

Ms. Atlas testified that after this meeting, she received another call from Beverly Cook, who told her that she had forgotten who her friends were, that UTLA had gotten Ms. Atlas her position and that she should "back off."

Ms. Atlas contacted several UTLA board members on behalf of the PDC members. One of those board members was Ed Zschoche. Ms. Atlas wrote a memorandum to Mr. Zschoche dated May 26, 1999, and sent a copy of it to every member of the UTLA board of directors. In the letter she expressed her concerns about a board of directors vote on the waiver request. The letter states in relevant part that: (1) Day Higuchi told her on three occasions that he would sign a waiver for the PDC staff and that Mr. Higuchi later denied making the

statements; (2) Day Higuchi had told at least one District administrator that he would sign a waiver, therefore allowing a PDC member to apply for and subsequently be offered an administrative position; (3) that there had been at least seven violations of the teacher professional development section of the contract; (4) that this situation reflected selective enforcement of the contract on the part of the District and UTLA; and (5) that Day Higuchi had stated that legal counsel informed him that UTLA would lose on the issue. Ms. Atlas raised several other issues and accused Day Higuchi of possible retaliation because of the events involving his wife at the PDC. She also noted that PDC members were considering legal action against the Union.

Ms. Atlas testified that the seven violations referred to in her letter, were "people that I knew of, who had not gone back to the classrooms, who had been at the PDC, and then I inquired as to the others . . . ." However, she later stated that she knew of no violation of the PDC section of the collective bargaining agreement.

Beverly Cook is a vice-president of UTLA. She recalled discussions in 1999 with Judith Atlas regarding the Charging Parties' request for a contract waiver. Ms. Cook recalls telling Ms. Atlas that the contract required PDC teachers to return to the classroom for several years prior to becoming an administrator.

Ms. Cook denies telling Ms. Atlas not to get involved in the matter because of a problem between Charlotte Higuchi and the PDC members, or that Ms. Atlas had forgotten her friends. However, Ms. Cook testified that she and Ms. Atlas are no longer friends. Ms. Cook also testified that she had heard about the problems between Charlotte Higuchi and the PDC members, but the information came primarily from the Charging Parties. She recalled

receiving Judith Atlas' letter on behalf of the Charging Parties and forwarding it to Day Higuchi.

UTLA board member Linda Guthrie testified that she discussed the waiver issue with Lillian Utsumi and Ruth Valadez on several occasions prior to the May 1999 board meeting. Ms. Guthrie recalled telling Lillian Utsumi that she had a right as a union member to address the board. Although members do not frequently address the board, Ms. Guthrie remembered only one such request having been denied.

Ms. Guthrie also testified that board members believed the PDC had distanced itself from the Union and that the matter had been discussed at past board meetings. According to Ms. Guthrie, the distancing had taken place over a period of time as a result of disagreements over task assignments, training issues and personality conflicts. The board had discussed moving PDC staff to the UTLA building to increase ties to UTLA.

Ruth Valadez had told Ms. Guthrie that she thought that UTLA had the perception that the PDC teachers were not supportive of the leadership. Ms. Guthrie asked Ms. Valadez who she had "pissed off" and Ms. Valadez said there had been instances where she had criticized UTLA leadership.

Ms. Guthrie knew that Ms. Utsumi wanted to direct new teacher training under a grant program. Ms. Guthrie and Ms. Utsumi discussed the fact that it was in the interest of UTLA to have a teacher control the program, rather than an administrator. Ms. Guthrie felt that professional development should remain under the direction of the people in the UTLA bargaining unit.

Ms. Guthrie discussed the waiver request with Day Higuchi in May and June 1999. In one of their discussions, she told him that Lillian Utsumi had been named in the Pre-Intern

Teaching grant. Ms. Guthrie told Mr. Higuchi that therefore the grant exception under the five-year rule should apply so that Ms. Utsumi could continue to work on the program. Ms. Utsumi would not have to become an administrator to direct the grant program; she could remain in the teacher bargaining unit. Mr. Higuchi expressed some doubt to Ms. Guthrie that Ms. Utsumi had been named in the grant.

At the May 1999 UTLA board meeting, Mr. Higuchi announced that there were members who wished to address the board regarding the four-year restriction. Ms. Guthrie testified that she made a motion to allow the Charging Parties to speak to the board. There was discussion by the board whether additional information was necessary and whether to make exceptions to the contract. The board also considered that the PDC staff knew the rules from the beginning. There was sentiment expressed that trust had not been maintained between the UTLA appointees at the PDC and UTLA that the PDC staff had not fulfilled their obligation to have a close relationship with the Union. Eventually, there was a vote on Ms. Guthrie's motion. She doesn't remember the count, but she does remember that it was not close. Her motion was defeated.

Ms. Guthrie said that she spoke to the Charging Parties prior to the June 1999 board meeting. She urged them to continue their request to address the board. Ms. Utsumi testified that another board member made a similar comment.

On June 9, 1999, Lillian Utsumi and Ruth Valadez sent a fax to Day Higuchi asking for an opportunity to address the waiver issue at the board meeting later that day. They made a

similar request to Sam Kresner by telephone. They also delivered copies of the Judith Atlas letter of May 26 and separate letters from themselves for each board member.[13]

Ms. Utsumi's letter urged the board members to support the waiver request. In her letter she recounted her years of Union activity and several recent accomplishments at the PDC. She also contended that Day Higuchi had nullified the PDC contract section in July 1998 when he told the staff that the PDC was no longer in place.

The letter sent by Ms. Valadez to the board also requested a waiver to allow PDC teachers to become administrators. In the letter, she reviewed her prior Union duties as a chapter chair and her work with regard to establishing the Special Education Teacher Training Academy. She contended Day Higuchi had unilaterally circumvented the collective bargaining agreement and dismantled the PDC.[14] She also stated that Mr. Higuchi had earlier committed to a waiver.

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[13]Charging Party James Dunlap did not send a letter. He testified that in the spring of 1999, he supported Ms. Utsumi and Ms. Valadez in their attempt to receive a waiver on the four-year restriction on taking administrative positions. However, at that time, Mr. Dunlap was not contemplating moving into an administrative position.

Later in the fall of 1999, Mr. Dunlap applied for a position as a personnel specialist, a job in the administrative bargaining unit. In February 2000, he was notified by Ken Sutherland, the LAUSD director of Certificated Placement and Assignments, that the District was interested in placing him in an administrative position. Later, after Mr. Sutherland was made aware of the four-year restriction, he called Mr. Dunlap and stated he could not offer him the position.

[14]According to Ms. Valadez, the basis for blaming Mr. Higuchi for the dismantling of the PDC was that she had spoken to Eli Brent, president of the administrator's union, and he had told her that Day Higuchi wanted to do it and he wasn't going to argue with Mr. Higuchi. Mr. Brent advised that this wasn't going to be one of his battles. Ms. Valadez also claimed that she spoke with Barbara Gutierrez, the third member of the policy board, who said it was Mr. Higuchi's idea and that she was getting instruction from above to go along with it.

At the June meeting, the board's attorney, Jesus Quinonez, stated that there had been a PERB charge filed against the Union regarding this matter. Ms. Guthrie again made a motion that the Charging Parties be permitted to address the board on the waiver issue. She was criticized by other board members for making the motion again, as they felt the matter had been resolved at the May meeting.

At the meeting, Ms. Guthrie argued that because the board made exceptions to the five-year term limit, equity dictated exceptions to the four-year prohibition on administrative assignments. However, a motion was made that the UTLA contract be upheld and the PDC members follow the contract. The motion also stated that it was not necessary that PDC members speak before the UTLA board. The motion passed 20 to 10. Ms. Guthrie testified that she did not see the letters sent by the Charging Parties. She was also unaware of the District's June 8 letter requesting waiver.

According to Ms. Guthrie, there was no discussion at the board meetings regarding Charging Parties' relationship with Charlotte Higuchi. Ms. Guthrie was made aware of the personality conflicts involving Charlotte Higuchi through her conversations with Lillian Utsumi and other PDC members.

Barbara Gutierrez testified that she met with Day Higuchi on December 22, 1998, to request a waiver of the four-year limitation on PDC teachers becoming administrators.[15]

[15]When Ms. Gutierrez assumed her PDC duties the prior July, she was told that there were people on the teacher staff who would be moving into administrative positions. One of the assistant superintendents had recommended that Ms. Utsumi be the administrative head of the New Teacher Training Academy. Ms. Gutierrez also learned of the District's interest in appointing Ruth Valadez to an administrative position at the Special Education Teacher Training Academy.

According to Ms. Gutierrez, Mr. Higuchi felt sure he could get a waiver for two members of the PDC staff approved by the UTLA board.

After that meeting, Ms. Gutierrez met with LAUSD staff relations to prepare a side-letter regarding the waiver. However, in January or February 1999, Mr. Higuchi told Ms. Gutierrez that he was not sure he could secure the waivers. In a later conversation, Mr. Higuchi informed Ms. Gutierrez that there was a lack of support on the UTLA board for the waiver. Ms. Gutierrez thought that this had been influenced by the status of negotiations between the District and Union. In March, Day Higuchi told Ms. Gutierrez that there would be no waiver of the four-year restriction.

Mr. Higuchi recalled having discussions with Barbara Gutierrez regarding the waiver issue. Ms. Gutierrez told him that the District wanted Ruth Valadez to be the administrator in charge of the Special Education Teacher Academy. The District also had an administrative position for Lillian Utsumi. He did not recall Ms. Gutierrez telling him that the District wanted waivers for all of the PDC members. Mr. Higuchi testified that he did not tell Ms. Gutierrez that waivers would be granted for Ms. Utsumi and Ms. Valadez.

Mr. Higuchi attended the April 1999 meeting with PDC staff and told them of the board's position and that UTLA would file a grievance if the District allowed PDC teacher members to move into administrative positions. The PDC staff disagreed with the UTLA position and argued that they had not agreed to the four-year restriction.

Mr. Higuchi recalled that the issue of a waiver request by PDC teachers came before the UTLA board in May and June 1999. At the May meeting, after discussion of the merits, the waiver request was denied. Mr. Higuchi testified that there may have been one or two people on the board who stated that they felt that the Charging Parties lacked loyalty to the

Union, and therefore should not be granted any special favors. There was discussion that PDC staff "should not lose sight of the fact that they were originally appointed to serve the interest of teachers" and that they should remain close to the point of view of teachers.

According to Mr. Higuchi, the decision on the waiver request reflected the original rationale for putting the language into the contract. UTLA did not want people applying for PDC positions and using them as stepping stones to administrative positions. With the language in the contract, UTLA believed they would get job applicants who intended to return to the classroom rather than seek promotions.

Prior to the June meeting, Mr. Higuchi learned that Lillian Utsumi and Ruth Valadez had sent letters asking to address the board. He raised the request with the board and it was turned down. He also knew that a packet of letters had been sent for each board member, but he didn't read them. He presented the option of hearing the matter to the board of directors, but they turned it down and declined to accept the materials. The board members took the position that the matter had been settled at the May meeting and they did not want to revisit the issue.

Following the June board meeting, Sam Kresner sent a letter to Andrew Cazares stating "UTLA believes these individuals are outstanding teachers whose direct services to children and bargaining unit members are invaluable. For this reason, and because the original intent of the contract language is still our current philosophy, UTLA is not willing to waive the four-year administrative ineligibility provision."

Mr. Higuchi testified that at prior board meetings, bargaining unit members had been granted exceptions to the five-year limitation on out-of-classroom assignments contained in Article XXXI. When Charlotte Higuchi returned to the District from her position at UCLA,

the Union's board approved her resumption of a teacher-advisor position, rather than return to the classroom. She had not reached the five-year term limit of Article XXXI.

Henry Springer is a facilitator in the adult education program. Mr. Springer was president of UTLA from 1976 to 1979 and was on the UTLA board for twelve years, ending in 1982. During that time, any member who requested to appear before the board was permitted, if a motion affecting the member were being considered. As a member, he addressed the UTLA board in 1997 regarding the five-year limitation on out-of-classroom assignments for teachers. Mr. Springer does not believe the Union should be in a position of impeding its own members from seeking promotions. He testified that the Union often granted waivers to contractual provisions if it could assist a bargaining unit member.

Sam Kresner testified that he attended the May and June 1999 UTLA executive board meetings. He was aware that the Charging Parties wanted to address the board regarding the waiver issue and that they had sent written materials to the board members for the June meeting, but the board members did not receive those materials. One member, Roz Markham, stated that the board did not need to hear any more about the matter and a majority of the board agreed. Mr. Kresner recalled that there had been discussion by the board that the PDC teachers had not been doing the kinds of things with their program that the Union wanted.

Grievance Request

Sue Shannon became the administrator of the LAUSD Professional Development Branch in June 1999. At that time, the terms of the UTLA appointees to the PDC had just expired. Their appointments had been extended to six years by the agreement between LAUSD and UTLA to a one-year extension of the five-year terms for non-classroom assignments described in Article XXXI.

Article XXXI was amended by the District and the Union during the extension and exceptions to the five-year limit were negotiated. Under the amended Article XXXI, 50 percent of the people in any work unit would be allowed to remain for one additional year, with staggered terms for the future. Additionally, teacher advisors working on a grant in which they had been named could continue in their position.

In late June, Lillian Utsumi met with Sue Shannon to discuss the expiration of her appointment to the PDC. They agreed that since Ms. Utsumi was named in the Pre-Intern Teaching Program grant, she would continue working on it.

James Dunlap also met with Ms. Shannon. He expressed an interest in remaining at the PDC and continuing to work under the grant in which he had been named. He believed that under the new 50 percent rule in Article XXXI he would be allowed to remain at the PDC another year.[16] Mr. Dunlap wanted to remain a PDC employee because it was a full year assignment and he would receive greater benefits than would otherwise be available under the grant. Mr. Dunlap testified that Ms. Shannon told him that she had discussed the matter with UTLA, the Union was not going to allow the 50 percent rule to be applied to the PDC. Mr. Dunlap continues to work on the grant program but is not on the PDC staff.

Sue Shannon testified that she had checked with LAUSD staff relations for an interpretation of the amended Article XXXI. She was told that the grant exception applied to PDC staff, but the 50 percent rule did not apply.

[16]Mr. Dunlap believed that under the 50 percent exception to the five-year rule in Article XXXI, he and Ruth Valadez could remain at the PDC because other staff had moved on to different jobs.

Before Ruth Valadez met with Ms. Shannon, she had an opportunity for discussions with Ms. Utsumi and Mr. Dunlap. Ms. Valadez learned that initially Ms. Utsumi and Mr. Dunlap had been told that it was time for them to return to the classroom. However, each of them mentioned that their name was contained in a grant, one of the specific exceptions of the Article XXXI five-year limitation on out-of-classroom assignments.

Ms. Valadez then met with Ms. Shannon. Ms. Valadez testified that Ms. Shannon apologized to her and said she had some bad news, Ms. Valadez must return to the classroom. Ms. Shannon stated that everyone in the District wanted Ms. Valadez to remain in her position with the Special Education Academy, but UTLA would not permit it. Ms. Valadez told Ms. Shannon that she wanted to remain at the PDC under the 50 percent rule. Ms. Shannon told her that UTLA and the District had decided that Article XXXI did not apply to the PDC. Ms. Valadez stated that she knew that Article XXXI had just been applied to Lillian Utsumi. According to Ms. Valadez, Ms. Shannon then replied that she was only a messenger. Shortly thereafter, Ms. Valadez left LAUSD for a position with another school district.

After the Charging Parties met with Sue Shannon, they called Judith Atlas. After reading amended Article XXXI, Ms. Atlas thought that it was applicable to the Charging Parties and that there might exist an exception to the five-year limitation.

Ms. Atlas called Elsie Myers, a UTLA area representative and requested a grievance form. According to Ms. Atlas, Ms. Myers refused to give her the form and told her that Ms. Myers would talk to Sam Kresner and Terry Skotnes. Ms. Myers called back and told Ms. Atlas that she had been informed by Messrs. Kresner, Higuchi and Skotnes that the PDC teachers could not grieve under Article XXXI. On June 28, Judith Atlas faxed a short note to

Elsie Myers stating that she was shocked that she could not get a grievance form. Another telephone conversation between Ms. Atlas and Ms. Myers took place on June 30th. On that date, Ms. Atlas sent a memorandum to Ms. Myers confirming their discussion that a grievance could not be filed.

On July 7, Ms. Myers sent a letter to Ms. Atlas. Ms. Myers denied refusing to forward a grievance form, stating that one will be forthcoming "when we decide there is" a contract violation. Ms. Myers then explained that the PDC section of the contract which limits terms to five years "takes precedence over Article XXXI." The letter also stated that there had been extensive discussions between UTLA and the PDC staff who had been advised they did not have a valid grievance. Lillian Utsumi testified that there had been no such discussion.

At the hearing in this matter, Sam Kresner testified that Article XXXI, as amended applies to the PDC staff. Mr. Kresner also testified that the sideletter extending all five-year terms for one year had applied to PDC staff.

POSITIONS OF THE PARTIES

Positions of the Charging Parties

The Charging Parties contend that they have been the victims of retaliation by the officers of UTLA. The retaliation was based on their letter requesting the removal of Charlotte Higuchi from the PDC and the pattern of independence from the Union exhibited by them in their work.

They also contend the failure of UTLA to support Ruth Valadez and James Dunlap in their attempts to remain at PDC under the 50 percent exception to the five-year rule constituted unlawful retaliation. It was clear from testimony of the witnesses and actions taken that Article XXXI, section 13.0, applied to the teacher members of the PDC. Inconsistent reasons

given by the Union for not filing a grievance on behalf of the PDC members demonstrates that the Union was improperly motivated.

A refusal to grant a chapter chair's request for a grievance form was unique in this case and convincing evidence of the animus toward them, the Charging Parties argue. Further evidence of animus toward the Charging Parties was the treatment received by their chapter chair, Judith Atlas, as she tried to assist them in the matter. Testimony demonstrates that Ms. Atlas was told by Beverly Cook that she must back off from representing the PDC members because there had been a problem between them and Charlotte Higuchi.

Charging Parties also assert that they were discriminated against when UTLA refused to waive the four-year restriction on administrative assignments. They are the only bargaining unit members who are subject to such a career limitation.

UTLA's rationale for enforcement of the four-year rule cannot be accepted, they argue, because the loss of three people does not constitute a drain of talent. The rationale that the four-year rule should be enforced because members of the PDC should not be allowed to use that job as a means to parley their way into an administrative position is also inapplicable. These individuals were chosen because they were highly qualified.

Charging Parties contend that Day Higuchi was strongly motivated to retaliate against them because of the removal of his wife from the PDC. His retaliatory conduct began almost immediately and the animosity was revealed when he told the Charging Parties to start cycling out of the PDC. In 1998, after the death of Helen Bernstein, Mr. Higuchi immediately began dismantling the PDC and undermining its effectiveness.

When they challenged Day Higuchi's actions in dismantling the PDC by their letter of January 1999, Charging Parties continue, he resumed his personal attacks against them by

withdrawing his prior agreement to support a waiver for Ms. Valadez and Ms. Utsumi to accept administrative positions.

Finally, Charging Parties assert the refusal of the UTLA board members to allow the Charging Parties to address them and the testimony of Linda Guthrie establish that the waiver request was never actually addressed by the board. Through this denial of fairness, the Charging Parties were denied due process.

Position of the Respondent

UTLA argues that while Charging Parties may have disliked the contract provision which prohibited them from becoming administrators for four years after serving their term at the PDC, they have not demonstrated that UTLA was motivated to retaliate against them for their protected conduct. Charging Parties presented no direct evidence of discrimination and they failed to present sufficient evidence allowing for an inference of discrimination. UTLA merely upheld clear and unambiguous terms of the collective bargaining agreement.

UTLA asserts that the 1994 letter was too attenuated from the waiver request to lead to an inference of discriminatory intent. The action taken by the PDC policy board in subsequent years to modify and restructure the PDC was done for rational and non-discriminatory reasons. Similarly, the suggestion to stagger PDC terms was intended to preserve the stability of the PDC. The 1998 restructuring was a response to the influx of new teachers and was negotiated by all three of the PDC policy board members.

There is also no evidence, UTLA argues, that the Union retaliated against the Charging Parties because of the January 1999 letter to the board. The UTLA board of directors' enforcement of the contractual restriction on administrative positions was legitimate and non-discriminatory. Further, Charging Parties' case must fail because they have suffered no injury

as a result of UTLA's denial of a contractual waiver. Lillian Utsumi and James Dunlap received grants which allowed them to continue work outside the classroom pursuant to Article XXXI, section 13, of the contract. Charging Party Ruth Valadez has taken a new job which pays a higher salary than she was making at the PDC.

Finally, UTLA argues, Charging Parties have not demonstrated discrimination in UTLA's application of Article XXXI. Further, the claim was not part of the PERB complaint.

LEGAL ISSUES

1. Did UTLA, by its refusal in May and June of 1999 to waive the four-year contractual prohibition against administrative assignments for UTLA appointees to the PDC thereby:

A. Violate its duty of fair representation toward the Charging Parties?

B. Illegally discriminate against the Charging Parties in retaliation for protected conduct?

2. Did UTLA by its refusal on or about June 30, 1999, to process the Charging Parties' grievance regarding alleged violation of Article XXXI, section 13, thereby:

A. Violate its duty of fair representation toward the Charging Parties?

B. Illegally discriminate against the Charging Parties in retaliation for protected conduct?

CONCLUSIONS OF LAW

The EERA requires at section 3544.9 that an exclusive representative shall "fairly represent each and every employee in the appropriate unit." Early PERB cases interpreting this section adopted the fair representation standard set forth by the U.S. Supreme Court in Vaca v.

Sipes (1967) 386 U.S. 171 [64 LRRM 2369].[17] Therein, the court determined that a union violates its duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory or in bad faith.

In Rocklin, the Board applied the fair representation standard disjunctively. The Board quoted from Griffin v. United Auto Workers (4th Cir. 1972) 469 F.2d 181 [81 LRRM 2485]:

> A union must conform its behavior to each of these standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

A union's duty of fair representation extends to contract negotiations, contract administration, and other activities which have a substantial impact upon the relationship of unit members to their employer. (Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

With respect to contract administration, the Board has held that the decision not to take a grievance to arbitration is lawful where a rational basis exists. (Castro Valley Unified School District (1980) PERB Decision No. 149.) Accordingly, PERB will dismiss a charge alleging a violation of the duty of fair representation if it is shown that a union has made an honest, reasonable determination that the grievance lacks merit. (Sacramento City Teachers Association (Fanning, et al.) (1984) PERB Decision No. 428 (Sacramento).) In determining whether that standard is met, PERB does not determine whether the union's decision was correct but whether it "had a rational basis or was reached for reasons that were arbitrary or based upon invidious discrimination." (Ibid.)

[17]Rocklin Teachers Professional Association (1980) PERB Decision No. 124 (Rocklin).

Requested Contractual Waiver

The contractual language at issue here states, "UTLA appointees shall be ineligible for administrative assignments for a period of four years from their date of cessation of service" at the PDC. The Union negotiated the provision in 1993, at the creation of the PDC. The intent is that Union appointees remain in the bargaining unit after their term expires. They are to share the professional expertise developed at the PDC with other teachers upon return to school sites. UTLA did not want its appointments to be used as a conduit into administrative positions.

Charging Parties are among the first group of UTLA appointees to have their terms expire.[18] They have demonstrated strong disagreement with the restriction on moving into administrative positions. They argue that it represents unwarranted intervention by the Union which thwarts the natural process wherein talented individuals advance in their careers. However, Charging Parties have not argued nor demonstrated that, on its face, the contractual provision is illegal under EERA.

Charging Parties contend that they are treated differently from other members of the bargaining unit. They note that promotion to the administrator ranks from a teacher advisor position is commonplace at LAUSD. The four-year restriction on advancement to administrative positions was negotiated only for the UTLA appointees of the PDC. Charging Parties challenge the rationale for negotiating and enforcing such a rule.

However, the wisdom of negotiating the subject provision is not at issue here. The determination on the alleged violation of the duty of fair representation requires a deference to

[18]There appear to have been no prior requests that the subject restriction be waived.

the wide latitude union representatives have in performing their responsibilities. It also requires recognition that decisions made need not meet every bargaining unit member's perception of fairness. (Humphry v. Moore (1964) 375 U.S. 335 [55 LRRM 2031].) In the negotiations context, an exclusive representative enjoys a wide range of bargaining latitude. Under the duty of fair representation, a union is not barred from making an agreement which may have an unfavorable effect on some members. (Riverside County Office Teachers Association, CTA/NEA (McAlpine) (2000) PERB Decision No. 1401.) Accordingly, the fact that the teacher-advisors outside of the PDC were able to move into administrative positions is of little relevance.[19]

Similarly, the UTLA board's vote to allow Charlotte Higuchi to return to a teacher advisor position, upon her return to the District from UCLA, does not aid the Charging Parties in demonstrating that they were the subjects of retaliation. The issues were quite dissimilar. Charging Parties sought a waiver from the prohibition against moving from the PDC into the ranks of administrators after completing full terms at the PDC. Charlotte Higuchi did not. She had spent only one year at the PDC prior to taking leave and a position at UCLA. She had more time available under the five-year out-of-classroom limitation of Article XXXI.[20] She sought to return to the ranks of teacher-advisors in the bargaining unit rather than to the

[19]Further, Charging Parties contention that they are the only members of UTLA who are barred from accepting administrative positions is not accurate. All bargaining unit members who accept appointment to PDC are barred from such positions for four years.

[20]Ms. Higuchi's detached services leave during her work at UTLA did not count against the five-year out-of-classroom limitation.

classroom.[21] She did not seek to become an administrator. There is not enough similarity in the issues to demonstrate that Ms. Higuchi received more favorable treatment than Charging Parties.[22]

Charging Parties contend that they are uniquely qualified for the administrative positions that they sought. A portion of their argument is devoted to a review of their academic credentials and the success they enjoyed in teaching careers and on various projects while at the PDC. Respondent UTLA does not dispute the qualifications of the Charging Parties. However, the qualifications of the Charging Parties is not a significant part of this analysis. The issue is whether the Charging Parties have demonstrated that the Union has stepped outside the bounds of rationality and acted to the detriment of Charging Parties for reasons that are "arbitrary, discriminatory, or in bad faith." (Vaca v. Sipes, supra, 386 U.S. 171.)

According to Charging Parties, the Union has enforced the collective bargaining agreement in bad faith. They contend that UTLA refused to grant a waiver of the four-year rule because of the personal animosity of Day Higuchi toward the Charging Parties and because UTLA considers Charging Parties to be renegades. Charging Parties theorize that Mr. Higuchi's animosity began with the 1994 letter to the Union by the teacher members of the PDC, which led to the departure of Charlotte Higuchi from the PDC, and has continued from that time forward.

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[21]The PDC section of the contract states that UTLA appointees "shall be reassigned to classroom teaching or assignment working directly with students upon concluding service" with the PDC.

[22]After finishing terms at the PDC, two of the Charging Parties have remained outside the classroom working on grants.

Charging Parties argue that Day Higuchi demonstrated a pattern of continuing reprisal against them after the 1994 letter. He had less frequent contact with them and he told them to consider "cycling out" rather than all depart at the same time. According to Charging Parties, Mr. Higuchi eventually "dismantled" the PDC. I find these contentions unpersuasive for the following reasons.

Charging Parties testified that prior to the 1994 letter, which led to the separation of Charlotte Higuchi from the PDC, they had more contact with Day Higuchi. He kept a desk at the PDC and he had frequent discussions with them. Policy board meetings were more frequent.

Day Higuchi testified that he had been upset by the incident involving his wife in 1994. It is clear that he had less contact with the Charging Parties and visited the PDC less frequently after his wife's departure. However, these facts do not establish an ongoing hostility by Mr. Higuchi in the performance of his union duties. Nor do they provide a basis for concluding that his professionalism had been compromised. I also note that while Mr. Higuchi was on the policy board, he was not the immediate supervisor of the PDC staff nor was he the UTLA chapter chair assigned to represent them. The need for his more frequent presence is not clear.

I am not persuaded by Charging Parties' argument that fewer policy board meetings is evidence of bad faith. One would expect that fewer policy board meetings were necessary after the start-up of the PDC, once projects had been selected, work was ongoing and a supervisor was appointed. The PDC teachers drafted the January 1999 letter which listed 23 of their major accomplishments.[23] Apparently, the PDC continued to function well with fewer

[23]A more extensive review of accomplishments was written by PDC staff in July 1996.

policy board meetings. Further, because Mr. Higuchi was one of three board members, it is not clear that he was solely responsible for fewer meetings.

Nor do I find that Mr. Higuchi's suggestion that the PDC staff consider "cycling out" demonstrates bad faith. Many of the projects were ongoing in nature. A desire to have some continuity through staggered terms seems reasonable. A couple of years later the District and UTLA were forced to amend Article XXXI because of the problems that could arise from all five-year terms expiring at the same time. Staggered terms resulted.

Charging Parties argue that the reorganization of the PDC was a result of Day Higuchi's bad faith. However, the record reflects that the changes were made by the full policy board as set forth in the collective bargaining agreement. Much of the change appears to be based on legitimate concerns.

Beginning in mid-1998, the PDC policy board made decisions to change the focus of the PDC. Thousands of new teachers had been recently hired because of state mandated class size reduction. Day Higuchi testified that the policy board decided to focus on the training of new teachers. The District representative on the board agreed. Barbara Gutierrez testified of a significant need to reallocate PDC funds to train new teachers and administrators. According to Ms. Gutierrez, the decisions to change the functions of the PDC were made in order to "support the superintendent with his initiatives."

The testimony of both Mr. Higuchi and Ms. Gutierrez establishes that the major decisions to change the direction and structure of the PDC were made at meetings of the policy

board.[24] These decisions included determinations that much of the teacher training would be conducted at UTLA headquarters and that some PDC staff would be relocated there. This change of work location reflected a desire by UTLA to be more closely identified with the work of the PDC.

The PDC was a creation of UTLA and the District through negotiations. As set forth in the collective bargaining agreement, it was the representatives of these entities along with the administrator's union, which selected the projects for the PDC staff. Structural changes may have been at the urging of UTLA, but that does not make them less legitimate. Certainly, the Union could promote structural changes to more closely identify itself with PDC teacher training. Additionally, the changes were made not by Day Higuchi alone, but by the policy board. Charging Parties have not demonstrated that the changes were made because of Mr. Higuchi's animosity towards them.

Charging Parties argue that the January 12, 1999, memorandum to Day Higuchi and the UTLA board so angered Mr. Higuchi that he went back on a promise to grant a waiver of the four-year restriction. The memorandum is titled "Dismantling of the Professional Development Cooperative." It states that the staff is unhappy and frustrated with the changes at the PDC and the fact that administrative staff has been kept better informed. It recounts staff accomplishments and demands a meeting to be "apprised of decisions involving our professional activities."

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[24]Charging Parties note that Barbara Gutierrez was unfamiliar with a list of policy board decisions distributed to PDC staff on April 15, 1999. The list described the allocation of PDC funds and stated that subject matter initiatives would be omitted in favor of the Teacher Training Academy. However, at the hearing in this matter, Ms. Gutierrez reviewed the document and stated that it fairly reflected previous action taken by the policy board.

Charging Parties sent this letter to the UTLA board shortly after Day Higuchi told Barbara Gutierrez that he thought that the board might approve two waivers.[25] Later Mr. Higuchi apparently discussed the matter with the UTLA board. In March, he told Ms. Gutierrez that the board would not approve a waiver. Later, he met with PDC staff and informed them that only two board members favored a waiver. The board formally addressed the issue in May and rejected any waiver of the four-year rule. These actions do not constitute Mr. Higuchi reneging on a promise that he would sign a waiver. He appears to have consistently maintained that the board would make the decision.

Nor do these events demonstrate that the UTLA decision was made in bad faith. The fact that the letter was sent, and may have been critical of Mr. Higuchi and the Union, does not prevent UTLA from taking action adverse to the Charging Parties so long as a rational reason exists for their actions. "Even if not kindly disposed to the grievants, a union may have a wide range of reasonableness within which to represent them." (The Developing Labor Law (1992) Third Edition, p. 1458 (fn. omitted).)

Charging Parties also contend that statements by District staff representative Andrew Cazares and UTLA vice-president Beverly Cook evidence bad faith. Ruth Valadez and Lillian Utsumi both testified that they were told by District staff relations representative Andrew Cazares that they were "targeted." Deputy Superintendent Lilliam Castillo was present. Ms. Castillo recalled Mr. Cazares stating that the four-year rule only applied to PDC staff. Ms. Castillo did not recall that Mr. Cazares used the term "targeted." Mr. Cazares did not testify.

It is difficult to firmly determine whether the term "targeted" was actually used or whether the term results from a joint interpretation of the explanation given by Mr. Cazares.

[25]Judith Atlas testified that Mr. Higuchi told her "that he felt there would be a waiver."

Even assuming the term was used, I do not rely on it as evidence of bad faith by the Union. Clearly, the statement represents an opinion by Mr. Cazares, the basis for which is unknown. No facts or testimony exist from which to draw a firm inference of improper union motivation.

Judith Atlas testified that in the spring of 1999 she received a call from UTLA Vice President Beverly Cook. According to Ms. Atlas, Ms. Cook told her to "back off" from her advocacy on behalf of the Charging Parties because of the 1994 incident involving Charlotte Higuchi's departure from the PDC. Beverly Cook recalled discussing the waiver request with Ms. Atlas. Ms. Cook testified that she told Ms. Atlas that the contract is clear, PDC staff could not move directly into administrative positions. Ms. Cook also testified that she never told Ms. Atlas to "back off." Nor did she tell Ms. Atlas not to get involved because there had been a problem with Charlotte Higuchi. No other witness testified to the conversation between Ms. Atlas and Ms. Cook.

On August 9, 1999, Ms. Atlas signed a declaration regarding her conversations with Day Higuchi over the waiver issue. She also stated that since those conversations, Ms. Cook and others have "ceased speaking to me or have taken away privileges granted to UTLA members." The declaration makes no mention of Ms. Cook discussing Charlotte Higuchi or telling her to "back off." The declaration was attached to the second amended charge in this matter. The amended charge alleges that Ms. Atlas was told by Ms. Cook that she would regret continued support for the PDC teachers.

At the hearing, Ms. Atlas gave testimony which at times was confusing or inconsistent. Ms. Atlas initially testified that the above conversation was her last conversation with Ms. Cook. Shortly thereafter she testified that she received another similar call from Ms. Cook. Ms. Atlas also testified about the letter in which she informed the UTLA board that there had

been at least seven violations of the PDC section of the collective bargaining agreement and to which she attached a list of names. Ms. Atlas testified that the seven violations were "people that I knew of, who had not gone back to classrooms who had been at the PDC." Later, when discussing the list of names which she attached to the letter, she stated that it was not her position that there had been a violation of the PDC section of the contract. Rather, the list represented teacher advisors who had become administrators which she was using to "show parity."

Faced with the discrepancies in the testimony, I am unable to make a firm conclusion as to the content of the conversation(s) between Ms. Atlas and Ms. Cook. I question why allegations of the statement "back off" and the discussion of the Charlotte Higuchi incident did not make their way into the declaration. However, it seems clear that there were words exchanged regarding Ms. Atlas's advocacy on behalf of the Charging Parties. Ms. Atlas and Ms. Cook had been friends and both testified that the friendship has ended.

Charging Parties also contend that they were improperly denied access to the board, so that board members voted without hearing all of their reasons for the requested waiver. According to Charging Parties, their request for a waiver was never fully considered.

As discussed, a duty of fair representation analysis contemplates a wide range of reasonableness allowed to a union. The analysis generally does not involve close scrutiny of a union's procedures. (Service Employees International Union, Local 99 (Kimmett), supra, PERB Decision No. 106.) The issue here is whether a rational basis exists for a union decision or whether that decision "was reached for reasons that were arbitrary or based on invidious discrimination." (Sacramento.)

There had been discussions between Day Higuchi and Barbara Gutierrez regarding a contractual waiver beginning in December 1998. Charging Parties were aware of these discussions. In March 1999, they were informed by Ms. Gutierrez that the waiver would not be granted by the Union. On April 19, Day Higuchi met with the PDC staff and told them that the waiver issue had been discussed with the UTLA board and that the Union would not waive the four-year restriction.

At the May board meeting, Day Higuchi told the board that there were individuals who wished to address the board on the waiver issue. Linda Guthrie made a motion that Charging Parties be permitted to do so. Her motion was followed by board discussion of whether there was a need to receive more information on the matter. There was also discussion on the merits of granting a waiver. Opinion was expressed that the PDC staff members should have been aware of the four-year restriction when they took the jobs. Day Higuchi testified that most of the board discussion regarded the original rationale of the four-year restriction on administrative assignments. The board determined that the original rationale remained valid. The four-year restriction was the best way to have people apply who would return to the classroom.

During Ms. Guthrie's testimony, she was asked whether comments were made that the Charging Parties were "anti-union." She stated that there were words "to that effect" and explained that there was discussion that Charging Parties had not maintained a close relationship with UTLA.[26] Ms. Guthrie's motion was solidly defeated and the waiver request

[26]Day Higuchi testified that there may have been one or two board members who stated that Charging Parties lacked loyalty to UTLA.

was denied. In sum, the UTLA board denied the request without being addressed by the Charging Parties.

Charging Parties were given an opportunity to discuss the waiver request with the Union's president and a board member. The matter was raised at a board meeting, the merits discussed and a vote taken. Charging Parties have not established that the procedure used by UTLA was outside the wide range of reasonableness afforded an exclusive representative.

Nor do I find that the board's desire not to revisit the matter at the June meeting was so unreasonable as to demonstrate a violation of the duty of fair representation. Ms. Guthrie renewed her motion that Charging Parties be allowed to address the board. Sentiment was expressed that the issue had already been decided. A motion was made "that UTLA contract be upheld and that PDC members follow the contract. Further, it is not necessary that PDC members speak before the UTLA Board." The motion passed 20 to 10. Charging Parties did not address the board, nor were their letters considered.

Charging Parties contend that the board could not have made an informed decision because it did not consider the material they submitted and did not let them address the June meeting. However, a review of the letters submitted by Ms. Utsumi and Ms. Valadez reveals that they reviewed their work with the Union and accomplishments at the PDC. They expressed their disagreement with the four-year restriction and criticized Day Higuchi for changes at the PDC. They each described how, through their work at the PDC, they had been able to secure significant grants which funded administrative positions for which they were

well qualified. These letters do not appear to be additional material that undermines the rationale for the board's original decision or its decision not to revisit the matter.[27]

I also find that UTLA has demonstrated a rational basis for the decision to uphold the contract. The PDC was established in 1993 to improve professional development and classroom instruction. Expertise gained was to be taken back to school sites and shared with other members of the bargaining unit. The Union, including then-President Helen Bernstein, did not want these positions to be used by UTLA appointees to move from the bargaining unit to the ranks of administrators. Through negotiations the Union won a provision that required their appointees to forego administrative positions for four years after leaving the PDC.

At the end of the first full terms of PDC appointees, waiver of the restriction was requested by two staff members whose PDC work had resulted in opportunities to become administrators. The UTLA board determined that the reasoning behind the contractual provision remained valid. There was continuing support among UTLA board members for the restriction negotiated only six years earlier.[28] Charging Parties have not met their burden of establishing that UTLA lacked a rational basis.

Because I find that UTLA had a rational basis for refusing to waive the four-year restriction on administrative assignments, I find that there was no violation of the duty of fair representation.

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[27]Similarly, the District's waiver request of June 8 does not appear to contain specific information that was necessary to the UTLA board's deliberations. It was merely a request to exempt all PDC teachers from the four-year restriction, a contractual provision which had been sought by the Union. In May, the board had considered the rationale of the negotiated restriction and decided not to make exceptions.

[28]Even Linda Guthrie expressed her support for having Ms. Utsumi's training grant remain under teacher control rather than directed by an administrator.

The complaint also contains an allegation that the Union's denial of a waiver of the four-year rule constituted illegal discrimination for protected conduct. In determining whether a union has engaged in discrimination, PERB uses the same standards as those relating to employers similarly accused. (See California State Employees Association (O'Connell) (1989) PERB Decision No. 753-H.) Unlawful intent is an essential element. A charging party must establish that he or she engaged in protected activity, that the union's conduct was motivated by that participation and that the union took an adverse action. Once a charging party has set forth a prima facie case, the burden shifts to the union to demonstrate by a preponderance of the evidence that its actions would have been the same in the absence of protected activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).)

In this case, the Charging Parties have demonstrated that they engaged in protected activity: they exercised their right to be active in the Union and filed an unfair practice charge with PERB. Furthermore, they suffered an adverse action when they were denied the waiver. I also find an inference of unlawful motivation. There was clearly animosity expressed to Judith Atlas for her representational activities on behalf of Charging Parties. Additionally, board discussion of distancing and lack of loyalty by the Charging Parties, shortly after they filed an unfair practice charge, also contributes to the inference. Both indicia of motive demonstrate that some board members were not completely focussed on the merits of contractual waiver. However, on the record of this proceeding and my discussion above, I find that UTLA has established that its actions would have been the same in the absence of protected activity. Accordingly, I find that UTLA did not illegally discriminate against Charging Parties when it voted not to grant the waiver.

Refusal to Process Grievance

In June of 1999, Charging Parties Ruth Valadez and James Dunlap were interested in remaining at the PDC although their terms of appointment had expired. They sought to take advantage of a recently negotiated exception to the five-year term limitation of Article XXXI, the 50 percent rule. Under the 50 percent rule, only half of the teacher advisors at any one location would be replaced in June 1999. All others would receive a one year extension.

LAUSD, through supervisor Sue Shannon, took the position that the 50 percent rule did not apply to employees at the PDC. However, Ms. Shannon told Mr. Dunlap and Ms. Utsumi that they were eligible for another of the exceptions to Article XXXI. Because they were named in grants, they could continue working and need not return to the classroom. Ms. Valadez was told that she had no such option, she would need to return to the classroom.[29]

Charging Parties contacted their chapter chair, Judith Atlas, and tried to file a grievance. Ms. Atlas thought that the 50 percent rule applied to the PDC staff and contacted UTLA Area Representative Elsie Myers to request a grievance form. Ms. Myers denied Ms. Atlas the form, essentially refusing to process the grievance.

The reasons Ms. Myers gave for not processing the grievance are puzzling. In her letter to Ms. Atlas, Ms. Myers said that Article XXXI did not apply to the PDC staff because the specific five-year term found in the PDC section of the contract took precedence. However, Article XXXI had been applied to the five-year terms of PDC staff the prior year, when all out-

[29]Ms. Valadez chose to leave LAUSD.

of-classroom assignments had been extended by a side letter between UTLA and LAUSD.[30] Ms. Myers said that she relied, in part, on Sam Kresner for authority that Article XXXI did not apply to the PDC staff. However, at the hearing in this matter, Sam Kresner testified without qualification that Article XXXI did apply to the PDC staff. In the letter, Ms. Myers also stated that there had been extensive discussions between UTLA and Charging Parties who had been advised that they did not have a grievance. Lillian Utsumi testified that there had been no such discussion.[31] Additionally, there has been no explanation why the PDC staff was eligible under one of the exceptions found in Article XXXI, the named-in-a-grant rule, but not under the 50 percent rule.

UTLA's post-hearing brief in this matter does not argue the merits of the alleged refusal to process a grievance. However, it does note that two of the Charging Parties were allowed to continue outside the classroom under Article XXXI. The Union's reply brief merely states that this allegation is not supported by the evidence; there is no explanation of why the grievance was not processed. UTLA argues "More importantly, this claim was not part of the PERB complaint and therefore, cannot be litigated as part of this case" and notes that the complaint does not mention the five-year rule.

The allegation that the Union violated its duty of fair representation by failing to pursue a grievance is part of this case, however. Paragraph 5 of the complaint states:

> On or about June 30,1999, Respondent, acting through its agent , Elsie Myers, Area Representative, took adverse action against Charging Parties by failing to provide their representative, Judie Atlas, UTLA Chapter Chair with a grievance form.

[30]The side letter memorialized an agreement to "extend the five year limitation on non-classroom assignments described in Article XXXI, Section 13 by one year." This language was applied to include the PDC staff.

[31]Ms. Myers did not testify at the hearing.

The Complaint sets forth the date, the particular union representative and the action taken. It is sufficiently specific to put UTLA on notice of the allegation. I find that the Complaint alleges that Ms. Myers, on behalf of UTLA, refused to process the grievance as requested by Charging Parties.

Mere negligence or poor judgement is not sufficient to establish a breach of the duty of fair representation. (Griffin v. UAW, supra, 469 F.2d 181, 183.) "The grievance process cannot be expected to be error free." (Hines v. Anchor Motor Freight (1976) 424 U.S. 554, 571 [91 LRRM 2481].) However, there was no evidence introduced to demonstrate that the Union simply erred or used poor judgment while exercising discretion in good faith. Rather, the facts here reflect a rapid shift in the UTLA position on Article XXXI, without explanation of changed circumstances or policy.[32] The position taken by Ms. Myers was contrary to the Union's established position both before and after the grievance request. I find this conduct to be so arbitrary as to violate the Union's duty of fair representation.[33]

The complaint in this matter also alleges that by refusing to process the grievance, UTLA illegally discriminated against the Charging Parties. In addition to the evidence of motive discussed above, Charging Parties have shown that the Union used an inconsistent justification with regard to this adverse action. (Novato.) UTLA has set forth no facts which demonstrate that its actions, with regard to the grievance request, would have been the same

[32]Article XXXI simply applied to PDC staff one day, but not on another.

[33]cf. U.S. Postal Service (1979) 240 NLRB 1198 [100 LRRM 1371], *modified* (8th Cir. 1980) 618 F.2d 1249 [103 LRRM 3045], breach of duty of fair representation found when union representative enforced own view of contract clause which was contrary to union policy.

absent protected activity. Accordingly, I find that UTLA has illegally discriminated against Charging Parties.

REMEDY

The PERB in section 3541.5(c) is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

UTLA has been found in violation of its duty to fairly represent Charging Parties Valadez and Dunlap.[34] The union violated this duty when it arbitrarily refused to process their grievances that they be allowed to remain at the PDC under the 50 percent exception in Article XXXI.

The question of the appropriate remedy for a union's failure to process a grievance has not previously been considered by the PERB. However, the National Labor Relations Board (NLRB) considered the matter in Iron Workers Local 377 (1998) 326 NLRB No. 54 [159 LRRM 1097]. There the NLRB wrote:

> . . . once the General Counsel has established that a union has unlawfully breached its duty of fair representation by failing properly to process an employee's grievance, then we will provide an appropriate cease-and-desist order and an order directing the Union to process the grievance in accordance with its duty. Before we will require a union to compensate an employee for losses alleged to have been suffered by the employee as a consequence of the union's mishandling of the grievance, however, the General Counsel must also show that the grievance was one presenting a claim on which the grievant would have prevailed if the grievance had been properly processed by the union.

[34]From the record, it appears that Ruth Valadez and James Dunlap are the only Charging Parties who attempted to remain at the PDC under the 50 percent rule. Briefs filed on behalf of Charging Parties argue that the rights of only Ms. Valadez and Mr. Dunlap were violated by the failure to file a grievance.

The Charging Parties have established that UTLA unlawfully breached its duty of fair representation by failing to properly process their grievance. It is appropriate, therefore, that UTLA be directed to cease-and-desist from its refusal to process their grievance. The Union will be further directed to process the grievance in accordance with its duty and attempt to resolve the dispute in consultation with the LAUSD.

It also is appropriate that the UTLA be required to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the UTLA, will provide employees with notice that the UTLA has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and the UTLA's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

At this point, no further remedy is possible. The question of whether the Charging Parties would have prevailed had UTLA properly handled their grievance has not been litigated. It is inappropriate, therefore, to propose a remedy that might be granted if UTLA is unable to resolve the grievance with the District. Should a compliance hearing become necessary on the question of a further remedy, the Charging Parties will not secure any make-whole remedy from UTLA until they first establish that UTLA would have won on the merits had the grievance been properly handled. In such compliance hearing, the burden of proof that the Charging Parties must satisfy will be the same as that "an arbitrator would have applied had the grievance been submitted to arbitration pursuant to the contractual grievance-arbitration procedure." (Iron Workers Local 377 , supra, 326 NLRB No. 54.)

Charging Parties have asked for attorney's fees. Attorney's fees and costs of litigation are not appropriate "unless there is a showing that the respondent's unlawful conduct has been repetitive and that its defenses are without arguable merit." (Modesto City Schools and High School District (1985) PERB Decision No. 518.) There is no pattern of repetitive findings of violations against the UTLA and it cannot be said that UTLA's defenses are without arguable merit. Accordingly, attorney's fees and other costs of litigation are denied.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the United Teachers Los Angeles (UTLA) violated the Educational Employment Relations Act (Act), Government Code section 3543.6(b). UTLA violated the Act when during or about the month of June 1999, it failed to fairly represent Charging Parties Ruth Valadez and James Dunlap by arbitrarily refusing to process their grievances. This refusal to process their grievances also constituted illegal discrimination for protected activity.

All other allegations in the complaint and companion unfair practice charge are hereby DISMISSED.

Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the UTLA and its representatives shall:

A. CEASE AND DESIST FROM:

Arbitrarily and discriminatorily refusing to process the grievances of unit members Ruth Valadez and James Dunlap and thereby violating its duty of fair representation toward them.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Effective immediately upon service of a final decision in this matter, accept and process the request of Ruth Valadez and James Dunlap to file a grievance against the Los Angeles Unified School District (District) regarding the District's refusal to grant them a one year extension in their service in the Professional Development Collaborative.

2. Immediately upon receipt of the grievance from Ms. Valadez and Mr. Dunlap, contact the District and make a good faith effort with the District to reach a satisfactory resolution of the grievance.

3. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to bargaining unit members customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the UTLA, indicating that the UTLA will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

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 California Code of Regulations, title 8, section 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.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Bernard McMonigle
Administrative Law Judge