STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GEORGE R. GERBER, JR., Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 258, Respondent.	Case No. LA-CO-869-E PERB Decision No. 1460 September 6, 2001

Appearances: George R. Gerber, Jr., on his own behalf; California School Employees Association by Madalyn Frazzini, for California School Employees Association, Chapter 258.

Before Amador, Baker and Whitehead, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (Board) on appeal by George R. Gerber, Jr. to a Board agent's dismissal (attached) of the unfair practice charge. The unfair practice charge alleged that the California School Employees Association, Chapter 258 violated section 3543.6(a) and (b) of the Educational Employment Relations Act (EERA)[1] by unlawfully collecting agency fees.

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

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or

After reviewing the entire record, the Board finds the dismissal letter to be free of prejudicial error and adopts it as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-869-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

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

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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

May 30, 2001

George R. Gerber, Jr.

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
George R. Gerber Jr. v. California School Employees Association
Unfair Practice Charge No. LA-CO-869; First Amended Charge

Dear Mr. Gerber:

The above-referenced unfair practice charge, filed February 12, 2001, alleges the California School Employees Association (CSEA) unlawfully collected agency fees and violated PERB Regulations. You contend this conduct violates Government Code section 3543.6(a) and (b) of the Educational Employment Relations Act (EERA or Act).

I indicated to you, in my attached letter dated May 4, 2001, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to May 11, 2001, the charge would be dismissed.

On May 9, 2001, I spoke with Charging Party at length about the deficiencies in the original charge. During this conversation, Charging Party requested, and was granted, an extension to May 18, 2001.

On May 21, 2001, I telephoned Charging Party regarding his failure to file an amended charge. At that time, I explained I would dismiss the charge if I did not receive an amended charge in the next two days.

On May 23, 2001, Charging Party filed a first amended charge. The amended charge reiterates the following allegations also raised in the original charge: (1) CSEA failed to hold a "prompt" hearing regarding the agency fee; (2) CSEA failed to provide Charging Party notice of the arbitration hearing; (3) CSEA failed to provide Charging Party with the auditor's report; (4) CSEA caused the District to violate the Government Code; and

(5) CSEA breached its duty of fair representation. Relevant facts are reiterated below.

In 1995, during a hiatus between contracts, Charging Party informed CSEA that he wished to withdraw from the union, and stop his payroll deductions. In 1999, CSEA and the District signed the above-referenced collective bargaining agreement, which contains a lawful organizational security provision. At this time, the District was obligated to begin deducting membership dues or a service fee from each employee.

In the spring of 2000, CSEA became aware that Charging Party was paying neither the membership dues nor the service fee. Pursuant to Article 3.10, CSEA ordered the District to begin deducting a service fee of $29.75 from Charging Party's paycheck. Deductions were taken from Charging Party's paycheck in May and June 2000. Since that time Charging Party has not paid a service fee to CSEA, nor have any moneys been deducted from his paycheck.

On July 19, 2000, Charging Party filed an unfair practice charge against CSEA, alleging CSEA failed to provide the required notice prior to taking out a service fee. In August 2000, PERB issued a complaint against CSEA, finding CSEA failed to provide the notice required in PERB Regulation 32992 prior to or concurrently with the initial agency fee collection.

On August 21, 2000, CSEA sent Charging Party a packet of information, satisfying their obligation to provide Charging Party notice under PERB Regulation 32992. The information provided to Charging Party included CSEA's calculation of the chargeable percentage of agency fees, an opportunity to object to paying the non-chargeable percentage, and information regarding how to challenge the chargeable percentage in front of a neutral arbitrator. In relevant part, the cover letter to Charging Party stated:

> Please note that the advance refund is the nonchargeable portion of your service fees due for the entire 2000-2001 school year. Thus, you must continue to pay the full service fee due each month. Should you leave employment before the end of the school year, CSEA will not require you to pay back its overpayment of the advance refund.
>
> You have a right to challenge CSEA's calculation of the 2000-2001 chargeable percentage by filing a request for arbitration. The arbitrator assigned to such cases is selected by the American Arbitration

> Association (AAA). If arbitration is requested, a prompt consolidated hearing will be scheduled and conducted pursuant to AAA rules. Unless another participant in the hearing objects, CSEA will pay AAA's administrative fee and the arbitrator's fee and expenses. Participants will be notified later of the precise time, date and location of the hearing.

Additionally, CSEA provided an independent auditor's report verifying the chargeable percentage, and several tables noting CSEA's expenditures and codes for the 1999-2000 fiscal year.

On September 11, 2000, Charging Party wrote a letter to CSEA Deputy Chief Counsel, Madalyn Frazzini, regarding the information sent by CSEA. In this letter, Charging Party states he is objecting to the chargeable expenses stated by CSEA and is requesting further financial information in order to prepare for the arbitration.

On November 6, 2000, December 15, 2000 and January 10, 2001, Charging Party again requested the financial information from Ms. Frazzini. CSEA did not provide Charging Party with any additional financial information.

On February 8, 2001, CSEA sent Charging Party a letter stating the date and time of the arbitration hearing provided for those employees challenging the chargeable expenses. The letter noted the hearing would take place on February 28, 2001, in San Jose, beginning at 9:00 a.m. Charging Party states he never received this letter. A copy of the letter was provided by the Respondent, and an examination of the letter demonstrates it was addressed correctly.

Charging Party further alleges that on February 26, 2001, he received notice of the arbitration from AAA. The formal hearing notice is signed and dated February 1, 2001, however, Charging Party states it was not mailed until February 22, 2001. In support of this contention, Charging Party provided a purported copy of the envelope the notice was received in. Charging Party did not appear at the arbitration hearing and did not contact anyone at the AAA to object to the consolidation or to object to the "late" notice.

Finally, Charging Party asserts that on several dates which cannot be provided, Charging Party requested a service fee authorization form from the District's Human Resources and Payroll Departments. Charging Party states employees were unable

to provide him with such a form, and could only provide him with a CSEA membership application.

Based on the facts contained in the original and amended charges, the charge fails to state a prima facie violation of the EERA, for the reasons provided below.

I. PERB Regulation 32994(3)

PERB Regulation 32994 specifies the requirements of an agency fee appeal procedure. Section 3 states:

> Within 45 days of the last day for filing an objection under Section 32994(b)(2) of these regulations and upon receipt of the employee's agency fee objection, the exclusive representative shall request a prompt hearing regarding the agency fee before an impartial decisionmaker.

Charging Party contends CSEA did not request a "prompt" hearing in this matter. However, as explained to Charging Party during our telephone conversation, mere legal conclusions are insufficient to state a prima facie case. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944; State of California (Department of Food and Agriculture (1994) PERB Decision No. 1071-S.) Charging Party fails to provide any facts demonstrating CSEA failed to request a prompt hearing. Charging Party merely relies on the date of the arbitration as evidence of CSEA's breach. However, the American Arbitration Association was the party responsible for setting the arbitration date. As such, CSEA and agency fee payers were at the mercy of AAA's availability. Such facts fail to demonstrate a violation of PERB Regulation 32994(3).

II. Notice of Arbitration

Charging Party contends CSEA violated PERB Regulation 32994(5) by failing to provide notice of the arbitration. Regulation 32994(5) states in relevant part:

> Any party may make a request for a consolidated hearing of multiple agency fee objections based on case similarities, including but not limited to hearing location. At any time prior to the start of the hearing, any party may make a motion to the impartial decisionmaker challenging any consolidation of the hearing.

Facts provided demonstrate that CSEA provided written notice of the arbitration on February 8, 2001. This notice is not required by PERB Regulations or the EERA. Indeed, it appears CSEA's notice to Charging Party was merely a courtesy. Formal notice of the arbitration is the responsibility of the AAA, which provided Charging Party with notice on February 26, 2001. Indeed, AAA rules for agency fee arbitration state that AAA will provided notice.

As CSEA was not required to provide notice to Charging Party, it cannot be found to have violated PERB Regulations when another party allegedly fails to notify Charging Party in a timely manner. Moreover, facts presented demonstrate Charging Party did not object to the late notice until he filed this unfair practice charge. Charging Party did not telephone the AAA Case Manager to complain or to request a continuance, nor did Charging Party make a motion challenging any consolidation. As such, the facts provided fail to demonstrate CSEA violated PERB Regulation 32994(5).

III. Auditor's Report

PERB Regulation 32992 requires that each nonmember receive written notice from the exclusive representative of the amount of agency fee, the basis of the calculation and the procedure for appealing the agency fee. Additionally, section (b) states:

> All such calculations shall be made on the basis of an independent audit that shall be made available to the nonmember.

Charging Party contends CSEA violated this provision by failing to provide the auditor's report. However, as noted above, CSEA provided a copy of the auditor's report in the information provided to Charging Party in August 2000. Indeed, Charging Party provided this information to PERB in the filing of this charge. As such, this allegation fails to state a prima facie violation of the EERA.

Assuming Charging Party is asserting CSEA must provide more than just the auditor's reported statement and tables, Charging Party fails to provide any support for this assumption. PERB Regulation 32992 requires only that CSEA disclose the basis for the calculation and basis for the chargeable expenditures. Such information was provided to Charging Party, and as such this allegation must be dismissed.

IV. Government Code section 3543.6(a)

Government Code section 3543.6(a) states that it shall be unlawful for an employee organization to cause or attempt to cause a public school employer to violate Section 3543.5. It appears Charging Party is alleging the District's failure to provide him with a service fee payer/payroll deduction form is due to CSEA's bad faith, and as such violates Government Code section 3543.6(a). This allegation, however, fails for several reasons.[1]

Under EERA, it is unlawful for an employee organization to cause or attempt to cause an employer to interfere with an employee's protected right. (Gov. Code sec. 3543.6(a)) A violation of this provision may only be established by a clear showing of how and in what manner the employee organization induced or attempted to induce employer interference or discrimination. (Tustin Unified School District (1987) PERB Decision No. 626.) In addition, the facts must establish a causal connection between the employer's unlawful conduct and the employee organization's behavior. (California Department of Personnel Administration (1987) PERB Decision No. 609-S.)

Initially, the charge does not demonstrate the District violated the EERA by failing to provide him with a service fee deduction form. Article 3.9 states in relevant part:

> As a condition of employment, any new employee to this unit shall be required to sign a payroll authorization form to pay dues or a service fee to the CSEA as provided in this article.

Charging Party claims that the District violated this provision by not giving him a service fee deduction form. However, Article 3.9 provides that such a form shall be given to new employees and not employees who have already refused payroll deduction. Moreover, as Charging Party is already a service fee payer and has stated that he will pay CSEA directly, it is unclear how the denial of such a form harms Charging Party's EERA rights. As such, it does not appear the District interfered with Charging Party's rights.

Even assuming the District did violate Charging Party's rights, the charge fails to establish any causal connection between the District's conduct and CSEA's behavior. Instead, Charging Party

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[1] It is unclear why Charging Party sought a service fee payer form when he is already a service fee payer.

simply concludes "the District is unintentionally being used by CSEA to violate 3543.5(d)." Charging Party further asserts that since CSEA is obligated to provide such a form to the District, the District's failure to supply the form to Charging Party demonstrates the "causal connection." However, the charge fails to demonstrate CSEA failed to provide the District with this form. Without any facts establishing a causal connection between the conduct, this allegation fails to state a prima facie case.

V. Duty of Fair Representation

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). In order to state a prima facie violation of this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> ". . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)" [Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

Charging Party states the above allegations also demonstrate CSEA breached its duty of fair representation. However, Charging Party fails to provide any specific facts regarding this alleged breach. Charging Party does not demonstrate any instances in which CSEA has acted arbitrarily, or in bad faith. While Charging Party may not agree with the manner of assessment or the amount of agency fee collected such determinations are generally an internal union matter and not subject to PERB scrutiny. (AFSCME Local 2620 (Cupp) (1987) PERB Decision No. 612-S.) Moreover it appears CSEA has complied with PERB Regulations and its own internal procedures in handling appeals of chargeable expenses. As such, this allegation must be dismissed.

Charging Party also contends CSEA inaction demonstrates discrimination against him because he is a service fee payer. In support of this allegation, Charging Party asserts CSEA discriminated against him by failing to inform him of the arbitration and by not providing him information. However, as stated above, CSEA was not obligated to provide Charging Party notice of the arbitration, although it appears CSEA did just that. Additionally, CSEA was not obligated to provide any more information to Charging Party than it provided initially. As such, this allegation must be dismissed.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

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

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

mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

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

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Madalyn J. Frazzini, Esq.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

May 4, 2001

George R. Gerber, Jr.

Re: **WARNING LETTER**
George R. Gerber Jr. v. California School Employees Association
Unfair Practice Charge No. LA-CO-869

Dear Mr. Gerber:

The above-referenced unfair practice charge, filed February 12, 2001, alleges the California School Employees Association (CSEA) collected unlawful agency fees and violated PERB Regulations. You contend this conduct violates Government Code section 3543.6(a) and (b) of the Educational Employment Relations Act (EERA or Act).

Investigation of your charge revealed the following. You are currently employed by the Sweetwater Union High School District (District) in the maintenance department. As a classified employee, you are exclusively represented by CSEA. CSEA and the District are parties to a collective bargaining agreement which expires on June 30, 2001. Articles 3.2 and 3.10 of the Agreement state in pertinent part:

> 3.2 Membership in CSEA is not compulsory, however, any unit member (including new employees) who is not a dues paying member of CSEA shall pay CSEA a service fee which is equal to CSEA's annual dues. This service fee payment shall be made either through payroll deduction or direct payments to CSEA.
>
> 3.10 In the event that an employee revokes a dues or service fee authorization or fails to make arrangements with CSEA for direct payment of service fee, the District shall deduct service fees until such time as CSEA notifies the District that arrangements have been made for the payment of such fees. The District shall deduct service fees automatically upon notice from CSEA, if an employee does not become a member or sign a

> deduction authorization in accordance with Education Code section 45168(b).

In 1995, during a hiatus between contracts, Charging Party informed CSEA that he wished to withdraw from the union, and stop his payroll deductions. In 1999, CSEA and the District signed the above-referenced collective bargaining agreement, which contains a lawful organizational security provision. At this time, the District was obligated to begin deducting membership dues or a service fee from each employee.

In the spring of 2000, CSEA became aware that Charging Party was paying neither the membership dues nor the service fee. Pursuant to Article 3.10, CSEA ordered the District to begin deducting a service fee of $29.75 from Charging Party's paycheck. The first, and only deduction, from Charging Party's paycheck took place in May 2000. Since that time Charging Party has not paid a service fee to CSEA, nor have any moneys been deducted from his paycheck.

On July 19, 2000, Charging Party filed an unfair practice charge against CSEA, alleging CSEA failed to provide the required notice prior to taking out a service fee. In August 2000, PERB issued a complaint against CSEA, finding CSEA failed to provide the notice required in PERB Regulation 32992 prior to or concurrently with the initial agency fee collection.

On August 21, 2000, CSEA sent Charging Party a packet of information, satisfying their obligation to provide Charging Party notice under PERB Regulation 32992. The information provided to Charging Party included CSEA's calculation of the chargeable percentage of agency fees, an opportunity to object to paying the non-chargeable percentage, and information regarding how to challenge the chargeable percentage in front of a neutral arbitrator. In relevant part, the cover letter to Charging Party stated:

> Please note that the advance refund is the nonchargeable portion of your service fees due for the entire 2000-2001 school year. Thus, you must continue to pay the full service fee due each month. Should you leave employment before the end of the school year, CSEA will not require you to pay back its overpayment of the advance refund.
>
> You have a right to challenge CSEA's calculation of the 2000-2001 chargeable percentage by filing a request for arbitration. The arbitrator assigned to such cases is selected by the American Arbitration

> Association (AAA). If arbitration is requested, a prompt consolidated hearing will be scheduled and conducted pursuant to AAA rules. Unless another participant in the hearing objects, CSEA will pay AAA's administrative fee and the arbitrator's fee and expenses. Participants will be notified later of the precise time, date and location of the hearing.

Additionally, CSEA provided an independent auditor's report verifying the chargeable percentage, and several tables noting CSEA's expenditures and codes for the 1999-2000 fiscal year.

On September 11, 2000, Charging Party wrote a letter to CSEA Deputy Chief Counsel, Madalyn Frazzini, regarding the information sent by CSEA. In this letter, Charging Party states he is objecting to the chargeable expenses stated by CSEA and is requesting further financial information in order to prepare for the arbitration. Additionally, Charging Party stated he would pay CSEA directly for the service fee and would not authorize a payroll deduction.

On November 6, 2000, December 15, 2000 and January 10, 2001, Charging Party again requested the financial information from Ms. Frazzini. CSEA did not provide Charging Party with any additional financial information.

On February 8, 2001, CSEA sent Charging Party a letter stating the date and time of the arbitration hearing provided for those employees challenging the chargeable expenses. The letter noted the hearing would take place on February 28, 2001, in San Jose, beginning at 9:00 a.m. Later that same month, the American Arbitration Association (AAA) sent Charging Party a letter informing him of the date and time of the arbitration. Charging Party did not appear at the arbitration hearing.

Finally, Charging Party asserts that on several dates which cannot be provided, Charging Party requested a service fee authorization form from the District's Human Resources and Payroll Departments. Charging Party states employees were unable to provide him with such a form, and could only provide him with a CSEA membership application.

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

Charging Party alleges numerous violations of PERB Regulations and the Government Code. As such, each allegation will be addressed in turn.

Initially, it appears Charging Party lacks standing to allege CSEA denied him a hearing and violated provisions of PERB Regulations. In Los Rios College Federation of Teachers (Deglow) (1992) PERB Decision No. 950, the union refunded the agency fees of the unit members who challenged the amount of the agency fee. The union determined not to take the matter to arbitration and thus ceased taking agency fees from unit members who appealed to the arbitration procedure. The Board held that after the union refunded the agency fees and ceased taking agency fees, the union did not violate the law by permitting the unit members to participate in an arbitration proceeding.

Facts provided, herein, are similar. Charging Party's agency fees were refunded by the union and he has not paid any moneys to CSEA since the May 2000 collection. As Charging Party has failed to pay agency fee, Charging Party lacks standing to allege he has been harmed by CSEA's actions. As such, these allegations fail to state a prima facie case.

Even assuming Charging Party has standing to file such allegations, the allegations fails to state violations of the EERA, as described below.

I. PERB Regulation 32992(b)

PERB Regulation 32992 requires that each nonmember receive written notice from the exclusive representative of the amount of agency fee, the basis of the calculation and the procedure for appealing the agency fee. Additionally, section (b) states:

> All such calculations shall be made on the basis of an independent audit that shall be made available to the nonmember.

Charging Party contends CSEA violated this provision by failing to provide the auditor's report. However, as noted above, CSEA provided a copy of the auditor's report in the information provided to Charging Party in August 2000. Indeed, Charging Party provided this information to PERB in the filing of this charge. As such, this allegation fails to state a prima facie violation of the EERA.

Assuming Charging Party is asserting CSEA must provide more than just the auditor's reported statement and tables, Charging Party fails to provide any support for this assumption. PERB Regulation 32992 requires only that CSEA disclose the basis for

the calculation and basis for the chargeable expenditures. Such information was provided to Charging Party, and as such this allegation must be dismissed.

II. PERB Regulation 32994(3)

PERB Regulation 32994 specifies the requirements of an agency fee appeal procedure. Section 3 states:

> Within 45 days of the last day for filing an objection under Section 32994(b)(2) of these regulations and upon receipt of the employee's agency fee objection, the exclusive representative shall request a prompt hearing regarding the agency fee before an impartial decisionmaker.

Charging Party contends CSEA violated this provision by not granting him a hearing. However, facts presented demonstrate that a consolidated arbitration hearing was held on February 28, 2001, regarding the chargeable expenditures. Consolidation of this hearing is provided for in PERB Regulation 32994(5) and Charging Party was provided notice of this hearing by two different parties. The hearing was conducted by an impartial decisionmaker as required by PERB Regulation 32994(4).

While PERB Regulation 32994(5) allows for an agency fee payer to object to the consolidation of the hearing, Charging Party fails to demonstrate he made a motion to the impartial decisionmaker challenging the consolidation. As such, facts provided demonstrate CSEA complied with these regulations and did not deny Charging Party a hearing.

III. PERB Regulation 32995(a)(1)

PERB Regulation 32995 provides that an exclusive representative shall open an escrow account in any independent financial institution for the depositing of:

> Agency fees to be collected from nonmembers who have filed timely agency fee objections pursuant to Section 32994(b)(2) of these regulations;

Charging Party contends CSEA has failed to place his advanced refund in an escrow account. However, Charging Party fails to note that he is not owed any advanced refund as he has failed to pay a service fee this year. As such, it is unclear how CSEA violated this provision.

Additionally, Charging Party contends he has not received an advance refund of the non-chargeable percentage of service fee. However, this allegation fails for the same reason as the one discussed above. As Charging Party has not paid a service fee for this year, it is unclear why Charging Party believes he is entitled to an advanced refund of a fee he has not ever paid. CSEA own cover letter to Charging Party explained this exact concept in stating:

> Please note that the advance refund is the nonchargeable portion of your service fees due for the entire 2000-2001 school year. Thus, you must continue to pay the full service fee due each month.

As Charging Party has failed to pay a service fee for this year, CSEA's failure to provide an advanced refund does not violate the EERA.

IV. Government Code section 3543.6(a)

Government Code section 3543.6(a) states that it shall be unlawful for an employee organization to cause or attempt to cause a public school employer to violate Section 3543.5. It appears Charging Party is alleging the District's failure to provide him with a service fee payer/payroll deduction form is due to CSEA's bad faith, and as such violates Government Code section 3543.6(a). This allegation, however, fails for several reasons.

Under EERA, it is unlawful for an employee organization to cause or attempt to cause an employer to interfere with an employee's protected right. (Gov. Code sec. 3543.6(a)) A violation of this provision may only be established by a clear showing of how and in what manner the employee organization induced or attempted to induce employer interference or discrimination. (Tustin Unified School District (1987) PERB Decision No. 626.) In addition, the facts must establish a causal connection between the employer's unlawful conduct and the employee organization's behavior. (California Department of Personnel Administration (1987) PERB Decision No. 609-S.)

Initially, Charging Party fails to demonstrate the District violated the EERA by failing to provide him with a service fee deduction form. Article 3.9 states in relevant part:

> As a condition of employment, any new employee to this unit shall be required to sign a payroll authorization form to pay dues

> or a service fee to the CSEA as provided in this article.

Charging Party claims that the District violated this provision by not giving him a service fee deduction form. However, Article 3.9 provides that such a form shall be given to new employees and not employees who have already refused payroll deduction. As such, it does not appear the District interfered with Charging Party's rights.

Even assuming the District did violate Charging Party's rights, the charge fails to establish any causal connection between the District's conduct and CSEA's behavior. Instead, Charging Party simply concludes "the District is unintentionally being used by CSEA to violate 3543.5(d)." Without any facts establishing a causal connection between the conduct, this allegation fails to state a prima facie case.

V. Duty of Fair Representation

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). In order to state a prima facie violation of this section of EERA, Charging Party must show that the Association's conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> ". . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive

> representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)" [Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

Charging Party states the above allegations also demonstrate CSEA breached its duty of fair representation. However, Charging Party fails to provide any specific facts regarding this alleged breach. Charging Party does not demonstrate any instances in which CSEA has acted arbitrarily, or in bad faith. While Charging Party may not agree with the manner of assessment or the amount of agency fee collected such determinations are generally an internal union matter and not subject to PERB scrutiny. (AFSCME Local 2620 (Cupp) (1987) PERB Decision No. 612-S.) Moreover it appears CSEA has complied with PERB Regulations and its own internal procedures in handling appeals of chargeable expenses. As such, this allegation must be dismissed.

Charging Party also contends CSEA is discriminating against him because he is a service fee payer. However, Charging Party does not provide any facts regarding this alleged discrimination. A charging party should allege the "who, what, when, where, and how" of an unfair practice. (United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision 944.) Mere legal conclusions are insufficient. (See State of California (Department of Food and Agriculture (1994) PERB Decision No. 1071-S.) As the Charging Party does not point to any specific facts regarding the alleged discrimination, this allegation must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 11, 2001, I shall dismiss your charge. If you have any questions, please call me at (510) 622-1016.

Sincerely,

Kristin L. Rosi
Regional Attorney