

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



EDWARD RUBEN TORRES,

Charging Party,

v.

OXNARD FEDERATION OF TEACHERS,

Respondent.

Case No. LA-CO-1041-E

PERB Decision No. 1494

July 31, 2002

Appearance: Edward Ruben Torres, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on appeal by Edward Ruben Torres (Torres) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that Oxnard Federation of Teachers (Federation) violated the Educational Employment Relations Act (EERA)¹ by breaching its duty of fair representation in violation of Section 3546.3(b).² Torres alleged that the Federation violated its duty of fair representation by failing to intercede with the Oxnard Union High School

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

²EERA section 3543.6 states, in pertinent part:

It shall be unlawful for an employee organization to:

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

District (District) on his behalf regarding alleged unfair treatment by his supervisors and the District's subsequent termination of his employment. Following her investigation, the Board agent dismissed the charge for failure to state a prima facie case.

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge, the warning and dismissal letters and Torres' appeal. The Board finds the dismissal letter to be free of prejudicial error and hereby adopts it as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-1041-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
Telephone: (510) 622-1022
Fax: (510) 622-1027



December 5, 2001

Edward Ruben Torres
642 E. Clara Street
Port Hueneme, CA 93041

Re: Edward Ruben Torres v. Oxnard Federation of Teachers
Unfair Practice Charge No. LA-CO-1041-E
DISMISSAL LETTER

Dear Mr. Torres:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 20, 2001. Edward Ruben Torres alleges that the Oxnard Federation of Teachers violated the Educational Employment Relations Act (EERA) by breaching its duty of fair representation.

I indicated to you in my attached letter dated July 30, 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 August 6, 2001, the charge would be dismissed.

On or about August 6, 2001, I granted you a one-week extension to file an amended charge. On August 15, 2001, you requested Deputy General Counsel Robert Thompson disqualify me from investigating your charge, citing my use of the term "Charging Party" and asserting that I was not fairly investigating your charge. On August 17, 2001, Mr. Thompson informed you that you did not follow proper PERB procedures in the filing of the request for disqualification. Mr. Thompson further extended the deadline for filing an amended charge to August 20, 2001.

On August 20, 2001, you requested a further extension to file an amended charge, stating you could not complete the amended charge while working on the disqualification request. Mr. Thompson further extended this deadline to August 22, 2001. On August 22, 2001, you telephoned me and requested an additional week to complete the amended charge. I granted you another extension to August 27, 2001. On August 24, 2001, I denied your request for disqualification.

On August 29, 2001, you filed a first amended charge. The amended charge reiterates facts provided in the original charge and provides additional documentation and facts. As the

amended charge includes additional factual information, I will summarize the relevant facts below.

You are employed by the Oxnard Union High School District as a Part-time, temporary teacher at the Oxnard Adult School, where you taught English as a Second Language. As a certificated employee, you are exclusively represented by the Oxnard Federation of Teachers.

On April 19, 2000, you sent a letter to Grace Tuazon, the principal's secretary at Oxnard Adult School. The letter stated in relevant part:

Before I ask something of you, I'd like to share some background, so you can better understand why I'm asking. You used to call me to sub; and, since this proved so helpful at the end of the month - since I only teach 12 hours - I thought: "I better be nice to Grace, so that she'll call me as much as she can." So, whenever you'd call, I'd try to let you know how much I appreciated it, by saying things like: "Thank you for thinking of me, Grace!" And, I'd try to say it with genuine feeling so you would understand that I really meant it.

Then something changed. You acted different, and started having Rose or Cecilia call instead. At first I thought nothing of it. And it certainly didn't bother me. After all, what does it matter who makes the call? I'm grateful to be called.

Yet, despite this, as it continued, I started asking myself: "I wonder how come?" And since I have no way of knowing why you do what you do, unless you tell me, I said to myself: "I don't know. But she must be feeling the need for distance, or she, herself, would call like she used to." Then, to be on the safe side, I concluded: "I better back off and not be so friendly or attentive. I don't want her to stop calling because I'm not respecting her nonverbal, or, maybe, even subconscious, cues for distance."

So I backed off, Grace, because I thought this is what you were, maybe, subconsciously asking for. But, having done so, let me share what this led to by citing specific instances. Because I interpreted your behavior as a request for greater distance and less attentiveness, it caused me to feel less certain about you how to relate to you. And, as a consequence, there were times when you walked by, or I past (sic) your desk, when I would have liked to have said: "Hi, Grace!" And talked a little bit. But, instead of doing so, I said nothing. Why? Because I was trying to give you what I thought you were requesting - by having others call me instead of you - distance. Frankly, I didn't particularly like it. I

would have preferred to talk some. But I thought you were asking for space, so I didn't do what I wanted. I did what I thought you wanted, understand?

* * * * *

The truth is I was trying to give you what I thought your actions were asking for, distance. Yet, after giving you what I thought you were requesting, not only do you not call, nobody calls. So obviously I misread your actions. And, quite possibly, you misread mine, huh?

I said I had something to ask. Now that I've shared this, and you can better understand what prompted my actions, please don't harbor a grudge - and play with my income as a result of it. Perhaps, it was a misunderstanding on my part. But it certainly wasn't disrespect, or a lack of gratitude for the help you send my direction whenever you are able, honest!

Yes, I've been distant. And it's been deliberate. But it isn't because I started taking you for granted now that the other girls were calling. As I've explained, I thought that the distance was what you were asking for based on having them call me instead of you. But if I misread this, and offended you as a result of it, I'm sorry. Truly, it was the last thing on my mind, particularly when I like it so much when you call.

Ms. Tuazon took offense to the tone of the above quoted letter and turned it over to Principal Pete Ortega. On April 24, 2000, you met with Mr. Ortega regarding the letter. During this meeting, Mr. Ortega informed you that he, and Ms. Tuazon, considered the letter to be a form of sexual harassment, as the letter seemed to indicate a "relationship" between you and Ms. Tuazon, that did not exist. Additionally, Mr. Ortega explained to you how substitutes are called so that you better understood the process.

On April 27, 2000, you sent a letter to Mr. Ortega requesting additional information and stating the following with regard to Mr. Ortega's relationship with Ms. Tuazon:

My third request concerns you. And now don't you become offended and think I am suggesting this is what I think you are doing. Because I am making no such suggestion. I am simply aware that you work much more closely with her than with me. Therefore, I ask that you guard against the protective "Daddy-Bear" syndrome. Had my intentions been mean spirited or inappropriate I would have understood it. But since they are clouded by financial duress, it occurs to me that her better

judgment may also have been clouded by emotional duress stemming from a misinterpretation of what I was actually saying. I mean, since she knew there was no relationship other than a professional relationship, logically speaking, had her better judgment not been eclipsed by the immediate shock of the misunderstanding, she might have thought: "I must be misreading this." And then I certainly wouldn't have given here that in writing so she could give it to you, would I? I mean, I may have occasional lapses of better judgment, depending on the circumstances, but I'm certainly not stupid enough to do something like that. This in itself should set the matter straight. On that note, then, I think this entire business needs to be acknowledged as an honest misunderstanding on both our parts: me for financial reasons and her for other ones, and them put (sic) behind us. And I think you should be instrumental in helping this to happen. Rather, than just supporting her, which is not to say this is what I think you are doing. I'm saying guard against it because you work so closely with her. Don't let this cloud your judgment too. Because it's the last thing everybody needs. It was an honest mistake. And that's all it was. Thank you.

On April 28, 2000, Mr. Ortega issued you a disciplinary letter regarding the April 19, 2000, letter. The disciplinary letter cautioned you to limit your conversations with Ms. Tuazon to business only, and "avoid any further unbusinesslike contact with other personnel in the school." You refused to sign this disciplinary letter, arguing that your conduct did not constitute harassment. It appears the matter was ultimately dropped, as the letter was not placed in your personnel file.

You contend this incident prompted Mr. Ortega to begin a campaign to discredit your teaching performance. More specifically, you contend that Mr. Ortega ordered other administrators to unfairly evaluate you, as your classes were observed on four occasions during the next eight months. Although requested in my July 30, 2001, letter, you did not provide a copy of any contractual provisions regarding evaluations and observations, as such, it is impossible for me to ascertain whether this conduct violates any contract or District policy.

On July 10, 2000, Assistant Principal John Grisafe observed your Beginning ESL class. On July 13, 2000, Mr. Grisafe presented you with an evaluation and observation report. The report states the following in the Recommendations section:

As mentioned in previous observations, Mr. Torres needs to vary the instructional techniques he uses in his class. Shorter instructional segments are strongly recommended. When using the video, it should support the lesson at hand or the video subject matter should be reinforced with further instruction. The meaning of vocabulary in a lesson should be introduced,

reinforced, and checked for understanding through out the class and for all the students. The four basic math functions are not part of the ESL Beginning Low target topics.

You did not sign this observation report. On July 19, 2000, Mr. Grisafe observed your classroom for a second time. On July 20, 2000, Mr. Grisafe sent you a note cautioning you against using the same techniques he had critiqued on July 13, 2000. On July 25, 2000, Mr. Grisafe issued you a warning letter. The letter stated in relevant part:

When I stopped by your class on July 19, 2000, to check on your enrollment, you where (sic) using the same technique as my last observation. As you recall, one of the recommendation (sic) of that observation was to vary your technique. As I discussed with you before, you needed to add two or three new techniques before the end of the summer session. You need to vary the instruction in your class. From what I saw Wednesday the 19th, it appears that you are still not doing so.

In July 2000, you telephoned Federation Executive Director, Elaine Snyder. During this conversation, you discussed with Ms. Snyder the two observations and the accompanying memos. Ms. Snyder questioned how Mr. Grisafe could know what techniques you had used during a two minute attendance count. You also discussed with Ms. Snyder the harassment memo Mr. Ortega had prepared. Ms. Snyder refused to file a grievance over the harassment memo, stating her belief that you should just follow the District's instructions regarding that matter.

On August 16, 2000, Ms. Snyder accompanied you to a meeting regarding the July evaluations. Although you both expected to meet with Mr. Grisafe, the meeting took place in Mr. Ortega's office and was run by Mr. Ortega. It is unclear what the outcome of that meeting was, but it is assumed that the evaluations remained in your personnel file.

On October 17, 2000, Mr. Grisafe observed your classroom again. On October 24, 2000, Mr. Grisafe prepared an Evaluation and Observation Report which rated you as Satisfactory in four of seven categories. You were rated Need Improvement in the categories of Planning Instruction, Assessing Student Learning, and Understanding and Organizing Subject Matter. In the recommendations section, Mr. Grisafe again noted that you needed to increase the variety of techniques you used in class.

On October 25, 2000, Mr. Grisafe issued you a mandatory improvement plan, which identified skills you needed to acquire. These skills included using additional instructional techniques and checking for student understanding. Mr. Grisafe instructed you to prepare weekly lesson plans that broke down, by 20 minute intervals, the lessons and technique you planned to use. You were further instructed to turn in these lesson plans to Mr. Grisafe at the end of the week. You refused to sign this improvement plan.

On November 3, 2000, you filed a written response to Mr. Grisafe's improvement plan. In your response, you stated you believe that the District may not use prior evaluations in preparing an improvement plan. You stated your belief that only the October 24, 2000, evaluation may be considered in judging your performance, and as the October 24, 2000, observation was better than the previous evaluation, you should not be subject to an improvement plan.

On November 20, 2000, you faxed a letter to Ms. Snyder regarding the October evaluation and improvement plan. This letter references prior conversations you had with Ms. Snyder regarding your work performance and evaluations. It appears from your correspondence that Ms. Snyder instructed you to "go along" with the District's suggestions and fulfill the requirements they asked you to fulfill. Additionally, you requested Ms. Snyder answer some questions about the amalgamation of your evaluations. As stated in your original charge, Ms. Snyder instructed you to follow their directions and stated she could not help you.

In November 2000, you spoke with the Federation's President regarding your evaluation and improvement plan. However, the Federation again refused to assist you in this matter, stating its belief that the District was acting within its contractual rights in issuing the evaluations and improvement plan.

Beginning in December 2000, you complied with the District's improvement plan by supplying Mr. Grisafe with lesson plans on a weekly basis. You continued to do so up until your dismissal. However, you continued to discuss the matter with Ms. Snyder, who informed you that the District's actions were consistent with relevant contractual provisions.

On January 11, 2001, Mr. Ortega observed your classroom. On January 17, 2001, Mr. Ortega prepared an Evaluation and Observation Report that rated you Unsatisfactory in the categories of Engaging Student in Learning, and Assessing Student Learning. You were rated Needs Improvement in the categories of Understanding and Organizing Subject Matter and Planning Instruction. Mr. Ortega also made nine separate recommendations regarding your performance. You refused to sign this report. During this meeting with Mr. Ortega, Mr. Ortega referred to the May 2000 harassment incident and stated his belief that he knew harassment when he saw it.

On January 18, 2001, Mr. Ortega sent you a letter regarding your employment. The letter stated in relevant part:

After visiting your class on Thursday, January 11, 2001, I have verified the initial evaluator's instructional concerns and confirmed the lack of diversity in the utilization of different instructional techniques.

Assessing student progress and checking for pupil understanding remain major instructional concerns.

Although after repeated requests, you are now submitting lesson plans, however, these lesson plans did not contain an objective. The objective of each lesson is a critical element around which all activities are developed and coordinated. In addition to an adequate lesson objective, there was little evidence of any teaching strategy recommended for Language Acquisition classes such as TPR, the Natural Approach, or SDAIE Methodology.

Thus, due to limited instructional improvement, this letter is to inform you that your services for the spring term of school year 2000-01 will not be required.

It appears you have no appeal rights under the contract as a temporary, part-time teacher. As such, the Federation could not have filed a grievance on your behalf.

On January 24, 2001, you sent a letter to Ms. Snyder asserting the District was violating the Civil Code by dismissing you for fraudulent reasons. Ms. Snyder did not respond to this letter.

Based on the facts provided in the original and amended charges, the charge still fails to state a prima facie case of breach of the duty of fair representation, for the reasons provided below.

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 Respondent'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 omitted.]

A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

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.]

You contend the Federation acted arbitrarily and discriminatorily by refusing to represent you with regard to your termination. However, as explained during our numerous conversations and in my July 30, 2001, letter, the Federation may refuse to pursue a grievance if the union makes an honest and reasonable determination that the grievance lacks merit. (AFSCME Local 2620 (Moore) (1988) PERB Decision No. 683-S.) Herein, Ms. Snyder and other Federation representatives were apprised of your situation and concerns, and determined that the District's actions were consistent with the contract. Indeed, it does not appear that in your communications with the Federation, you were able to point to a single contract provision that prohibited the District's actions. As such, the charge fails to demonstrate the Federation's rejection of your request was based on anything but an honest judgment regarding the allegations.

You further contend the Federations actions were discriminatory. More specifically, you assert the Federation discriminated against you because of your part-time temporary status. You contend:

I mean that whether a teacher is part-time or full-time, and regardless of the contractual rights afforded by the district and federation does not supersede nor negate those rights and protections granted by the California Civil Code. The fact that a teacher is part-time does not negate its lawful protection from malice and fraud. Yet this is precisely the position the federation took.

It appears you are contending the Federation discriminated against you by not upholding your Civil Code rights prohibiting fraud and malice. However, the Federation does not owe you such a duty. Since the duty of fair representation is limited to contractually based remedies under the union's exclusive control, the Federation's duty does not extend to noncontractual administrative remedies or judicial relief. (California Union of Safety Engineers (John) (1995) PERB Decision No. 1064-S.) As such, the Federation is not obligated to represent you in matters concerning civil rights violations or Education Code violations. (Greene v. Pomona Unified School District (1995) 32 Cal. App. 4th 1216; San Francisco Classroom Teachers Association (1985) PERB Decision No. 544.) As the charge fails to demonstrate the Federation acted arbitrarily, discriminatorily or in bad faith, the charge fails to state a prima facie case, and must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,¹ 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. (Regulation 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. (Regulations 32135(a) and 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 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. (Regulation 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 Regulation 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. (Regulation 32135(c).)

¹ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. (Regulation 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: Lawrence Rosenzweig

KLR

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
Telephone: (510) 622-1022
Fax: (510) 622-1027



July 30, 2001

Edward Ruben Torres
642 E. Clara Street
Port Hueneme, CA 93041

Re: Edward Ruben Torres v. Oxnard Fed. of Teachers
Unfair Practice Charge No. LA-CO-1041-E
WARNING LETTER

Dear Mr. Torres:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 20, 2001. Edward Ruben Torres alleges that the Oxnard Fed. of Teachers violated the Educational Employment Relations Act (EERA)¹ by failing to bargain in good faith with the Oxnard Union High School District.

Investigation of the charge revealed the following. Charging Party was employed by the Oxnard Union High School District (District) as a Part-time, temporary Teacher. As such, Charging Party was exclusively represented by the Oxnard Federation of Teachers.

On April 19, 2000, Charging Party wrote a letter to his principal's secretary, Grace, apparently asking for more substitute teaching hours. It appears Grace took offense to the tone of Charging Party's letter and turned the letter over to the principal. Charging Party's principal began an investigation into the matter, suggesting the letter constituted unlawful harassment. In May 2000, the principal drafted a letter of reprimand regarding Charging Party's letter. Charging Party refused to sign the letter of reprimand, arguing his conduct did not constitute harassment. It appears the matter was ultimately dropped, and no letter of reprimand was placed in Charging Party's personnel file. Charging Party does not provide a copy of his letter to Grace, nor does Charging Party provide a copy of the letter of reprimand he was requested to sign.

Charging Party contends the principal then began a campaign to discredit his teaching performance. During the next eight months, Charging Party's classes were observed four times by the assistant principal, who noted several deficiencies in Charging Party's performance. It is unclear whether such observations violate any contractual provisions, as Charging Party fails

¹ EERA is codified at Government Code 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.

to provide a copy of the relevant contractual provisions. At some unstated time during the following months, Charging Party was placed on a mandatory improvement plan.

In July and August 2000, Charging Party spoke with Elaine Snyder, the Federation's Executive Director regarding the alleged harassment Charging Party was subjected to. Ms. Snyder refused to file a grievance on Charging Party's behalf and refused to speak to Charging Party's principal, stating she believed Charging Party should just follow the District's instructions and not make any more people mad.

In October 2000, Charging Party again spoke with Ms. Snyder about the harassment. Ms. Snyder again stated she refused to assist Charging Party. In fact, Charging Party states,

I will say this for her, even though, by her own admission, it wasn't right, she certainly was consistent in not helping me.

In November 2000, Charging Party spoke with the Federation's President. During this conversation, Charging Party reiterated his request for representation regarding his negative evaluations. However, the Federation again stated it believed the District was acting within its contractual rights and refused to pursue the matter.

In December 2000, Charging Party again called Ms. Snyder regarding his negative evaluations and the mandatory improvement plan. Ms. Snyder reiterated her earlier refusal of representation, stating that as a part-time temporary teacher, Charging Party did not have the same contractual rights as other employees. Additionally, Ms. Snyder stated her belief that the District's actions did not constitute a violation of the contract and, as such, the Federation would not assist Charging Party.

On January 17, 2001, Charging Party was dismissed from his employment with the District. On January 24, 2001, Charging Party mailed a letter to Ms. Snyder regarding his termination. Charging Party requested the Federation represent him in his appeal of the termination. However, it appears the Federation did not respond to this letter.

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.

Initially, it must be noted that Charging Party alleges the Federation failed to bargain in good faith with the District. However, Charging Party lacks standing to allege such a violation, as the exclusive representative's statutory duty to negotiate is owed to the employer rather than to employees. (Oxnard Educators Association (Gorcey et. al.) (1988) PERB Decision No. 664; California State University (Wang) (1990) PERB Decision No. 813-H.) I will assume, instead, that Charging Party wishes to allege the Federation breached its duty of fair representation under Section 3543.6(b), and the charge will be analyzed as such.

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should

have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

In the case an alleged breach of the duty of fair representation, the statute of limitations begins to run on the date the employee, acting with reasonable diligence, knew or should have known that further assistance or response from the union was unlikely. (Los Rios Federation of Teachers (1991) PERB Decision No. 889.) Where a protracted course of conduct is involved, the statute of limitations begins to run from the point at which any alleged injury to the union member became fixed and reasonably certain. (Oakland Education Association (Freeman) (1994) PERB Decision No. 1057.)

Herein, facts demonstrate that Charging Party knew as early as July 2000, that the Federation would not assist him in this matter. Moreover, the Federation repeated its refusal in October, November and December 2000. As such, Charging Party knew or should have known in the fall of 2000 that assistance or response from the union was unlikely. Therefore, Charging Party's allegations occurring prior to January 20, 2001, are time barred, as they were filed more than six months after the alleged unlawful conduct.

As such, only Charging Party's allegation that the Federation refused to assist him after his termination is timely filed. 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 Respondent'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 omitted.]

A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

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.]

In analyzing whether an honest judgment has been made, PERB does not judge whether the union's assessment was "correct," but only whether that judgment "had a rational basis, or was reached for reasons that were arbitrary." (Sacramento City Teachers Association (1984) PERB Decision No. 428.)

Facts provided demonstrate Ms. Snyder and other union officials listened to Charging Party's requests on several occasions and engaged in numerous discussions with Charging Party regarding his evaluations. Additionally, Federation representatives provided Charging Party with clear and consistent reasons why they would not represent him or file a grievance on his behalf. Although Charging Party does not agree with the Federation's rationale, such disagreement does not rise to the level of a violation. As such, this allegation fails to state a prima facie violation of the EERA.

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 that 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 August 6, 2001, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,



Kristin L. Rosi
Regional Attorney

KLR