STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SHARON BUXTON, Charging Party, v. COALITION OF UNIVERSITY EMPLOYEES, Respondent.	Case No. LA-CO-91-H PERB Decision No. 1517-H April 7, 2003

Appearances: Sharon Buxton, on her own behalf; Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar by Arthur Krantz, Attorney, for Coalition of University Employees.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Sharon Buxton (Buxton) of a Board agent's dismissal of her unfair practice charge. The charge alleged that the Coalition of University Employees (CUE) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by failing to adequately represent her in a grievance against the Regents of the University of California (University) and failing to inform her of the results of that grievance in a timely fashion. Buxton alleged that this conduct constituted a violation of HEERA sections 3571.1(e) and 3578.

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

After review of the entire record in this matter, including the Board agent's dismissal, Buxton's appeal and CUE's response to Buxton's appeal, the Board affirms the Board agent's decision consistent with the following discussion.

BACKGROUND

Buxton had been employed with the University of California San Diego Medical Center since January, 1991, had worked as an administrative assistant, and was exclusively represented by CUE. On July 14, 1999, the University sent Buxton notice of her layoff, which was effective August 31, 1999. At that time CUE had not yet negotiated a collective bargaining agreement (CBA) with the University and the parties were following the terms of an expired agreement between the University and CUE's predecessor.[2] On August 9, 1999, CUE filed a grievance on Buxton's behalf. The dispute centered on whether the University had used the appropriate layoff units in laying off Buxton.

On August 31, 1999, CUE appealed Buxton's grievance to Step 2. On November 1, 1999, CUE sent a letter to Labor Relations Advocate, Belinda M. Hein, indicating its desire to proceed with Buxton's grievance to Step 3.

On April 15, 2000, Buxton requested information from the University regarding her grievance. Buxton wrote the request for information herself after calling CUE Representative Judie Murray (Murray), who had indicated that she could not make sense out of Buxton's file. Murray later informed Buxton that her request for information had been forwarded to the University. Murray told Buxton that she would communicate with her when she heard from the University and that Murray did not want Buxton contacting her because she did not want to

[2]The University had an agreement with CUE's predecessor, the American Federation of State, County and Municipal Employees (AFSCME), dated November 1, 1994 to June 30, 1997.

be interrupted unnecessarily. Buxton alleges that Murray had promised to contact her if Murray received a response from the University. Buxton further claims that Murray falsely indicated that the University was not required to respond to Buxton's Step 3 information request. Buxton believes that Murray was worried about upsetting the University's labor relations staff and deliberately sabotaged Buxton's grievance in order to protect herself by blocking Buxton's access to appropriate University staff and failing to aggressively challenge the information provided by the University. In summary, Buxton alleges that CUE failed to challenge the information provided by the University and failed to enforce the bargaining unit members' rights under the contract and under HEERA.

Sometime in March or April 2001, Buxton called CUE regarding a matter unrelated to her grievance and learned that her grievance had been denied. On April 17, 2001, Buxton received from CUE a copy of the University's denial of her grievance, dated June 6, 2000. From the University's June 6 letter, Buxton learned that the University communicated with Murray regarding Buxton's grievance on April 26, 2000, but Murray neither replied to the University nor informed Buxton of the communication. The University's June 6 letter indicated that the grievance could not be taken to arbitration as the CBA with AFSCME had long expired and CUE had not yet negotiated a new CBA with an arbitration clause. Although Buxton alleges that April 17, 2001 was the first time she obtained the University's correspondence denying her grievance, CUE counters that the University sent Buxton a copy of the June 6, 2000 letter when it was initially issued.[3] Buxton however asserts that April 17,

[3]The Board agent included in the warning letter a statement from CUE that the University had provided Buxton with a response to her grievance when it was initially issued. This statement is not in the record and therefore, the Board should delete this finding from the decision. (Golden Plains Unified School District (2002) PERB Decision No. 1489.) In any case, the Board agent did not use this statement as a basis for the dismissal.

2001 was the first time that she had seen the June 6 letter and that she had not previously received a copy when it was initially issued in June 2000.

On January 12, 2000, Buxton filed an unfair practice charge alleging the University violated the HEERA by unilaterally changing the layoff procedures.[4] After learning that an individual employee does not have standing to file such a charge, Buxton requested that CUE file a charge, but CUE refused.

Buxton alleges that all CUE representatives are employed by the University and therefore have a conflict of interest in providing representation to unit employees.

Buxton filed her charge on October 15, 2001 and an amendment to the charge on March 15, 2001.

The Board agent's dismissal held that Buxton's charge was in part untimely and otherwise failed to state a prima facie case. With regard to the finding of timeliness, the Board agent explained that Buxton filed the charge on October 15, 2001 and under HEERA section 3563.2(a), PERB may not issue a complaint for events occurring before April 15, 2001. The Board agent found that Buxton was aware that CUE had required her to write her own information request in April 2000 and that Buxton had learned in April 2000 that Murray[5] did not want Buxton to contact her. Buxton was also aware that CUE refused to file an unfair practice charge on her behalf at some unknown date, presumably sometime around late January 2000, when PERB dismissed Buxton's charge against the University. These events thus fell outside of PERB's jurisdiction.

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[4]Unfair practice Case No. LA-CE-564-H, dismissed January 28, 2000.

[5]The Board agent mistakenly identified Robin Luczak, not Judie Murray, as the CUE representative handling Buxton's grievance during this time.

The Board agent found that for events occurring on or after April 15, 2001, Buxton failed to state a prima facie case for duty of fair representation. Citing Fremont Unified School District Teachers Association, CTA/NEA (King) (1980) PERB Decision No. 125 (Fremont USDTA), United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258 (UTLA (Collins)), and Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, the Board agent determined that CUE's conduct was not arbitrary, discriminatory or in bad faith. The amended charge merely repeats allegations in the original charge. Although not exemplary in processing Buxton's grievance, CUE pursued the grievance through all available steps despite the failure to inform Buxton of its status.

In addition, CUE's duty to fairly represent Buxton does not extend to filing unfair practice charges. (California State Employees Association (Bradford) (2001) PERB Decision No. 1421-S.) Therefore, the Board agent dismissed Buxton's claim regarding CUE's failure to file a charge on Buxton's behalf against the University alleging that the University unilaterally changed layoff units.

DISCUSSION

HEERA section 3563.2(a) 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.)

Buxton filed her unfair practice charge on October 15, 2001. Consequently, the Board may only issue a complaint for events occurring on or after April 15, 2001. The six-month statutory limitations period begins to run when the charging party knew or should have known of the conduct giving rise to the alleged unfair practice. (State of California (Department of Food and Agriculture) (1998) PERB Decision No. 1290-S, citing The Regents of the University of California (1983) PERB Decision No. 359-H; p. 2, warning letter.) Buxton alleged that in April 2000, she called Judie Murray regarding the status of her Step 3 information request to the District. Murray informed her that her request had been forwarded to the University, that Murray would contact her when she received a response from the University, but that Buxton should not contact Murray because Murray did not want Buxton interrupting her unnecessarily. Buxton never heard from Murray. In March or April 2001, Buxton contacted Robin Luczak when she noticed a change in the CBA on CUE's website. On April 17, 2001, for the first time, according to Buxton, she received the University's denial of her grievance from CUE. CUE argues that Buxton should have used due diligence to contact CUE during that time, but given Murray's directive that Buxton not contact her, it may have been a futile exercise. That, as Buxton alleges, the University's response to her grievance and the information gleaned from that response were previously unknown to her, the Board concludes that Buxton's claim regarding CUE's failure to provide this information was timely.

The key issue becomes whether Buxton has met the standard for showing that CUE breached its duty of fair representation. She has alleged that the exclusive representative denied her the right to fair representation guaranteed by HEERA section 3578 and thereby violated section 3571.1(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont USDTA; UTLA (Collins).) In order to

state a prima facie violation of this section of HEERA, Buxton must show that CUE's conduct was arbitrary, discriminatory or in bad faith. In UTLA (Collins), the 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.

We find that CUE incompetently handled Buxton's grievance but its conduct and the resulting consequences to Buxton do not meet the standard for arbitrariness under established state and federal precedent. 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 rationale [sic] basis or devoid of honest judgment. (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; emphasis added.)

The Board has found failure by a union representative to carry through on a promise to constitute breach of the duty of fair representation arising out of the union's arbitrary conduct. (San Francisco Classroom Teachers Association, CTA/NEA (Bramell) (1984) PERB Decision No. 430.) Upon receipt of a denial of his level one grievance, Bramell asked the union to process his grievance to the second level. He called the union to determine the status of his grievance and was told that the union had not yet appealed the grievance to the second level. The union representative apologized, and because the deadline for appeal was imminent,

promised to request an extension of time from the employer. Despite the promise, the union failed to request the extension and later wrote Bramell a letter stating that it would not pursue his grievance further because it lacked merit. When the employer replaced Bramell, the union protested in writing about the method of filling the vacancy but did not request Bramell's reinstatement. The Board found, at page 9 of the decision, that the union's actions cumulatively presented a pattern demonstrating an arbitrary failure to represent Bramell fairly in his employment relationship with the employer. (See also, American Federation of State, County and Municipal Employees, International, Council 57 (Dehler) (1996) PERB Decision No. 1152-H.)

Federal precedent further elucidates the standard for a union's arbitrary failure to fairly represent an employee.[6] The Ninth Circuit Court of Appeals in Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270 [113 LRRM 3532] (Dutrisac) provided the most comprehensive description of the term "arbitrary." At page 1272, the court stated:

> A union acts arbitrarily if it 'ignore[s] a meritorious grievance or process[es] it in a perfunctory fashion.' (Citation.) Although arbitrary conduct is not limited to acts intended to harm the employee, Robesky v. Qantas Empire Airways, Ltd. 573 F.2d 1082, 1089 (9th Cir. 1978), the standards for determining when an unintentional mistake by a union official should be considered 'arbitrary' are still evolving. (Citation.)
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> In Robesky, we stated that an unintentional mistake is arbitrary if it reflects a 'reckless disregard' for the rights of the individual employee, but not if it reflects only 'simple negligence violating the tort standard of due care.' 573 F.2d at 1089-90; *accord*,

[6]HEERA expressly provides for a duty of fair representation in Section 3578 and makes the breach of that duty an unfair practice under Section 3571.1(e). Although the National Labor Relations Act (NLRA) and Railway Labor Act do not expressly provide for the duty of fair representation, the courts have interpreted the Act to imply such a duty, long utilizing the same standard described in Section 3578. (Vaca v. Sipes (1967) 386 U.S. 171, 190 [64 LRRM 2369].) Thus, federal decisions interpreting the NLRA in this area may guide the Board's analysis. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal. 3d 608 [116 Cal.Rptr. 507].)

> Tenorio v. NLRB 680 F.2d 598, 601 (9th Cir. 1982). 'Reckless disregard' and 'simple negligence,' however, are merely labels. In deciding whether the facts of a particular case constitute a breach of the duty, it is more instructive to compare the types of unintentional errors in union grievance processing that usually are held to breach the duty of fair representation with those usually held not to breach the duty.
>
> Most of the decisions finding 'simple negligence' insufficient to establish a breach of the duty involve alleged errors in the union's evaluation of the merits of a grievance (citation), in its interpretation of the collective bargaining agreement (citations), or in its decisions concerning presentation of the grievance at the arbitration hearing (citations). When the challenged conduct is not an erroneous decision by the union but its failure to perform a ministerial act required to carry out the decision, courts have been more willing to impose liability for merely negligent conduct. (Citations.) [Emphasis added.]

The cases in which the courts have found a breach of the duty for mere negligence have involved the union's failure to perform a ministerial act that foreclosed any forum or remedy for the employee. For example, in Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090] (Robesky), the employee was fired. The union filed a grievance on her behalf which was denied at all preliminary levels by management. Robesky requested that the union take the grievance to arbitration but without informing her, the union did not do so. Instead, it negotiated a settlement with the employer, which included reinstating Robesky without backpay. Robesky, thinking that her grievance was proceeding to arbitration, refused the settlement, and thus lost her job. The court found two possible theories for breach of the duty: either (1) the union deliberately failed to tell Robesky of its decision not to take her grievance to arbitration and the union's decision was therefore without rational basis; or (2) if unintentional, the union's negligent failure to disclose its strategy was egregious. With regard to the second standard, the court stated,

> Acts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary. (Citations.) [Robesky, at p. 1090.]

The court further opined that:

> . . . it is clear that unintentional acts or omissions by union officials may be arbitrary if they reflect reckless disregard for the rights of the individual employee, (citations); they severely prejudice the injured employee, (citation); and the policies underlying the duty of fair representation would not be served by shielding the union from liability in the circumstances of the particular case, (citation). [Emphasis added.]

In Dutrisac, the employee was discharged and the union filed a grievance on his behalf. After the employer rejected the grievance at the preliminary levels, the union decided to submit the grievance to arbitration. The union representative believed he was filing the grievance within the time limits but actually filed the request two weeks late and the arbitrator dismissed the grievance as untimely. The court held that Dutrisac stated a claim for breach of the duty of fair representation based upon the union representative's negligence but limited its holding to "union negligence . . . [in] cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Dutrisac, at p. 1274; emphasis added.)

The matter before us presents a pattern of alleged intentional and failed communication between the exclusive representative and the employee. Sometime in or around April 2000, after asking CUE representative Murray to file the request, according to Buxton, Murray stated, "I do not work for you. I suggest you pick up your file and see if you can make sense out of it." Buxton stated that she wrote the request and hand-delivered it to Murray, who told Buxton that the correspondence had to go through her (Murray). Buxton alleges that Murray misinformed her that the University did not need to respond to her Step 3 grievance

information request. Per Buxton, Murray later called her and told her that she had forwarded the request with a cover letter to the University, and that Murray would notify Buxton if and when she received a response. Buxton says that Murray reminded her that the University did not need to respond to the request. According to Buxton, Murray also told Buxton not to contact Murray because she did not want her work interrupted unnecessarily and that the University only allowed her limited time to work on union business. At a different time, Buxton stated that Murray told her that Buxton's filing an unfair practice charge made the University labor relations staff mad at her and that Murray did not want to get on the wrong side of these people. According to the June 6, 2000, Step 3 grievance response from the University, the University had requested on April 26, 2000, clarification of the information requested by CUE and did not obtain a response. As a result, the University issued the denial of Buxton's grievance without receiving any clarification. Finally, Buxton alleges that she did not learn of the University's denial of her grievance until she contacted the union about another matter in April 2001 and then saw the response for the first time when she received it in the mail from CUE on April 17, 2001.

Although CUE did make efforts to process the grievance, it failed to inform Buxton of its progress, to respond to the University's request for clarification, or to notify Buxton of the University's ultimate response. CUE's failure to communicate with Buxton coupled with Murray's instruction that Buxton not contact her approaches the standard for arbitrariness.

On the other hand, Buxton acknowledges that CUE pursued Buxton's grievance through Step 3 of the process and attachments to Buxton's charge show that CUE made information requests on Buxton's behalf throughout the grievance process. Buxton also acknowledges CUE's understanding that it was unable to proceed to arbitration. That

understanding is based upon the fact that arbitration was not available under an expired CBA, as also noted in the University's June 2000 Step 3 response.

Board precedent corroborates this view. (See Coachella Valley Federation of Teachers, CFT/AFT (Kok) (1998) PERB Decision No. 1302; relying upon State of California, Department of Youth Authority (1992) PERB Decision No. 962-S (Youth Authority).) In Youth Authority, the Board cited the U.S. Supreme Court's decision in Litton Financial Printing Div. v. NLRB (1991) 501 U.S. 190, 111 S.Ct. 2215, 115 L.Ed. 2d 177 [137 LRRM 2441] (Litton) (limiting the holding in Nolde Bros., Inc. v. Bakery Workers (1977) 430 U.S. 243 [94 LRRM 2753] (Nolde Bros.)) for the principle that arbitration clauses do not survive an expired CBA, except for disputes involving events that occurred before expiration, or that involved post-expiration conduct that infringes on rights accrued or vested under the agreement. The Board, in Youth Authority, stated that this is an apparent exception to the doctrine in NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177], which prohibits unilateral changes to terms and conditions of employment where an existing agreement has expired and the parties have not completed negotiations on a new agreement. In Litton, the court stated that: "[t]he object of an arbitration clause is to implement a contract, not to transcend it. . . . [so that] postexpiration grievances concerning terms and conditions of employment [may not] remain arbitrable." Thus, the court concluded that:

> A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement. [Litton, at p. 206.]

The determination becomes a matter of contract interpretation.[7] (Id., at pp. 207-208.) In Litton, similar to this case, the court evaluated the arbitration and layoff provisions of an expired collective bargaining agreement during a campaign by a unit employee to decertify the union. No contract negotiations occurred while the union's status was uncertain. The National Labor Relations Board ultimately certified the union and within two months Litton laid off several unit employees. The court held that the agreement's unlimited arbitration clause "by which the parties agreed to arbitrate all '[d]ifferences that may arise between the parties' regarding the Agreement, violations thereof, or 'the construction to be placed on any clause or clauses of the Agreement'" is subject to postcontract arbitration. (Id., at p. 205.) However, the court found that the layoff provision could not be said to create a right that vested or accrued during the term of the agreement or a contractual obligation that extended beyond expiration. (Id., at p. 210.) The layoff provision stated that "in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." (Id., at p. 209.) In a 5 to 4 decision, the majority of the court held that this provision involved a "residual element of seniority." (Id.) The court explained that aptitude and ability are factors that change over time and that the order of layoffs was to be determined primarily with reference to those factors. (Id.) Therefore, the court found that the layoff provision was not subject to postexpiration arbitration. (Id.) This is distinguished from the severance payments provision in Nolde Bros., which was deemed by the same court to be a form of accrued deferred compensation and thus arbitrable after expiration of the CBA. (Id.)

[7]If the parties wish to agree that CBA provisions be arbitrable postexpiration, the Litton court suggested that "the parties can consent to that arrangement by explicit agreement. . . . [or] a collective-bargaining agreement might be drafted so as to eliminate any hiatus between expiration of the old and execution of the new agreement." (Litton, at p. 201.)

Under the Litton test, the Board must look at the applicable provisions of the CBA in the instant matter to determine whether the layoff provisions are arbitrable.[8] Article 7 – Arbitration Procedure of the parties' expired CBA states, in pertinent part:

> A. Grievances which have not been settled under the procedures provided in Article 6 – Grievance Procedure, may be appealed to arbitration.[9] Only the Union shall have the right to submit a grievance to arbitration and only after the timely exhaustion of the procedures of Article 6 – Grievance Procedure. . . . Grievances which are not processed within the above time limit, and/or which do not contain the appropriate Union signature, will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration or heard in arbitration, the last preceding University written answer shall become final.

Article 13 – Layoff and Reduction in Time of the expired CBA provides, in pertinent part:

> B. 3. An indefinite layoff is a layoff for which no date for recall to work is specified.
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> C. SELECTION FOR LAYOFF
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> 1. If, in the judgment of the University, budgetary or operational considerations make it necessary to curtail operations, reorganize, reduce the hours of the workforce and/or reduce the workforce, staffing levels will be reduced in accordance with this Article. The selection of employees for layoff shall be at the sole discretion of the University.

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[8]Although the complete copy of the CBA was not submitted into the record, the Board may take official notice of the CBA contained in the Board's files pursuant to PERB Regulation 32120 and 32320(a)(2). (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

[9]Article 6 – Grievance Procedure defines grievance as "a written complaint by an individual employee, a group of employees or the Union involving an alleged violation of a specific provision of " the CBA during the term of the CBA. Unless otherwise provided in the CBA, individual employees, groups of employees, or the union may utilize the grievance procedure. The grievance procedure specifies time limits for submitting the grievance and for the University's response at each step of the process.

> 2. The University shall review and, at its sole non-grievable discretion, determine when some, any or all casual employees will be released prior to laying off career employees.[10]
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> D. 2. e. With regard to indefinite layoff only, the order of indefinite layoff of employees in the same class within a department/division shall be in inverse order of seniority except that the University may retain, at its discretion, employees irrespective of seniority who possess special skills, knowledge, or abilities which are not possessed to the same degree by other employees in the same class and which are necessary to perform the ongoing function of the department/division. To the extent permitted by law, the University may also consider workforce diversity when making layoff decisions and implementing layoff actions. All such exceptions and the decision to make such exceptions shall not be subject to Article 7 – Arbitration Procedure of this Agreement.
> (Emphasis added.)

Article 39, Duration of Agreement, states in pertinent part:

> A. The terms and conditions of this Agreement shall remain in full force and effect commencing on November 1, 1994, and shall terminate at 11:59 p.m. on June 30, 1998.
>
> C. 5. During the period of negotiations on Articles properly designated for amendments the terms and conditions of this Agreement, including those Articles already designated for amendment, shall remain in full force and effect.

Looking at Article 7.A. and Article 39. C.5 of the expired CBA, it appears that the arbitration provisions were intended to apply to post-expiration grievances during negotiations for a successor agreement. However, the layoff provisions in Article 13 appear to grant the University discretion to select which employees to lay off, to retain employees of lessor seniority who retain special skills, knowledge or abilities necessary for the ongoing function of

[10]Under Article 34 of the expired CBA, "career positions" are positions established at 50 percent or more of full-time and are expected to continue for at least one year. A "casual position" is a position established for less than one year, or for less than 50 percent of full-time regardless of the duration of the position. Under the CBA, employees in career positions appear to have somewhat more job security than employees in casual positions.

a particular department or division, and to consider workforce diversity in making layoff decisions. The University also has discretion to retain casual employees over career employees. This discretion is non-arbitrable. These provisions are similar to those in Litton, which the court found not to "create a right that vested or accrued during the term of the Agreement or a contractual obligation that extended beyond expiration" because these are factors that may change over time. In addition, the non-arbitrability of these provisions is supported by the express exemptions in Article 13 of the CBA, even during its term.

As CUE and Buxton could not pursue Buxton's grievance beyond Step 3 to arbitration, CUE's understanding that the arbitration procedure is not an available remedy to challenge the order of Buxton's layoff is reasonable and not evidence of breach of the duty of fair representation. The fact that CUE's conduct did not extinguish Buxton's ability to pursue remedies within CUE's control precludes, in this matter, a claim for breach of the duty of fair representation.

Buxton also alleges that she made various demands upon CUE regarding how she wanted Murray to argue and otherwise handle the grievance. Failure to pursue the grievance in the way requested by the employee does not necessarily constitute a breach. (United Teachers of Los Angeles (Buller) (1984) PERB Decision No. 438.) Buxton's allegations fail to reach the standard for arbitrary, discriminatory or bad faith conduct.

ORDER

The unfair practice charge in Case No. LA-CO-91-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.